NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY *v.* ROBINSON.

Opinion delivered February 17, 1930.

Snodgress & Snodgress, for appellant.

Oscar Hunt Winn, for appellee.

KIRBY, J. Appellant prosecutes this appeal from a judgment rendered in favor of appellee, beneficiary in a policy of insurance issued by it on the life of Tom Hunt, in the amount of $512.

It was alleged that the policy was issued on August 9, 1926, insuring the life of Tom Hunt, the amount of the policy, that all payments of premiums had been duly made, the death of the insured on December 14, 1926,

proof of loss, and a refusal to pay same by the company. A copy of the policy was exhibited with the complaint.

A demurrer to the complaint was overruled, and a motion to make more definite and certain was granted and complied with, and an answer was finally filed admitting the issuance of the policy, the payment of premiums and setting up a provision in the policy: "No obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health," with the allegation that the insured at the time the policy was issued was afflicted with dropsy, and abscess of the liver and had been so afflicted for a long period of time; that the company would not have issued the policy if it had known of his condition and because of it denied liability thereon.

The cause proceeded to trial, and the jury was instructed and a verdict rendered in favor of appellee for the face of the policy, penalty and attorney's fees. No abstract of the testimony of any but one witness for appellee is furnished the court nor any of the instructions given upon the trial except one No. 1. There are many assignments of error in the motion for a new trial, but it is only insisted for reversal that the court erred in admitting the testimony of the beneficiary to the effect that the policy sued on was issued by the company in lieu of its policy that had long been held and paid on by the insured, which had been destroyed in a fire that burned his home; and also in refusing to grant a continuance upon the introduction of such testimony and giving the instruction complained of relative thereto. No objection was made by appellant when the testimony was introduced about the issuance of the policy sued on as a substitute for or in lieu of the same kind of policy that had been held by the insured at the time of its destruction in the fire. Appellant's counsel cross-examined the witness exhaustively relative to this matter, and, as said, made no objection to its introduction until after appellee's evidence in chief was all introduced,

when he moved to exclude the testimony because of surprise and its incompetency, there being no allegation of the fact in the complaint, and asked a postponement or continuance of the case to give him an opportunity to meet this proof.

The action was necessarily based upon the policy issued and held at the time of the death of the insured, and the testimony tending to show that this policy was issued in lieu of or as a substitute for the other policy that had been held by the insured until its destruction by fire was competent, and, of course, if it was issued by the company in lieu of its valid policy held by the insured at the time of its destruction, there was no reason to say that it would not be valid, regardless of the provision that it created no obligation for the company unless the insured was alive and in sound health at the date of its issuance, since it only took the place of or evidenced the liability of the company under the valid contract of insurance that had been destroyed in the fire. In any event there was no attempt on the part of the insurer to show that it did not issue any such policies under the conditions disclosed by the evidence attempting to show its issuance of the substitute policy, except upon such conditions as new policies were issued. The court did not err in telling the jury that, if this policy was issued to restore the lost policy, it made no difference whether the deceased was in sound health or not when the last policy was issued. The burden of proof was upon the appellant company, having admitted the issuance of the policy sued on, to show its invalidity, and it has wholly failed to make an abstract of the testimony heard in the case, save that of the witness and the instruction given by the court, none other of which are complained of. The presumptions must necessarily all be in favor of the verdict, and the judgment will be affirmed. *Files* v. *Tebbs*, 101 Ark. 207, 142 S. W. 159.

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

TAYLOR *v.* CHEAIRS.

Opinion delivered February 17, 1930.

[redacted]

John Baxter, for appellant.

P. L. Neville and *J. T. Cheairs,* for appellees.

MEHAFFY, J. This suit was begun in the Drew Chancery Court by W. E. Taylor, State Bank Commissioner in charge of the Bank of Commerce, McGehee, Arkansas, an insolvent banking corporation, against John T. Cheairs, Jr., and wife, seeking to foreclose a mortgage given by Cheairs and wife to the McGehee Valley Bank, and later transferred to the Bank of Commerce.

John T. Cheairs, Jr., on the 8th day of March, 1920, made a promissory note to the McGehee Valley Bank for

$9,000, said note being payable on the 15th day of November, 1920, and bearing interest at 10 per cent. per annum. To secure the payment of said note, John T. Cheairs, Jr., and wife executed to the McGehee Valley Bank a mortgage on certain property located in the town of Tillar, Drew County, Arkansas.

Appellant alleged that two payments had been made and credited on said note, one of $202.86 on the 23d day of March, 1922, and $150 on the 15th day of February, 1927.

The McGehee Valley Bank failed, and its assets were taken over by the State Bank Commissioner for the State of Arkansas, and sold to the Bank of Commerce in January, 1922.

The appellant alleged that the defendants, John T. Cheairs, Jr., and Maye K. Cheairs, made, executed and delivered to Mrs. J. E. Kincannon a purported deed to part of the property described in the complaint, said deed purporting to have been executed on the 29th day of March, 1927. It was alleged that said deed was executed without consideration, and for the purpose of hindering and defrauding defendant from the collection of the debt. Mrs. Kincannon is the daughter of John T. Cheairs. The appellant prayed that the deed to Mrs. Kincannon be set aside and that its mortgage be foreclosed.

The appellees, John T. Cheairs, Jr., and wife, filed an answer and cross-complaint. They denied the payments credited on the note, and denied that they were the owners of the property. They alleged in their cross-complaint, that the $150 credit on the note was fraudulent, and that it was not a payment made on the note sued on.

In March, 1924, John T. Cheairs, Jr., executed and delivered to the Bank of Commerce of McGehee, Arkansas, a chattel mortgage to secure a note of $5,464.60. Said note was payable December 27, 1924. Among other property included in said mortgage was a certain mule

which was afterwards killed by a train of the Missouri Pacific Railway Company, and the company paid to Cheairs $150, which he gave to the cashier of the bank.

It is also alleged in the cross-complaint that no credits of any sum whatever were ever placed on the margin of the records in Drew County; that the property included in the real estate mortgage was the homestead of John T. Cheairs, Jr., and wife, and appellees also pleaded the statute of limitations.

Mrs. Kincannon also filed answer in which she alleged that she was the owner of the property, having purchased it from John T. Cheairs and his wife.

The chancellor found that appellant's cause of action was barred by the statute of limitations, and dismissed the complaint and, to reverse this decree, this appeal is prosecuted.

The appellant first contends, that the debt was not barred by the statute of limitations; that the credit of $150 made on February 16, 1927, was a payment on the note sued on, and that this payment had the effect of taking the action out of the statute of limitations, and that it was a new promise and acknowledgment of the debt.

The evidence as to the payment of the $150 is conflicting. The preponderance of the evidence, however, supports the finding of the chancellor.

The special deputy bank commissioner, H. A. Daugherty, testified that he took charge of the Bank of Commerce on the 27th day of June, 1927, and was the custodian of all the assets of the bank, and that he found among the assets of the bank the note and mortgage sued on. He testified that the credits were indorsed on the note as shown in the complaint at the time he took charge. The original note and mortgage were introduced. He also testified that they held a chattel mortgage given by Cheairs, and small mortgages indorsed and signed by Cheairs. They held a chattel mortgage

against Cheairs which covers other indebtedness, and there was no credit on any other indebtedness of the $150.

D. O. C. Cleveland testified that he lived at Dermott, and was cashier of the Bank of Commerce from 1925 until it closed its doors in 1927; that Mr. Cheairs handed him the Missouri Pacific Railway check for $150, and that he credited it on the note. When asked if Cheairs made any contention at this time that the bank had any mortgage on a mule, this witness testified that he did not until this suit was brought. When asked if he had ever had any conversation with Cheairs with reference to the payment of any other note, he said, "nothing special." This note, meaning the real estate note, was the one he was more interested in than any others, because he said it was his understanding that it was the only note which the bank had which had any security behind it.

This witness said that when Cheairs handed him the Missouri Pacific check he told him to credit it on the note, and said nothing about a mule note, and that he did credit it upon the real estate note. At the time the bank closed Cheairs owed the bank more than $11,000, besides the realty note and mortgage.

Cheairs testified that included in one of the mortgages that he executed to secure the payment of a certain note to the bank was a mule, and that this mule was killed by one of the trains of the Missouri Pacific Railway Company, and that the railway company paid him $150, and he turned that over to the cashier of the bank. He also testified that he saw the cashier after the mule was killed, and before he collected for it, and told him about the railroad train having killed the mule, and that as soon as he received the voucher he would turn it over to him, and that he did thereafter turn it over to him and told him to credit it on the mule note.

Other witnesses testified about the mule that was killed, described it and gave its name, and the mule they described with the name given by them was included in the chattel mortgage of Cheairs to the bank. Among

others who testified to this was Mr. Lusk, the section foreman.

If Cheairs had given the Missouri Pacific check, and stated to him what the cashier says he did, that is, credit this on my note, this would evidently have been understood to mean the note secured by the mortgage on the mule. But, as we have said, the preponderance of the testimony shows that it was the intention to pay this on the note secured by the chattel mortgage, and the bank therefore had no right to indorse this credit on the other note. But it is contended that when the chattel mortgage was given by Cheairs on March 29, 1924, this mortgage was a new promise and an acknowledgment of the debt.

The mortgage contained the following clause: "It is understood and agreed by and between the grantor and the grantees herein that this mortgage is not given in settlement of any former indebtedness, but is to secure a new debt as herein set forth; and that this mortgage also is given to secure all other and further indebtedness whether incurred heretofore or hereafter until full and final settlement," etc.

The chattel mortgage also contained the following, after reciting the several notes mentioned, aggregating the $5,464.60 due November 1, 1924:

"And this mortgage being given to secure the payment of, not only said notes, any and all renewals thereof, but also any and all other and further indebtedness, whether original or by indorsement, which grantor or either of them may assume, guarantee or contract to pay to the grantee for any loans, advanced, indorsements, credits, overdrafts, or acceptances, made prior to the foreclosure or satisfaction of this mortgage, and all just charges made against the grantor; it being the intention of the parties that this mortgage shall secure all present obligations and all future obligations made prior to the foreclosure of this instrument."

And another clause is contained in said mortgage, and relied on by appellant as follows:

"To the discharge and satisfaction of all indebtedness and obligations held by grantees against the grantor or either of them."

And it is contended that the mortgage given March 29, 1924, in which the above clauses appear, is a new date from which the statute of limitations would run on all the indebtedness, including the note in controversy. It is contended that this was a new promise, and broad enough to cover all indebtedness owing by Cheairs to the Bank of Commerce.

In support of this contention appellant cites and relies on the case of *Kelly* v. *Telle,* 66 Ark. 464, 51 S. W. 633. The note sued on in that case was barred by the statute of limitations before the beginning of the suit; that is, more than five years had elapsed and no demand had been made. The suit was begun on the 6th day of October, 1893, more than five years after the execution of the note. But on the 8th day of February, 1890, Telle addressed a letter to the payee of the note in which the court said that he definitely and unconditionally admitted the execution and validity of the note sued on, and, in effect, definitely promised to pay the amount according to the legal tenor and effect thereof. And, for that reason, because he had definitely and unconditionally admitted the execution and validity of the note and definitely promised to pay the amount, the court held that this furnished a new date from which the statute ran, and that the bar had not attached when suit was instituted.

We do not think, however, it can be said that there was any definite promise to pay here or any acknowledgment of the indebtedness involved in this suit. Written instruments must be considered as a whole and the intention of the parties ascertained.

The first clause mentioned by appellant in the mortgage is as follows: "It is understood and agreed by

and between the grantor and the grantees herein, that this mortgage is not given in settlement of any former indebtedness, but is to secure a new debt as herein set forth; and that this mortgage also is given to secure all other and further indebtedness whether incurred heretofore or hereafter until full and final settlement."

It could not have been the intention of the parties to secure the note sued on when they had expressly stated that it was not given in settlement of any former indebtedness, but to secure a new debt as therein set forth. When the whole clause is considered, it was manifestly the intention of the parties not to include any former indebtedness, but to secure the new debt as therein set forth.

The next clause relied on by appellant reads as follows:

"It being the intention of the parties that this mortgage shall secure all present obligations and all future obligations made prior to the foreclosure of this instrument."

All present obligations meant obligations created at that time, because it has already been stated in the mortgage that it was not given in settlement of any former indebtedness. And, when the three clauses relied on by appellant are construed together, the conclusion that the debt sued on in the instant suit was not intended is inevitable.

Appellant also calls attention to and relies on *Conley* v. *Archillian,* 146 Ark. 64, 225 S. W. 5. The court said in that case: "It is insisted that one of the notes sued on was barred by the statute of limitations. But this is not true if the payments of interest were made as testified by Conley. Moreover, before the bar of the statute had fallen, the deed from J. W. Conley was executed, and, as found by the court, the assumption at that time of the payment of the two notes furnished in

part the consideration for the deed, and this suit was commenced July 1, 1917."

Such, however, is not the case here. In fact, there is no question about the payments being made, and the preponderance of the testimony showed that the $150 payment was not made on this note, but on the note secured by the chattel mortgage. Moreover, the court in the instant case found that there was no assumption at the time of the execution of the chattel mortgage.

As we have already said, the intention of the parties is to be ascertained. Where the statute of limitations was pleaded in a case, the court held that there was no bar of the statute, but used this language: "Though usual, it is not necessary that a mortgage state the amount of the debt to be secured, or that it is evidenced by a note or any other instrument. If it contains a general description, sufficient to embrace the liability intended to be secured, and to put a person examining the records upon inquiry, and to direct him to the proper source for particular information of the amount of the debt, it is sufficiently certain." *First National Bank of Corning* v. *Corning Bank & Trust Co.*, 168 Ark. 17, 268 S. W. 606.

The court in the above case also said: "The case of *Lightle* v. *Rotenberry*, [166 Ark. 337, 266 S. W. 297], is also authority for holding here that the intention of the parties at the time of the execution of the mortgage, as expressed by the language there employed, governs, and that this purpose cannot be enlarged by any contemporaneous parol or subsequent agreement that it should secure any indebtedness other than that referred to in the mortgage."

The authorities on the question of the reviving a cause of action by written promises or acknowledgments are in hopeless conflict. And while it is not necessary that the acknowledgment or promise should be formal, or that the debt should be specifically described,

the writing relied on must clearly refer to the very debt in question, and the acknowledgment must be express, clear and direct.

One of the recitals in the mortgage is as follows: "All of said notes being due and payable November 1, 1924, and this mortgage being given to secure the payment of, not only said notes, any and all renewals thereof, but also any and all other and further indebtedness, whether original or by indorsement, which grantor or either of them, may assume, guarantee, or contract to pay to the grantee for any loans, advances, indorsements, credits, overdrafts, or aceptances," etc.

We think this clearly shows that the debts mentioned which were secured by this mortgage other than the note were debts that the parties might assume, guarantee, or contract to pay, or for loans, advances, indorsements, etc., and certainly did not include the note sued on.

Said mortgages also has this recital: "No real estate included in this mortgage."

When the entire mortgage is considered, the conclusion that it did not refer to the note involved in this suit cannot be escaped. There is no reference to this note and mortgage anywhere in the chattel mortgage, and it is contended that Cheairs is indebted to the bank in approximately $20,000.

"Although specific reference to a particular claim has been declared unnecessary, it has also been held that the promise or acknowledgment must itself specify or plainly refer to the particular demand or cause of action, and it matters not where the uncertainty lies, whether in the acknowledgment or in the identification, its existence is equally fatal to the plaintiff's recovery, or that the acknowledgment should furnish the means by which the character or amount of the debt can be certainly ascertained, or refer to something from which this can be certainly determined. So it is held that the new

promise must arise out of facts which identify the debt with such certainty as will clearly determine its character, and fix the amount due; and a general admission of unsettled matters of account between the parties, or a general admission of indebtedness not referring to any particular claim, where there are several claims, is not sufficient to support a promise to pay any particular demand, and particularly where such general acknowledgment is made to a third person and not to the creditor. * * * There must, however, be a clear recognition of some amount due which is reasonably ascertainable." 37 C. J. 1101.

"Many examples of what the rule is on this subject may be found in our books; some of later date may be consulted in the cases of *Cooke* v. *Ashe, Chambers & Campbell* v. *Sims,* and *Williamson* v. *King, Admr. of Bacot.* It is said in the last case cited, the acknowledgment must be of some specific demand; that the promise should be so explicit that the liability could be made apparent by stating the terms of the undertaking in a declaration, reference being had to the old demand for a consideration; that is, the extent of the liability must appear in the terms of the assumption." *Brailsford* v. *James,* 3 Strobhart, (S. C.) 171.

"The acknowledgment of Ashe is that the account existed against him, but no particular sum was acknowledged; nor does it appear what specific account was intended to be acknowledged. The acknowledgment, therefore, can amount to no more than the avowal that he owed Cooke on open account an unascertained sum of money which he would pay by installments. The witness does not recollect that he even owed the present account to Ashe nor the amount of the account assumed, but he lately said he had not paid it, and that Cooke did not give him the correct check. There is had no express assumption of any specific amount or account." *Cooke* v. *Ashe,* Bailey's Law Cases, S. C., Rep. 246; *Robbins* v. *Farley,* 33 S. C. Law 33, 348.

The cause of action on the note sued on was barred by the statute of limitations, and under our statute the mortgage was barred when the debt was barred. Holding as we do that the cause of action was barred by the statute of limitations, it becomes unnecessary to decide whether the conveyance by Cheairs and his wife to Mrs. Kincannon was valid or void. The property being the homestead, it would not be liable for any other debt of Cheairs, and they could convey it to their daughter or any other person, and it would not be a fraud on the creditors as the homestead is exempt.

The decree of the chancery court is affirmed.

SOUTHERN SURETY COMPANY *v.* PHILLIPS.

Opinion delivered February 17, 1930.

Buzbee, Pugh & Harrison, L. P. Biggs and *D. M. Halbert,* for appellants.

D. D. Glover, Joe McCoy and *W. H. Glover,* for appellees.

MEHAFFY, J. R. O. Gwin entered into a contract with the Arkansas State Highway Commission on the 17th day of October, 1927, for the construction of a road in Hot Springs County, Arkansas, known as State Job No. 621.

The Southern Surety Company executed a bond to the Highway Commission for the faithful performance of said contract. The evidence does not show how much of the construction work was done nor how much money had been earned or paid to the contractor, nor how much was due him at the time the surety company took charge of the work. But on February 12, 1929, the contractor, R. O. Gwin, executed the following instrument:

"Whereas, the undersigned, R. O. Gwin, entered into a contract with the State Highway Commission of the State of Arkansas, on the 17th day of October, 1927, for the construction, grading and drainage structures on the Dallas County Line-Malvern Road, State Highway No. 9 S-4, State Job No. 621, Hot Spring County, and

"Whereas, the undersigned executed a bond to the State Highway Commission for the faithful performance of said contract on which bond the Southern Surety Company became surety; and,

"Whereas, the Southern Surety Company of New York has succeeded to all of the rights and liabilities of said Southern Surety Company under said bond; and,

"Whereas, by virtue of an arrangement made by the undersigned with M. W. Elkins, of Little Rock, Arkansas, the said M. W. Elkins has furnished a large sum of money which has been used in constructing said highway for the benefit of the undersigned, and it has finally become nec-

essary for said M. W. Elkins and said Southern Surety Company of New York to assume the liabilities of the undersigned under said contract, and to collect from the State Highway Department the amounts due said Highway Department under the terms of said contract.

"Now, therefore, in consideration of the premises, I hereby assign to the said M. W. Elkins all my right, title and interest in and to any sum of money which may be due me by the said Highway Department under the terms of said contract, subject, however, to the rights and interests of Southern Surety Company of New York, therein, and the said Southern Surety Company of New York is hereby authorized and directed to pay out of moneys received from the State Highway Department under said contract; first, all lawful claims growing out of the performance of said work; second, all amounts which may be due to it, and, third, the remainder, if any, to the said M. W. Elkins, but not to pay the said Elkins any more than I owe the said Elkins, and the remainder to be returned to R. O. Gwin.

"Witness my hand this 12th day of February, 1929.

"R. O. Gwin (Signed)

"Witness: L. P. Biggs (Signed)."

Appellants state in their brief that a great many suits were brought against the contractor and the surety by laborers, materialmen and subcontractors. Something like thirty or forty different persons brought suits in the justice court and in the circuit court of Hot Spring County.

The evidence, however, does not show any suits except these. Some of these suits were brought in the latter part of 1928 and some in January, 1929. Those brought in justice court were appealed to the circuit court by the surety company and were consolidated under the following agreement:

"It is agreed by and between the attorneys for the plaintiffs and the attorney for the defendant, Southern Surety Company, in the above entitled cases, that the

said cases may be consolidated and proceed as one case hereinafter under the style of E. T. Phillips and others v. R. O. Gwin and Southern Surety Company. It is agreed that the statements of account set out in each of the complaints, and/or exhibits thereto in each of said cases, is true and correct, and was furnished as therein alleged."

The parties waived a jury, and, by agreement of parties, the cases were tried by the court sitting as a jury, and the court found for the appellees. The court found that the appellant, Southern Surety Company, was not liable to plaintiffs on the bond of the contractor to the Highway Commission, but found against the appellants on the agreement entered into on the 12th day of February, 1929. The judgment of the court in favor of appellants on the bond was not appealed from; hence the only question for our consideration is whether or not the appellants are liable on the instrument executed on the 12th day of February, 1929.

Counsel for appellants state in their brief that the surety company might, under its original assignment, have appropriated the fund received from the highway department, and used the same as far as it went in paying obligations which were recoverable against the surety. This being true, there was no occasion or reason for the assignment made by Gwin except to pay all lawful claims growing out of the performance of the contract. But whether they could have paid these obligations and appropriated the money or not is immaterial, because they are either liable under the instrument of February 12 or they are not liable at all. It is contended that this is not a contract but merely an order, draft, direction or agreement by Gwin.

A contract is an agreement which creates an obligation. There must be competent parties, a subject-matter, a legal consideration, mutuality of agreement and mutuality of obligation. Agreement is the expression by two or more persons of a common intention to affect their

legal relations. It consists in their being of the same mind and intention concerning the matter agreed on. The instrument of February 12 was an assignment and an offer, and, until accepted, it was not binding. An acceptance, however, may be by an act of the party as it was in this case.

Mr. L. P. Biggs testified in this case about the contract entered into between Gwin and the State Highway Commission, and the surety bond and assignment set out above, and then said: "The Southern Surety Company of New York and M. W. Elkins demanded of and received from the State Highway Department all of the money due said Gwin by the Highway Department on the aforesaid contract for construction, and that this was done after making and signing the paper attached to his deposition."

This was the assignment of Gwin. In other words, when the assignment was made, the surety company and Elkins then, under the terms and provisions of the assignment, received all of the money that the Highway Department owed Gwin. The acceptance of the offer made by Gwin constituted a contract. But it is said that the appellees have no right of action arising out of the instrument signed by the contractor, but that it is merely an order, draft or direction, and then cite and rely on the case of *Rogers Commission Co.* v. *Farmers Bank,* 100 Ark. 537, 140 S. W. 992. The court in that case said, however:

"It was not necessary to the bank's liability that it should have on deposit to the drawers' credit more than the amount of this check at the time of its presentation, for it would have become liable to its payment by an acceptance of it, and could have permitted an overdraft as it has usually done, or withheld its own check which it claimed to have in its drawer against the account of the makers of the check which latter the testimony indicates it did do."

It will therefore be seen that the case relied on holds that if the offer is accepted it constitutes a contract and the bank would have to pay.

Appellant next calls attention to the case of *Sims* v. *American National Bank of Fort Smith*, 98 Ark. 1, 135 S. W. 356. That was a case where the indorsement on the check was forged. And, while it was paid, the court held that there was never an acceptance, and the payee of a check cannot maintain an action upon it against the bank on which it is drawn until it is accepted. But, when accepted, it constitutes a contract upon which the suit may be maintained.

In the next case cited and relied on by appellant, *Exchange Bank & Trust Co.* v. *Ark. Grocer Co.*, 169 Ark. 1084, 277 S. W. 871, the court, among other things, said:

"If there was an acceptance of the order by the garnishee, its character, by that act, was changed from a simple order to an assignment. * * * It occurs to us that this act of the association in receiving and filing the order was tantamount to saying to Bueker, the drawer of the order: 'We acknowledge receipt of your order, accept the same, and will pay the money to the Exchange Bank & Trust Company as you direct.' "

So, in the instant case, when the surety company and Elkins, after the assignment or instrument signed by Gwin had been delivered to them, collected all the money due the contractor, it amounted to saying: "We acknowledge the receipt of your order and accept the same, and will pay the money due you to the persons holding lawful claims growing out of the performance of your work."

The next case relied on by appellant is *Southern Trust Co.* v. *American Bank of Commerce & Trust Co.*, 148 Ark. 283, 229 S. W. 1026, 14 A. L. R. 761. In that case the court said that the check would not operate as an assignment of the funds so as to empower Smith to sue for the amount, and that it had become the settled doctrine of this court that the payee of an unaccepted check cannot maintain an action upon it against the bank on which it is drawn, and that the unauthorized payment by the bank on a forged endorsement does not constitute an

acceptance. It is also the settled doctrine of this court that, if there has been an acceptance, then the payee can maintain an action against the bank.

It is next contended by the appellants that the plaintiffs cannot sue on this contract. Our statute provides: "Every action must be prosecuted in the name of the real party in interest except as provided in §§ 1091, 1092 and 1094." And appellants state what they call the essentials of a contract made for the benefit of a third person to enable the third person to maintain the suit, and they quote as follows:

"One may maintain an action upon a promise made to another for his benefit if such promise was founded on a consideration, and especially where the promisor received property and in consideration thereof agreed to discharge the debt of another." Citing *Spear Mining Co.* v. *Shinn,* 93 Ark. 346, 124 S. W. 1045; *Hecht* v. *Caughron,* 46 Ark. 132; *Bloom* v. *Home Insurance Agency,* 91 Ark. 367, 121 S. W. 293; *Chamblee* v. *McKenzie,* 31 Ark. 155; *Talbot* v. *Wilkins,* 31 Ark. 155; *Thomas Mfg. Co.* v. *Prather,* 65 Ark. 27, 44 S. W. 218.

All of these cases support the theory that one may maintain an action upon a promise made to another for his benefit, but it is argued that the instrument is not a promise, agreement, contract or obligation made by appellants to pay anything or do anything, but a mere written consent of the contractor. That was true until accepted by the appellants, but when they acted on the promise of Gwin and accepted the money, that instrument named the persons for whose benefit the contract was made. And the promise of Gwin, as it is called, provided that appellant should pay all of the debts of Gwin growing out of the work on the road.

There is no evidence showing how much they received, but the appellants themselves state that it became necessary for the Southern Surety Company to finance the job to completion with funds furnished by M. W. Elkins, who was already a large creditor of the con-

tractor and who hoped to recoup a part of his loss by completing the project. In other words, appellants state that they expected to make a profit by taking over the road. The only evidence in the case that Elkins furnished any money at all is in the assignment signed by Gwin in which it is stated, among other things, that Elkins furnished a large sum of money which has been used in the construction of the highway for the benefit of Gwin, and the only evidence in the record that Gwin could not complete the contract is the statement in the same instrument that it has finally become necessary for said Elkins and said Southern Surety Company of New York to assume the liabilities of the undersigned under said contract, and to collect from the State Highway Department the amounts due said highway department under the terms of said contract. How much was due from the highway department is not shown, as we have already said, and how much of the work was done. In fact, there is no evidence tending to show what profit the appellants made out of taking over the contract, but, according to their own statement, they took it over expecting to make a profit.

Appellant argues that there was in the minds of the parties when the instrument was written only an intent to have the contractor confirm the payments theretofore made and thereafter to be made for his account. They say that when the instrument was signed there was around the table subcontractors awaiting for the payment of the amount agreed on. This may be true, but there is no evidence in the record tending to show this to be true.

It is also argued that there was not in the minds of any one who had any interest in the matter any idea or intent to create a promise on the part of appellants to pay all Gwin's lawful claims. There is no evidence on this question except the instrument itself, and it specifically provides for the payment of all lawful claims growing out of the performance of said work. The agreement

entered into by the attorneys shows that the account of each appellee is correct, and that the purpose for which they were furnished was correctly stated. And each account states, in substance, that the material was furnished to be used in the construction of the road. Now the agreement is that the account is correct, and that it was for material furnished to be used in the construction of the road.

Appellants call attention to the case of *Spear Mining Co.* v. *Shinn,* 93 Ark. 346, 124 S. W. 1045. In that case the court said, among other things:

"The weight of modern authority holds that one may maintain an action on a promise made to another for his benefit, if such promise is founded upon consideration." 3 Page on Contracts, § 1307; *Hendrick* v. *Kindsay,* 93 U. S. 143.

"And especially is this true where the one who makes the promise receives property, and in consideration thereof agrees to discharge a debt in favor of another. * * * And so one corporation may become liable for the debts of another corporation, where it has in express terms or by reasonable implication assumed the payment of the liabilities of the debtor corporation."

Appellants then cite *Bloom* v. *Home Insurance Co.,* 91 Ark. 367, 121 S. W. 293, and say that that case is not of great assistance in the case. In that case the court said:

"By § 5999 of Kirby's Digest, it is provided that every action must be prosecuted in the name of the real party in interest, with certain exceptions which do not apply here. The beneficial owner is the real party in interest within the meaning of this provision of the code. 30 Cyc. 45. Where a contract is entered into for the benefit of a third person, the latter is the real party in interest; and a majority of the American courts have adopted the rule that such person may maintain an action for the violation of the contract."

Appellants next calls attention to the case of *Georgia State Savings Assn.* v. *Dearing,* 128 Ark. 149, 193 S. W. 512, and quote as follows: "A person for whose benefit a contract is made, but incurring no obligation himself, cannot sue upon the contract." In that case the court also said: "The rule in this State is that a stranger to a contract between others in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise (no consideration from the stranger, and no duty or obligation to him on the part of the promisee), cannot recover thereon."

But in this case there was a duty; there was a consideration. These persons had furnished material to go into the construction of the road. There was money in the highway department due the contractor for this work, how much we do not know, and these persons had furnished the material, and Gwin was indebted to them and promised to pay that debt, and the other parties, the appellants, in accepting that contract, thereby promised to pay these parties.

In the next case referred to by appellants, *Thomas Mfg. Co.* v. *Prather,* 65 Ark. 27, 44 S. W. 218, the court said:

"This court long ago ruled, in line with the doctrine which generally obtains in this country, that where a promise is made to one upon a sufficient consideration for the benefit of another, the beneficiary may sue the promisor for a breach of his promise. * * * Of course, the name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. Indeed he may be one of a class of persons, if the class is sufficiently described or designated."

The next case referred to and relied on by appellants is *Schmidt* v. *Griffith,* 144 Ark. 8, 221 S. W. 746. The court in that case said:

"There are many decisions of this court announcing the familiar rule that, where a promise is made to one

party upon a sufficient consideration for the benefit of another, the beneficiary may sue the promisor on his promise.''

Appellants say that, if the contractor had turned over his home to the surety, and, in consideration of the transfer, the surety had promised to pay all the contractor's debts, then appellees might sustain the complaint. If they could, we see no reason why the same rule does not apply in turning over other property. In this case the contractor owed the appellees. The materials furnished by them were used in the construction of the road, and the amounts sued for are correct. The contractor turned over to the appellants all the moneys due him from the highway commission, and the appellants, by accepting the assignment, agreed to pay all lawful claims growing out of the performance of the work. These claims come within that class.

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

[redacted]

IMPERIAL OIL MARKETING COMPANY *v.* ROGERS.

Opinion delivered February 17, 1930.

[redacted]

Mahony, Yocum & Saye, for appellant.

Marsh, McKay & Marlin, for appellees.

MCHANEY, J. On February 19, 1927, appellees leased to appellant a certain lot in El Dorado, and all improvements thereon, ''together with all the equipment and personal property used or employed as a part of or in con-

nection with a filling station, and located on said lot on the 11th day of February, 1927, * * * from the 11th day of February, 1927, to and including the 10th day of February, 1930," for a monthly rental of $150. The lease agreement contained this clause: "It is agreed that in case the premises shall, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use as a filling station, this lease shall terminate as to both parties."

Appellant entered into possession of the leased premises, and operated a filling station thereon until April 14, 1928. On the night of April 13, a fire occurred, which originated in a waste paper basket in the northeast corner of the building on the leased lot, and the walls adjacent to this corner were somewhat damaged, as also a portion of the ceiling in this room, the building being divided into three rooms. The blaze was quickly extinguished by the fire department, but in doing so a door was broken open, a window knocked out and two holes torn in the roof as well as water damage to certain office furniture and equipment. Appellant, contending that it had the right to do so under the clause of the lease agreement above quoted, surrendered possession of the leased premises to appellees, moved out and refused to pay further rent from said date. Appellees brought this action to recover damages as for breach of the lease agreement based on the difference between the rent reserved, and the rental value at the time of the breach, rents having declined in the meantime. The case was tried to a jury on instructions that are not complained of, which resulted in a verdict and judgment for appellees.

At the close of the evidence, appellant requested a directed verdict, which was refused, and this is the only assignment of error urged now for a reversal of the case. We think the court correctly refused this request. There is no substantial dispute in the evidence. The actual fire damage was very small. The damage to the roof,

the door, the window and the water damage was done by the fire department in extinguishing the flame. The question was whether all this damage, when considered together as the result of the fire, rendered the "premises" "unfit for use as a filling station." Manifestly the parties did not contemplate that the lease would terminate if the premises were only slightly damaged by fire, but only in case the fire damage was such as to render the premises unfit for use as a filling station. This precise question was submitted to the jury, and, by its verdict, it found that the damage was not such as to render the premises unfit for use as a filling station. The undisputed evidence is that the necessary repairs could have been made in a few hours, and without interruption of appellant's business in the operation of a filling station. The building and other personal property leased were not destroyed by fire, but only damaged, and the question was whether the damage was such as to render the premises unfit for occupancy. The principle of law announced in *Tedstrom* v. *Puddephatt,* 99 Ark. 193, 137 S. W. 816, Ann. Cas. 1913A, 1092, we think is applicable here. It was there said: "We think that it is well settled by the authorities that, under leases containing provision for a forfeiture thereof and a cessation of the rent, in event of destruction of the premises by fire or other casualty, or inability to occupy the same on that account, a partial destruction of the premises will not terminate the lease, though it renders the premises, or a part thereof, temporarily untenantable for the purpose of the lease, and will not relieve the tenant from future liability for rent."

While it is true the provision in the lease in that case is somewhat different from the clause above quoted in this case, yet the principle is the same, and is controlling here.

The evidence was sufficient to support the verdict, and the judgment is accordingly affirmed.

SULLIVAN *v.* TIMES PUBLISHING COMPANY.

Opinion delivered February 17, 1930.

A. F. Barham, Gladish & Taylor and *Caraway, Baker & Gautney,* for appellant.

G. B. Segraves, James G. Coston and *J. T. Coston,* for appellee.

McHANEY, J. In 1906 Leon Roussan died testate in Mississippi County, Arkansas. His will provided that all his property described therein, including lots 5 and 6, townsite addition to Osceola, the property in controversy in this litigation, should be the property of his wife, Adah L. Roussan, and continued: "To have and to hold, use, after she had paid off all indebtedness as may remain due at my demise, and which now consists of a mortgage held by the American Building & Loan Association of Little Rock, Arkansas, and a mortgage held by the Ladies Aid Society for $200, and other debts amounting to about $300 more.

"In liquidating these claims she may sell any part of the property she may deem best or more advantageous, the remainder to be used by her for her sole use and benefit for support. After her death the real estate is to go to my sister, Clara, for her sole use and benefit, and at her death the property will revert to my lawful heirs. No

bond or other legal process shall be required of my wife nor my sister before taking immediate and full and undisputed possession."

This will was admitted to probate, and Mrs. Roussan qualified as executrix thereof. After administering the estate for some time, she filed a report in which she claimed that the estate was indebted to her in the sum of $2,542.23. No objection or exceptions having been filed as to the report, which remained on file for three months, the probate court entered an order approving the report, and finding that the estate was indebted to her in said sum. No appeal was taken from this order. In 1913 she filed a petition to sell the property in controversy to pay the debts of the estate which the court approved, and ordered the property sold for this purpose. She thereupon advertised the property for sale, but there were no bidders, and no sale was had. She then resigned as executrix, and C. C. Ermen, who was appointed to succeed her, filed a like petition to sell the property to pay debts, and another order was made to sell said lots 5 and 6. He caused an appraisement to be made, the sale advertised, and at this sale Mrs. Roussan bid $2,500 for lot 5, and $500 for lot 6, which was more than two-thirds of the appraised value of said lots, and the property was struck off to her, there being no other bidders. This sale was reported to, approved and confirmed by the probate court on April 12, 1915, and deed was executed to her. No objections or exceptions were filed in the probate court to any of the proceedings therein, and no appeal was taken from any of the orders of the court, but thereafter Mrs. Roussan held, occupied and used the property as her own, mortgaged it, and on September 5, 1924, conveyed it to the appellee, the Times Publishing Company. Thereafter in January, 1927, Mrs. Roussan died, and in September following appellants who are the collateral heirs of said Leon Roussan, brought this action against the appellees in which they alleged their relationship to the testator, that they are

his sole surviving heirs, that Mrs. Roussan by the terms of said will acquired only a life estate in the property, and that the Times Publishing Company by its deed acquired no greater title than was devised to her under said will; that, by the sale of other property belonging to the estate, Mrs. Roussan obtained sufficient money to pay the debts owing by the testator at the time of his death, and that all the debts had been paid by her prior to her conveyance of the property involved in this litigation to the Times Publishing Company. Issue was joined on these allegations, and at the conclusion of the testimony on a trial of the case the court instructed a verdict for the appellees on the ground that the orders and judgments of the probate court were valid on their face and were not open to collateral attack in that court, and that all the evidence offered constituted a collateral attack on such judgments and orders and was therefore incompetent.

We think the court was correct in so holding. Whether the will created in Mrs. Roussan only a life estate with remainder to the collateral heirs, and whether her deed destroyed the estate in remainder or defeated it as to said lots 5 and 6, we do not find it necessary to decide in this case.

On the application for the second sale, the probate court made an order finding "that the said estate is indebted to Mrs. Leon Roussan in the sum of $2,795.48, and to Lamb & Rhodes in the sum of $100." The court made other substantial findings of fact in connection with its order to sell, showing that the statute governing the sale of real estate to pay the debts of the estate were substantially complied with. The court thereupon entered a judgment directing the sale of said property in accordance with the statute, and the sale was made, reported, approved and confirmed. It is said that Mrs. Roussan made no report for more than six years, and that there was no claim allowed against the estate until December, 1912, and that the report she made shows that the claims which she paid were barred by limitation, and that they

were not presented to and allowed by the probate court prior to 1912. Conceding this to be so, the action of the court in allowing Mrs. Roussan's claim for the amount of debts she had paid was an order from which an appeal should have been taken by any person interested. This was not done, but about fifteen years later this collateral attack is made. The probate court is a court of superior jurisdiction, and, when acting within its jurisdictional rights, its judgments import absolute verity and are not open to collateral attack. *Graham* v. *Graham,* 175 Ark. 530, 1 S. W. (2d) 16; *Day* v. *Johnston,* 158 Ark. 478, 250 S. W. 532.

The probate court had jurisdiction to order a sale of the real estate to pay debts. This jurisdiction is specifically given it by statute. In *Stumpff* v. *Louann Provision Co.,* 173 Ark. 193, 292 S. W. 106, this court held that "the county court is a court of superior jurisdiction, and its judgments, rendered in pursuance of jurisdiction rightfully acquired, cannot be attacked collaterally." We there quoted from *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390, 142 S. W. 836, as follows: "It is well settled in this State that, in a collateral attack upon a judgment of a court of general jurisdiction, every presumption will be indulged in favor of the jurisdiction of the court, and the validity of the judgment or decree."

We therefore hold that appellants are precluded from maintaining this action, and that the instructed verdict was properly given by the court. Judgment affirmed.

KEITH *v.* DRAINAGE DISTRICT NO. 7 OF POINSETT COUNTY.

Opinion delivered February 17, 1930.

C. T. Carpenter, for appellants.

Chas. D. Frierson, for appellee.

BUTLER, J. The appellants, Harry A. Keith and Mamie Keith, filed a complaint in the circuit court of Poinsett County, on the.....day of....., 1922, which is as follows:

"Drainage District No. 7 of Poinsett County, Arkansas, is a drainage and levee district created under and by virtue of the Acts of the General Assembly of the State of Arkansas for the year 1917 and the acts amendatory thereof. Said drainage district, as described in said act and the acts amendatory thereof, comprises a vast area of land in Poinsett County, and includes therein all the lands in township 12 north, range 6 east in said county. Plaintiffs are the owners of south half of southeast quarter, section 27; northeast quarter, section 34, and north half of southeast quarter, section 34, all in township 12 north, range 6 east, and containing three hundred and twenty (320) acres, and all of said lands are within the boundaries of said drainage district.

"Pursuant to the powers conferred upon it by said acts aforesaid, the board of directors of said district, under the advice and directions of its engineer, prepared, adopted and filed in the office of the county clerk of Poinsett County, Arkansas, plans and specifications for the improvements to be made and constructed in said district. On the 24th day of May, 1919, said district, through

its commissioners and engineer, made, adopted and filed plans and specifications for the construction of said levees, drains, ditches and floodways, which said plans and specifications of said improvements are referred to generally as the reservoir and as the floodway. Said plans and specifications provide for the construction of a levee and drainage ditch along and upon either side of right-hand chute of Little River, and a reservoir on and near St. Francis River and St. Francis Lake in said county. Said reservoir is formed by means of the construction of a levee and drainage ditch on the west side of St. Francis River from the county line on the north, extending in a southeastern direction to a point near the foot of St. Francis Lake on the south, and on the east side of said St. Francis River and St. Francis Lake there is also established a levee and drainage ditch extending from the county line between Craighead County and Poinsett County on the north, in a southwestern direction, to the foot of St. Francis Lake in the south. Said improvement along right-hand chute of Little River, being described as follows:

"A levee and drainage ditch on each side of the right-hand chute of Little River beginning in sections 29 and 30, township 12 north, range 7 east, thence in a southwestern course through said sections 29 and 30 to section 25, township 12 north, range 6 east, on the north and west side of right-hand chute of Little River, and on the south and east side of Little River a levee and drainage ditch through sections 36 and 35, township 12 north, range 6 east, thence in a southwestern direction through sections 2, 11, 10 and 9, in township 11 north, range 6 east.

"That said levee and drainage ditch last described crosses and closes the right-hand chute of Little River, as the same traverses section 36, township 12 north, range 6 east, and diverts the waters thereof into the St. Francis River. That, beginning at a point in section 25, township 12 north, range 6 east, as shown on the map of said improvement filed May 24, 1919, there is a levee and drain-

age ditch running due north through said sections 24, 13, 12 and 1, said township and range, to the county line between Poinsett and Craighead counties on the north. That beginning at a point in section 5, township 12 north, range 6 east, on the west side of the St. Francis River, there is a levee and drainage ditch constructed in a southeastern direction through said section, and sections 8, 17, 20 and 32, in township 12 north, range 6 east, and through sections 4, 5, 8 and 9 in township 11 north, range 6 east. The whole area thus described as being a reservoir comprises about sixteen thousand acres of land, constituting and being shown as the reservoir, for the purpose of carrying the waters from the various ditches and drains established in said district, and also the water of the St. Francis River and lake, and the waters diverted as aforesaid from the right-hand chute of Little River into said reservoir. That there is also constructed across the St. Francis River in the south part of section 10, township 11 north, range 6 east, a levee and drainage ditch, whereby the natural flow of the waters of the St. Francis River, in its channel as it flows in a southeastern direction is diverted and caused to flow in a direction almost due west and into a floodway, which floodway runs in a southwestern direction through sections 9, 16, 17, 20, 21, 29, 30, 31 and 32, township 11 north, range 6 east, and sections 5, 6, 7 and 18 in township 10 north, range 6 east, and thence in a southwestern direction into the St. Francis River at a point in section 10, township 9 north, range 5 east, said floodway herein described being a part of said improvement, as shown on said map aforesaid.

"That said improvements, aforesaid, confine the waters of St. Francis River and St. Francis Lake in a space much narrower than formerly occupied by said river and said lake. That the waters of the right-hand chute of Little River are diverted, and caused to flow into the St. Francis River, and that the waters of the St. Francis Lake, at the point hereinbefore described are also diverted and caused to flow toward, and in the di-

rection of, said floodway. That said diversion, in each of the instances herein mentioned, is from the natural course and channel of the said rivers as hereinbefore stated. That said floodway hereinbefore referred to is about one-half mile in width, and the improvement therein consists of the construction of a levee and drainage ditch on either side thereof, said ditch on each side of said floodway being one hundred feet in width. That, by reason of the establishment of said improvements according to said plans and specifications aforesaid, the waters of the St. Francis River and St. Francis Lake and right-hand chute of Little River are diverted and confined as herein described, and thereby raised five or six feet in excess of the waters of said river and lake at ordinary tide, and completely submerging all of the lands hereinbefore described as belonging to the plaintiffs, which are within the reservoir hereinbefore described.

"That prior to the improvement aforesaid, all of said lands were high and above ordinary overflow of the St. Francis River. A part of said lands are in cultivation and all of said lands are susceptible to cultivation. That plaintiffs have cleared and cultivated a part of said lands, erected two dwelling houses, barns and other improvements thereon, and that said lands prior to said improvements were useful and valuable farming lands. That, when the improvements described in the plans and specifications are completed, the lands of plaintiffs will be completely submerged, and rendered useless and unfit for cultivation or occupancy.

"That, although the lands of plaintiffs are embraced within the boundaries of the district, no benefits or damages have been assessed against the same, and no order has been made assessing benefits or damages against said lands. That the defendant has appropriated all of the lands of plaintiffs to its use in the construction of said improvements aforesaid, and has failed, neglected and refused to compensate plaintiffs for the value of the lands taken and appropriated, and has refused to insti-

tute any action, suit or proceeding for the condemnation of the lands of the plaintiffs so taken, appropriated and used. That plaintiffs' lands are of the value of forty-eight thousand dollars.

"That defendant has unlawfully taken and appropriated and deprived plaintiffs of their property without due process of law in violation of article 14, § 1 of the Constitution of the United States of America. That defendant has unlawfully taken and appropriated to its own use the private property of the plaintiffs, without first making compensation therefor, in violation of article 2, § 22, of the Constitution of the State of Arkansas.

"Wherefore plaintiffs pray judgment against said defendant, Drainage District No. 7 of Poinsett County, Arkansas, for said sum of forty-eight thousand dollars ($48,000), for costs and all proper relief."

The case was continued on motion of the defendant, awaiting the action of this court in the case of *Sharp* v. *Drainage District No. 7,* on the ground that that case would be decisive of the questions in the instant case. The Sharp case was decided May 5, 1924. *Sharp* v. *Drainage District No. 7,* 164 Ark. 306, 261 S. W. 923. After that decision a demurrer was interposed to the complaint of plaintiffs, which demurrer was sustained, and to review the action of the lower court in sustaining the demurrer this appeal has been brought.

It is first insisted by the appellee that this suit was brought under the provisions of the act of the General Assembly of 1917 creating the district, and that since the passage of that act it had been amended from time to time and curative acts passed, the general effect of such acts being to materially change the plans and specifications of said improvement, and that the improvement was finally constructed on the plans as revised and altered. If in fact the levees were not constructed as alleged in the complaint, so as to injure plaintiff's land, this would be a matter of defense.

It is insisted also that the allegations of the complaint do not bring it within the rule announced in the case of *Sharp* v. *Drainage District, supra,* but in effect allege that in constructing levees plaintiff's lands were left outside and unprotected by said levees, and that therefore it was not such a taking of the property for which compensation could be had, but was such "damage, if any, which must be suffered by the individual for the benefit of the general public."

We recognize the rule laid down in *City Oil Works* v. *Helena Improvement Dist. No. 1,* 149 Ark. 285, 232 S. W. 28, 20 A. L. R. 296, and in a number of other cases, both of this court and of the courts of the United States, cited in brief for appellee, that a landowner, whose property is left outside of a levee is not entitled to damages because of the failure to protect his land or because the levee as constructed may prevent water from flowing off his land as it otherwise would, or may deepen the water in an overflow of land between the embankment and river. The court, however, is of the opinion that the allegations of the complaint are not within the above rules, but that they state with sufficient precision a cause of action under the rule announced in *Sharp* v. *Drainage District, supra.* The complaint does not allege that the lands alleged to have been damaged have been left outside the levees created, but that streams have been dammed thereby diverting the water from its natural course over the lands of plaintiffs, raising the water level much higher, and continuing it much longer than before the construction of the levees, resulting in the injury complained of. Appellee asserts that in the instant case the complaint shows on its face that these lands are simply left unprotected by the levees, not assessed, and not condemned, and not affected otherwise by the construction of the levees. We do not believe that a fair construction of the complaint justifies this conclusion. The complaint, after tracing the course of the construction of the levees, in plain language states that the levee crosses and closes

the right hand chute of Little River, and that there is also constructed across the St. Francis River a levee which diverts the waters of the chute of Little River, and of the St. Francis River from the natural flow in a southeastern direction to a western course, causing the same to flow upon the lands of the plaintiffs. In the opinion of the court this is a sufficient allegation of the taking and damage of appellants' lands within the meaning of the provision of article 2, § 22, of the Constitution of 1874. In the case of *Sharp* v. *Drainage District, supra,* the court held that, while the allegations might not be definite, yet, giving those allegations their most favorable intendment, it was fairly inferable that a cause of action was stated. But in this case no such inference need be indulged as to the allegations of the complaint. There are specific allegations as to the damming of two streams, by which the overflow is alleged to have been caused, and, as is said by the court in the case of *Sharp* v. *Drainage District, supra,* this "takes the case out of the general rule and brings it within one of the well known exceptions, which is that the waters of a stream may not be obstructed by dams or other embankments so as to throw the water back upon the upper proprietors, and thereby damage or destroy entirely the use of their property." The court further said: "If the commissioners had erected levees along both banks, at some distance therefrom, for the purpose of preventing the waters of the St. Francis River from overflowing the adjacent lands, the fact that the lands of the plaintiff were left outside of the levees would bring him within the rule above announced, and he could not recover compensation for his lands thereby damaged or taken. It is fairly inferable from the complaint, however, that something more than this was done. In order to prevent the waters within the banks of the levees from spreading out and overflowing the lands below the levees, a dam or embankment was constructed at the lower end of the levees, so

as to impound the waters and let them out through a floodgate or floodway, at the will of the commissioners. This caused an obstruction to the flow of the waters, and threw them back upon the lands of the plaintiff, so as to destroy their use for agricultural purposes."

The court is of the opinion that the instant case comes squarely within the rule announced in the Sharp case, *supra,* and that the circuit court erred in sustaining the demurrer to the complaint. For this error, the judgment is reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings according to law.

OUACHITA VALLEY BANK *v.* PULLEN.

Opinion delivered February 17, 1930.

Rose, Hemingway, Cantrell & Loughborough, for appellants.

Homer T. Rogers, Compere & Compere, Haynie, Parks & Westfall and *McRae & Tompkins,* for appellees.

BUTLER, J. The following statement is made in the brief of counsel for the appellees: "The question of law and fact in these two interventions are so nearly similar that they were tried together in the lower court, and this appeal covers both interventions," and on this theory counsel for all parties have treated the facts as interchangeable, and applied to each the same principles of law. We think, however, there is an essential and vital difference in the facts established by the evidence regarding the formation and conduct of the Bank of

Smackover from that of the Louann State Bank, that the law governing one has no application to the other, and we therefore deem it necessary to take up and consider the two cases separately.

I. BANK OF SMACKOVER.

The appellant, Ouachita Valley Bank, prior to 1928, had been organized and doing business in the city of Camden, Arkansas, for more than thirty years, its business during that time having been carried on in such manner as to gain general confidence, and to bring in satisfactory dividends to its stockholders. About the year 1922, oil was discovered in what is known as the Smackover Field, and there was a great influx of money into Smackover, and a great need for banking facilities. The Ouachita Valley Bank (hereafter for convenience called Valley Bank) thought first of organizing a branch bank at Smackover, but abandoned this idea when advised that this was not permitted under the laws of the State of Arkansas. However, recognizing the advantages likely to accrue to it from having a bank in Smackover where the deposits of oil men would be large, four of the directors of the Valley Bank, together with a Mr. O. B. Gordon who was not connected with the Valley Bank, organized the Bank of Smackover with a capital stock of $13,000. Three of these directors of the Valley Bank, Mr. Gaughan, Mr. George Gordon and Mr. W. W. Brown each took $3,000, Mr. Bauerlein, another director of the Valley Bank, and also its cashier, subscribed $500, and Mr. O. B. Gordon, who was elected cashier of the Bank of Smackover, subscribed $500.

The Valley Bank advanced the money for the entire capital stock in the following manner. Each of the stockholders of the Bank of Smackover gave his personal note to the Valley Bank payable six months after date, which was renewed from time to time, and the Valley Bank paid into the Bank of Smackover the face value of such notes. Shortly after its organization, the Bank

of Smackover, by some improvident business transaction, became involved to the extent that it was necessary for the stockholders to be assessed 100 per cent. on their stock, for which assessment they gave their notes to the Valley Bank, which bank advanced the money and the business was continued. The organization of the Bank of Smackover was perfected about October, 1922. After the 100 per cent. assessment, the business was continued and proved very profitable, which business was conducted in the following manner. The deposits of the Bank of Smackover, which were large—running from $200,000 to $500,000—were placed by said bank with the Valley Bank, the latter bank paying the former from 2½ to 4 per cent. on daily balances, and its deposits loaned to various corporations, firms and individuals by Mr. W. W. Brown, president of the Valley Bank, and Mr. C. W. Ramsey, active vice president of the Valley Bank. The notes were taken in the name of the Valley Bank, payable at its office, and were then indorsed without recourse to the Bank of Smackover. They were then sent to the Bank of Smackover, entered upon its books according to number, and returned to the Valley Bank for collection. Such of these notes as were not paid were later renewed and made payable directly to the Bank of Smackover, but these transactions were handled by the Valley Bank, as in the first instance, and the renewal notes were sent to the Bank of Smackover for entry upon the books and returned to the Valley Bank where they were kept, all of such notes as were collected being collected by, and at, the Valley Bank.

The deposits in the Bank of Smackover were subject to frequent fluctuation. At times large sums were deposited, and again there were large withdrawals, so that at times the cash reserve of the Bank of Smackover would sink below the reserve required by law. When this occurred, the Valley Bank would send to the Smackover Bank the amount of cash needed to bring

the reserve up to the legal requirement, and it would take in lieu of such advance a sufficient number of the notes belonging to the Bank of Smackover to equal the amount of cash sent, and these notes would then be entered on the books of the Valley Bank as a part of its assets. It was understood that, while nominally the shares of the capital stock of the Bank of Smackover belonged to the incorporators of that bank, they were in reality the property of the Valley Bank. All of the dividends that accrued from the earnings of the Bank of Smackover were applied to the payment of the notes executed to the Valley Bank for the cash that had gone into its capital stock. The board of directors of the Valley Bank, in discussing the affairs of the Bank of Smackover, reached an understanding on a resolution offered by one of the directors that when the earnings of the Bank of Smackover should pay the notes aforesaid, all the earnings of the stock should go to the Valley Bank, and that said bank would stand any losses on the Bank of Smackover.

As we have seen, all of the directors of the Bank of Smackover, except one, were directors of the Valley Bank, and a majority of the directors of the Valley Bank were directors of the Bank of Smackover. At all times after the organization of the Bank of Smackover, until 1928—approximately six years—W. W. Brown was the president of the Valley Bank and also president of the Bank of Smackover. C. W. Ramsey was employed by the Bank of Smackover shortly after its organization and afterward—about July, 1923—entered the employ of the Valley Bank as first assistant to the president, and in 1924 or 1925 became its vice president, he and the president having sole charge of the loan and discount departments of the Valley Bank, making and collecting loans, handling the borrowing of money and the extension of notes. These two gentlemen had exclusive management of the business between the Valley Bank

and the Bank of Smackover. The board of directors of the Valley Bank met usually about once a month, and, when the discussion of the affairs of the Valley Bank was concluded, those directors of the Valley Bank who were also directors of the Bank of Smackover would then take up and discuss the affairs of that bank. Of course, all of these meetings were in the office of the Valley Bank in Camden. The business was conducted in this manner from October, 1922, until the 26th of March, 1928, when the Valley Bank, becoming insolvent, its doors were closed by the Bank Commissioner, causing the Bank of Smackover to fail also.

The facts above stated are practically undisputed. There is some question, however, as to what was the understanding between the Bank of Smackover and the Valley Bank, or Mr. Brown and Mr. Ramsey, its president and vice president, regarding a guarantee of the collection of the notes taken by the Valley Bank for the Bank of Smackover. Ramsey's testimony regarding this is somewhat equivocal as to whether or not it was the distinct agreement between Brown and himself, as president and vice president of the Valley Bank, and the Bank of Smackover, that the payment of all of the notes taken by the Valley Bank was guaranteed, and Mr. Brown testified that he knew of no such arrangement. However, it is undisputed that the assistant bank commissioner, after the organization of the Bank of Smackover, and at the time when the affairs of the Valley Bank were being examined, had a discussion with Mr. Brown relative to the two banks, and the hazard of the oil business, in which conversation Mr. Brown told him that it was the intention to furnish paper from the files of the Valley Bank to the Bank of Smackover, and that he was told that the paper would have to be indorsed without recourse, and Mr. Brown remarked, "Of course, we expected to take care of that"; that afterwards, in 1927, when the examination by the Bank Commissioner

was made of the affairs of the Smackover Bank, no information or data of record could be discovered in that bank, but only dummy notes, and it was ascertained that all of the papers and original notes were in the possession of the Valley Bank; that the representative of the Bank Commissioner then visited Camden, in company with the cashier of the Bank of Smackover, in an effort to ascertain the condition of that bank, and there Mr. Ramsey stated to the representative of the Bank Commissioner that the Ouachita Valley Bank would take care of any loss that the Bank of Smackover might sustain on the notes, and that a notation was made on the report submitted to the Bank Commissioner as follows: "Mr. Ramsey of the Ouachita Valley Bank stated that the Ouachita Valley Bank would take care of all losses on loans"; that this report, with the above indorsement upon it, was transmitted to the directors of the Bank of Smackover, which was examined by them, but the directors testified that they did not discover or notice the memorandum.

The chancery court found, on the facts as above stated, "that the Ouachita Valley Bank pursued a course of conduct in dealing with the Smackover Bank and the Louann Bank that would estop it from disputing liability on any paper involved in these petitions, had no bank failures occurred. The Louann Bank has properly pleaded estoppel. The manner of dealing and handling the paper existed between the Bank of Smackover and the Ouachita Valley Bank over considerable greater length of time. The principles of estoppel would apply even stronger." A master was appointed and directed to find which of the notes exhibited with the interventions were taken direct to the Valley Bank, and by that bank indorsed to the Bank of Smackover or to the Louann Bank with or without recourse; which of the notes were taken direct to the Bank of Smackover, or to the Louann State Bank, as renewals of notes first

mentioned, and by whom such renewals were taken; which notes were taken from the Valley Bank direct to the Bank of Smackover, or to the Louann State Bank, and never entered upon the books of the Valley Bank, but accepted as direct loans by the Bank of Smackover, or by the Louann State Bank, and by what person the said notes were taken, and under what authority; which of the notes had been compromised and settled, and which of the notes had never passed through the Valley Bank but were taken direct by the Bank of Smackover, or by the Louann State Bank.

The master filed a report which has been exhibited by the litigants to this suit as to correct finding and thereupon the court rendered its decree giving judgment against the Valley Bank for the amount of the notes of the following classes:

1. Notes made payable to the Ouachita Valley Bank and assigned by said bank to the Bank of Smackover without recourse.

2. Notes which represented renewals of notes originally taken, payable to the Ouachita Valley Bank, and by it assigned without recourse to the Bank of Smackover, said renewals being taken at the Ouachita Valley Bank and being made payable direct to the Bank of Smackover.

3. Notes taken by the Ouachita Valley Bank by authority of W. W. Brown, president, and C. W. Ramsey, vice president of the Ouachita Valley Bank, payable to the Bank of Smackover; the Ouachita Valley Bank advanced the money to borrowers on these notes and charged the amount to the account of the Bank of Smackover with the Ouachita Valley Bank, and sent the notes to the Bank of Smackover without entering them upon the books of the Ouachita Valley Bank as notes payable to it, and without ever carrying them on its books as assets; and that the amount of the notes of the aforesaid classes, "be credited by the Bank Commissioner in

favor of the Bank of Smackover as a claim against the Ouachita Valley Bank, and that the Bank of Smackover receive upon said claim the same dividends as other creditors."

The court made the same findings and rendered the same judgment as to notes of similar classes in the transactions between the Valley Bank and the Louann State Bank, and decreed that the amount of such be allowed as claims of the Louann State Bank against the Ouachita Valley Bank. From the findings and judgment of the trial court an appeal is brought to this court.

It is insisted by the appellee that there was a specific agreement on the part of President Brown and Vice President Ramsey of the Valley Bank to guarantee the collection of all notes taken for the Bank of Smackover and that Brown and Ramsey had the power to make this contract, while the appellant contends that there was no such agreement ever entered into, and, if there had been, Brown and Ramsey had no power to make the contract. Appellant also contends that the fact that the notes taken in the name of the Valley Bank for the Bank of Smackover were indorsed by the Valley Bank without recourse negatives the alleged contract of guaranty, and that such indorsement cannot be contradicted, and that, if any such contract had been made, it was void under the statute of fraud.

We think the circumstances surrounding the organization and conduct of the affairs of the Bank of Smackover, clearly show the position of the appellant on these questions is not tenable, for, while in theory the two banks were separate and distinct corporations, they were in fact one and the same institution. To escape this conclusion, the appellants urge that the Bank of Smackover was not organized as a branch bank, and any such attempt, either direct or indirect, would be an *ultra vires* act on the part of the Valley Bank, and therefore void because done without authority of the statute,

and also in direct conflict with the express prohibition of § 13 of the State Banking Law passed by the General Assembly at the session of 1923, amending § 677 of Crawford & Moses' Digest. That section, in so far as it is applicable to the appellants' position, is as follows: "If the commissioner is satisfied that the persons named as stockholders have the confidence of the community and are financially able to discharge the obligations resting upon the stockholders under any of the provisions of this act, and that the requisite capital has been in good faith subscribed, * * * then he shall, * * * give to the persons named as stockholders a certificate of incorporation * * * and shall authorize it to proceed with its business; but, with only one office for the transaction thereof in only one town or city as to which the application has been made." The directors of the Valley Bank were advised by the attorneys, that they could not lawfully organize a branch bank at Smackover and, with that advice and the statute above quoted in mind, they sought to do by indirection what was forbidden them to do directly, and by means of this procedure were able to and did secure large increases in the cash deposits carried by it together with all the benefits arising from the deposits nominally made with the Bank of Smackover. The interest it paid on daily balances was in effect paid to itself, and the interest arising from the loans made for the Bank of Smackover was paid to it, and used first in repaying to it the sums advanced to pay for the capital stock of the Bank of Smackover with the understanding that when this debt was discharged all the profits arising from the operations of the Bank of Smackover should become the property of the Valley Bank.

The question is, can the Valley Bank under such circumstances plead and secure protection from liability to the creditors of the Bank of Smackover on the ground that its acts were unlawful? It urges that its *ultra vires*

act was not only the mere excess of corporate authority, but forbidden by the act of the Legislature, *supra,* and therefore was void. This might be true if the Valley Bank itself were seeking some benefit or to enforce some obligation, but not so where it is seeking to escape a liability by reason of its unlawful operations. While, as a general proposition of law, no action can be brought on a contract which is expressly declared void by statute, there are important exceptions to this rule, one of which is that where to hold an *ultra vires* transaction void punishes the very persons whom the Legislature plainly meant to protect, or would be followed by other manifest injustice, no such construction will be allowed. The statute above quoted under which the appellant seeks immunity was manifestly enacted for the protection of those dealing with the bank; its purpose was to protect depositors and other creditors of the institution, and has not expressly made void any act done in contravention to that part of the statute providing for "only one office for the transaction thereof in only one town or city as to which the application has been made."

In the case of *Doyle Dry Goods Co.* v. *Doddridge State Bank,* 175 Ark. 153, 298 S. W. 863, a borrower sought to defeat the collection of a loan, because the bank extending the credit did so in violation of the law prohibiting a loan by a bank in excess of thirty per cent. of its capital stock, and the bank by subterfuge so managed the loan as to deceive the Bank Commissioner, and to circumvent the State Banking Law. The borrower insisted that the bank could not recover, because it would be forced to rely on an illegal transaction, and that relief therefore should be denied. The conduct of the bank in making the loan was *ultra vires,* and in violation of the express statutory inhibition, but this court held that, as the provision of the banking law was enacted for the protection of the public in its dealings with banks and as a security for its creditors, the contention of the bor-

rower did not come within the spirit of the law. As it was not the intention of the Legislature to relieve the borrower of liability on account of the violation of the law by the officers of the bank, certainly relief should be denied the bank itself when it seeks to escape a just demand by subterfuge, through which it hopes to evade a statutory inhibition.

Since the Bank of Smackover was organized by a majority of the directors of the Valley Bank and as a feeder for such bank, it must be assumed that they had knowledge, not only of the purpose of its organization, but of the manner in which its affairs were conducted, all of which unquestionably was for the benefit of the parent bank, which benefits were actually received by it. Therefore, although the purpose for which the Bank of Smackover was organized and the manner in which its business was conducted to circumvent the law and the acts of its officers *ultra vires*, the Valley Bank cannot complain nor escape liability for the obligations of the Bank of Smackover. *Wilson* v. *Davis,* 138 Ark. 111, 211 S. W. 152.

In support of the conclusion above reached we quote from the case of *American Southern Trust Co.* v. *McKee,* 173 Ark. 158, 293 S. W. 50, as follows: "If the American and the St. Louis banks had authorized Walz to take charge of the Bank of Gillette as an instrument through which to carry on their business, or had operated it as a branch bank, or had taken the management and control of the same, their liability would have been the same as if they had done the business in their own name." See also *Richardson* v. *National Bank of Mena,* 96 Ark. 594, 132 S. W. 913; *Minneapolis F. & M. Mutual Ins. Co.* v. *Norman,* 74 Ark. 190, 85 S. W. 229, and cases therein cited. Having reached the conclusion that the Valley Bank is responsible for the conduct of the affairs of the Bank of Smackover, the question arises, what is the extent of its liability? The majority of the court are of

the opinion that the liability as fixed by the court below is correct, and that its decree as to the Bank of Smackover should be affirmed.

As to the decision of the chancellor on the question of interest charges and as to the adjustment and settlement of certain notes by the Bank Commissioner, we are of the opinion that the finding of the chancellor is correct, subject only to the proceeds arising from such interest and compromised settlement to be applied in the same manner as the other assets of the Smackover and Valley Banks.

II. STATE BANK OF LOUANN.

The facts with reference to the dealings of the Ouachita Valley Bank with the State Bank of Louann are somewhat different from those with the Bank of Smackover. Although in one place in the testimony of Mr. Ramsey the statement was made that the transactions of the Ouachita Valley Bank were first had with the Louann State Bank, and that afterward dealings were begun between the Smackover Bank and the Valley Bank on the same basis as that existing between the Valley Bank and the Louann Bank, he was evidently mistaken or confused when this statement was made. The facts are that the Bank of Louann was organized at some date which is not disclosed by the record, and that it first began doing business with the Valley Bank in 1924, at which time it was a going concern with a capital stock of $15,000. As oil had been discovered at Smackover, so also in the Louann territory, and deposits were being made in the State Bank of Louann out of all proportion to its means to safeguard, and handle in the usual way—that is, the Louann State Bank was unable to loan its money with proper security, and in amounts sufficient to carry on the business of the bank, and return a fair interest on the investment, and its vaults were unequal for the security of its funds. Its deposits ran well above $100,000, and frequently to a much larger amount. At

this time, namely, in 1924, Mr. W. W. Brown, the president of the Ouachita Valley Bank, and Mr. Ramsey, its vice president, acting for themselves, each bought $3,000 worth of the capital stock of the Louann State Bank, and made an arrangement with that bank to transfer its account from the banks with which it was then doing business to the Ouachita Valley Bank, and to do its business exclusively with the Valley Bank, and that all of its deposits, except such as were sufficient to meet the requirements of the law as to cash reserve, should be kept in the Valley Bank for two purposes; one, for the security of those funds, and the other, that the money might be loaned by Brown and Ramsey for the benefit of the Louann State Bank, the Valley Bank paying for the privilege of handling the funds from two to four per cent. on daily balances. Brown and Ramsey agreed to make these loans, and agreed that the Valley Bank would guarantee the payment of all such notes as might be taken for money of the Louann Bank loaned out by them.

In 1927 a representative of the Arkansas State Bank Department, on examining the affairs of the Bank of Louann, found that the local directors at Louann knew nothing about the condition of the bank, and that there was no information or data of record from which its condition might be ascertained. Accordingly, he came to Camden where he conversed with Mr. Ramsey, and found the original notes belonging to the Louann State Bank on deposit with the Valley Bank. Mr. Ramsey stated that the Valley Bank would take care of any losses that the Louann Bank might have on the notes; that it was not a written agreement between the two banks, but was an agreement between Mr. Ramsey and the Louann Bank. A report of this was made to the Bank Commissioner, but there is no showing that such communication was ever made known to the Valley Bank by the Bank Commissioner.

The dealings with regard to lending money and taking notes was practically the same as those had with the Bank of Smackover, some of the notes being made payable to the Valley Bank and indorsed without recourse to the Louann State Bank. Some of these notes, if not all, on becoming due and unpaid, were renewed, payment to be made direct to the Louann State Bank. These notes would be sent to the Louann State Bank for number and entry on its books, and returned to the Valley Bank for safe keeping and collection. Also, when the cash balance of the Louann State Bank would fall below the legal amount, Mr. Ramsey would transfer cash from the Valley Bank sufficient to bring up the cash balance in the Louann Bank to the required amount, and in lieu of such cash advanced would take a part of the notes of the Louann Bank, and transfer them on its books to the account of the Valley Bank. There were two notes, aggregating the sum of $1,000, of the Page Oil Corporation taken by the Valley Bank, or Ramsey for the Bank of Louann, but these were objectionable to the Bank Commissioner, of which fact Ramsey was informed, and the notes were taken back and the Louann Bank given credit for them on its account with the Valley Bank.

Mr. S. M. Harris, cashier of the Louann State Bank, after reciting the agreement between Brown and Ramsey on the one part and the Louann State Bank on the other, and that the notes taken for the loan of its money should be guaranteed, stated: "It was a great convenience to the Louann Bank to have the Valley Bank make the loans for it. We had a superfluity of depositors and a dearth of borrowers. I would not have accepted the notes if it had not been for the agreement with the Valley Bank."

Mr. Ramsey was asked the following question: "But it was your understanding that the Ouachita Valley Bank dealt with the State Bank of Louann and the Bank

of Smackover, so far as these notes were concerned, on exactly the same basis—that is, it was guaranteed to the State Bank of Louann and also to the Bank of Smackover the payment of every one of these notes sent from the Ouachita Valley Bank to either of these banks, and you so testified in your original testimony?" Ramsey answered, "Yes, sir, that is my recollection." Mr. Brown testified, and also Mr. Ramsey, that there were never any objections made to the actions of either of them as to what they had done or the action they had taken as to the Bank of Smackover or the Louann State Bank. However, nowhere in the testimony is there any evidence that any member of the board of directors of the Ouachita Valley Bank, except Mr. Brown, knew that Ramsey had guaranteed to the Louann State Bank the collection of the notes, and there is nothing in the testimony from which such an inference could be drawn. There was no action taken in the matter or any authority shown to have been given by the board of directors of the Valley Bank to Ramsey to make the guarantee for such bank.

From the above statement it is apparent that the liability of the Valley Bank to the Louann Bank must be measured by different rule from that applied to the Bank of Smackover. In the first place, it may be said that Mr. Brown, the president of the Valley Bank, by virtue of his office, had no inherent power to bind his principal by any contract that he might make. His powers as such were very small, and his control over the affairs of the Bank of the slightest, except as to the exercise of powers delegated by the governing body (board of directors), or of which they had knowledge, or which he had openly exercised for so long a time as would impute such knowledge. In his transactions with the Louann Bank, except the negotiating of loans, the borrowing of money and the handling of commercial paper, he had no power either expressly granted or which

he was ever shown to have exercised. Indeed, it may be said that he did not himself deal with the Bank of Louann, but all of such dealings were made by Mr. Ramsey. Mr. Brown stated that the negotiations were had by Ramsey, and reported to him (Brown), and that he sent none of the notes to the Louann Bank and did not know how they were indorsed until long afterward; that he did not send the notes and did not know when they were sent back. In their dealings with the Louann Bank, Ramsey and Brown insist that they were not the agents of the Louann Bank, but of the Valley Bank, but it is not from their statements that their relationship with the Louann Bank and their authority to deal therewith so as to bind the Valley Bank can be tested.

As is said in 1 Mechem on Agency, § 285: "The authority of an agent, and its nature and extent, where these questions are directly involved, can only be established by tracing it to its source in some word or act of the principal. The agent certainly cannot confer authority upon himself or make himself agent merely by saying that he is one." This rule was recognized by this court in *American Southern Trust Co.* v. *McKee,* 173 Ark. 147, 293 S. W. 50. Both Brown and Ramsey had absolute authority in dealing with all matters relative to the lending and collection of money; they had charge of the loan and discount department of the Valley Bank, made and collected loans, handled the borrowing of money and the extension of notes, and for all of these purposes "ran the bank." Of course, they could, and did, bind their principal in doing anything within the apparent scope of their authority as to such matters, but there was and could have been no implied authority to bind the principal in any transaction not included in, or necessarily implied from, their dealings relative to the business intrusted to their management. The circumstances show that the interest of Ramsey and Brown, in so far as their relations with the Louann Bank were

concerned, was in conflict with the duties they owed the Valley Bank. The deposits of the Louann Bank were out of all proportion to the amount of its capital stock, and the handling of these deposits promised large returns; Brown and Ramsey were owners of two-fifths of the entire capital stock of the Louann Bank; Ramsey was paid a salary by that bank; the revenue which would be derived from the loans made would belong to the bank, and, as stockholders, they would share largely in it. It was greatly to their interest to see that the loans made of the funds of the Louann Bank be secured in every possible way, while the Valley Bank had no direct interest in these matters, and it would not be to its interest, but very much against it, to pledge its faith and credit to the guarantee of loans of the Louann Bank made by its own directors and paid employees. Ramsey states most positively that in these transactions he was acting as the agent of the Valley Bank, but the facts themselves contradict him. As we have seen, he was interested in the Louann Bank, and that interest conflicted with the interest of his principal. "An agent cannot prostitute the name of his principal to the service of his own personal notes, and this rule applies with full force to the officials of a corporation in making use of a corporate name." *City Electric Street Ry. Co.* v. *First Natl. Bank,* 65 Ark. 543, 47 S. W. 855.

In *Greer* v. *Levee Dist. No. 3,* 140 Ark. 60, 215 S. W. 171, Mr. Justice Wood, speaking for the court, said: "The knowledge of J. J. Scroggins, president of the bank, and his testimony as to the purpose of himself and co-makers in borrowing the money from the bank, is not chargeable to the bank, for in that transaction, where his interests conflicted with that of the bank, it must be held that he was not acting for or representing the bank, and his conduct could create no estoppel against the bank to enforce the payment of the notes."

It is argued that the bank knew of the guaranty made by Ramsey, and acquiesced in by Brown, because

they contend that the knowledge of Brown, the president, and of Ramsey, the vice president, was that of the bank itself. This contention is answered in *Greer* v. *Levee Dist., supra,* and in the case of *First Natl. Bank* v. *First Natl. Bank,* 159 Ark. 517, 252 S. W. 594, where it is said: "The testimony developed the fact that the cashier of each of these banks was lending money to the other, and in about equal amounts, but they both testified that they had authority from their respective boards to do so. It is the theory of the defendant that the cashier of the plaintiff bank knew Harkins was acting for himself and not for the defendant bank in this transaction, and an attempt was made, on his cross-examination, to develop the fact that the note was not sent to the defendant bank, but was sent to Harkins individually. An objection was made to this testimony, but we think it was proper. If there was, in fact, a collusive agreement between these cashiers to lend each other money, and the cashier of the plaintiff bank sent the note to Harkins knowing that in what Harkins did he would be acting for himself individually, and not for the bank, the defendant bank would not be liable for the conversion of the note by Harkins, even though he should admit its conversion, because, in a transaction of that kind he would not be the bank's agent."

As a matter of fact, the alleged guaranty made by Ramsey to the Louann Bank was unknown to any of the directors of the Valley Bank except Brown. Neither Brown nor Ramsey testified that any responsible member of the Valley Bank was ever advised of this transaction. They say they made no attempt to conceal what they did from the board of directors of the Valley Bank, but the fact remains that only those two and the cashier of the Louann Bank knew anything about the guaranty, and they did not disclose the same to the directors of the Valley Bank. Each member of the board of directors of the Valley Bank testified in this case, and they all

stated that they did not know, and had never been informed, of any such contract, and that they only knew that the Louann Bank was carrying its deposits with the Valley Bank as any other bank would do; that this was not unusual in banking affairs, and none of the dealings with the Louann Bank was of such nature. Ramsey testified there was nothing out of the ordinary rules of banking in sending the notes to the Valley Bank for collection—it had much safer vaults than the Louann Bank, and was a much safer place to keep money. Had the directors of the Valley Bank made an inspection of the books of the Valley Bank with a view of ascertaining the mode of its business with the Louann Bank, nothing out of the ordinary would have been disclosed. None of the notes were carried on the books of the Valley Bank in its bills receivable account, but all were kept in a file as the property of the Louann Bank. Mr. Ramsey stated that he was ready at any time to take up any bad note of the Louann Bank, and pay the cash of the Valley Bank therefor, but this intention was not known to the board of directors of the Valley Bank, and there was no custom of that kind in which the directors could have acquiesced or about which they could have known. There was only one bad note shown to have been handled in this way during the four or four and a half years which elapsed from the beginning of the business with the Louann Bank until the close of the Valley Bank's doors in 1928. This could not show a course of dealing, the knowledge of which would be imputed to the bank.

Inasmuch as Brown and Ramsey, in making the alleged guaranty, were acting in their own interest, and adverse to the interest of the Valley Bank in this transaction, as they were acting beyond the scope of their authority without the express or implied authority to do so, as this conduct on their part was unknown to the board of directors, and there were no circumstances

shown from which such knowledge might be imputed to them, it is our opinion that such guaranty was not binding on the Valley Bank, and the chancellor erred in so holding. This cause must, therefore, be reversed and remanded with directions to enter a decree in conformity with the principles of equity, and not in conflict with the views herein expressed.

HOWELL *v.* KINCANNON.

Opinion delivered February 17, 1930.

Harney M. McGehee, for appellant.

Dave Partain and *R. S. Wilson,* for appellee.

BUTLER, J. W. H. Howell was convicted in the Crawford Circuit Court at its March term, 1929, of murder in the first degree, sentenced to be executed, and confined at the penitentiary walls awaiting the date of his execution which has been set for the 28th day of February, 1930. On February 4, 1930, the Honorable J. O. Kincannon, judge of the 15th Judicial Circuit, in which Crawford County is situated, issued a writ directed to S. L. Todhunter, warden of the State penitentiary, commanding him to produce Howell in the Crawford Cir-

cuit Court on the 14th day of February, 1930, to the end that his present sanity or insanity be inquired into and determined. The said Howell, by his attorney, Harney M. McGehee, filed in this court his petition, alleging that the said J. O. Kincannon, as judge, and the Crawford Circuit Court were without authority to issue the aforesaid writ and without jurisdiction to hear and determine the same, and prayed that the said judge be prohibited from proceeding further in this regard.

The question presented to this court for determination is whether or not, after sentence has been pronounced, court adjourned, and the condemned individual transported to and confined in the penitentiary awaiting execution, has the court at which the trial was held, and which rendered judgment, authority to inquire into the question of the sanity or insanity of the condemned arising after judgment, or to make any orders in regard thereto? The authority sought to be prohibited is one which the courts have attempted to exercise but rarely, and this is the first time the question has come directly before this court. Our investigation of the textwriters and adjudicated cases discloses a singular paucity of authority on this question.

In Smoot on the Law of Insanity, § 455, it is said: "Where the defendant in a criminal trial is found to be insane subsequent to trial, verdict and sentence, the insanity has the effect of suspending further procedure. If it occurs subsequent to the trial and verdict, and before sentence, no sentence can be pronounced against the defendant while he is in such condition, not only because it cannot be carried out, but because he would not be able to understand the nature and import of the proceedings, and would not be able to intelligently answer whether there was any reason, as there might be, why judgment should not be pronounced."

Mr. Bishop, in the second edition of his work on Criminal Procedure, § 1369, in discussing the writ of

error *coram nobis,* says: "With us, the cases to the question are few, yet sufficient; as, if unknown the defendant was insane at the trial, or if being in danger and trepidation from a mob he pleaded guilty, and was sentenced to prison to save his life, or if being under eighteen he was sentenced to a punishment permissible only against an older person, this writ of error *coram nobis* is maintainable."

Mr. Blackstone says: "If a man in his sound memory commits a capital offence, and before his arraignment he became mad, he ought not to be arraigned for it; because he cannot advisedly plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced, and if, after judgment, he becomes of nonsane memory, his execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." 4 Blackstone, Commentaries. Cooley's Ed., page 24.

From the above authorities, it will be seen that the law for the sake of humanity early recognized the propriety of staying the execution of one condemned to death where it might be shown, after trial and judgment, that the defendant was either insane at the time of the trial or had become insane thereafter; and as no method was pointed out to make this beneficial rule effective, the courts, because of the duty arising in such instances making it incumbent on rational beings out of the dictates of humanity to find a remedy, of necessity assumed the power to inquire into the sanity of a condemned person, and, where it appeared upon investigation that the condemned was insane, revoked the judgment or stayed the execution. The power thus assumed was recognized to inhere in the courts to be exercised so long as the law-making power should fail to point

out a method by which these questions might be heard and determined; but, whenever that voice should speak and declare a mode and method different or place the authority to determine these questions elsewhere, the power of the courts would necessarily cease.

In the case of *Adler* v. *State,* 35 Ark. 517, 37 Am. Rep. 48, this court has held that a circuit judge has power, after the expiration of a term, to issue the writ of error *coram nobis* to reverse a judgment of conviction in a criminal case where it is shown that the defendant was insane at the time of the trial, and that fact was not made known. This rule has been subsequently upheld by this court in a number of decisions, but we have failed to find any case where the writ was issued or its issuance approved by the court in a case where the defendant became insane after the trial, judgment, and lapse of the term, except where the language was obiter. We may assume, however, that such right inhered in the court unless the Legislature had pointed out another and different remedy. It is insisted by the respondent that such power is now inherent in the circuit court, and he cites as authority to that position the cases of *Johnson* v. *State,* 97 Ark. 131, 133 S. W. 596, and *Ferguson* v. *Martineau,* 115 Ark. 317, 171 S. W. 472, Ann. Cas. 1916E, 421. Upon a cursory examination, those cases appear to support that view. In *Johnson* v. *State, supra,* the court, quoting from the statute providing that, when a defendant appears for judgment, he may, for cause against the judgment, show that he is insane, and that the court, on reasonable grounds for believing that such is the case, may impanel a jury to determine the question, uses the following language: "If the insanity of the defendant be not brought to the attention of the court, and inquired into before the judgment is pronounced, the circuit judge may, after the expiration of the term, issue the writ of error *coram nobis* to set aside the judgment of conviction and suspend sentence in accordance with the statute above quoted."

And in the case of *Ferguson* v. *Martineau, supra,* at page 326, the court said: "It cannot be doubted, therefore, that, even in the absence of any statute upon the subject, the circuit court or judge thereof, in vacation, would have the inherent power to say that the execution of the judgment of that court was not in force upon a person who was insane at the time set for his execution. A writ upon proper application could be issued by the court or the judge thereof, returnable to the court to inquire into the alleged insanity of the prisoner at the time set for the execution to the end that the sentence of the law might not be carried out if it were determined by a jury empaneled for the purpose that the defendant were insane." Upon further investigation of these cases, however, it will be seen that this question was not before the court. In *Johnson* v. *State,* the only question before the court was an alleged error in the selection of the jury, and the only defense made at the trial was that of insanity. The court there said: "After a careful examination of the record, we are of the opinion that there is no error and the judgment should be affirmed," but, on the suggestion that since the judgment and verdict was rendered the defendant had been pronounced insane, and removed from the jail to the county hospital, the court further said: "That, however, does not affect the adjudication of this court affirming the judgment of the trial court where no error is found in the record of the trial. Appellant pleaded insanity as a defense to the crime, but no plea of present insanity was interposed at the trial, nor was there any suggestion of present insanity as a reason why judgment should not be pronounced on the verdict of the jury. There is no provision in the statute for suspending proceedings in this court on account of appellant's insanity, though ample protection is provided in that respect in the lower court. The circuit judge has the power to issue the writ of error *coram nobis* to set aside a judgment of conviction

when it appears that the defendant was insane at the time of the trial, and the fact was not made known at the trial."

The question before the court in the instant case was not remotely connected or involved in the case of *Johnson* v. *State, supra,* so that the language there used by the learned chief justice as above quoted is clearly referable to the question of procedure where insanity exists before the judgment is pronounced. In the case of *Ferguson* v. *Martineau, supra,* the only question before the court was the jurisdiction of a court of equity to restrain by injunction the execution of a criminal under judgment to enable the probate court to inquire into the sanity of the condemned, and it was held that such court was without jurisdiction, and that a writ of prohibition was the proper remedy to prevent the usurpation of jurisdiction. Therefore, the language above quoted was *obiter dictum,* and, while not carefully chosen, it is fairly inferable from the cases cited (*Adler* v. *State, supra,* and *State* v. *Helm,* 69 Ark. 167-71, 61 S. W. 915) as authority for the language used, that the power of the circuit court referred to was the power to suspend sentence before judgment was rendered. All the decisions of this court called to our attention, to-wit, *Adler* v. *State, supra, Linton* v. *State,* 72 Ark. 532, 84 S. W. 608, and *State* v. *Helm, supra,* are cases where the question of insanity was raised or referred to before judgment was rendered.

The Legislature of this State, at an early date, provided, (chapter 44, § 14, of the Revised Statutes of 1838) that "if, after judgment and before execution of the sentence, such convict becomes insane or lunatic, if the punishment be capital or corporal, the execution thereof shall be stayed until the recovery of such convict from such insanity or lunacy"; and, by chapter 45, §§ 187, 188 and 189 provided the method by which

insanity might be determined and the procedure for such determination as follows:

"Section 187. If, after any convict be sentenced to be punished by death, the sheriff shall have cause to believe that such convict has become insane, he may summon a jury of twelve competent jurors to inquire into such insanity, giving reasonable notice thereof to the attorney for the State."

"Section 188. The attorney for the State shall attend such inquiry, and may produce witnesses before the jury, and may cause subpoenas to be issued by a justice of the peace for that purpose; and disobedience thereto may be punished by the circuit court, as in other like cases."

"Section 189. The inquisition of the jury shall be signed by them and by the sheriff; and if it be found that such convict is insane, the sheriff shall suspend the execution of the sentence until he receive a warrant from the Governor or the circuit court, as hereinafter authorized, directing the execution of such convict."

"Section 190. The sheriff shall immediately transmit such inquisition to the Governor, who may, as soon as he shall be convinced of the sanity of such convict, issue a warrant appointing a time for the execution of such convict, pursuant to sentence."

By § 290 of chapter 10 of the Criminal Code, approved July 22, 1868, it was provided that, "the only officers who shall have the power of suspending the execution of a judgment of death are the Governor, and, in cases of insanity or pregnancy of the defendant, the sheriff, as provided in the next section; and, in cases of appeals, the clerk of the Supreme Court, as prescribed in title 9, chapter 1, article 1."

Section 291 of the Code is as follows: "When the sheriff is satisfied that there are reasonable grounds for believing that the defendant is insane or pregnant, he may summon a jury of twelve persons on the jury list,

drawn by the clerk, who shall be sworn by the sheriff, well and truly to inquire into the insanity or pregnancy of the defendant, and a true inquisition return; and they shall examine the defendant, and hear any evidence that may be presented, and by a written inquisition, signed by each of them, find as to insanity or pregnancy. And, unless the inquisition find the defendant insane or pregnant, the sheriff shall not suspend the execution; but if the inquisition find the defendant insane or pregnant, he shall suspend the execution, and immediately transmit the inquisition to the Governor."

Section 292 of the Code is as follows: "Whenever a judgment of death has not been executed on the day appointed therefor by the court, from any cause whatever, the Governor, by a warrant, under his hand and the seal of the State, shall fix the day of execution, which warrant shall be obeyed by the sheriff, and no one but the governor can then suspend its execution."

It will be seen that as early as 1838 the Legislature, by specific enactment, placed with the sheriff, who had custody of the condemned, the duty, when occasion arose, to have inquiry made as to his sanity, and to report the finding, if found to be insane, to the Governor, and by the express language of § 290, Criminal Code, *supra,* no one but the Governor, the sheriff, and the clerk of the Supreme Court could in any manner, or for any cause, suspend the execution of a judgment of death. As a result, whatever inherent power existed in the circuit court until that time was divested, and the duty to determine the question of insanity of the defendant devolved upon the sheriff. The provisions of our Criminal Code are almost identical with those of the Criminal Code of the State of Kentucky in force at the time of the adoption of our Code, which was followed by the commissioners in drafting the Code approved and adopted by our Legislature. By the Kentucky Code, as by our own, the sheriff was clothed with authority to

make inquiry into the insanity of a defendant in his custody under sentence of death, and in Kentucky it has been held, since the enactment of its Criminal Code, that "up to the time of final sentence that discretion (to suspend sentence in case of insanity) is vested in the trial judge; after sentence, the policy of our law seems to be to vest it in the executioner." In view of the sections of our Criminal Code above quoted, and especially of § 290 *supra,* we can come to no other conclusion than that in cases of insanity after sentence, circuit courts have no longer authority to deal with that question.

Act No. 55 of the Acts of the General Assembly of 1913 changes the mode of execution of the death penalty from hanging to electrocution, the custody of the prisoner after judgment and before execution from the sheriff of the county to the superintendent of the State penitentiary, and the place of execution from the county where the crime was committed to the death chamber within the confines of the State penitentiary. As we have seen, from an examination of the Acts of the General Assembly from 1838 it has been the policy of the law for the person charged with its administration to exercise discretion as to holding insanity inquisitions in capital cases. The sections of our Code above quoted are now §§ 3250 and 3251 of Crawford & Moses' Digest, and, as it "gives an insane condemned person who has no further recourse in law a remedy where none other existed by statute before," it is remedial in its nature, and should therefore be liberally construed so that the remedy be made effective if it can be done. At the time this statute was passed the sheriff was the executioner, and had the custody of the person of the defendant from the date of judgment to that of execution, and he was therefore the only one who could have full and free access to the presence of the defendant, and observe him during the time of his confinement before execution; and, since by the enactment of act No. 55, *supra,* all

these duties and opportunities for observation have passed from the sheriff to the keeper of the penitentiary, the only way by which those sections of our Code, *supra,* can be given any practical effect is by substituting the keeper of the penitentiary for the sheriff.

A number of authorities have been called to our attention on this point in the able brief of the Attorney General which we deem it unnecessary to review herein since our court has always recognized that statutes remedial in their nature should be liberally construed so as to afford all the relief within the power of the court which the language of the statute indicates the Legislature intended to grant. By the terms of the statute, the Governor, and, in cases of insanity, the sheriff, and on appeals to this court, the clerk of this court, were the only authority by which sentence of one condemned might be stayed after judgment; and, as the purpose of the section following was to clothe the officer charged with the execution of the death sentence, having in his custody the person of the condemned, with the duty of causing inquiry to be made as to the sanity of the defendant, when he had reasonable grounds to believe the defendant insane, then to give any other effect to the statute, since the enactment of act No. 55, *supra,* would render the remedy abortive, and in effect destroy the law.

In the case of *Barrett* v. *Commonwealth,* Court of Appeals of Kentucky, December 21, 1923, reported in 202 Ky. 153, 259 S. W. 25, in dealing with an identical situation to that in the instant case, where the law at first clothed the sheriff with authority to institute and conduct insanity inquisitions when he was executioner, and where the mode of execution was afterwards changed from hanging to electrocution, and the executioner from the sheriff to the keeper of the penitentiary, as in this State, the court said: "We can see no reason why, after the removal of the convict to the penitentiary, such an in-

quest may not be held by the warden of the penitentiary, if he is satisfied there are reasonable grounds to believe the condemned insane or pregnant. In this respect he simply takes the place of the sheriff, and performs the same duties except as to the place and manner of execution. He has custody of the condemned, and is informed as to his mental condition. Being charged with the solemn execution of the death penalty, such an affliction upon the part of the condemned person appeals to his mind and conscience, as he is the natural one to intrust with the responsibility of determining whether or not there are sufficient grounds for holding an inquest."

We therefore think that, in order to give effect to the statute providing for the stay of the execution of a condemned insane person, it is necessary that the warden be clothed with all the powers which were entrusted to the sheriff before the passage of act No. 55, *supra*, and that it is now the duty of the superintendent of the penitentiary to conduct the insanity inquisition.

We have not overlooked the cases cited by respondent in support of his construction of the holding of the court in the cases of *Johnson* v. *State*, and *Ferguson* v. *Martineau*, *supra*, but we have examined these cases and do not find them in conflict with the views herein expressed. The case of *In re Smith*, 25 N. M. 48, 176 Pac. 819, 3 A. L. R. 83, cited by respondent, we find, turns on the construction of the statute under which the proceedings in a criminal case in which an insanity inquest was held, and such statute was held by the court to be not applicable to criminal proceedings, but was a statute for the protection of civil and property rights. In the case of *State* v. *Superior Court*, 139 Wash. 125, 245 Pac. 929, 49 A. L. R. 801, cited by respondent, the question before us in the case at bar was not there before the court. The question was whether in insanity inquests the change of venue statute of that State applied. The other cases cited by respondent merely recognized and approved the

inherent power of courts at common law in proper cases to have control of their judgments, and, of necessity, the protection of insane persons where the law is silent, and did not consider statutes such as ours, which has taken from the courts such inherent power.

The prayer of the writ of prohibition must be granted, and it is so ordered.

Mr. Chief Justice HART agrees with this opinion except as to that part of the opinion which holds that the effect of our statutes is to abolish the power of the court, and he is of the opinion that the circuit court still has power in cases of present insanity after judgment to determine that question by proper proceeding.

HART, C. J. I agree that the question under consideration is a matter subject to legislative regulation, but I do not agree that the connection of courts with proceedings of this sort has been taken away by the statutes construed in the majority opinion. To so hold, according to my notion, is impliedly at least to overrule the holding in *Sease* v. *State* 157 Ark. 217, 247 S. W. 1036, to the effect that after verdict and sentence, the court may inquire by inspection and by witnesses whether the prisoner has become insane since his sentence. I quote from that opinion the following:

"The petition now before us is sufficiently broad, however, to constitute an allegation of insanity at the present time and to invoke relief by suspension of the sentence as long as the condition of insanity of the accused exists."

"In our former decisions we have recognized the power of the court to grant relief in capital cases, where the convict is insane when the time comes for executing the judgment. This remedy however, as shown in the Kelley case *supra* (156 Ark. 188, 246 S. W. 4) must be exercised with caution, and the court determines as a preliminary question, whether there is sufficient ground for entering upon an investigation of the question of the insanity of the convict. As we have already said,

the testimony now adduced is merely cumulative of that which was adduced at the trial and tends only to show general insanity, which began long before the commission of the homicide. It is true there were introduced the affidavits of physicians, who testified as experts, but that testimony is merely cumulative. There was no showing of a substantial change in the prisoner's condition since the original trial."

It has been suggested that the court decided that case without having its attention called to the statute now under consideration. Reference to the briefs filed for Sease show that the case first cited is 115 Ark. 317, 171 S. W. 472, which is *Ferguson* v. *Martineau,* where the court discussed the effect of the statutes upon each other, and concluded by saying: "It cannot be doubted, therefore, that, even in the absence of any statute on the subject, the circuit court, or judge thereof, in vacation would have the inherent power to say that the execution of the judgment of that court was not in force upon a person who was insane at the time set for his execution. A writ upon proper application could be issued by the court or the judge thereof returnable to the court to inquire into the alleged insanity of the prisoner at the time set for the execution to the end that the sentence of the law might not be carried out if it were determined that the defendant was insane."

In both cases, the court doubtless considered that the Legislature intended that the officer named in § 3251 of C. & M. Digest might suspend the execution of the death sentence until he could transmit the inquisition to the Governor for his information in the exercise of the power to grant reprieves, commutations of sentence and pardons after conviction conferred upon him by article 6, § 18, of the Constitution; and that it was not intended by the Legislature to take away the jurisdiction of the courts in the matter in the manner outlined above. Neither was it intended that § 3250 of the Digest conferring upon certain officers under certain circum-

stances the power of suspending the execution of a judgment of death should take away the jurisdiction already possessed by the courts.

If, as now declared, the sections of the statutes are controlling, and the jurisdiction of the trial court in a proceeding like this is at an end, the court should have so held in the Sease case to the end that his attorneys might have availed themselves of the only legal remedy in his behalf after sentence of death, and thus have pointed out and secured to him the constitutional guaranty of our bill of rights and the 14th Amendment of the Constitution of the United States that no person shall be deprived of his life without due process of law.

HUMPHREY *v.* TINSLEY.

Opinion delivered February 24, 1930.

[redacted]

Feazel & Steel, for appellant.

HART, C. J., (after stating the facts). The Legislature of 1915 passed an act for the purpose of bringing about cattle tick eradication, and establishing a Board of Control for enforcing the law relating thereto with full power to promulgate the necessary rules looking to that end. The act was sustained as a valid exercise of the police powers of the State for the protection of the health of cattle, and that this class of legislation emanates from the same source as that dealing with the public health. The court said that, while the Legislature could not delegate its power to make laws, it might delegate to a board or other governmental agency the power to make and enforce rules and regulations for the execution of a statute according to its terms; and that, when these boards adopt rules or regulations by virtue of legislative authority, they may be said to be in force by authority of the statute. *Davis* v. *State,* 126 Ark. 260, 190 S. W. 436; *Cazort* v. *State,* 130 Ark. 453, 198 S. W. 103; *Palmer* v. *State,* 137 Ark. 160, 208 S. W. 436; and *Boyer* v. *State,* 141 Ark. 84, 216 S. W. 17.

In the application of the principle in *State* v. *McCarty,* 5 Ala. App. 212, 59 So. 543, the Court of Appeals of Alabama held that the State, under its police powers, may prescribe stock quarantine regulations, and punishment for their violation, and may require its citizens, at their own expense, to disinfect their stock.

In *United States* v. *Grimaud,* 220 U. S. 506, 31 S. Ct. 480, it was held that Congress could not delegate legislative power, but that the authority to make administrative rules was not a delegation of legislative power, and that

such rules do not become legislation, because violations thereof are punished as public offenses. In that case the court recognized that it is sometimes difficult to define the line which separates legislative power to make laws from administrative authority to make regulations. It is a matter of scientific knowledge, that wherever the cattle tick is found, there Texas fever exists; and, as has been judicially declared, Texas fever and cattle ticks go hand in hand. Because Texas fever is communicable and is a dangerous cattle disease, which may be carried on cattle from one locality to another, quarantine regulations, including the spraying or dipping of cattle, have generally been held valid under the police powers of the State. In order to effectuate the purpose for which they are intended, some leeway must be given administrative officers in the execution of the laws. While the law must be complete in all its parts and govern every step taken in its execution, much discretion must be left to the administrative officers in putting it in operation, and in executing it. To this no valid objection can be made. Of course, the administrative officers may be dealt with for any arbitrary, discriminating or willful disregard of their official duties. We are of the opinion that the Board of Control may mould and fashion its rules to suit changing conditions.

As said in Sutherland, Statutory Construction, vol. 1, § 68, 2d ed., p. 148: "The true distinction is between the delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law."

The issue raised by the appeal in the case at bar involves the construction of paragraph 2, § 4 of the rules promulgated by the Board of Control, which reads as follows:

"Paragraph 2. In counties or portions of counties where systematic tick eradication is being conducted under the regulation of this board, it shall be the duty

of all persons owning or having charge of any cattle to dip, or otherwise disinfect by means that may be designated, all their cattle every fourteen days under the supervision of a duly authorized inspector of this board, unless they receive written notice that they are not required to dip their cattle."

The Legislature of 1919 made it the duty of any peace officer, when notified by a duly authorized inspector, to dip cattle at a time and place designated by said inspector, when the owner fails, refuses, or neglects to dip his cattle under supervision on regular dipping dates. A fee for the payment of the officer is provided for in the same section, and, upon the owner failing to pay the same, the peace officer may sell the cattle, and take his statutory fee and the expenses of the sale out of the proceeds of the sale. General Acts of 1919, p. 216.

The evidence adduced in favor of appellants tends to show that appellee refused to dip his cow under the supervision of the inspector as required by the rules of the board. The appellee admits this, and also testified that he carried his cow home without doing so. He seeks, however, to maintain his action of replevin for the cow by showing that he sprayed his cow in the presence of the inspector just as other cows were being sprayed, which he testified were in similar condition to his cow. This was not a compliance with the rules. It would take away from the inspector his discretion or supervision in the matter and place it in the owner of the cattle. Such a course would soon result in a practical nullification of the rules, and tick eradication could not be accomplished except by the unanimous voluntary action of the owners of cattle within the district.

In this view of the matter, the law had just as well never have been passed. If compulsory dipping or spraying is to be enforced, it must be done under the supervision of an officer appointed for that purpose, and not left to the judgment of each cattle owner. No uniformity in enforcing the rules of the board can be accomplished ex-

cept under the supervision of an officer whose duty it is to act, and he must be left to act on his own judgment in the matter, always subject to removal or punishment for an arbitrary discharge of his duties or willful disregard of them.

Here the undisputed evidence shows that the appellee refused to allow the inspector to dip the cow, but claimed the right to spray her himself, and then carried her home. This fact was reported by the inspector in charge of the dipping vats to appellants, who were the proper officers to enforce the rules of the board. Appellants then took the cow, dipped her, and held her for payment of the fees and expenses allowed them by statute for so doing. It is true that appellee testified that his cow was sprayed with the same material used by the inspector, but he admits that the inspector told him that this cow would have to be dipped and that he refused to allow this to be done and took his cow home after spraying her according to his own notion. Thus, according to his own evidence, the supervision or discretion of the inspector was taken away, and that of the owner of the cattle was substituted. This act was in violation of the rules; and when the inspector notified appellant of the refusal of appellee to allow his cow to be dipped under his supervision, it became their duty, as officers charged with the enforcement of the rules of the board, to take charge of appellee's cow for the purpose of dipping her, and they had the legal right to keep the cow until appellee paid them the statutory fee; and in default of payment thereof, appellant might sell the cow for the dipping fee and expenses of sale as provided by statute.

Therefore, the court erred in not directing a verdict for appellants; and for that error the judgment must be reversed, and the cause will be remanded for a new trial.

COMMERCIAL INVESTMENT TRUST *v.* MILES.

Opinion delivered February 24, 1930.

Herbert V. Betts, for appellant.

Bert B. Larey, for appellee.

HART, C. J. This is an appeal from the order of the circuit court quashing an execution, and making perpetual a temporary injunction which had theretofore been issued.

The facts decisive of the issue raised by the appeal may be briefly stated as follows: On May 28, 1926, Commercial Investment Trust instituted an action of replevin in the circuit court, against Godfrey B. Miles to recover the possession of an automobile. The action was based upon the right of the plaintiff to recover the possession of the car under a conditional sales contract which provided that the automobile should remain the property of the seller until it was paid for. The com-

plaint alleged default in the payment of the installment notes, and that there was due and unpaid on them the sum of $593.32. The prayer of the complaint was for judgment for the recovery of the automobile or its value in the sum of $593.32, and for $100 damages for the detention of the same.

Miles retained possession of the automobile under a bond given for that purpose on the 8th day of June, 1926, signed by himself and P. G. Sample and H. C. Bull as sureties. The body of the bond is as follows:

"We undertake and are bound to the plaintiff, Commercial Investment Trust, in the sum of six hundred and ninety-three 32/100 dollars, that the defendant, Godfrey B. Miles, shall perform the judgment of the court in the above entitled cause."

On the 9th day of November, 1926, there was a judgment by default in favor of the plaintiff against the defendant Miles and his sureties, P. G. Sample and H. C. Bull, for the sum of $593.32, with interest at six per cent. per annum. The judgment recites that the defendant has been duly served with summons, but makes default, and that the cause is submitted to the court upon the complaint, the original note and contract, and the bond of the defendant to retain the property, which is set forth in full together with a recitation, that it was executed by the defendant and his sureties, P. G. Sample and H. C. Bull. No appeal was taken from this judgment.

After the lapse of the term at which said default judgment was rendered, H. C. Bull and P. G. Sample presented to the court a petition to correct said default judgment so as to make it speak the truth, and this petition was heard in the circuit court on the 24th day of November, 1927, and the default judgment rendered on November 9, 1926, was corrected, so as to read as follows:

"It is ordered and adjudged by this court that the Commercial Investment Trust shall have judgment against the defendant, Godfrey B. Miles, for the prop-

erty in controversy of the value of $593.32 inclusive of 6 per cent. interest from October 21, 1926. Damages waived."

Subsequently, the plaintiff caused an execution to issue on its judgment, and defendant moved to quash the execution. Plaintiff showed by competent evidence that the defendant, Miles, had held the possession of the car under the retaining bond, and that by continual use since the institution of the replevin suit the car had greatly deteriorated in value, and was now practically worthless.

Under this state of facts, we are of the opinion that the court erred in quashing the execution. Conceding that the docket entry correctly shows the judgment rendered by the court in the first instance, it simply means that the court rendered judgment for the plaintiff for the automobile or its value when sued for in the sum of $593.32. The word "of" is clearly a misprision and was intended for "or." That "of" was used in the sense of "or" is evident from the record proper considered together. The prayer of the complaint was for judgment for the automobile or its value. There was a default judgment which recited that the cause was submitted upon the complaint, the original note and contract, and the bond to retain the property. From the original note and contract, the court found that there was due and unpaid the sum of $593.32 on the purchase price at the date of the institution of the replevin suit. The rule is that in actions to recover personal property or its value, sold under a conditonal bill of sale, the proper measure of its value to the plaintiff is the balance due on the contract price in the absence of proof to the contrary. *Winton Motor Carriage Co.* v. *Blomberg,* 84 Wash. 451, 147 Pac. 21.

If the court merely meant to render judgment for the car, there would have been no use in finding its value. The view we have adopted and the conclusions reached by us bring the case squarely within the principles an-

nounced in *Commercial Investment Trust* v. *Forman,* 178 Ark. 695, 10 S. W. (2d) 897, where it was held that in cases like this, the seller or holder of the installment notes in a conditional sales contract was entitled to judgment against the sureties on the retaining bond as well as against the buyer for the balance due on the sales contract, against which the present value of the car should be credited. In that case it was held that where the buyer, in an action of replevin to recover an automobile sold with reservation of title, gave bond and retained possession of the car until it was worn out and then returned it to plaintiff, the latter was entitled to judgment against defendant and the sureties on his bond for the balance due under the sales contract, against which the present value of the car should be credited.

But for the retaining bond, the car would have been returned to the seller when the suit was brought, at which time value as found by the court was equal to the balance due on it. By virtue of the execution of the retaining bond, the buyer was enabled to keep the car until it was worn out, and he cannot now satisfy the judgment by returning a worthless car. The court in its judgment in the replevin suit fixed the value of the car as it was at the time the plaintiff was entitled to recover possession of it, which was at the commencement of the suit; and the defendant could not keep and use the car until it had become worthless, and then return it in satisfaction of the judgment.

This principle was also recognized in *Love* v. *Hoff,* 179 Ark. 381, 16 S. W. (2d) 12, and applied in a case where the plaintiff in the replevin suit had kept possession of an automobile and had used it until it had become worn out. The court said the plaintiff in execution was entitled to have restored an automobile of undepreciated value, and that the plaintiff in the replevin suit could not satisfy a judgment against himself by returning a depreciated car in satisfaction of the judgment.

Therefore, the judgment of the circuit court will be reversed, and the cause remanded with directions to order the clerk to issue an execution for the sum of $593.32 with the accrued interest, and for further proceedings according to law.

BUTT *v.* SAXON.

Opinion delivered February 24, 1930.

W. P. Feazel, Sam E. Leslie and *Walter M. Purvis,* for appellant.

Barber & Henry and *Frauenthal, Sherrill & Johnson,* for appellee.

SMITH, J. Prior to the 17th day of March, 1924, a receiver was appointed by the Pulaski Chancery Court to take possession of the assets of the Climber Motor Company, an insolvent corporation, and in the progress of the litigation the receiver was ordered to sell the assets of the company at public sale, upon a credit of three months. The order of sale required the receiver, acting as a special commissioner, to require bond of the

purchaser, with security to be approved by him, for the performance of the offer to buy.

Notice was given pursuant to the order of sale, and a sale of all the assets was made on March 17, 1924. A report of the sale was made, which recited that J. W. Dickinson had purchased the property for $90,000, and that he had executed bond with R. L. Saxon as surety. This report was duly approved and confirmed on the 21st day of March, 1924, which was a day of the October, 1923, term of the court. The April term of the court began on the first Monday of April following.

On June 2, 1924, J. S. Butt, who had previously recovered a judgment against Dickinson in the Howard County Chancery Court, filed a duly certified copy thereof in the office of the clerk of the circuit court of Pulaski County, and the lien thereof has been kept in force by revivor proceedings, and it is now a subsisting lien on any land in Pulaski County in which Dickinson has an interest. Certain valuable lands in Pulaski County were embraced in the assets of the corporation which were sold by the receiver.

On the 8th day of August, 1924, a petition was filed in the Pulaski Chancery Court, signed by attorneys for Dickinson and Saxon, in which it was alleged that Saxon —and not Dickinson—was the purchaser at the receiver's sale; that Saxon had already paid the sum of $28,000 to the receiver, and was ready to pay the balance, with the interest thereon, when an order was made correcting the decree confirming the sale so as to show that Saxon —and not Dickinson—was the purchaser of the property. After hearing testimony, the court found the fact to be that an error had been made in the report of the receiver, in that it recited that Dickinson was the purchaser, and Saxon was the surety, whereas the truth was that Saxon was the purchaser, and Dickinson was the surety, and the order of confirmation was set aside, and an order entered confirming the sale as having been made to Saxon and not to Dickinson, and upon

the entry of this order Saxon paid the balance then due upon the purchase price, and a deed, duly approved, was delivered to him. It appears that to obtain the money to complete the payment Saxon obtained a loan from the Bankers' Trust Company, of Little Rock, upon the security of the real estate sold at the receiver's sale.

Three suits were filed in the Pulaski Chancery Court, which were consolidated for the purpose of trial and heard as a single case, and it is from the decree therein rendered that this appeal comes.

J. S. Butt was the plaintiff in one of these cases, and for his cause of action he alleged that his judgment against Dickinson herein referred to was a lien on the land herein involved, and he prayed the court to make an order setting aside the previous order, above referred to, correcting the confirmation of the sale, and to set aside the deed executed pursuant thereto, and that he have his judgment against Dickinson declared a lien on the land. Saxon and the Bankers' Trust Company were made defendants in this suit. Answers and cross-complaints were filed which elaborated the facts herein summarized.

When the notes of Saxon to the Bankers' Trust Company matured and were not paid, suit was brought to foreclose the deed of trust securing them, and all persons in interest were made parties and the same issues were raised.

The third suit was brought to enforce a mechanic's lien against Saxon, which was conceded to be subject to the lien of the deed of trust to the Bankers' Trust Company.

A decree was rendered, from which only Butt has appealed, and we need therefore consider only the issue which he raised on this his appeal, and that is, that the court was in error in holding that his judgment against Dickinson was not a lien upon the land.

For the reversal of this decree it is insisted that the court erred in setting aside, at the April term of

the court, the order confirming the sale, made at the previous October term.

The undisputed testimony shows that Dickinson did not attend the sale and did not bid thereat. On the other hand, it is undisputed that Saxon was the last and highest bidder, and the undisputed testimony further shows that he personally paid the entire purchase price, and that Dickinson paid nothing. After the sale it became necessary to execute a bond to comply with the order of sale, and it was not certainly known who the surety would be, so that, when the report of the receiver was prepared, this part of the report was left blank, and when the report was completed and filed it recited that Dickinson was the purchaser, and Saxon the surety, and the report was confirmed with this recital in it.

The simplest principles of equity and justice require the correction of this error, and § 6290, C. & M. Digest, affords full authority for doing so, as this was a misprision of the clerk within the meaning of that statute. It is true the report of sale was not prepared by the clerk, nor was the precedent for the order confirming it, but it was his duty to prepare this order. Section 1374, C. & M. Digest, provides that "He (the clerk) shall seasonably record the judgments, rules, orders and other proceedings of the court of which he is the clerk, * * *," and it is his duty to record them correctly. The court was the vendor in this case, acting through its receiver, and the order of the court should have correctly named the purchaser. It was a misprision not to do so, and the error was properly corrected at the subsequent term. Section 6290, C. & M. Digest. Moreover, the court had not lost its jurisdiction over the case at the expiration of the October term. It was necessary for the court, at its ensuing April term, to determine whether the purchaser had become entitled to his deed by complying with his bid, and the court then determined that he had and that Saxon was the purchaser. It was therefore within the jurisdiction of the court to correct the er-

roneous recital in the order of confirmation, and to order the deed delivered to the actual purchaser, and this order was properly entered.

The decree of the court is correct, and must therefore be affirmed, and it is so ordered.

MUSHRUSH *v.* DOWNING.

Opinion delivered February 24, 1930.

Maddox & Greer, for appellants.

Horace Sloan, for appellees.

SMITH, J. A. H. Vieth recovered a judgment against the Mushrush Lumber Company, a corporation organized under the laws of the State of Illinois, in this court on February 16, 1925 (167 Ark. 669, 269 S. W. 44), which was duly assigned on March 31, 1927, to W. P. Downing,

and a certified copy of the judgment, with the assignment thereof, was later filed in the office of the clerk of the circuit court of Poinsett County, in which county the corporation owned certain real estate. Downing later assigned a half interest in the judgment to Jess Brown.

The corporation was organized under the laws of Illinois on January 6, 1913, and on March 14, 1914, was authorized to do business in this State by filing a certified copy of its articles of incorporation and designating an agent upon whom process might be served. For the nonpayment of its franchise tax to the State of Illinois the Secretary of State certified the corporation to the Attorney General of that State for dissolution, but no action was taken by the Attorney General to forfeit the charter of the corporation. On April 25, 1923, the Governor of this State, acting under act 158 of the Acts of 1923, page 132, declared the corporation to have forfeited its authority to transact further business in this State on account of the nonpayment of the Arkansas franchise tax. The principal, but not the only, stockholders of the corporation were Mark Mushrush, who died intestate June 19, 1926, survived by his widow and several children, and W. M. Pepple, who died testate April 11, 1926, and whose estate was devised to his widow.

On February 3, 1927, Asa Mushrush filed suit in the chancery court of Poinsett County against the widow and heirs of Mark Mushrush, in which he alleged that Mark Mushrush had become indebted to him in a sum evidenced by two notes, to secure the payment of which a mortgage was given on certain lots in the town of Weiner, in Poinsett County, and it was prayed that this mortgage be foreclosed, as the notes had not been paid. These are the lots to which the corporation had the record title.

On April 26, 1927, another suit was filed in the chancery court of Poinsett County by W. P. Downing and A. H. Vieth, for the use of W. P. Downing, against the Mushrush Lumber Company, the widow and heirs of Mark Mushrush, the widow of W. M. Pepple, Jesse S.

Baker, a stockholder in the corporation, and Asa Mushrush, which contained the following, among other, allegations: The facts herein stated were alleged, and it was further alleged that the lots in the town of Weiner, mortgaged to Asa Mushrush by Mark Mushrush, were not the property of Mark Mushrush, but were the property of the Mushrush Lumber Company, and were subject primarily to the payment of its corporate debts. It was prayed that the real estate in the county be declared to be subject to the lien of the plaintiff's judgment, and that the mortgage from Mark Mushrush to Asa Mushrush be canceled. Brown was later made a party to this proceeding.

These cases were consolidated and tried together, and the decree of the court below, from which this appeal comes, canceled the mortgage from Mark Mushrush to Asa Mushrush, and the correctness of this action is the question in the case.

Testimony was offered on behalf of Asa Mushrush to the effect that the assets of the corporation were divided between Mark Mushrush and Pepple, who were the principal stockholders, and that Mark Mushrush took the Arkansas assets of the corporation, while those in Illinois were given to Pepple. No deed was produced from the corporation to Mark Mushrush, and no competent or sufficient testimony was offered to prove that one had ever been made; in fact, the testimony to the effect that such a deed had been executed consisted principally in the proof of declarations of Mark Mushrush, that he owned all the Arkansas property which had once belonged to the corporation, and that he acquired this title by the division of the corporate assets between himself and Pepple, who, together, had acquired and owned all the stock of the corporation.

It is the insistence of Asa Mushrush, who was never at any time a stockholder in the corporation, that his mortgage from Mark Mushrush is valid and superior to the judgment lien, and, further, that Brown could not

and did not acquire any interest in the judgment lien, for the reason that, at the time when he claimed to have done so, he was in possession of the Weiner property as the tenant of Mark Mushrush, and, as a tenant, he could not purchase a lien on the demised premises and claim thereunder before a surrender of the possession to his landlord, which he had not done.

It appears that Brown took possession under a written lease executed in the name of the corporation, but Asa Mushrush testified that Brown told him that he took the lease from Mark Mushrush, but had it changed in the name of the corporation, because the record *title to* the property was in the corporation.

A number of interesting questions are raised in the briefs of opposing counsel, but we find it unnecessary to consider many of them to dispose of this appeal.

Under the laws of Illinois, the cancellation of a corporate charter by the Secretary of State does not dissolve the corporation, but it is a mere declaration of that fact as a preliminary administrative act upon which a dissolution suit can be based. *People* v. *Rose,* 207 Ill. 352, 69 N. E. 762; 8 Fletcher, Cyclopedia Corporations, § 5445, p. 9060; 4 Harker's Illinois Statutes Annotated (1919), §§ 118-123, p. 4542 and 4543. But it also appears that under the laws of that State the corporate existence is continued, even after dissolution, for the purpose of enforcing corporate liability. 4 Harker's Illinois Statutes Annotated (1919), § 79, p. 4534.

The judgment here sought to be enforced is based on notes dated July 1, 1920, (167 Ark. 670, 269 S. W. 44) which was prior to the date of the certificate of the Secretary of State of Illinois showing the delinquency in the payment of the franchise tax in that State; and it is clear that the certificate of the Governor of this State, above referred to, was not an attempt to dissolve this Illinois corporation. Indeed, he could not have done so. Section 741 of chapter "corporations" in 7 R. C. L., p. 733. The only effect of this certificate was to withdraw from the

foreign corporation authority to transact business in this State, and being sued was not "doing business" in violation of our statutes regulating foreign corporations operating in this State. *Linton* v. *Erie Ozark Mining Co.*, 147 Ark. 331, 227 S. W. 411; *Buffalo Zinc & Copper Co.* v. *Crump*, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87.

We think the decree of the court below was correct. It is undisputed that the corporation, the judgment defendant in the original Veith case (167 Ark. 669, 269 S. W. 44), owned the town property, and, as we have said, there was no sufficient showing that it had ever been conveyed by the corporation to Mark Mushrush. Proof of the self-serving declarations of Mark Mushrush, to the effect that he had acquired this title (and there was no attempt to prove that a deed had been executed to him from the corporation) is ineffective to show that fact. *Arkmo Lbr. Co.* v. *Cantrell*, 159 Ark. 445, 252 S. W. 901; *Davis* v. *Falls*, 172 Ark. 314, 288 S. W. 723; *McCurry* v. *Griffin*, 170 Ark. 421, 279 S. W. 995; *Strickland* v. *Strickland*, 103 Ark. 183, 146 S. W. 501; *Waldroop* v. *Ruddell*, 96 Ark. 171, 131 S. W. 670.

The mortgage does not purport to be the act and deed of the corporation, and Mark Mushrush had no power to mortgage the corporate property as an individual, whatever his interest in the corporation may have been. Section 2449 of chapter on Corporations in 14A C. J., p. 532; *Red Bud Realty Co.* v. *South*, 96 Ark. 281, 131 S. W. 340.

There is nothing in the contention that Jess Brown could not acquire an interest in the judgment, by reason of his tenancy. In the first place, the relation of landlord and tenant was not shown between Brown and Mushrush individually.

In the case of *Connolly* v. *Rosen*, 144 Ark. 442, 222 S. W. 716, it was held (to quote a headnote) that "The rule which forbids a tenant to dispute his landlord's title and right to possession without delivering possession

has no application where defendant in possession denies that a tenancy ever existed."

But, even though the existence of a tenancy were conceded or established by the testimony, we perceive no reason why Brown, as a tenant, might not buy an interest in the judgment, or buy the entire judgment.

At § 143, chapter on Landlord and Tenant, in 16 R. C. L., p. 656, it is said:

"There is authority for the position that there is such a confidential relation between a tenant and his landlord as will preclude the tenant from purchasing an adverse title, without notice to his landlord, and that where he does so it will be presumed that his purchase was made for the benefit of and to protect the landlord's possession. On the other hand, according to the better view, the relation does not itself preclude a tenant from purchasing a title adverse to that of his landlord; while there are fiduciary relations where one may not purchase and hold for himself an adverse interest, but the purchase will inure to the benefit of the person toward whom he holds the confidential relation, the relation of landlord and tenant does not as a general rule fall within this class. And, *a fortiori,* if a lessee under a defective title is disturbed by a party having a paramount title, he is not restrained by his lease from purchasing the paramount title, without the consent of his lessor, although he had not been evicted or ousted."

In the note to the text quoted, the case of *Lausman* v. *Drahos,* 10 Neb. 172, 4 N. W. 956, is cited as the authority for the position that there is a confidential relation between a tenant and his landlord which precludes the tenant from purchasing an adverse title, without notice to his landlord, and that, when he does so, it will be presumed that his purchase was made for the benefit of and to protect his landlord's possession. But this court expressly declined to follow that case in the case of *Pickett* v. *Ferguson,* 45 Ark. 195, and referred to it as a case standing alone as supporting that doctrine. See also *Dennis* v.

Tomlinson, 49 Ark. 577, 6 S. W. 11; *Swift* v. *Ivery,* 147 Ark. 141, 227 S. W. 600.

We therefore adhere to what the text quoted designates as the better view, that the relation of landlord and tenant does not itself preclude a tenant from purchasing a title adverse to that of his landlord, and therefore that Brown had the right to purchase an interest in the judgment against the corporation.

We are of the opinion that the decree of the court below is correct, and it is therefore affirmed.

STATE USE CALHOUN COUNTY *v.* MARYMAN.

Opinion delivered February 24, 1930.

Joe Joiner and *Compere & Compere,* for appellant.

Powell, Smead & Knox, for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Calhoun County, by appellant against appellee, to recover $2,500 which was paid to him out of the county funds on a post-dated check drawn in his favor by H. B. Easterling, county treasurer, to settle an individual debt which Easterling owed appellee, for borrowed money. It was alleged, in substance, that the county owed appellee nothing at the time the check for $2,500 was accepted and cashed by him; that the payment of said amount to him by Easterling out of the county's public moneys was without authority, fraudulent and unlawful; and that he knew the payment out of said funds was an unlawful and

wrongful conversion of the public funds of said county, its subdivisions and agencies.

Appellee filed an answer denying the material allegations of the complaint.

The cause was submitted to the court, without the intervention of a jury, upon the pleadings and testimony, which resulted in a finding of the issues for appellee and a consequent judgment that appellant take nothing in the suit, from which is this appeal.

The facts are undisputed. In the month of September, 1928, H. B. Easterling, county treasurer of said county, had wrongfully and fraudulently converted more than $2,500 of the county's money to his own use. In order to cover up his shortage in his settlement with the county court, Easterling applied to appellee, a friend with whom he had had considerable business dealings, for a personal loan for a few days of $2,500. Appellee did not know of Easterling's shortage, nor the purpose for which he was borrowing the money. Appellee agreed to lend him the amount requested, and it was arranged between them that Easterling would make a draft on appellee for the amount which appellee would honor, and, in repayment of same, Easterling, as treasurer of the county, gave appellee a post-dated check for $2,500, which check was to be held by him and cashed on a date agreed on for payment. Pursuant to this arrangement, Easterling made a draft on appellee for the amount, and deposited the draft in the Citizens' Bank of Thornton, Arkansas, to his credit, as county treasurer. This deposit was made on September 18, 1928. The post-dated check which Easterling gave appellee was drawn on the Hampton State Bank, and was signed "H. B. Easterling, County Treasurer," and was paid by the bank upon which it was drawn some time in September, 1928. Four months subsequent to that time Easterling's term of office expired, and shortly thereafter it was discovered that his shortage to the county amounted to over $23,000.

It is argued, in support of the judgment of the trial court, that appellee was an innocent purchaser for value of the post-dated check; and that, in addition, the county received the money which he loaned to H. B. Easterling. According to the undisputed facts appellee loaned the money to H. B. Easterling and not to the county. At the time Easterling deposited the money, which he had individually borrowed from appellee, in his account as treasurer, it was his money and not the money of appellee. Easterling paid the $2,500 to the county upon his shortage at that time, and it must be regarded as a payment by him, and not by appellee. Appellee could not have followed the money into the treasurer's fund and recovered same from the county. He had no right of action whatever against the county for the $2,500 which he loaned to Easterling as an individual. Appellee accepted payment of this individual loan to H. B. Easterling out of the public funds belonging to the county, although he had no claim whatever against the county at the time. The post-dated check was not issued for any indebtedness the county owed to appellee or any other person. It was issued directly to him in payment of Easterling's individual debt. The transaction was and is inhibited by § 2833 of Crawford & Moses' Digest, which is as follows:

"It shall be unlawful for any person or persons whomsoever to borrow or receive any public funds from 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 for the use or benefit of any other person or persons, or of any corporation."

The statute was passed to protect the public funds, and to interpret the statute as meaning that one in due course might accept a check thereon in payment of an individual debt against the custodian of the fund would render the statute nugatory.

The judgment of the trial court is therefore reversed, and, as the facts are fully developed, a judgment is directed to be entered here in favor of appellant against appellee for $2,500, and interest thereon from September, 1928, at the rate of six per cent. per annum.

BINGANAN *v.* STATE.

Opinion delivered February 24, 1930.

John E. Tatum, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment of conviction for obtaining money on a check under false pretenses. The appellant was first indicted for forging and uttering a forged instrument in giving the check, and upon appeal to this court, upon a confession of error by the Attorney General, the cause was reversed. *Binganan* v. *State,* 180 Ark. 266. Pending the appeal, the grand jury, without any further directions from the court, indicted appellant for obtaining money under false pretenses by the issuance of the check. He moved to dismiss the indictment as having been returned without authority and pleaded former acquittal.

Appellant contends that the court erred in not quashing the indictment herein, insisting that it was found without authority by the grand jury, since the matter had not been resubmitted to the grand jury by direction of the court after the first indictment was returned. The finding of the indictment for forgery, etc., however, the first indictment, cannot be considered a dismissal of the cause by the grand jury within the meaning of the statute, § 2997-98, C. & M. Digest, (2212-2214, Kirby's Digest), and, if such were the case, the court held in *Marshall* v. *State,* 84 Ark. 90, in construing the statute, that it has no reference to the independent action of the grand jury over such causes, saying: "It contains no limitation upon the duty of that body, after it had been impaneled and sworn, to make its inquiries and presentments as broad as the oath it takes. * * * It is the function of the grand jury, therefore, to investigate and reinvestigate concerning matters within their jurisdiction as often as they 'have knowledge or may receive information,' and the statute under consideration is not intended to limit or restrain that function."

Nor was the plea of former acquittal available to appellant. It is true that he was convicted of the offense for the same act, that of issuing the check upon a bank in which he had never had an account and cashing it, upon which he was convicted forging and uttering the same check as a forged instrument, but he was not put in jeopardy a second time by this trial for the same offense, but for an altogether different one. "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense." 16 C. J. 295, § 443; *Turner* v. *State,* 130 Ark. 48, 196 S. W. 477; *Woodson* v. *Fort Smith,* 165 Ark. 443, 264 S. W. 934; *Young* v. *State,* 176 Ark. 170, 2 S. W. (2d) 14.

Neither was error committed in allowing the introduction of testimony showing the drawing and issuance of another check, an altogether different one, to another party upon the same bank upon the same day. The court limited the jury's consideration of this testimony with a proper instruction, and told them specifically that they could not convict the defendant of the offense with which he was charged upon that testimony.

The appellant admitted drawing the check, but stated that he did not tell the person to whom it was delivered that he had funds in the bank on which it was drawn, but only that his wife would put the money in the bank to meet the payment. The testimony, however, was sufficient to support the verdict, and, finding no error in the record, the judgment must be affirmed. It is so ordered.

MENTE & COMPANY, INC., *v.* WESTBROOK.

Opinion delivered February 24, 1930.

Coleman & Gantt, for appellant.

Rowell & Alexander, for appellee.

MEHAFFY, J. The appellant is a manufacturer of burlap bags in New Orleans. The appellee, Howell L. Westbrook, was formerly engaged in the grain and milling

business in Pine Bluff, under the name of Westbrook Grain & Milling Company. The appellee, Helen F. Westbrook, is his wife.

In August, 1920, Howell L. Westbrook entered into a written contract with Mente & Company, Inc., for the purchase of 75,000 yards of burlap to be manufactured into bags as ordered by him. As the bags were ordered, they were manufactured and shipped and were to be paid for within ten days. Orders were given and shipments were made from time to time, but Westbrook was slow in making his payments. After November 8, 1921, he failed to give any further orders or to answer letters, and the contract was by appellant treated as having been breached by him after he had placed orders for something like one-half of the burlap provided for in the contract.

Appellant brought suit against Westbrook on June 16, 1923, in the circuit court of Jefferson County, for damages for breach of the contract, and recovered a judgment of $2,162.84 with interest. The judgment was affirmed by this court on May 3, 1926. On May 20, 1927, an execution was issued and levied on H. L. Westbrook's interest in a lot in Pine Bluff. This lot was formerly the homestead of W. H. Westbrook, the father of Howell L. Westbrook, and under the will H. L. Westbrook claimed a one-half interest in the lot. After the levy of the execution Westbrook produced a deed which had not been recorded, purporting to have been executed by him to his wife on the 24th day of December, 1923. Westbrook had the deed recorded after the execution was levied. The sheriff proceeded to sell his interest in the lot, and the appellant subsequently received a deed from the sheriff.

On July 28, 1927, appellant filed this suit in the chancery court, alleging that the conveyance from Westbrook to his wife was made at a time when he was largely indebted and insolvent for the purpose of defrauding and delaying his creditors, and praying that the deed be can-

celed as a cloud on the title of appellant acquired at the execution sale.

We deem it unnecessary to set out the evidence in full, but the evidence, in substance, showed that H. L. Westbrook was engaged in the wholesaling of grain and manufacture of milling products in Pine Bluff from 1912 until some time in 1925. His business consisted almost altogether of buying grain in carload lots, and either selling it in its original state or after being manufactured into feed products. Practically his only creditor for a long while was the local bank from whom he borrowed money upon which to operate. In June, 1914, he executed a deed of trust upon all of his real estate except the lot in question to the Cotton Belt Savings & Trust Company for $20,000, and also covering all indebtedness which he might owe this bank. His indebtedness to this bank, secured by a deed of trust, was from $20,000 up as high as $80,000. At the time he executed the deed to his wife he was indebted to the Cotton Belt Savings & Trust Company something like $39,000.

The statement introduced in evidence showing the condition of Westbrook's business on December 31, 1923, showed that his net worth above his indebtedness was in excess of $100,000. The undisputed proof shows that the property cost to construct approximately $125,000. It was not encumbered in any way except the deed of trust to the bank. The undisputed proof also shows that at the time that Westbrook executed the deed to his wife, and at the time the judgment was secured in the Jefferson Circuit Court, he had ample personal property which could have been sold under the execution, and that it would have sold for enough to satisfy appellant's judgment. There was no effort on the part of Westbrook and nothing done by him to prevent the execution and sale of this property. After the judgment he prosecuted an appeal to the Supreme Court, but did not give any supersedeas bond, and there was nothing to prevent appellants from having the execution levied on the personal prop-

erty. Appellant not only did not do this, but no execution was levied after the affirmance of the case in the Supreme Court for about a year. The lot sold at execution sale for $570.40, plus the expenses of the suit, and this amount had been credited on the judgment of the Mente Company against Westbrook.

The bank foreclosed its mortgage or deed of trust, and at the foreclosure sale the property was purchased for $35,000. The bank afterwards sold it for $30,000. The sale of the property was not sufficient to pay the bank's claim, there being a balance of approximately $1,500. After the bank sold the property the purchaser expended approximately $20,000 on it. The property thereafter burned, and the owner collected $55,000 insurance. The undisputed proof shows that the insurance company deducted quite a sum because of the building not being entirely destroyed, and, in addition to this building, there was a warehouse that was not destroyed by the fire. The undisputed proof also shows that the amount of insurance paid was considerably less than the value of the property destroyed by fire.

The chancellor found that the execution sale should be set aside, and the deed executed by the sheriff to Mente & Company should be canceled, and that the credit of $570.40 upon the judgment in favor of Mente & Company against Westbrook should be set aside.

It is contended by appellant that the deed from Westbrook to his wife was made to defraud creditors. The bank intended at one time to include the lot in controversy in its mortgage or deed of trust, and prepared a deed of trust including this property, but it was never executed. The evidence shows that Westbrook took it to have it executed, but he did not do so, and he did not tell the bank at the time that the property belonged to his wife.

Appellant first cites and relies on the case of *Rudy* v. *Austin,* 56 Ark. 73, 19 S. W. 111, 35 Am. St. Rep. 85, in which it was stated: "If he be insolvent, unable to pay

his debts, the presumption that it is fraudulent as to antecedent creditors is conclusive."

And they also rely on the case of *Driggs* v. *Norwood,* 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78, in which the court stated: "Every voluntary alienation of his property by an embarrassed debtor is presumptively fraudulent against existing creditors. Indebtedness raises a presumption of fraud, which becomes conclusive upon insolvency."

The declarations of law above set out have been many times approved by this court and there can be no controversy about the statements being correct, as many times declared by this court. But it is a question of fact in this case as to whether Westbrook was at the time of the conveyance to his wife insolvent. One is not prohibited from conveying his property to his wife or any other person simply because he is in debt. If that were true, most of the voluntary conveyances made would be void because most people are in debt. But if a man was really worth $100,000 above his indebtedness, it would certainly not be a fraud to convey property of approximately $1,000 value, although it might turn out thereafter that under a forced sale his property would not bring enough to satisfy his creditors. There is some evidence in the case tending to show that the wife of Westbrook declined to sign the deed of trust to all the other property which included the Westbrook home until Westbrook conveyed his interest in this lot. It is contended that the deed was not made on the 24th of December, 1923, as alleged by appellee, but we think the evidence is practically conclusive that it was made on the date mentioned. The fact that it was a voluntary conveyance, that it was made when Westbrook was indebted to the bank, and that it was not recorded, are all properly admitted in evidence for the purpose of showing whether the conveyance was fraudulent.

In the first place, courts should carefully scrutinize all cases of alleged fraud against creditors wherein

members of the family of the debtor make claim to important or valuable interests as creditors, or conveyances to husband and wife, when attacked as fraudulent should be very carefully scrutinized. And a gift of property to his wife by one indebted at the time is presumptively fraudulent as to existing creditors. When it is shown that a gift of property was made by the husband to the wife, that the husband was largely indebted at the time, the burden of proof is on the husband and wife to show that the debtor's intentions were innocent, and that he had at the time abundant means to pay all his debts. But, on the other hand, if the evidence shows that one had ample means to pay all his debts, the conveyance to his wife of property of small value as compared with his whole property, together with other facts tending to show good faith, would be sufficient to justify the conclusion that the transfer was not fraudulent.

There is no controversy about the principles of law in this case. The relationship of the parties, the fact that the conveyance was voluntary, and the fact of the indebtedness of the grantor at the time, are all to be considered in determining whether or not the conveyance was in fact fraudulent. But it is also well settled, that, if the evidence shows that the grantor had abundant means other than this property to satisfy all his creditors, the conveyance will not be declared fraudulent. It is also well settled that, to entitle a creditor to set aside a conveyance as fraudulent, it is necessary not only that there be fraud on the part of the vendor participated in by the vendee, but also that there be an injury to the person complaining. The creditor who seeks to set aside a conveyance as fraudulent must show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt. And, not only that, but he must show that the debtor did not have other property sufficient to pay the creditor. And this is especially true where there is no evidence of fraud except the

relationship and the conveyance, and the fact that the debtor was largely in debt.

The undisputed proof in this case shows that the creditor could have made his money by the sale of personal property owned by the debtor at the time of the judgment in the Jefferson Circuit Court. If he had done this, the conveyance, even if fraudulent, could not have injured him, and fraud without injury or injury without fraud will not support an action to set aside a conveyance as fraudulent. 12 R. C. L. 491.

"Whatever may have been the early doctrine on the subject, at the present time there is no doubt that a husband may not only convey directly to his wife for a valuable consideration, but he may also convey to her as a gift when not prejudicial to his creditors. All gifts from a husband to his wife are good *inter se,* and against all persons claiming under them. The mere existence of the relation of husband and wife between the grantor and grantee does not create an implication as to fraud against creditors, especially where one fails to show that he was a creditor at the time of the conveyance, or that the husband was insolvent. To render a conveyance from husband to wife fraudulent and void as to creditors, there should exist an intent on the part of the husband to defraud, or at least to hinder and delay, his creditors. And if a conveyance is made with actual fraudulent intent, participated in by the wife, the conveyance will be void without question. It is unnecessary, however, that an actual fraudulent intent should exist on the part of the husband. Such intent may be, and generally is, inferred from the circumstances surrounding the conveyance, and the existence of the relation of husband and wife is an important fact to be taken into consideration in weighing the evidence relating to the good faith of a conveyance, and this because husband and wife have unusual facilities for the perpetration of fraud on creditors. A conveyance from husband to wife requires less proof to show fraud, and, when a *prima facie* case is made, stronger

proof to show fair dealing than would be required if the transaction were between strangers." 12 R. C. L. 513-14.

"Evidence of indebtedness at the time a conveyance is made is important, however, on the question whether such conveyance was fraudulent, but mere indebtedness at the time the conveyance was made, though evidence of fraud, does not necessarily make it void. So a conveyance to one's wife is not in fraud of the rights of creditors, where the grantor retains ample property for the satisfaction of all his debts, and there is no intent to defraud, nor is it fraudulent where the settlement itself provides for the payment of all existing debts, and such debts are actually paid in pursuance of the settlement. But a husband cannot give to his wife that which the law regards as belonging to his creditors." 12 R. C. L. 516.

In the instant case, as we have already said, the undisputed proof shows that when the appellant obtained judgment for breach of contract in the Jefferson Circuit Court an appeal was prosecuted by Westbrook without giving a supersedeas bond. And at that time the debtor had ample personal property which could have been sold and the judgment satisfied. No effort on the part of Westbrook was made to prevent this, and no effort on the part of the creditor was made to collect his debt. The undisputed proof is that he waited for more than a year after the case was affirmed in the Supreme Court before undertaking to collect his judgment.

As to whether the conveyance in the instant case was fraudulent and as to whether the debtor at the time had ample property out of which the appellant could have made its money are questions of fact, and the chancellor's decisions or findings on questions of fact are conclusive here unless contrary to the clear preponderance of the testimony. *Pattison Orchard Co.* v. *Southwest Ark. Utilities Corp.*, 179 Ark. 1029, 18 S. W. (2d) 1028; *Sternberg* v. *Lane*, 179 Ark. 448, 17 S. W. (2d) 286; *Cain* v. *Mitchell*, 179 Ark. 556, 17 S. W. (2d) 282.

Our conclusion is, that the finding of the chancellor is not against the weight of the evidence, and the decree is affirmed.

NATIONAL SURETY COMPANY *v.* SOUTHERN LUMBER & SUPPLY COMPANY.

Opinion delivered February 24, 1930.

Barber & Henry, for appellant.

L. P. Biggs, for appellee.

MEHAFFY, J. Crutchfield & Jeffus, contractors, had a separate contract with each of three school districts to erect school buildings. There was a contract with the Gregory district, another with the Hilleman and another with the Howell-Wiville. The contractors entered into a bond for the faithful performance of their contracts as provided by statute. There was one bond in each case. The appellant, however, was surety in each of the bonds. The buildings were erected and the contractors gave checks for the amount due to all the creditors. The bank declined to pay any of the checks because funds of the contractors in the bank were insufficient to pay all the

checks. The contractors had given three checks to the appellee, one for the full amount on each of the contracts. It was afterwards ascertained that the funds of the contractors in the bank amounted to 95 per cent. of the aggregate indebtedness on the three contracts. The creditors then entered into an agreement whereby all of the money would be paid out by the contractors by paying each creditor 95 per cent. of the amount due said creditor. The amount on deposit in the bank to the credit of the contractors was $9,752.72, and the amount of the indebtedness was $10,137.53. 95 per cent. of the amount due appellee on the three contracts was $7,397.47.

After the creditors had entered into the agreement the contractors sent a check to appellee for $7,397.47. This was 95 per cent. of the amount due appellee on the three contracts. Nothing was said by the debtor about how it should be applied, and the creditor, appellee, applied the sum thus received so as to pay in full the amount due on the Gregory job, and also the amount in full on the Hilleman job, leaving a balance due on the Howell-Wiville job of $388.79.

The appellee brought suit against the surety company and contractors to recover this amount. There was a judgment in favor of appellee for the amount sued for, and this appeal is prosecuted to reverse said judgment.

One provision in the contract entered into by the creditors whereby each received 95 per cent. of the amount due was as follows:

"It is further agreed, however, that this instrument shall not be taken as a release of any liability on the part of Crutchfield & Jeffus or the National Surety Company, and it is understood and agreed that the Farmers' National Bank, and the various creditors entering into this agreement do not undertake to release Crutchfield & Jeffus or the National Surety Company, but that any cause of action against the said Crutchfield & Jeffus or the National Surety Company shall be preserved."

As stated by appellant in its brief, the appellee's cause of action is based upon the appellant's liability under the terms of the bond executed by it on the Howell-Wiville contract for an alleged balance due for material furnished by appellee for construction of the Howell-Wiville school. The appellant admits a balance due the appellee on the Howell-Wiville job of $157.71, and tendered this amount in court, appellant's theory being that, since the creditors were paid 95 per cent. of their claims this should have been applied on the separate contracts, paying 95 per cent. of each, and that that would leave a balance due on the contract sued on of $157.71. Of course if this application of payments had been made, there would have been an indebtedness or balance due on each of the other contracts and the three amounts would total the amount sued for in this action, and it calls especial attention to the following paragraph in the agreement entered into by the creditors:

"Each of the said creditors is to be paid out of the total amount in the hands of the said bank a proportionate sum represented by the proportionate part that the check of each creditor bears to the total amount due all the creditors."

In other words, pay to each creditor 95 per cent. This was done in the instant case. The appellee was paid 95 per cent., but there was no application made by the debtor, and no suggestion as to how the payments should be applied.

It is contended on the part of the appellant that, since appellee received a proportionate amount upon its total account, it necessarily received its proportionate payment on the Howell-Wiville job. We do not agree with the appellant in this contention. The contractors were indebted to appellee on three separate accounts paid $7,397.47, and the creditor applied the payment as above shown.

Appellant contends, and correctly, that an application of payments once made, either by the debtor or the

creditor, discharges the guarantor *pro tanto,* and cannot be affected by change of application by the creditor and the principal debtor. It is true that an application, once made, cannot be changed, but in the instant case there had never been an application. The three checks that were given first, if they had been honored, would have been a payment in full on the three contracts. So, there was not even a suggestion of an application of payments in that. Then, when the last check was sent, the debtor made no request as to how it should be applied, and it was applied as above set forth.

"The right to apply payments is one strictly existing between the original parties, and no third person has any authority to insist on an appropriation of the money in his own favor, where neither the debtor nor the creditor has made or required any such appropriation. * * * While the authorities are not entirely in accord, third persons, such as guarantors, sureties, indorsers, and the like, secondarily liable on one of several debts, cannot control the application which either the debtor or the creditor makes of a payment, and neither the debtor nor the creditor need apply the payments in the manner most beneficial to such persons. This rule applies as well to a corporation engaged in the business of writing surety bonds for a compensation, as to an ordinary accommodation surety. Accordingly, it has been held that where a creditor has several demands against the same debtor, one of which is secured by an indorsement, and he has procured attachments to be issued and levied on all the demands, he has the right to apply the proceeds of the attachment to the satisfaction of the demands not secured by the indorsement, and then seek satisfaction, if necessary, from the indorser." 21 R. C. L. 107-8.

"The exercise of the right of appropriation of payments belongs exclusively to the debtor and creditor, and no third person can control or be heard for the purpose of compelling a different appropriation from

that agreed upon by them. But an appropriation by either party cannot afterward be changed so as to injuriously affect the rights of third persons. * * * Third persons, such as guarantors, sureties, indorsers, and the like, secondarily liable on one of the debts, cannot control the application of a payment by either the debtor or the creditor, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such persons.'' 30 Cyc. 1250-51.

''In a case in Michigan where a bond was given by a contractor to insure the payment of labor and material furnished on the contract, it was held that the sureties were not relieved by reason of the payment of an antecedent debt from the contract price of the improvement. It was said: 'This bond did not, in terms, provide that the contractor should apply his earnings to pay the laborers or materialmen, and the statute does not provide for such a bond. It undertook that the contractor should perform his personal obligations in his own way. It contemplated that he would receive and disburse his money as should suit his convenience. * * * The law does not have the same solicitude for corporations engaged in giving indemnity bonds for profit as it does for the individual surety who voluntarily undertakes to answer for the obligations of another. Although calling themselves sureties, such corporations are in fact insurers, and in determining their rights and liabilities, the rules peculiar to suretyship do not apply.' '' *Chicago Lbr. Co.* v. *Douglas,* 89 Kan. 308, 131 Pac. 563, 44 L. R. A. (N. S.) 843; *Valve Mfg. Co.* v. *Fidelity & Casualty Co. of New York,* 114 Kan. 151, 217 Pac. 282; *Salt Lake City* v. *O'Connor,* 68 Utah 233, 249 Pac. 810; *Puget Sound State Bank* v. *Gallucci,* 82 Wash. 445, 144 Pac. 698, 39 Am. & Eng. Ann. Cas., 767; *Wyandotte Paving & Const. Co.* v. *Wyandotte Coal & Lime Co.,* 97 Kan. 203, 154 Pac. 1012, Ann. Cases 1917C, 580.

Where there are different sureties on different contracts, still the debtor and creditor have the right to ap-

propriate the payments. If this surety company had been surety on the bond sued on in this case, and other surety companies were sureties on the other bond, still either the debtor or creditor would have had the right to appropriate the payments to the other two, and the surety company could not complain. In the instant case, however, the appellant was surety on each bond, and, according to its own contention, if the payments had been applied like it says they should have been applied, it would have owed the same amounts, but would have owed it on three separate contracts. If the payments had been applied as suggested by the appellant, the funds would have been insufficient to pay the amounts due on each of the contracts, and the balance due on the three contracts, for which the surety company would have been liable, would have been the amount sued for in this case. In other words, if the course suggested by appellant had been pursued, the appellant would have been liable for the same amount, but on three contracts instead of one.

There is no controversy about the amount that was due at the time the $7,397.47 was paid. The appellant does not claim that it paid the debts, but admits that it left a balance of $388.79 for which it would have been liable if the payments had been made on each of the claims as suggested by appellant. Therefore, there could have been no injustice in this case in the application of the payments by the creditor. The surety company is not called upon to pay any more than it admits it would have been liable for, if the payments had been applied as suggested by it. But, even if that were not true, as we have already said, the debtor and creditor are the persons who have the right to make the application, and the third person or surety company has no right to be heard, and no right to direct how the payments shall be applied. The rule as announced by this court is that the debtor at the time of making a payment has the right to direct the application. If he fails to make such ap-

plication, the creditor has the right to make it. *Briggs v. Steele,* 91 Ark. 458, 121 S. W. 754.

But, whether the creditor or the debtor had a right to make it and did it, the appellant has sustained no injury, because it has not been called on to pay any more than the evidence conclusively shows it was liable for.

We find no error, and the judgment of the circuit court is affirmed.

[redacted]

MINETREE *v.* MINETREE.

Opinion delivered February 24, 1930.

[redacted]

Jeff Bratton, for appellant.

C. M. Buck, for appellee.

McHANEY, J. In April, 1906, Dr. James N. Minetree, then a resident of Manila, Chickasawba District, Mississippi County, Arkansas, attempted to adopt appellant, then bearing the name of Ollie McCain, an infant under two years of age, as his son and heir; the order of the

probate court of said county and district being as follows:

"ORDER FOR ADOPTION OF CHILD.

"Pursuant to requests of a certain petition made by Dr. James N. Minetree of Manila, Arkansas, and presented to the court on the 24th day of April, 1906, asking for the adoption of the infant son of Mr. and Mrs. Luther E. McCain, as his own and lawful heir, by showing in said petition that the mother of said child is dead and that the father thereof is a resident of Mississippi County, Arkansas, and that said child is possessed of no property whatever and by Luther E. McCain, father of said infant child appearing in open court on the 24th day of April, 1906, and giving his consent to this order of adoption, it is therefore ordered by me a judge of said probate court that said infant child be adopted agreeable to the terms of above said petition and that its name be Ollie McCain Minetree, and that the care and custody of said infant child be given to petitioner, James N. Minetree."

The petition mentioned in the order had been lost from the files and could not be introduced in evidence. Appellant was thereupon taken into the home of Dr. Minetree and appellee, who is his widow, with whom he thereafter continued to reside, and who treated him as a son, supported him, and attempted to educate him. Shortly after the above order of adoption was made, Dr. Minetree removed with his wife and appellant from thence to Dona Ana County, New Mexico, where they continued thereafter to reside, and where the appellee now resides. In June, 1923, Dr. Minetree died testate, his will having been executed in November, 1919, leaving all his property to his wife, the appellee. It was duly probated in New Mexico and placed of record in Mississippi County, Arkansas. Appellant's name was not mentioned in the will. He continued to live with the appellee, his adoptive mother, until the fall of 1928, when, believing himself entitled in law to the property of his adoptive

father, subject to the widow's right of dower, he demanded same, which was refused, and this suit followed. About 200 acres of land in Mississippi County are involved. The court found that the above order of adoption was and is void, and dismissed appellant's complaint for want of equity. Was the learned chancellor correct in so holding?

Sections 1 and 2 of the Act of February 25, 1885, No. 28, p. 32, now §§ 252 and 253, C. & M. Digest, provide that (1) "any person desirous of adopting any child may file his petition therefor in the probate court, in the county where such child resides"; and (2) "such petition shall specify, first, the name of such petitioner; second, the name of such child, its age, whether it has any property, and, if so, how much; third, whether such child has either father or mother living, and, if so, where they reside. Such petition shall be verified by the oath or affirmation of such petitioner."

The first case coming to this court after the adoption of the above statute was *Morris* v. *Dooley,* 59 Ark. 483, 28 S. W. 30, 31, 430. Neither the petition for, nor order of, adoption in that case showed the child to be a resident of the county (Phillips) at the time the petition was filed and the order made. The court said:

"The proceeding to adopt a child as an heir was unknown to the common law, and in this State exists only as a special statutory proceeding. Prior to the passage of the act of February 25, 1885, authorizing such proceedings (Acts 1885, p. 32), the probate courts possessed no such powers, and could exercise no such jurisdiction, as it conferred. The jurisdiction was conferred by a special statute. Mr. Black in his work on Judgments, says: 'It is well settled that a judgment in a summary proceeding must show upon its face everything that is necessary to sustain the jurisdiction of the court rendering it.' Section 280. The rule seems to be, especially in this State, as settled by this court in *Hindman* v. *O'Connor,* 54 Ark. 643, 16 S. W. 1052, 13 L. R. A. 490, that 'where the juris-

diction is conferred on a court by special statute, and which is to be exercised in a special and often summary manner, the judgment can only be supported by a record which shows jurisdiction, and no presumptions as to its jurisdiction will be indulged.' *Harvey* v. *Tyler,* 2 Wall. 328 (17 L. ed. 871); *Galpin* v. *Page,* 18 Wall. 371 (21 L. ed. 959); *Gibney* v. *Crawford,* 51 Ark. 35, 9 S. W. 309; *Hindman* v. *O'Connor,* 54 Ark. 643, 16 S. W. 1052, 13 L. R. A. 490; Black, Judgments 279; Freeman, Judgments 123; 12 Am. & Eng. Enc. Law, 276 *et seq.*

"But it is contended that only those facts which the statute requires to be set out in the petition need to be made to appear in the record; but we hold, on the contrary, that in a proceeding of this kind, under a special statute, and not according to the course of the common law, the court in which the proceeding is had *quoad hoc* must be considered as an inferior court, and that, unless all jurisdictional facts appear in the record itself, the judgment in the proceeding will be void upon collateral attack. In *Henning* v. *Planters' Ins. Co.* (C. C.) 28 F. 440, the court said: 'Nor can the want of such averment or showing be supplied by proof *aliunde* the record, offered at the trial of the subsequent suit, predicated on the alleged judgment. The defects of the record cannot be so pieced or patched up by parol.' 'Jurisdictional facts cannot rest in parol to be proved in one case, and perhaps disproved in another.' Judge Cooley, in *Montgomery* v. *Merrill,* 36 Mich. 97. There is nothing in *Railway Co.* v. *Lindsay,* 55 Ark. 281, 18 S. W. 59, that militates against this doctrine. There it is held that the judgment of the justice of the peace could be supported by parol, as on appeal to the circuit court the cause was to be tried *de novo;* and the statement filed in lieu of the complaint was amendable in the circuit court, as well as in the magistrate's court, and would be treated as amended to conform to the evidence, which had been heard without objection."

Mr. Justice RIDDICK wrote a very strong dissenting opinion in that case, which was concurred in by Mr. Chief Justice BUNN, but the majority opinion has been the law in this State since that time, and has been consistently followed by this court since. *Willis* v. *Bell,* 86 Ark. 473, 111 S. W. 808; *Avery* v. *Avery,* 160 Ark. 375, 255 S. W. 18; *O'Connor* v. *Patton,* 171 Ark. 626, 286 S. W. 822, 826. And, as further sustaining *Morris* v. *Dooley,* see *St. Louis, I. M. & S. R. Co.* v. *Dudgeon,* 64 Ark. 108, 40 S. W. 786; *Ward* v. *Magness,* 75 Ark. 12, 86 S. W. 822; *Reeves* v. *Conger,* 103 Ark. 446, 147 S. W. 438; *Beakley* v. *Ford,* 123 Ark. 383, 185 S. W. 796; *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39.

(1) Appellant concedes that such is the law in this State, but insists that, since, at the time of the order of adoption, he was an infant of tender years, and that the order shows his father to be a resident of Mississippi County, the fact of his residence is sufficiently shown on the face of the record, and that the order of adoption is valid. It will be noticed that the order does not state that the minor was at the time a resident of the Chickasawba District of Mississippi County. It does state "that the mother of said child is dead and that the father thereof is a resident of Mississippi County, Arkansas." Assuming without deciding that the finding in the order that the mother is dead and that the father is a resident of the county is sufficient to establish the residence of the child in the county on the general rule that the residence of the father is that of his minor child, still it is not sufficient to show that the residence of either the father or the child was in the Chickasawba District of that county. By act No. 81, Acts 1901, p. 136, Mississippi County was divided into two judicial districts, and the jurisdiction of the circuit, chancery, and probate courts of each district was defined. In § 14 of said act, it is said: "That all matters of probate jurisdiction pertaining to that part of Mississippi County within the Chickasawba District and to persons and property resident and being therein

shall be subject to the jurisdiction and examination of the probate court of Mississippi County for the *Osceola* District.'' The use of the word ''Osceola'' in this connection is clearly a clerical error in copying or printing, as the whole context shows that the word ''Chickasawba'' was intended. Otherwise it would be meaningless. As regards probate jurisdiction, the two districts are the same as separate counties. Therefore, even though it be assumed that the residence of the child is that of its father, the order of adoption is fatally defective in failing to affirmatively show on the face of the record that the father was at the time a resident of the Chickasawba District of Mississippi County, in the absence of a finding that the child was such a resident, because the jurisdiction of the court depended upon it.

Appellant next says that, even though the adoption order be held void, appellee is estopped from asserting its invalidity. We cannot agree with appellant, as we are of the opinion this court has held to the contrary in *Avery* v. *Avery, supra,* and inferentially at least in the other adoption cases above cited. Here, as we have already shown, the order is void on its face for lack of jurisdiction of the court. It is the same as if no order of adoption had ever been made. A valid will was made by Dr. Minetree, which omitted to name appellant therein. All his property was given to appellee, and no course of conduct on the part of either toward appellant could estop appellee from claiming the property as sole beneficiary against a stranger in blood who claims under a void order of adoption. As said in *O'Connor* v. *Patton, supra,* ''The right of inheritance as such is conferred in our State upon a stranger in blood only by pursuing the special statutory proceeding for adoption''; and we think the statute should be strictly construed as against the adopted child, ''because it is in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature which has prevailed from time immemorial.'' 1 Cyc. p. 932.

It is finally urged that there was an oral contract of adoption between the father of appellant and Dr. Minetree. Conceding this to be so, still appellant must fail. This exact point was decided against appellant in *O'Connor* v. *Patton, supra,* where we said: "'Conceding, without deciding, that an oral contract for the adoption of a child and to give the same rights as a natural child, may be enforced after the death of the foster parent, this doctrine could not avail Louis E. Patton under the pleadings and proof in this case, because A. H. Patton disposed of all the property of which he was possessed by will which was duly probated by judgment of the probate court. '* * * The mere contract to adopt is not sufficient of itself to make the child a legal heir of the promisor, because the right to take as heir exists only by operation of law. The child takes in these cases by virtue of the contract and by way of damages or specific performance. An agreement to adopt does not prevent the person making the agreement from disposing by will of all his property to other persons than the child to be adopted; but an agreement, either express or implied, to give the adopted child a certain portion of the adoptive parent's property, will be enforced.' 1 C. J. p. 1377, § 21(b). Our statute providing that, where a person makes a will and omits to mention the name of a child, if living, etc., he shall be deemed to have died intestate, and the child whose name is omitted shall be entitled to a child's portion of the estate, refers to natural children, or legally adopted children. The right of inheritance as such is conferred in our State upon a stranger in blood only by pursuing the special statutory proceeding for adoption."

Having examined all grounds urged for a reversal and not finding them well taken, the decree must be affirmed. It is so ordered.

SMITH, J., (dissenting). There are no subjects upon which the conscience of the courts should be more tender than those relating to the custody, support, and adoption of infants. The human soul is capable of no sentiment

more noble and unselfish than that of love for little children. With animals, the love of offspring is the instinct which preserves their species, and the human race would not survive without it. Certainly, humanity's progress towards civilization has been aided by this love, and the law here under review is a recognition of it, and, in my opinion, the law should not be whittled away by technical constructions. On the contrary, it should have the most liberal construction to effectuate its humanitarian and Christian purpose, and it is the general policy of the courts to so construe such statutes.

Indeed, as Mr. Justice RIDDICK points out in his dissenting opinion in the case of *Morris* v. *Dooley,* upon which case the majority rely, it has been doubted by some courts whether the heirs of an adult, who has procured an order adopting a child as his own, have any right to object that the prescribed procedure in procuring the order of adoption was not strictly followed.

It is not my purpose, however, to assault the opinion in the Dooley case. The dissenting opinion of Mr. Justice RIDDICK, in which Chief Justice BUNN concurred, does that to my satisfaction, but I do protest against its unnecessary extension, and, with due respect for the majority, I say that the doctrine of that case has been extended in the majority opinion.

The statute enumerates the recitals which the petition must contain, and the residence of the child is not one of these, yet the order in the Dooley case was held void for the *sole* reason that it did not recite that the child was a resident of the county in which the order of adoption was made. The order did recite that the parents of the child were dead, and there was therefore no presumption as to its place of residence, as the presumption which the law indulges that the residence of an infant is that of its parents could not be applied in that case, they being dead. But the order here held defective and void recites that the mother was dead, but that the father was a resident of Mississippi County and present in court, and

does not the recital that the only living parent was a resident of Mississippi County carry irresistibly the implication that this two-year-old infant was also a resident of that county?

In the chapter on "Domicile," 9 R. C. L., § 10, p. 547, it is said: "It is a general rule that an infant cannot of his own volition acquire a domicile. It is also a well-established rule that the domicile of every person at his birth is the domicile of the person on whom he is legally dependent, whether it is at the place of birth or elsewhere; and so the domicile of the father is in legal contemplation the domicile of his minor children. If the parents change their domicile, that of the minor necessarily follows it, though there is authority to the effect that in order to change the child's domicile the parents must act in good faith and with reference to the welfare of the child. The domicile of an infant, if legitimate, is that of the father, if living. On the death of the father, the domicile of a minor follows that of its mother during her widowhood; but the last domicile of an infant's deceased father fixes the legal residence of the infant in the absence of proof of the residence of the surviving mother. On the death of both parents the domicile last derived from the parents, or either of them, continues to be the domicile of the child until legally changed or until the child reaches his majority, when he has power to choose and acquire his own domicile." The following cases from this court sustain the text quoted: *Grimmett* v. *Witherington,* 16 Ark. 377, 63 Am. Dec. 66; *Johnston* v. *Turner,* 29 Ark. 280; *Young* v. *Hiner,* 72 Ark. 299, 79 S. W. 1062; *Landreth* v. *Henson,* 116 Ark. 361, 173 S. W. 427; *Johnson* v. *Taylor,* 140 Ark. 100, 215 S. W. 162; *Taylor* v. *Collins,* 172 Ark. 541, 289 S. W. 466.

The attorney who was employed by Mrs. Minetree to procure and prepare the order of adoption testified that in the preparation of the order of adoption he had the statute before him, and that he thought he had prepared an order in exact conformity with the statute, and I sub-

mit that it is only by a technical and strained construction of the statute that the contrary can be held.

Other courts have not construed their adoption statutes so technically, but have sustained such proceedings where there has been a substantial compliance with the statute, upon the theory that the proceeding was for the benefit of infants, who had no volition in the matter, and whose interests it was the duty of the courts to protect.

In ordinary proceedings of this kind, the child is not consulted, and it has no more control over the proceeding than it had over its own natural birth. Its destiny is in other hands. It is without volition. Surely, its future should not be trifled with, and the order of adoption fixes its future. The child loses its identity, its name; it becomes another person; it has another parent. Such a proceeding should not be declared void unless the letter of the law plainly demands.

In the case of *Milligan* v. *McLaughlin,* 94 Neb. 171, 142 N. W. 675, 46 L. R. A. (N. S.) 1134, it was held by the Supreme Court of Nebraska (to quote the headnote): "While, under the provisions of § 800 of the Code of Civil Procedure, a person desiring to adopt a child should file the petition for adoption in the county of his residence, and the county court of another county should refuse to receive and file the same, yet, the statute being enacted for the benefit of the child, in a case where the facts are that all the interested parties appeared before the county court of another county, and agreed on the one side to relinquish the child, and consented to its adoption on condition that it should have the full rights of heirship as if born in wedlock, and on the other to adopt and make it an heir, and the child is surrendered to the custody of, and remains in the family of, the adopting parent until the death of that parent, which occurred while the child was of tender years, the collateral heirs of the deceased adopting parent are estopped to deny the validity of the adoption proceedings and that the child is entitled to inherit."

That may be an extreme case, and it is certainly unnecessary to go to the same length to uphold the order of adoption here under review. The case does show, however, the disposition of courts to uphold such orders whenever it is possible to do so.

The case of *Kenning* v. *Reichel,* 148 Minn. 433, 182 N. W. 517, 518, 16 A. L. R. 1016, reviews many cases on the subject, and it was there said that "there need not be more than a substantial compliance with the requirements of the statute to sustain the validity of the proceeding;" and our case of *Coleman* v. *Coleman,* 81 Ark. 7, 98 S. W. 733, is one of the cases cited in support of that statement. In the annotator's note to this Kenning case, it is said: "Formerly, the courts were inclined to construe the adoption statutes strictly, since they were in derogation of the rights of the natural heirs at common law. No presumptions were indulged in favor of the jurisdiction of a court of limited powers, and, where the record failed to show a finding of fact required by the adoption statute, the defect was regarded as a jurisdictional one, available to the next of kin of the adoptive parent in a collateral proceeding. *Morris* v. *Dooley* (1894) 59 Ark. 483, 28 S. W. 30, 430; *Ferguson* v. *Jones* (1888) 17 Or. 204, 3 L. R. A. 620, 11 Am. St. Rep. 808, 20 p. 842. Compare *Coleman* v. *Coleman* (1906) 81 Ark. 7, 98 S. W. 733, the holding of which is given *infra.* * * * The courts, however, have abandoned the view that the adoption statutes are to be construed strictly, as in derogation of common-law rights, since they are obviously not intended to supplement the rules of common law, but to make a complete change in the law. Consequently mere errors and irregularities in the decree of adoption, or in other parts of the record of the proceeding, are no longer considered to be jurisdictional defects, and a decree of adoption cannot be successfully attacked by a presumptive heir in a collateral proceeding, except on the ground that the court was without jurisdiction to render the decree."

A large number of cases from many States are cited in support of the annotator's statement that adoption statutes are not to be strictly construed and that courts are abandoning the policy of so doing.

The opinion in the case of *Avery* v. *Avery,* 160 Ark. 375, 255 S. W. 18, would indicate that this court had come to that view, for it was there held (to quote a headnote) that, "where the record in adoption proceedings recites that the natural father of the child appeared in open court and petitioned for the child to be adopted by himself, and the mother, by affidavit filed in court, assented to the adoption, whereupon the order was made, a substantial compliance with Crawford & Moses' Digest, § 256, is shown." See, also *White* v. *Dotter,* 73 Ark. 130, 83 S. W. 1052.

The case of *Van Matre* v. *Sankey,* 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196, which is itself a well-considered case, citing many authorities, is followed by an annotator's note, covering many pages, citing many cases to the effect that adoption proceedings should be liberally construed in favor of the adopted child. Indeed, many of the authorities, including the Van Matre case itself, are to the effect that "neither an adopting parent, nor his heirs or representatives after his death, can question the validity of the order of adoption of a minor child procured at his instance and with his consent."

The majority say they have not extended the Dooley case, but have only followed it; that the act dividing Mississippi County into two districts creates two probate courts, one for the Osceola District and the other for the Chickasawba District, and that these districts must be treated, for all probate court purposes, as separate counties, and that the adoption proceedings must therefore be had before the court having jurisdiction of the district of the county in which the child resides.

This reasoning, carried to its logical conclusion, would overrule the Dooley case. The whole theory of

that case is that an adoption order is not a judgment of a court of superior jurisdiction, but is a special statutory proceeding, and it is the jurisdiction of a *court* which the statute creating Mississippi County parcels out to the two districts thereof.

One of the landmark cases in our jurisprudence is that of *Borden* v. *State,* 11 Ark. 519, 44 Am. Dec. 217. After there laying down the rule, which has since been consistently followed, declaring the presumption of verity to be indulged in favor of the judgments and decrees of superior courts, the learned judge who wrote that opinion said: "The remaining question before us in this case is whether or not the probate court is to be regarded as a superior court within the principles laid down. We answer emphatically that in our opinion it must be so considered. Because it is not only a court of record, but a constitutional court of fixed and permanent character invested with general jurisdiction and plenary powers over the matters committed by law to its peculiar cognizance and open to review by appeal. There is abundant authority thus to hold as to this court, and if there was not, it would be a matter of serious public concern. Because, while in point of law it is equal, in point of fact it is a more important court to the people of this State than the circuit court. And this will be manifest at once when it is considered that it only requires a period of about forty years to pass every atom of property in the State real and personal and many choses in action through the ordeal of the probate court; while it is estimated that the whole would not be passed through the circuit court in an entire century. We feel freely warranted therefore, not only on the score of authority, but for cogent reasons of public policy, to fix this court upon the footing of superior courts. (*McPherson* v. *Cunliff*) 11 Serg. & Rawle (Pa.) 429 (14 Am. Dec. 642); (*Kempe* v. *Kennedy*) 5 Cranch. 173 (3 L. ed. 70); (*Grignon* v. *Astor*) 2 How. 340 (11 L. ed. 283); (*Grant* v. *Raymond*) 6 Pet. 220 (8 L. ed. 376)."

If, therefore, an adoption order is a judgment to be rendered only by a court having jurisdiction as such of the territory apportioned to it, then it is the judgment of a superior court, for a probate court is a superior court, and its judgments are clothed with the presumption of regularity which renders them impervious to the collateral attack here made upon the judgment under review.

If, on the other hand, the order is merely a special proceeding had in the probate court, and the Dooley Case so holds, then the order contains all the recitals which the Dooley Case held were essential. The surviving parent was a resident of Mississippi County, and the adoption order so recites, and the statute, under the strictest construction, requires nothing more, and the Dooley Case required nothing more because the residence of the sole surviving parent is the residence of the child.

I am of the opinion, therefore, that the order of adoption here under review has been construed too strictly; that it is valid, and should be upheld.

I am authorized to say that Justices KIRBY and MEHAFFY concur in the views here expressed.

SHERMAN *v.* MCILROY BANKING COMPANY.

Opinion delivered February 24, 1930.

C. D. Atkinson, for appellant.

George A. Hurst, for appellee.

McHaney, J. This was an action by appellee to foreclose two certain chattel mortgages given to secure two promissory notes, one of $11,000, dated March 17, 1927, and the other for $2,000, dated September 23, 1927, which had been reduced by payments, the first to $2,090.69, and the second to $227.50 at the time suit was brought. The $11,000 was secured in addition to other collateral by chattel mortgage executed by appellant, M. J. Sherman, to Sherman's, Inc., a corporation of Fayetteville, Arkansas, of which said M. J. Sherman was president, and one L. H. Kempton was secretary and treasurer, which covered certain household furniture, fixtures and equipment. This mortgage was assigned to appellee on the date of the execution of the $11,000 note, the assignment being executed by Sherman's, Inc., by L. H. Kempton, secretary and treasurer, and was delivered to the appellee as additional security for the amount of said note. Appellants contended in the court below and contend here that the household goods covered by said mortgage belonged to appellant, Florence Sherman, and that she consented for her husband to mortgage them to Sherman's, Inc., to give it additional credit standing, and it was furthermore contended that said Kempton had no authority as secretary to assign said mortgage to appellee for the reason that he had sold his stock in the corporation, Sherman's, Inc., on March 10, 1927, seven days before he made the assignment, and that it was done without the knowledge or consent of M. J. Sherman.

The chancery court overruled appellant's contentions, and decreed a foreclosure and sale of the property.

In the decree of foreclosure a personal judgment was rendered against Sherman's, Inc., for $2,110.36, the balance due on the $11,000 note. This note was executed by Sherman's, Inc., to appellee. It thereafter became insolvent and made an assignment for the benefit of the creditors, including appellee, and it accepted its *pro rata* share of the proceeds of the assets assigned for the benefit of the creditors. It is said that this constituted an accord and satisfaction of all personal liability of the corporation. But appellants are in no position to complain about the judgment against the corporation. Although it was served with process, it made no answer and has not appealed from the judgment of the court.

It is next said that the court erred in holding that the mortgage on the household goods was properly assigned to appellee as collateral security to the $11,000 note. We cannot agree with appellants in this regard. The proof shows that the mortgage was included in a long list of notes and accounts belonging to Sherman's, Inc., and deposited by it with appellee as collateral security for the $11,000 note. This list of notes and accounts was prepared and signed by the officers of the corporation; the assignment being as follows: "Assignment, March 17, 1927. Sherman's, Incorporated, a corporation, being organized under the laws of the State of Arkansas, for value received, hereby assign and transfer to the McIlroy Banking Company the following accounts and notes due said Sherman's, Incorporated, viz., to secure money borrowed this date as evidenced by the note of said company in favor of McIlroy Banking Company. Sherman's, Inc., by M. J. Sherman, president. Attest: L. H. Kempton, secretary and treasurer." Then follows six pages of transcript showing a long list of notes and accounts, and near the end of the list appears the mortgage in question of $2,000, the total amount, including said $2,000 being $11,775.89. All the notes and accounts were left with Mr. Kempton, secretary of Sherman's, Inc., but the bank took possession of

the $2,000 chattel mortgage, and had Mr. Kempton assign it to the bank. We are therefore of the opinion that appellant M. J. Sherman knew that the $2,000 mortgage was assigned along with the other notes and accounts to appellee. At least, the chancellor's finding in this regard is not against the preponderance of the evidence. While it appears that Kempton had sold his stock to Sherman prior to the indorsement of the assignment on the mortgage to appellee, it appears also that he was continuing to act as secretary and treasurer of the corporation on March 17, 1927, with the knowledge and consent of the president, as they both joined in the assignment of the notes and accounts, including the mortgage in question on that date. We find no error, and the decree is affirmed.

MOTOR CREDIT COMPANY *v.* SMITH.

Opinion delivered February 24, 1930.

Duty & Duty, for appellant.

John Mayes, for appellee.

BUTLER, J. The facts in this case are not in dispute. The appellant became the owner of a conditional sales contract, under the terms of which title was retained in an automobile until the purchase price was paid. During the time the purchaser remained in possession of the car under his conditional sales contract, he bought certain casings and inner tubes to place on the car from the appellee, title to which was retained by the appellee until purchase price thereof should be paid. The purchaser made default in his payment on the purchase price of the car, and the appellant repossessed the same under the conditional sales contract, the casings and inner tubes in question being on the car at that time, and having been used for some time without being paid for.

The appellee brought an action in replevin for the casings and inner tubes in the court of justice of the peace. An appeal was taken from the judgment of that court to the circuit court, where the case was tried, and the court rendered judgment for $35 in favor of the appellee, from which judgment is this appeal.

The amount involved is small, but the principle is important. It is the contention of the appellant, that where personal property is sold under a conditional sales contract, as the automobile in question, and the buyer purchases and places accessories thereon, that such accessories so added to the subject-matter of the conditional sale, becomes the property of the seller by "accession," and, as between the party who furnishes the accessories and the seller of the automobile, the accessories become the property of the latter when the auto-

mobile is reclaimed for the non-payment of the purchase price.

Where such accessories become a component part of the chattel and so incorporated as to be incapable of separation without injury to the whole, they merge in the principal thing, and become the property of the owner. It might be said that ordinarily casings would become component parts of an automobile to which they are attached, where the rights of third persons do not intervene, and the cases cited by the appellant appear to support that view.

The case of *Blackwood Tire Co.* v. *Auto Storage Co.,* 133 Tenn. 515, 182 S. W. 576, L. R. A. 1916E, 254, Ann. Cas. 1917C, 1168, held that where an automobile is sold, and title retained by the seller until the purchase price is paid, and the purchaser buys and attaches casings to the machine, and, in default of payment of the purchase price of the machine, it is retaken by the seller, such casings become a part of the machine by accession, and the purchaser of the machine cannot detach them from the same upon the seller retaking the machine for default in the payment of the purchase price. In that case, however, attention was called to the fact, that the seller of the parts had not retained title in them, and for that reason the writer of the opinion distinguished that case from the case of *Clark* v. *Wells,* 45 Vt. 4. The other cases cited by the appellant, *Baugham Auto Co.* v. *Emanuel,* 137 Ga. 354, 735 E. 511, 38 L. R. A. (N. S.) 824, *Small* v. *Robinson,* 69 Me. 425, 31 Am. Rep. 299, and *Shaw* v. *Webb,* 131 Tenn. 173, 174 S. W. 273, L. R. 1915 D, 1141, Ann. Cas. 1916 A, 626, are cases holding the title of a seller of an automobile under conditional sales contract is superior to the lien of a mechanic for repairs made. We think an analysis of those cases shows that they have no application to the facts in the instant case.

The appellant also relies upon § 6874 of Crawford & Moses' Digest for a reversal of this case. By § 6866 of Crawford & Moses' Digest a mechanic, making re-

pairs upon an automobile, is given a laborer's lien, and sellers of parts are likewise given a lien in the nature of a materialman's lien. By § 6874, *supra,* these liens are made subject to that of a vendor of an automobile retaining title for balance of purchase money due thereon. This section can have no application in the instant case, because there is no question of liens involved, the question being which, if either, of two sellers of chattels, both retaining title for payment of the purchase price, shall be preferred to the other. The cases of this court cited by the appellant, *Corning Motors Co.* v. *White,* 173 Ark. 144, 293 S. W. 46, and *Lowe Auto Co.* v. *Winkler,* 127 Ark. 433, 191 S. W. 927, merely construe and uphold the proviso in § 6874, *supra,* while the case of *Shelton* v. *Little Rock Auto Co.,* 103 Ark. 142, 146 S. W. 129, is not in point, as that is a case brought by a mechanic to enforce a lien for work done upon an automobile under an act prior to that of § 6866, *supra,* in which the court held that the mechanic had no lien.

Berry, in his work on Automobiles, (6th ed.) vol. 2, § 1806, lays down the rule that "where the seller of an automobile under a contract of conditional sale retakes the automobile upon default of the buyer to keep the terms of the contract, he is entitled to any tires or other replacements which the purchaser placed on the machine while it was in his possession, *provided the title to such parts passed to the purchaser* when he acquired them."

An application of the above rule was made in the case of *Clark* v. *Wells,* 45 Vt. 4, 12 Am. Rep. 187, where one having possession of a stage coach, engaged a wheelwright to put new wheels and axles on the same, the title to such wheels and axles being retained by the wheelwright until the price thereof had been paid. A third person purchased the stage coach and sought to hold the wheels and axles under the doctrine of accession, and in an action between him and the wheelwright the court held that the doctrine of accession did not apply for the reason

that the seller of the wheels and axles had never parted with title thereto.

We can see no difference in principle in the case last cited from that of the instant case, or why the rights of a seller under a conditional sales agreement should be different in chattels of one species than another. The reason in any case for the recovery of the thing sold or its value is that the seller has not parted with the ownership. This right ought not to be defeated merely because the thing sold has been attached to another object, unless from the nature of its destined use and manner in which it is attached, a separation cannot be made without injury to such other object, or its remaining component parts.

This appears to the effect of the rule announced in Berry on Automobiles and in *Clark* v. *Wells, supra,* and which we approve.

Therefore, as casings and inner tubes can be detached from an automobile without injury to its remaining parts, the seller of such will not be defeated in an action for their recovery or value, title having been retained by him, and default of payment of purchase price having been made the ground that these articles have been affixed by the purchaser in the proper place upon an automobile, also purchased by him under a like contract as were the parts, and that such automobile had been repossessed by its conditional seller. Such being our conclusion, it follows that the judgment of the circuit court must be, and is hereby affirmed.

GALLAHER *v.* SHOCKEY.

Opinion delivered February 24, 1930.

W. H. Dunblazier and *George W. Dodd*, for appellant.

Cravens & Cravens, for appellee.

BUTLER, J. The question presented in this case is unique, *i. e.*, Does the natural mother of a child adopted by another, which child died before the execution of a will by the adopted parent, inherit the estate of the deceased adopted parent which the child would have inherited had she been living at the time of the execution of the will and the death of the testator, where no mention of such child is made in the will?

The facts are as follows: Mrs. F. M. Shaw, in October, 1906, adopted a little girl, Minnie Masina Early. In April, 1910, the child died, and in January, 1916, Mrs. Shaw made her will devising and bequeathing her estate, both real and personal, to the appellee, Sallie Shockey, no mention being made in the will of her adopted child or of the mother or sister of said child. Annie Specht Early was the mother of Minnie Masina Early, and Lena Gallaher was the daughter of Annie Specht Early, and the sister of Minnie Masina. In October, 1927, Mrs. Shaw died, without ever having had any children born to her. After the death of Mrs. Shaw, Annie Specht Early conveyed to Lena Gallaher all her right, title and interest in and to the estate of Mrs. F. M. Shaw, deceased, "which was inherited from said Minnie Masina," and Lena Gallaher thereupon filed her petition in the Sebastian Probate Court of the Fort Smith District, alleging the above mentioned facts, and that she was entitled to receive the

distributive share of the estate which would have descended to Minnie Masina Shaw, if she was still surviving, "which interest is one-half of the estate left by the said F. M. Shaw, after payment of her funeral expenses and just debts." From an order denying the prayer of the petition by the probate court and from a like order on appeal to the circuit court, this appeal is prosecuted.

The appellant, petitioner, for reversal of the judgment denying the prayer of the petition, relies on § 10507 of Crawford & Moses' Digest, which is as follows: "When any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person, so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal, of the testator as if he had died intestate." The appellant cites the case of *Branton* v. *Branton,* 23 Ark. 576, as persuasive of the construction placed by her on the statute, *supra.* This was a carefully considered case, in which the history of our statute and the decisions on similar statutes were reviewed, but we find no rule announced in the main case, or in any of the cases cited therein, which would sustain the construction urged upon us by the appellant. In the Branton case, while the interpretation of the statute here insisted upon by the appellant was not presented to the court, the plain inference is, from the language of the opinion, that no such interpretation would have been adopted, the court saying: "We see no principle in the statute but what is apparent upon its face, that it intended to provide for children and descendants that are not named in the will. The statute does not prohibit a man from disposing of his property according to his own will. He may give his several children more or less than his wife, may give them much or little, or none of his estate; but the law will treat him as a father and a man in making a compulsory provision

for his children, as in intestacy, unless he shall express a contrary intention towards every child and its children, by naming it, or them, in the will."

To extend the word "representative" as used in the statute beyond the descendants of children living at the time of the execution of the will, in our opinion, would be against its obvious meaning, when the qualifying words immediately following are given their ordinary interpretations. When the statute used the expression, "or the legal representatives of such child *born and living* at the time of the execution of such will," it unquestionably had reference to the issue born of such children. The purpose of the statute was to protect children and their descendants not mentioned in the will on the theory that such children were overlooked and their names accidentally omitted, and such statute could have no application, nor was it intended to have any application, to collateral heirs.

The judgment of the trial court denying the prayer of the petition of appellant is therefore affirmed.

EARLY STRATTON COMPANY *v.* COOPER.

Opinion delivered February 24, 1930.

Berry, Berry & Berry, for appellants.

S. V. Neely and *R. V. Wheeler,* for appellees.

HUMPHREYS, J. Executions were issued out of the circuit court of Crittenden County upon judgments obtained in nine separate suits in favor of different plaintiffs against different defendants, and delivered to C. W. Cooper, sheriff of said county, on the date of issuance to be levied upon property of the defendant or defendants in each suit to collect the respective judgments.

Notices were served upon the sheriff that motions would be filed for summary judgments against him in each case of failure to make due return of the executions, and, pursuant to the notices, motions for summary judgments were filed in each case in which it was alleged that he failed to return the executions, and that the indorsements made by the sheriff upon the back of each execution was insufficient to constitute a return within the meaning of the law. The purported returns (all identical) were as follows:

"On this.....day of.....(giving date), 1928, I have endeavored to serve the within execution, and, finding no personal property upon which to levy, and none being pointed out to me, and no indemnifying bond being furnished, I make this *non est* return."

Special defenses, unnecessary to set out, were interposed in two of the cases by the sheriff. The important defenses (common to all the cases) interposed were that the defendant or defendants in each case owned no personal or real property in said county subject to execution; and a denial that he failed to make a return in sixty days, and that the indorsements upon the executions were not "due returns," such as were required by law.

Demurrers were filed by the plaintiff to the answers, and, by agreement, the series of actions were consolidated and proceeded to a hearing under the style of *Early Stratton Company et al., plaintiffs,* v. *C. L. Goad et al., defendants,* and C. W. Cooper, sheriff, respondent, upon the pleadings and upon the testimony theretofore

introduced relative to the special defenses interposed in two of the cases.

The court overruled the demurrers to the answers. The plaintiffs then elected to stand upon their demurrers, whereupon the court dismissed each motion for a summary judgment, from which is this appeal.

The demurrers to the answers admitted that the several defendants had no personal or real property in the county upon which the several executions could have been levied, and that the purported returns, evidenced by the writing on the back of the several executions, were returned within sixty days; but the contention for a reversal dismissing their respective motions for summary judgments is that the purported returns are insufficient to constitute returns within the meaning of § 6256, Crawford & Moses' Digest, which provides as a penalty "for failing to return an execution the amount of the judgment on which it was issued, including all the costs and ten per centum thereon." It is argued that the purported return refers to personal property only, and is an admission that the sheriff did not make any effort to find or levy the several executions upon real estate belonging to the several defendants. We cannot agree with appellants in their interpretations of the return. The sheriff closed his return with the following statement: "I make this *non est* return." He meant something by using this sentence. Ordinarily, executions like these do not operate on the person of a defendant, and by the use of "*non est*" he did not mean to say that the defendant or defendants were not to be found in the county. His purpose was clearly to make a *nulla bona* return. The demurrers to the answers of the sheriff not only admitted that he made returns within sixty days, but that none of the defendants owned any personal or real property in the county upon which executions might be levied, and, further, that he called upon the attorneys for plaintiffs for advice as to property owned by the defendants, upon which to levy the executions, but plaintiffs failed to point out any. In

the light of these admissions, we construe the several returns on the executions as meaning that the sheriff was unable to find either personal or real property in the county, belonging to the defendants, upon which to levy. The statute invoked as a basis for the motions for summary judgments is highly penal, and should be construed liberally in its application to the facts in a given case.

After the trial court overruled the several demurrers, the plaintiffs elected to stand on their demurrers, so it was proper for the court to dismiss their motions for summary judgments.

No error appearing, the judgments are affirmed.

WILSON *v.* WILKINS.

Opinion delivered March 3, 1930.

U. C. May and *A. F. Smith,* for appellant.

Evans & Evans, for appellee.

HART, C. J., (after stating the facts). According to Blackstone, the absolute rights of each individual are defined to be the right of personal security, the right of per-

sonal liberty, and the right of private property. 3 Cooley, Bl. Com. *119.

According to the allegations of the complaint and the testimony of appellee, there was a willful intimidation of his right of personal security and right of private property by causing him to leave his home by threats and intimidation. This was an actionable wrong. Counsel for appellants concede this to be true, but they seek a reversal of the judgment on the ground that the court erred in allowing plaintiff to recover for mental suffering which was unaccompanied by any physical injury. They rely upon the rule announced in *St. L. I. M. & S. Rd. Co.* v. *Taylor,* 84 Ark. 42, 104 S. W. 551, 13 L. R. A. (N. S.) 159, and other cases, where we have held, that, in actions for negligence, there can be no mental suffering where there has been no physical injury.

The rule is well settled in this State, but it has no application to willful and wanton wrongs, and those committed with the intention of causing mental distress and injured feelings. Mental suffering forms the proper element of damages in actions for willful and wanton wrongs and those committed with the intention of causing mental distress.

According to the evidence for appellee, the very object of the words spoken in the present case was to cause him mental anxiety and thereby compel him to leave his home and farm, and this was precisely what he said he did do. In the case at bar, the mental suffering was the result of the wrongful acts of appellants against appellee; and, even though there was no physical injury, the courts generally hold that such mental suffering may be taken into consideration in assessing the damages for the wrong. In cases like this the mental suffering was the natural and proximate consequence of the willful wrong which was the basis of the action. *Kline* v. *Kline,* 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397; *Spade* v. *Lynn & Boston Rd. Co.,* 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512; *Davis* v. *Tacoma Railway & Power Co.,* 35 Wash.

203, 77 Pac. 209, 66 L. R. A. 802; *Lonergan* v. *Small,* 81 Kan. 48, 105 Pac. 27, 25 L. R. A. (N. S.) 976; 17 C. J. 831; and 8 R. C. L. 531.

This rule has been expressly recognized and applied by this court in *Lyons* v. *Smith,* 176 Ark. 728, 3 S. W. (2d) 982. In that case, plaintiff by threats and intimidation was prevented from growing and cultivating his land, and the court held that, the evidence having showed that a willful and wanton wrong had been committed against her, the trial court properly submitted the question of mental suffering, although it was unaccompanied by physical injury.

No other assignment of error is argued, and the judgment will be affirmed.

LISTER *v.* FIRST NATIONAL BANK OF VAN BUREN.

Opinion delivered March 3, 1930.

[redacted]

[redacted]

L. E. Lister, for appellant.

E. L. Matlock, for appellee.

HART, C. J., (after stating the facts). There was no error committed by the trial court in finding for the plaintiff. The burden in the case was upon Lister to show the negligence of the plaintiff, as the collecting bank and the damages resulting to him therefrom. *Bank of Keo* v. *Bank of Cabot,* 173 Ark. 1008, 294 S. W. 49.

The undisputed evidence shows that the check was handled by the plaintiff as a collecting bank through its correspondents in the usual and customary way that checks handled for collection were handled by it and other banks. The plaintiff as the collecting bank, without any delay or negligence whatever, sent the checks to its correspondent bank which usually handles its Oklahoma business for collection. Then the check was handled without any negligence on the part of the correspondent bank, and was paid by the payee bank by a draft on another bank. This draft was presented in due course for collection; but, in the meantime, the First State Bank of

Hartshorne, which was the payee bank, had failed; and the check given by it in payment of the draft in question was dishonored on that account.

Prior to the passage of the act of 1921, amending the act creating the establishment of a State Banking Department, it was held that a bank receiving a draft for collection merely is the agent of the drawer or forwarding bank, and could only receive money in payment unless otherwise directed. *Darragh Company* v. *Goodman*, 124 Ark. 532, 187 S. W. 673.

Since the passage of the act of 1921 (General Acts of 1921, p. 514, § 14), the collecting bank is only liable for the default or negligence of its correspondent bank. *Farmers' & Merchants' Bank* v. *Ray*, 170 Ark. 293, 280 S. W. 984; and *Hicks Company, Ltd.*, v. *Federal Reserve Bank of St. Louis*, 174 Ark. 587, 296 S. W. 46.

In the latter case, it was expressly held that a correspondent bank, in forwarding checks sent to it for collection by the depository bank, was not negligent in accepting from the bank on which the checks were drawn drafts instead of money, where in so doing it followed the banking custom and was without notice of the drawee bank's insolvency.

In the case at bar, the undisputed evidence shows that there was no notice on the part of the plaintiff or any of its correspondents that the bank on which the check was drawn was insolvent. The proof also shows that the check was handled in the usual and customary way, and, besides that, the deposit slip given for the check when it was deposited for collection showed on its face that the collecting bank would charge it back to the depositor if it was dishonored.

It follows that the judgment of the circuit court was correct, and it will be affirmed.

UNION SAW MILL COMPANY *v.* AGERTON.

Opinion delivered March 3, 1930.

[redacted]

[redacted]

[redacted]

Gaughan, Sifford, Godwin & Gaughan, for appellant.

J. V. Spencer and *Marsh, McKay & Marlin,* for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted that the judgment should be reversed because the evidence is not legally sufficient to support the verdict. In making this contention, counsel for the defendant insist that the timber was cut and removed within a reasonable time by the defendant. The record shows that the defendant was the original owner of the land and conveyed it by warranty deed to Henry F. Murray on the 20th day of December, 1906. In the deed, the defendant reserved to itself the timber on the land, with the right of ingress and egress to its employees and teams to cut and remove the timber. The deed shows that the parties intended that the timber should be severed from the land, and no time was fixed therefor. In such cases the inference is that the timber shall be removed within a reasonable time. *Earl* v. *Harris,* 99 Ark. 112, 137 S. W. 806; *Burbridge* v. *Arkansas Lumber Co.,* 118 Ark. 94, 204 S. W. 304; *Young* v. *Cowan,* 134 Ark. 539, 178 S. W. 304;

Ozan-Graysonia Lumber Co. v. *Swearingen,* 168 Ark. 595, 271 S. W. 6; and *Orr* v. *Southern Lumber Co.,* 170 Ark. 361, 279 S. W. 1013.

Subsequently, the plaintiff became the owner of the land and sued the defendant in trespass for cutting the timber from the land in the first part of 1928. The defendant admitted cutting the timber and hauling it from the land, but justified its action on the ground that the timber had been excepted from the grant when it conveyed the land; and, under the authorities above cited, it had a reasonable time within which to remove the timber. It also claimed that the time was not unreasonable when its plan of conducting its business was considered. What is a reasonable time depends upon circumstances, such as the quantity of timber, the character of it, facilities for marketing it, and all other facts and circumstances showing the conditions surrounding the parties at the time of the execution of the contract. In cases of dispute, this becomes a question of fact for the determination of the court or of the jury trying the case. This has become the settled rule of this court and has been applied in numerous cases according to the facts of each particular case. No two state of facts are precisely the same; and in cases where the jury is the trier of the facts, its verdict must be final on appeal if there is any substantial evidence to support it.

Tested by this rule, it cannot be said that there is no substantial evidence to base a verdict in favor of the plaintiff. The jury might have legally inferred from the evidence adduced by the plaintiff that it was convenient and practical for the defendant to have cut and removed the timber from the land when it established a spur track near it in the latter part of 1906, and kept it there for the ensuing two years. The record shows that the defendant kept a crew of men to cut and remove the timber from its lands, and that it took them but a few days to cut the timber in question. It employed private carriers to haul the timber from the land to its spur track, and the jury

might have found that it could have done this equally as well when it established its first spur track near the land, as it could have done to have waited until the first of the year 1928 to do so. As we have already seen, the deed itself shows that severance of the timber from the soil was contemplated, and it became the duty of the defendant to cut and remove the timber within a reasonable time. Under all the facts and circumstances surrounding the transaction, we think the jury might legally infer that the defendant failed to cut and remove the timber within a reasonable time and had therefore forfeited its right thereto. The evidence for the plaintiff also justified the amount of damages found by the jury.

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

McGehee *v.* Cunningham.

Opinion delivered March 3, 1930.

Hardin & Barton, for appellant.

Cravens & Cravens, for appellee.

SMITH, J. Appellee, plaintiff below, alleged as his cause of action against appellants, the breach of a written contract of employment, whereby he had been damaged in the sum of $1,200. The contract upon which suit was brought was preceded by a correspondence, which involved the exchange of a number of letters, and, while these letters cannot be considered for the purpose of altering or varying the terms of the written contract, they may be considered as showing the relative situations of the parties, and thus enable us to determine the meaning of the language employed by them in their written contract. *Inter-Southern Life Ins. Co.* v. *Shutt,* 175 Ark. 1161, 1 S. W. (2d) 801.

Appellee was a cotton buyer and classer, and was employed by appellants in that capacity to buy cotton for their account. One of the letters from appellants proposed a commission of fifty cents per bale, and expressed the opinion that a live man might buy as many as fifteen or twenty thousand bales of cotton in Oklahoma alone, and appellee's operations were not to be limited to that State. Appellee replied that he was a married man with two children, and that his family was dependent upon him for support, and he would require an all-year contract

at a guaranteed salary, payable monthly or semi-monthly, as well as the commission basis proposed by appellants.

The parties, having apparently come to terms through their correspondence, met to consummate the contract of employment, and after some discussion it was agreed that appellant should reduce the contract to writing, and appellee returned to his home in Oklahoma, and a few days later received the copies for his signature. The contract was signed, but it was agreed, in the correspondence relating thereto subsequent to its execution, that these letters, which slightly amended the contract, should be construed as a part of it.

The relevant and material portions of the written contract are as follows: It was agreed that appellee, who was designated as the party of the first part, should buy cotton for appellants, designated as the party of the second part, in the Oklahoma City market and vicinity, but should buy "only on limits, and under direction of the parties of the second part," and that, on all cotton bought and taken up by the party of the first part, he was to receive fifty cents per bale commission. There are certain provisions about the payment of telephone calls and telegrams, and other expenses, which need not be recited, and it was then provided as follows:

"Parties of the second part agree to advance to the party of the first part two hundred dollars ($200) per month during term of this contract—one hundred dollars ($100) of which is to be payable on the first of each month in advance, and one hundred dollars ($100) on the 15th, and to pay him balance commissions, if any, that have accrued at close of season. In addition to this advance of two hundred dollars per month, the parties of the second part agree to make further advances, if necessary, sufficient to cover telephone, telegraph and traveling expenses, whenever the party of the first part is going outside of the State of Oklahoma for the purpose of buying and/or taking up cotton; it being agreed and understood that such advances are only a loan to the party of

the first part, and are to be paid back to the parties of the second part at the end of the season or before, if possible. It is mutually agreed and understood that the parties of the second part guarantee that the party of the first part will buy forty-eight hundred (4,800) bales during the term of this contract.

"It is further agreed that in the event that either party is dissatisfied with this contract that they may terminate it by giving sixty days notice.

"Witness our hands this 14th day of July, 1928."

In the letter amending or supplementing this contract these provisions appear:

"It is mutually agreed between us, that on any cotton that we buy and you take up, you are to receive the full commission of fifty cents (50c) per bale, but on any cotton that you buy and call upon us to take up, you are to receive twenty-five cents (25c) per bale. The other 25 cents is to go to us for the purpose of paying the expenses and time of the man who we might be required to send. In this event, bales bought will be considered half bales in the guarantee of forty-eight hundred.

"Fourth Paragraph. When you are called upon to go outside of Oklahoma to take up cotton or buy cotton, the expenses of the trip will be advanced to you by us, and are to be paid back to us out of excess commissions that you receive above the forty-eight hundred bales, if you do not receive any commissions above the forty-eight hundred bales then this expense is to be borne by us."

On October 30th, appellants wrote appellee a letter, in which, after reciting the unsatisfactory condition of the cotton business, closed with the following statement: "Unless something turns up between now and the first of January, we are going to close up shop until another season. This will be sixty days' notice to you of cancellation of the contract. We hope that by the end of this time that, if you have not already secured employment, that matters will shape themselves so that we can go on."

In his reply to this letter, appellee expressed his surprise and his unwillingness to be dismissed, and requested a letter of recommendation, and received a reply thereto in which he was authorized to refer prospective employers to appellants, and was assured that, "We will say all that we can in your behalf, and nothing that will hurt you."

After writing the letter of October 30th, appellants remitted to appellee three checks, each for a hundred dollars, and, on December 8th, wrote a letter enclosing a check for a hundred dollars, in which it was stated that, "We are enclosing our check for $100, which pays your salary up to January first, which is the expiration of the sixty days' notice that we gave you. This completes our agreement with you." Upon receiving this letter appellee called appellants over the long distance telephone, but they declined to have any conversation with him. Appellee cashed the check, and at the expiration of the year brought this suit, and at the trial, from which this appeal comes, made proof of his inability to secure any other employment to minimize his damages. He had been paid $1,200. There was a verdict and judgment in his favor for the sum of $1,200, from which is this appeal.

The controlling instruction is one numbered 3, which was given over appellants' objection, and which reads as follows: "You are instructed that the contract in evidence, and supplement thereto, means that the plaintiff, under the terms was entitled to a minimum compensation thereunder of fifty cents a bale on forty-eight hundred bales of cotton; and the fact that the contract was terminated by the defendants did not deprive him of that right, and he would still be entitled to a minimum recovery of fifty cents a bale on forty-eight hundred bales of cotton, less the twelve hundred dollars which has been paid, unless precluded from doing so under other instructions."

We think this instruction correctly construed the contract. The correspondence between the parties makes

plain the fact that each was contracting with reference to the "cotton season," and the testimony shows that such contracts usually cover a year. It was contemplated that appellee might buy as much as fifteen or twenty thousand bales of cotton, and it was guaranteed that he should be given the opportunity during the year to buy as much as forty-eight hundred bales, and had he done so his commission would have been $2,400, which exactly pays the salary of $200 per month for a year. It is true the contract also provided that: "It is further agreed that in the event that either party is dissatisfied with this contract they may terminate it by giving sixty days' notice." This provision and the guaranty above referred to are apparently conflicting, and these provisions must be construed together to arrive at the intention of the parties when the contract was executed. It is also to be remembered that the contract was prepared by appellants, and it is a familiar rule of construction that for this reason it must be construed most strongly in appellee's favor, and, when so construed, we think the contract gave appellants the right to terminate the contract upon sixty days' notice, but that action would not discharge the guaranty. It remained, and furnished the basis upon which the minimum salary should be computed. Now, while the sixty days' notice of termination extinguished appellee's right to buy cotton in excess of the forty-eight hundred bales, as he might otherwise have done, he had the right under his guaranty to buy that amount of cotton, because it was this guaranty which furnished the consideration inducing appellee to enter into the contract. If appellants had the right at any time, for any reason satisfactory to themselves, to discharge appellee, the guaranty becomes meaningless and worthless, but, as appellants wrote the contract, the guaranty contained in it must be most strongly construed against them, and we, therefore, hold that, in the absence of a breach of the contract by appellee which justified its cancellation by appellants, the right to cancel was

subject to the guaranty, and its cancellation operated only to discharge appellants from any liability to pay commissions on any excess over forty-eight hundred bales—that number not having been bought when the notice of cancellation was given.

It is also insisted that the notice of cancellation, and the letter of December 8th enclosing the last check in payment of the sixty days' salary, constituted an accord and satisfaction, and that a verdict should have been directed in appellants' favor for this reason.

Upon this question the court gave at appellants' request an instruction numbered 4 which reads as follows: "You are further instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that the defendants on the 8th day of December, 1928, paid the plaintiff by check the sum of $100, and that they did so with the expressed intention that this was settlement in full with the plaintiff, and so advised the plaintiff at the time, and that the plaintiff accepted said check with knowledge that it was thus intended, then you are told that the plaintiff could not recover further in this case."

It is insisted that the jury disregarded this instruction and, further, that a verdict should have been directed in appellants' favor for the reason that the undisputed facts show that there was an accord and satisfaction.

We do not agree with counsel in this contention. Appellee denied that he had received the check in satisfaction of his demands under the contract. On the contrary, he contends that there was no controversy about the sum paid him. This was a liquidated demand payable in any event, and there was no controversy about the indebtedness which the last check paid. This check paid the salary up to January 1, 1928, and there was no controversy about it. The controversy was over the salary accruing thereafter, and nothing was paid on that account. The payment was upon an undisputed item, which was payable in any and at all events, and we think

the court was correct in refusing to hold, as a matter of law, that there had been an accord and satisfaction, and instruction numbered 4, set out above, was as favorable as appellants were entitled to have given on this subject. *Johnson* v. *Aylor,* 129 Ark. 82, 195 S. W. 4; *Feldman* v. *Fox,* 112 Ark. 223, 164 S. W. 766.

Appellants offered testimony tending to show that appellee had purchased cotton for their account which "fell short of the grades and staples for which they were bought by the plaintiff," and the action of the court in refusing to admit this testimony is assigned as error.

There was no error in refusing to admit this testimony, as the answer sets up no such defense, and no offer was made to so amend the answer as to present that question. The notice discharging appellee assigned no such reason, and the letter of recommendation hereinabove referred to contained no intimation that such a contention would be made. The injection of this question into the case after the plaintiff had put on his testimony raised an issue which appellee had no reason to suppose he would be called upon to meet. The pleadings presented no such issue, and there was no offer to so amend them as to raise it, and the testimony was properly excluded on that account. Under the circumstances stated we think there was no abuse of discretion calling for the reversal of the judgment, had the court refused to permit the answer to be amended to raise this question had a request been made for permission to amend. *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. (2d) 63.

Certain other questions are raised which we find it unnecessary to discuss, and, as no error appears, the judgment must be affirmed, and it is so ordered.

CONTINENTAL CASUALTY COMPANY *v.* BAKER.

Opinion delivered March 3, 1930.

Powell, Smead & Knox, for appellant.

Harry C. Steinberg and *G. E. Snuggs,* for appellee.

SMITH, J. On January 21, 1927, the appellant insurance company, hereinafter referred to as the company, issued to appellee a sickness and accident insurance policy covering the year expiring January 20, 1928. Under the terms of the policy appellee was indemnified against sickness or accident in the sum of $80 per month for such time as he should be unable to follow his usual avocation on account of sickness or accident, with double indemnity at the rate of $160 per month during such time as he should "be resident in a duly licensed hospital, said double indemnity not to exceed, however, a period of two months."

Attached to the policy, and made a part thereof, was an agreement, referred to as a "rider" or a "paymaster's order," which was directed, "To the paymaster of my employer," which recited that the insured was employed as a freight conductor by the Missouri Pacific Railroad Company, and had made application for the insurance, and that, "This order is given to provide for the payment of the premium thereon, which you are authorized and requested to deduct from my wages in ten installments as hereinafter designated, pay to the company for me, and charge against my pay account for services rendered or to be rendered, to my employer on whom this order is drawn." This paymaster's order, which was executed in duplicate, further directed that, "if for any reason whatever you fail to make deduction of any installment from the wages of the period hereinafter designated for that purpose, you are further authorized and requested at the option of the company to deduct and pay the defaulted installment from any of my subsequent wages. * * * The amount of my said premium is $77.60, and it is to be deducted from

my wages for the months here listed in ten installments as follows:

"(1)	March, 1927	$7.75
"(2)	April, 1927	7.75
"(3)	May, 1927	7.75
"(4)	June, 1927	7.75
"(5)	July, 1927	7.75
"(6)	August, 1927	7.75
"(7)	September, 1927	7.75
"(8)	October, 1927	7.75
"(9)	November, 1927	7.75
"(10)	December, 1927	7.80"

It appears, therefore, that no part of the premium, which was payable in ten equal installments, was due until March, 1927, when the first installment was payable. But before that time, to-wit: on February 22, 1927, the insured became ill and totally disabled because of an abscess on his lungs, and was thereafter confined in the hospitals of the railroad company, which were duly licensed hospitals, until the latter part of June, 1927.

Proof of this illness was made, and in satisfaction of its admitted liability therefor the company made payments as follows:

On March 28, 1927	$ 80.00
On April 22, 1927	100.00
On May 21, 1927	100.00
On July 18, 1927	232.00

On the reverse of the check for $232 was written the following receipt: "Received of the Continental Casualty Company $512 in full compromise, payment, satisfaction, discharge and release of any and all claims that I myself, my heirs, executors, administrators, assigns or beneficiaries now have or may hereafter have against said company, under policy numbered 6,321,637 for or on account of injuries or illness sustained by me on or about 2-18-27, and any loss that may hereafter result from said injuries or illness." This receipt was signed by appellee, the insured.

Appellee was discharged from the hospital on June 26, 1927, and on July 1 resumed work, but in the capacity of brakeman on a passenger train, at $5 per day, and this employment continued up to and including the 11th day of July, when he sustained a relapse and again became totally disabled, and on July 14 was readmitted to one of the railroad company's hospitals where he remained for about four or five months, and his disability continued until January 5, 1928, and this suit was brought to recover for this period of time.

At the conclusion of all the testimony each side asked a directed verdict, and neither side asked any other instructions, and a verdict was directed for the plaintiff for the amount sued for. Therefore, under our practice the case will be treated as having been heard by the court sitting as a jury, and the judgment rendered pursuant to the instruction so given will be affirmed if the testimony, viewed in its most favorable light, is sufficient to support the judgment.

When appellee sent in the last proof of his first illness in the latter part of June, 1927, he wrote a letter to the company directing that the amount of all unpaid installments or premiums be deducted from the amount of the indemnity then due him, but when the check therefor came dated July 18, 1927, this had not been done, and the check was for the full amount of indemnity which had not been paid, with no deductions for the past due and unpaid installments of premium for the months of March, April, May and June. The July installment was then due, but was not delinquent.

It is the insistence of the company that the receipt signed by the insured, set out above, was a full acquittance of all liability that had then accrued under the policy, and that there was no subsequent liability therefor, for the reason that default had been made in the payment of the installments of premium, the policy providing that it should be void if these installments were not paid.

We think the court below was correct in holding that the receipt which appellee signed was not intended to and did not cancel the policy, but was a mere acquittance of all demands for indemnity under the policy for the first illness and disability, and that the policy continued in force as a subsisting contract of insurance unless it had forfeited on account of the nonpayment of the premium. Whether this had occurred is the real question in the case.

It will be remembered that, before the last remittance was made by the company in the discharge of the liability for the first illness, direction had been given to the company to deduct the installments of premiums then due and unpaid. The company would have had the right to do this in the absence of direction from the insured, but it did not do so, and it could not treat the policy as having forfeited for the nonpayment of installments of premium while it had it in its own hands a much larger amount of money than was required to pay the installments. It is so held in the following cases: *Security Life Ins. Co.* v. *Matthews,* 178 Ark. 775, 12 S. W. (2d) 865; *Pfeiffer* v. *Missouri State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600; *Knights of Pythias* v. *Sanders,* 174 Ark. 279, 295 S. W. 25; *Missouri State Life Ins. Co.* v. *Miller,* 163 Ark. 480, 260 S. W. 705; *Mutual Life Ins. Co.* v. *Henley,* 125 Ark. 372, 188 S. W. 829; *American Nat. Ins. Co.* v. *Mooney,* 111 Ark. 514, 164 S. W. 276; *Union Central Life Ins. Co.* v. *Caldwell,* 68 Ark. 505, 58 S. W. 355.

It is also to be remembered that the company had in its possession when the last remittance was made an order on the paymaster of the railroad company for so much of appellee's salary as was necessary to pay all installments of premium then due, and, as he had worked eleven days at $5 per day, there was due him from the railroad company more money than was required to pay the installments of premium then due. The company, therefore, had no right to cancel the policy while it held

this order, which was in effect an assignment *pro tanto* of his salary.

Now, it is true, as the company insists, that on the 28th or 29th of July the railroad company remitted to appellee the whole amount of his wages earned in the month of July, all of which he kept, but it is not to be assumed from this fact that the paymaster's order would not have been honored had it been presented. Moreover, it is also true that, before this payment was made by the railroad company of the July wages, appellee had been disabled by sickness from and including the 12th day of July, and had been resident in a licensed hospital from and including the 14th day of July, so that there had accrued to him, before the railroad company paid him his wages, out of which the insurance company had the right and was under the duty to collect the premium, an amount of insurance indemnity exceeding the installments of premium then due.

We conclude therefore that the court below was warranted in finding that appellee was never in default in the payment of his installments of premium, and that the policy did not lapse, and the judgment must therefore be affirmed, and it is so ordered.

FORT SMITH-VAN BUREN BRIDGE DISTRICT *v.* JOHNSON.

Opinion delivered March 3, 1930.

J. B. McDonough, for appellant.

Hill, Fitzhugh & Brizzolara and *Warner & Warner,* for appellees.

HUMPHREYS, J. Appellant, a bridge improvement district, brought suit against the collector of its revenues and the American Surety Company, which made his bond, in the circuit court of Sebastian County, Fort Smith District, to recover an alleged shortage of $1,250.67 in the collector's account with it. The complaint alleged that, before the collector entered upon his duties and obligations to collect the assessment of benefits in the district from the property owners therein, he was required to give a bond in the sum of $10,000, which was made by his co-appellee, American Surety Company of New York, the material part of which is as follows:

"We, William Dewey Johnson, as principal and the American Surety Company of New York, as surety, bind

ourselves to pay Fort Smith & Van Buren Bridge District, Forth Smith, Arkansas, as obligee, such pecuniary loss, not exceeding ten thousand and no/100 dollars, as the latter shall have sustained of money or other personal property by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction, or willful misapplication on the part of the principal, directly or through connivance with others, while holding the position of collector in the service of the obligee."

The complaint alleged, as one of the grounds for a recovery against its collector that he collected $1,250.67 of its revenues which he failed and refused to turn over to it on December 29, 1927, at the time same became due.

The complaint also alleged as a ground for recovery against both its collector and his surety on the bond, the appellees herein, that its collector willfully misapplied said money.

Appellees filed separate answers to the complaint denying the alleged shortage in the accounts, the willful misapplication of the revenues collected, or the violation of any of the terms or conditions of the surety bond sued upon. In addition to these denials, the American Surety Company said that, if the collector, its co-appellee, failed to account to appellant for the sum of $1,250.67, or any other sum or amount whatsoever, such failure was due solely to the fact that said sum of money was stolen from the office of appellant, and without the knowledge or consent of Johnson, the collector, and that it was not obligated under the terms of the bond for moneys or property stolen, embezzled, wrongfully abstracted or willfully misapplied by third persons, without the knowledge and consent of the said Johnson, and without his connivance therein.

The cause was submitted to the jury upon the testimony adduced by the respective parties on conflicting evidence as to whether there was a shortage; if so, whether the fund was willfully misapplied by Johnson, the collector, or whether stolen by a third party under the theory

that the bond sued upon was strictly a fidelity bond, and not a statutory bond, and that, in order for appellant to recover from either or both of the appellees for a shortage in the accounts of its collector, it must appear from the weight of the testimony that the shortage resulted from fraudulent or dishonest acts of appellant's collector. The jurymen were told by the trial court that the bond sued upon only covered loss of funds through fraudulent or dishonest acts of appellee, Johnson, and if they believed, from the evidence in the case, that some person or persons, other than Johnson, stole the funds of appellant, they should return a verdict for appellees.

The trial of the cause resulted in a verdict and judgment for appellees, from which is this appeal.

As far as the American Surety Company is concerned, the only important question presented for determination on this appeal, is whether the bond sued upon indemnified appellant against a loss or shortage in the account of its collector in any event, or whether the indemnity was restricted to a shortage or loss in his accounts due to a willful misapplication of the funds by him. Appellant contends that the trial court erred in restricting the indemnity to the terms of the bond because the statute creating the district provided for a bond to be given by the collector, "conditioned that they will faithfully discharge the duties of their office, and account for and pay over all moneys that come into their hands, according to law, and the order of the commission"; and that this condition shall be read into the bond, whether written therein or not. The doctrine relative to indemnity bonds in this State, as announced in the cases of *Union Indemnity Co.* v. *Covington,* 178 Ark. 533, 12 S. W. (2d) 884, and the *Fidelity & Deposit Company of Maryland* v. *Crane Company,* 178 Ark. 676, 12 S. W. (2d) 872, 874, is that where the statute requires the giving of such bonds the conditions contained in the statute will not be read into the bond, where "the bond does not contain any covenant showing that it was intended to be executed

in obedience to the provisions of the statute, but, on the other hand, expressly negatives that idea.'' In the instant case the obligations in the bond expressly negative the idea that it was intended as a statutory bond. It would do violence to the language of the bond itself to construe it as a statutory bond, for the provisions of the bond negative any such construction.

Appellant also contends for a reversal of the judgment because the burden of proof was cast upon it by the trial court, in the instructions to the jury, to show that the shortage, if any, was a willful misapplication of the fund. In answering the American Surety Company not only denied the allegations of the complaint that the shortage was due to a willful misapplication of the funds by the collector, but stated that if there was a shortage it was due to the fact that the amount was stolen by a third party. Appellant argues that the statement to the effect that it was stolen by a third party constituted an affirmative defense and shifted the burden to appellee on that issue, but we think not. It amounted to a denial of a misapplication in a more definite way than it had done in its general denial of the misapplication of the funds by Johnson. We think it was a negative defense, and did not shift the burden of proof to the American Surety Company. The burden still rested upon appellant to show a willful misapplication of the funds under the terms of the bond.

Appellant also contends for a reversal of the judgment on the ground that the court erroneously permitted appellant to cross-examine Houston J. Payne touching the proportion of cash in checks received by him in the collection of the revenues of the Sebastian Bridge District. Houston J. Payne officed in the same room with William Dewey Johnson, and both were collectors of the revenues of separate bridge districts covering the same territory. Houston J. Payne was called by appellant as a witness to show the conditions and circumstances surrounding the alleged theft, and the cross-questions were

directed to an ascertainment, if possible, of the amount stolen in cash from Johnson in the absence of both during the lunch hour. We think this testimony a circumstance material to a determination of whether there was a shortage, and whether and how much of it resulted from the theft of a third party.

We think, however, that the allegation in the complaint is broad enough to cover any shortage that may exist in the accounts of the collector from him personally under his statutory or common-law liability. He cannot escape from his statutory or common-law liability to account for all the funds that came into his hands, because he furnished a bond to the district restricting his liability in the bond to fraudulent or dishonest acts on his part. He was personally responsible to the district for all the funds collected by him, irrespective of the terms of his bond. The trial court erred, therefore, in restricting his liability to the terms of his bond in submitting the case to the jury. As far as he is concerned, the cause should have been submitted to the jury upon the theory that if there was a shortage he was responsible in dollars and cents for the amount thereof.

The cause will therefore be affirmed as to the American Surety Company and reversed as to William Dewey Johnson, and as to him remanded for a new trial.

Mr. Justice KIRBY dissents.

J. W. MYERS COMMISSION COMPANY *v.* FRUIT PRODUCTION COMPANY.

Opinion delivered March 3, 1930.

D. H. Howell, for appellant.

Starbird & Starbird, for appellee.

HUMPHREYS, J. The only question involved on this appeal is whether appellant was entitled to recover 15 per cent. as commissions on the gross proceeds of a car of apples, which he retailed in the market for appellee, instead of ten cents per box, the amount he did recover; and a determination of this question depends upon the proper construction of a letter written to appellee by appellant before the car of apples was shipped, received and sold. It was admitted that the car of apples was consigned to, and sold by, appellant, under authority of the following letter:

"Van Buren, Arkansas,
"September 23, 1927.

"Mr. J. M. Hughes,

"Cashmere, Washington.

"Dear Sir: We have your letter of September 20, and certainly glad to hear from you, as our trade here are going to be interested in western apples.

"Upon receipt of this, I would be glad if you would drop me a wire stating what size you can ship, and the price, and I am sure that we can turn you some business. I don't know just what to say in regard to the fourth-class apples, as I don't know just what they will look like. If you can get a line on bulk apples, especially Delicious, get in touch with us, and it might be well for you to express us a sample of these fourth-class apples. We certainly expect to turn you all our western apple business, and will also expect you to take care of us on our wants in this territory. I know that your apples will sell well if you keep your quality, and pack up to what you have been shipping down this way in past seasons. I note in the first of your letter that you are getting ready to ship some of your fine fruit down this way. In this, I know that you can't go wrong because, if we can't get the price

that we want for them on arrival here, I can arrange for them to go on storage and draw money on them.

"For your information, all the cheap apples will be gone from here in a very few days. I have close to five thousand bushels of ordinary Ben Davis on storage that I expect to sell around $2.50 per bushel later in the season.

"Let me hear from you at once, as I think we have a chance to make some money on your apples this year, and remember that I will sell them for you in car lots for $25 brokerage, or break the cars at 10c per box, or, if you prefer it, I will work joint account with you. Very truly yours,

"J. W. Myers Commission Co., by J. W. Myers."

Mr. J. M. Hughes, to whom the letter was addressed, was, and is, the representative of appellee.

The car of apples had been shipped into several markets, same having been diverted from one point to another on account of congestion. After they arrived in Dallas, Texas, where there was no sale for them, on advice of appellant they were diverted and shipped to him to be sold on the Little Rock market, but, finding no sale for them in Little Rock, he shipped them to Van Buren, Arkansas, without first advising appellee; broke the car and sold them in job lots. Subsequently he rendered an account of the car showing gross sales to the amount of $956.70, from which he deducted freight and cold storage charges and expenses for repacking, and 15 per cent. commission in the total sum of $883, leaving a balance of $73.46 due appellee for this car of apples, which it refused to accept, contending that appellant was entitled to ten cents a box as commissions for selling the apples, instead of 15 per cent.

This suit followed resulting in a verdict and judgment in favor of appellee for $167.36, instead of the amount appellant tendered it.

In submitting the cause to the jury the trial court construed the letter contract, set out above, as meaning that appellant would retail or sell in job lots all apples

consigned by appellee to him for sale irrespective of class or grade, for a commission of ten cents a box. Appellant contends that this was an erroneous construction of the contract, because the commission named in the letter was only intended to apply to high-grade or fancy apples and not to apples in class C or fourth-grade apples. The government inspection showed that they were C grade apples.

The letter is general and refers to all classes of apples mentioned therein. Nothing was said in the letter about charging a larger commission for selling one grade or class of apples than another. In fact, the letter says nothing about the commission until the last paragraph. The attention of appellee was then called in that paragraph to the fact and appellee was asked to remember that appellant would sell the apples in carload lots for $25 brokerage, or break the cars for ten cents per box. This commission charge clearly referred to any kind of apples which appellee might ship to appellant. The trial court properly construed the contract.

The judgment is affirmed.

BROWN *v.* CARLTON.

Opinion delivered March 3, 1930.

Golden & Golden, for appellant.

J. R. Parker, for appellee.

HUMPHREYS, J. The purpose of this suit, disclosed by the original complaint filed by the Exchange Bank & Trust Company, and the amended complaint filed by Carroll J. Brown, duly appointed receiver by the United States District Court to take charge of the estate of Herman Carlton, a bankrupt, against Herman Carlton, Gertrude T. Carlton and Irene Carlton, was to set aside as fraudulent a deed of date October 20, 1924, from Herman Carlton to Gertrude T. Carlton conveying certain lands in the old town of Lake Village, in the Julia R. Streett's Addition to Lake Village, in Lakeside Addition to the town of Lake Village; and a deed of date December 16, 1926, from Herman Carlton to his sister, Irene Carlton, conveying an undivided one-half interest of lot 5 of Yergers-McMehon subdivision of the NW¼ of section 22, township 15 south, range 1 west in Chicot County, Arkansas, and to subject Herman Carlton's equity in said real estate to the payment of his debts.

The suit was brought on December 16, 1927, and, after separate answers had been filed by the defendants denying the material allegations in the complaint, and after Herman Carlton had testified in the case, he died on March 11, 1929, and the cause was revived against his administratrix, Gertrude T. Carlton.

The cause proceeded to a hearing in the chancery court of Chicot County upon the pleadings and testimony, which resulted in a finding by the trial court that, at the time the conveyances in question were made, Herman Carlton was solvent, and that they were not made in contemplation of insolvency, nor for the purpose of defrauding existing or future creditors, and a decree dismissing the original as well as the amended complaint for the want of equity, from which is this appeal.

Appellant contends for a reversal of the decree upon the alleged ground that the finding of the trial court was contrary to a preponderance of the testimony. After a

very careful reading and consideration of the evidence in the case, we have concluded that the finding of the chancery court was in accordance with the weight thereof. It is true the conveyance by Herman Carlton to his wife was voluntary or without consideration, but at the time it was made and for more than three years thereafter he was solvent. There is nothing in the evidence which reflects that the conveyance was made in contemplation of insolvency. A very reasonable explanation is made as to why he gave his wife the property in question. The lots conveyed, as well as other lots owned by his wife, Gertrude T. Carlton, were incumbered for a balance of about $14,000 to the Georgia State Savings Association, which had been borrowed to construct a hotel and some stores thereon. Additional money was needed to make repairs as well as other improvements, and the Georgia State Savings Association wanted the title to all of the property in the name of one of them before it increased the loan and took a new mortgage. In order to comply with the request of the Georgia State Savings Association, Herman Carlton gave his wife the property in question, only owing at the time a few current debts amounting to three or four hundred dollars, which had been incurred for their living expenses. It is true that in the same year that the conveyance was made Herman Carlton borrowed $3,600 from three different banks with which to buy bank stock in the Chicot Bank & Trust Company. He joined a pool entered into by himself and five or six of the best men of the village to buy $75,000 of the stock [illegible]d by Walter Davies in said bank; the capital stock of the bank was $150,000. The pool was represented in the purchase of the stock by Gordon N. Peay of Little Rock, Arkansas, who investigated the bank and found the book value of the stock to be $96 a share. Others who investigated the bank said that the stock was worth $12[illegible] a share. Although Walter Davies was disgruntled and desired to sell the stock and was willing to take twenty-eight cents on the dollar for it, the purchasers who

had formed the pool and paid twenty-eight cents per share therefor believed that they were buying same at a great bargain, and believed it so firmly that all of them borrowed the money with which to buy same. Herman Carlton bought $14,000 of the stock, and pledged $2 for $1 to three different banks from which he borrowed the money to pay his part into the pool. The banks from which he borrowed the money willingly made the loan and took the stock as collateral security therefor. We see nothing in the transaction to indicate insolvency or contemplated insolvency at the time he conveyed the lots in question to his wife nor when he purchased the stock.

The transfer to his sister of the lot heretofore described was made for a valuable consideration. There was a vendor's lien for something near its value at the time he conveyed it. He sold his sister his equity therein for $500 of the stock in the Chicot Bank & Trust Company. All he owned at the time were a few current debts, $4,000 to the banks which he had borrowed to pay for the stock he had bought and about $1,000 in collections he had made for insurance companies he represented. The amount he owed the insurance companies was afterwards paid by his sister who was appointed agent of the insurance companies in his place. At the time he made this transfer to his sister he still owned $14,000 of the stock in the Chicot Bank & Trust Company, a part of which had been assigned as collateral security for loans with which to buy the stock. In the spring of 1927, after the conveyance to his sister, the Chicot Bank & Trust Company failed, and, when the Bank Commissioner assessed $14,000 against him on his stock, it rendered him financially helpless and insolvent. He turned all of his stock in the Chicot Bank & Trust Company over to the trustee in bankruptcy, the appellant herein. His equity in the property he conveyed to his sister was inconsequential and was for a valuable consideration, and, according to the weight of the evidence, was not made to defeat his creditors in the collection of their debts. A

fair interpretation of the evidence reflects that he thought the three banks were amply secured by the collateral he had deposited with them.

No error appearing, the decree is affirmed.

FENTRESS *v.* SICARD.

Opinion delivered March 3, 1930.

Hardin & Barton, for appellant.

Daily & Woods, for appellee.

KIRBY, J., (after stating the facts). The authorities are well nigh uniform in holding that a mortuary or undertaking establishment of the kind complained of here is not a nuisance *per se.* It may become a nuisance, however, by reason of its location in a residential district or from the manner in which it is operated. In 46 C. J., p. 726, it is said: "An undertaking establishment or funeral parlor is not a nuisance *per se,* but by reason of surrounding circumstances it may become a nuisance. It may constitute a nuisance by reason of its location, as, for instance, under particular circumstances, when it is located in a residential district, notwithstanding, it has been held, it does not directly affect the health or grossly offend the physical senses; but it is more frequently held that the mere location in a residential section is not sufficient to make such an establishment a nuisance." If the

district of the location was an exclusively residential one, its intrusion therein would ordinarily constitute a nuisance, and could be prevented by injunction. Change is the order of time however, that progress and development may not be hindered or obstructed, and the transition from a residential district into a business district is recognized and has been effected. The great preponderance of the testimony herein shows, that the establishment of the mortuary upon the site selected would enhance the value of the surrounding property as business property, and would not detract from its value for residential purposes, for which it had long since fallen into disuse, so far as new or further development is concerned. The chancellor did not find there would be any depreciation of value in the property because of the location of the mortuary, or that the health or comfort of the residents in the vicinity would be at all imperiled or likely destroyed by the operation of the mortuary there, but held only that its location could not but be a continuing reminder of death, (the dead being there), necessarily producing discomfort and depression of spirit of all people residing within the sight of it, without regard to its proper operation, and the appearance and setting of the modern structure. Its operation would be a necessary business, of course, and since the testimony shows the transition of the district from residential to business has so far progressed, that the property there will be rather enhanced in value because of its location than depreciated in any respect for residential purposes, it would not constitute a nuisance that should be prevented or suppressed by injunction.

The chancellor's finding otherwise is contrary to the preponderance of the testimony, and the decree must be reversed and the cause remanded with directions to dismiss the complaint for want of equity. It is so ordered.

NEWTON COUNTY *v.* PHILLIPS.

Opinion delivered March 3, 1930.

Jack Holt and *Shouse & Rowland*, for appellant.

W. P. Spears and *J. M. Shinn*, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not rendering judgment against the clerk for $105.64, one-half of the amount of scrip $211.28, which he offered with $17.72 in cash in payment of the county tax collected and charged against himself, $229.

The county clerk was charged with the duty of collecting the county privilege tax for recording deeds and

mortgages and issuing marriage licenses, and, the majority is of opinion, comes within the designation "or other officer" under the statute, § 10046, C. & M. Digest, requiring the collector of revenue to pay the revenues collected "in kind" in settlement, and making himself subject to a fine for violation of the act "and liable on his official bond for the difference in value between the funds received and those paid." Although it is true the clerk would have been required to receive in payment of the county privilege tax, if it had been tendered, the county scrip for that amount, and could have paid this scrip so received in full settlement of the tax to the county, he did not in fact do so, but allowed the debtor the discount of the depreciated value of the scrip, collecting of him 25 cents in money only for the 50-cent tax for which he attempted to make settlement of the tax due the county with county scrip. This could not be done. Although he claimed he only collected in cash one-half of the amount of the privilege tax required by law to be paid the county, it is undisputed, conceded in fact, that he collected in each instance, in money, his own fees and one-half of the amount of the county tax, an amount in excess of the amount due for county tax. Since this was collected in money, he was bound to pay "in kind" into the treasury, in settlement with the county court, the whole of the tax collected, which the court correctly held had not in fact been done by the payment into the county treasury of the $211.64 in county scrip of the value in cash of 50 cents on the dollar. He could not take, regardless of the custom, in payment of the amount of privilege tax required by law to be collected a less amount than fixed by law and was bound to pay "in kind" in settlement of the tax collected. Having in fact collected in cash more than the amount of the tax required to be collected and being bound to pay "in kind" the funds received, the whole amount of the tax, the court erred in not rendering judgment for the balance of the tax, which should have been collected by him and paid "in kind"

into the treasury. He was bound to collect the tax, collected only one-half of it in cash, and, not being permitted himself to substitute depreciated scrip, not paid to him, in settlement of the tax, he could not discharge his obligation to the county to pay the whole amount of privilege tax "in kind" into the treasury, which he attempted to do, by using depreciated scrip worth only 50 cents on the dollar.

The judgment must accordingly be reversed, and the cause remanded with directions to enter a judgment for one-half the cash value of the scrip attempted to be paid in settlement or $105.64. It is so ordered.

MORRILTON ICE & FUEL COMPANY *v.* MONTGOMERY.

Opinion delivered March 3, 1930.

Edward Gordon and *J. W. Johnston,* for appellants.
W. P. Strait, for appellees.

KIRBY, J. This appeal is prosecuted from a decree for the balance of the purchase money due for machinery or apparatus sold to appellants, and foreclosure of materialman's lien therefor.

Appellees, an Illinois corporation engaged in business in Chicago, upon receipt of a telegram from appellants, stating: "In market for sterilizer. Send representative at once. Wire." Sent its agent to appellants engaged in the manufacture of ice at Morrilton, and sold them, under the terms of a written contract, "One (1) SEL 3 Hartman electrolytic sterilizer 400/500 G.P.H. 2020."

The contract recites the terms of sale and payment, and "the seller guarantees the Hartman electrolytic water sterilizer to deliver water clear of suspended matter, and of such clearness as to conform to the platinum wire test of the American Public Health Association, and that water from this apparatus shall conform in every respect to the limits laid down by the United States Treasury Department, Bureau of Public Health, covering potable waters. *Also bacterial count when plates are kept clean.*" (Words in italics inserted by purchaser before signing.) It also recites that the guaranty is made with the understanding that the water purifying apparatus shall be operated according to instructions furnished, and for the making of any tests desired by the purchaser, who is to furnish samples of the water for tests, etc., within 30 days after the installation of the apparatus or sterilizer. It recites further, "that it is agreed that all agreements and understandings, verbal or written, made or had respecting the machine sold, are abrogated, superseded and canceled by this contract, and at the time of the execution of same." After the execution of the contract and before the arrival of the machine sold at Morrilton, appellants sent another telegram to appellees asking about the purchase of containers for selling "electrified water." During the

negotiations for the sale of the sterilizer, one of the members of appellant's firm went with appellee's agent to examine a sterilizer of like kind in operation at Atkins, Arkansas, and after returning from the inspection of it closed and executed the contract of purchase. The title to the machine was retained by the seller until the purchase money was paid, and the contract also provided for its installation by the seller.

When the machine arrived, however, appellants, without notice to appellees, had it installed in their new ice factory, and, upon later complaint of its unsatisfactory operation, appellees sent its engineer to correct any condition that might interfere with the proper operation of the machine, which was done to the satisfaction of appellants. Appellants thereafter refused to execute the notes for the remaining purchase money due, $1,510 and interest, under the terms of the contract and within 90 days from furnishing the machine or sterilizer, installed in the new ice plant, appellees brought this suit for collection of the balance of the purchase money due for the sterilizer, for enforcement of a vendor's lien thereon and a materialman's lien against the plant, making the proper allegations in its complaint therefor and exhibiting the contract therewith.

Appellants denied the allegations of the complaint, and alleged that the appellee's agent procured the contract of sale upon false and fraudulent representations to appellants, "that said machinery would remove from the water all bacteria, and would also remove from the water all iron in substance or nature, and enable the defendants to reduce the core in each block of ice to a feather edge which would purify the water and greatly reduce the expense of the defendants in operating said plant, and improve the quality of defendant's ice by removing the iron in solution and reducing core to feather edge, softening water and destroying or eliminating all bacteria or contamination." That the apparatus or machine failed to remove the iron in solution from the water,

to reduce the core in the ice to a feather edge or soften or purify the water in the manner represented by the agent, and that but for the fraudulent representations made to induce appellants to enter into the contract it would not have been made. Denied any liability under the contract, and asked judgment for $510 paid at the time it was entered into.

The agent denied having made the alleged false and fraudulent representations about what the machine would do, and stated that all the guaranty was written into the contract, which was read over before its execution by appellants, who inserted some small amendments. There was some testimony on the part of appellants tending to prove the false representations alleged to have been made by the agent, which he denied as already said, and it was not disputed about the machine doing the work properly in accordance with the written guaranty, nor any denial made by appellants of the telegram sent before the contract was entered into or after its execution, nor of the execution of it by appellants after one of the firm had visited a plant at Atkins, a town nearby, and inspected a like machine in operation. Appellants were experienced manufacturers of ice, operating two plants for that purpose, and using distilled water in the old plant. Without further recital of the testimony, it will suffice to say that the chancellor's finding that there was no false representations made in the sale of the sterilizer, and no guaranty of the effects of its performance and operation, except as written in the contract, is supported by the preponderance of the testimony.

Appellants insist that the chancellor's findings are contrary to the preponderance of the testimony, but such is not the case as already stated. Appellants alleged and sought to show that the written contract, admitted to have been executed by them, was obtained by false and fraudulent representations of a guaranty by appellees through its agent in making the sale; that the machine would in its operation remove iron in solution and other

chemicals from the water, and soften hard water. There is no contention that any misrepresentation was made as to the guaranty of the operation of the machine sold as written in the contract, and the preponderance rule of proof does not apply in an attempt to vary the written contract by the addition of a parol warranty not included therein, and false representations relative thereto. "The solemn written engagement of contracting parties cannot be reformed or amended, except upon clear and satisfactory proof that the writing fails, by reason of fraud, accident or mutual mistake in the preparation or execution thereof, to express the agreement intended to be entered into." *Mitchell Mfg. Co.* v. *Kempner,* 84 Ark. 349, 105 S. W. 880; see also *Texas Co.* v. *Williams,* 178 Ark. 110, 13 S. W. (2d) 309; *Eureka Stone Co.* v. *Roach,* 120 Ark. 326, 179 S. W. 499; *Welch* v. *Welch,* 132 Ark. 238, 200 S. W. 130.

It is true appellants do not ask a reformation of the contract nor a rescission of it, but deny liability thereunder because of alleged false and fraudulent representations guaranteeing the effect or result of the operation of the machinery, removing chemicals from and making hard water soft, not contained in the written contract, attempting to establish it by parol testimony. Such an alleged guaranty, altogether at variance with the written contract, could not be added to the writing for avoiding its effect, because of fraudulent representations as to the violation of the parol guaranty by a less degree of proof than would be required for reformation of the contract to include it. The undisputed testimony showed the amount of the purchase price still due under the terms of the contract; that the machinery was furnished and installed in the new ice plant of appellants upon the lot or site particularly described in the testimony; the refusal of appellants to pay the balance of the purchase price of the machine, and the bringing of the suit therefor, and for foreclosure of a material furnisher's lien against the ice plant within the 90 days which entitled ap-

pellees to a foreclosure of a lien against the plant for the balance of the purchase money due. *Anderson* v. *Seamans,* 49 Ark. 480, 5 S. W. 799; *Pfeifer Stone Co.* v. *Brogdon,* 125 Ark. 428, 188 S. W. 1187; *Carr* v. *Hahn & Carter,* 126 Ark. 609, 191 S. W. 232; *Standard Lumber Co.* v. *Wilson,* 173 Ark. 1029, 296 S. W. 27.

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

FLOYD *v.* STATE.

Opinion delivered March 3, 1930.

Smith & Blackford, for appellant.

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

MEHAFFY, J. Neeley Shaver died about January 18, 1926. He was embalmed in the usual way and buried at Evening Shade, in Sharp County, Arkansas, and was exhumed in November, 1927, the contents of his stomach, liver and kidneys being sent to Dr. Manglesdorf, state chemist at Little Rock, and he reported finding one and one-half grains of arsenic poison in his stomach and more than ten grains in his other organs, which was enough to cause death. John Mullen a brother-in-law of the appellant, had a policy of insurance upon Shaver's life for about $11,000. Shaver lived on Mullen's farm, and was with him for several years, and had farmed Mullen's land a part of the time. On the day before he died that night John Mullen received word that Shaver was sick, while he was at Minturn, and immediately went to Walnut Ridge and employed Dr. Land to go and wait upon Shaver, and Mullen went with the doctor to Shaver's house in the afternoon. Dr. Land examined him, prepared and left a bottle of medicine with the old lady who lived with Shaver, giving her directions, and he and Mullen went back to Walnut Ridge. Dr. Land found Shaver very sick, run-down and having smothering spells; found that he had been eating hogshead cheese and found that it was in a tin dishpan and not fresh, and the doctor concluded that Shaver had ptomaine poison, but said that it could have been arsenic. A few hours later, the appellant, Frank Floyd, a tenant on the same farm, went over to the Shaver place to sit up and give medicine. He testified that he gave the medicine with the help of the others at the house, out of the bottle he found there. He arrived at the Shaver home about six or seven o'clock in the evening. Shaver died about midnight. Fredis and Ora Pierce, a son and daughter of Dan Pierce, who died subsequent to Shaver's death, and upon whose life the same John Mullen had a life insurance policy, made to him as a creditor, about which he had had some litigation with the widow and heirs of Dan Pierce, which litigation was compromised, and the widow and heirs of Pierce,

receiving a portion of the proceeds of the policy, as witnesses testified that the appellant came by their house on the evening that Shaver died and showed them a bottle of medicine, similar to the one described by Dr. Land, and that he gave Shaver some medicine out of the bottle which he took over. Their testimony showed that after Shaver died appellant put the bottle with the remaining medicine in it into the stove. That he raised the cap of the stove and put it in, but said nothing at the time. Julia Brogdon, the old lady who lived with Shaver, testified that she helped Frank Floyd give the first dose, and that she knew it was out of the bottle which Dr. Land left with her to be given. Dr. Seal, who had been Shaver's physician, testified that he had given him a Fowler's solution or arsenic for a long time, which was a medicine commonly given for run-down old men, and that a habitual taker of it would leave traces of it in the system. The jury found the defendant guilty of murder in the first degree and fixed his punishment at life imprisonment. Motion for new trial was filed and overruled, and appeal prosecuted to this court.

We do not deem it necessary to set out the testimony in full, but the evidence tends to show that Fredis and Della Pierce saw appellant about seven o'clock, and that at that time he had a little bottle of medicine, about three inches long, reddish looking with a whitish looking sediment at the bottom. That he had this medicine as we were going to Shaver's house. They testified that Frank Floyd gave Shaver a dose when he got over there; that Shaver was suffering pretty badly when they got there. That appellant gave him a dose out of the bottle he took with him, about fifteen minutes after he got there and another dose in about an hour and a half. They also testified that Shaver got worse and did not want to take the second dose, said it was smothering him. Shaver died about twelve o'clock. After he died, Floyd burned the bottle of medicine in the stove. The undisputed evidence shows the finding of arsenic in the body after death.

Dr. Land testified that the medicine he left for Shaver was a reddish brown looking substance with a whitish settling in the bottom of the bottle. The doctor was at Shaver's about four or five o'clock. Julia Brogdon testified about the doctor leaving the bottle of medicine, and that the first dose was given after appellant came and that she knew it was out of the bottle Land left. She did not know what became of the bottle.

Dr. Seal testified that Shaver was addicted to taking Fowler's solution of arsenic, and that the last two years of his life he was very feeble.

Frances Collins testified that Della Pierce wanted her to testify that she saw Floyd with a bottle of medicine.

The appellant testified in his own behalf and denied the statements made by Fredis and Ora Pierce; that he did not see Shaver Sunday, and his testimony as to being elsewhere on Sunday was corroborated by John Holloway and Taylor Mullen. Some witnesses were introduced and testified that Frank Floyd's reputation was good. After both sides had rested the court permitted the State, over the objection of defendant, to recall defendant for further cross-examination.

It is first contended by appellant that the evidence was insufficient to support the verdict, and that it affords mere grounds of suspicion and does not justify a conviction. He contends that there is no substantial proof. The fact that enough arsenic was found in his body to have killed him, together with the testimony of Fredis and Ora Pierce that they saw appellant give Shaver medicine and then burn the bottle with the balance of the medicine, and the other circumstances testified to in the case, were sufficient to carry the case to the jury. The next contention made by appellant is, that the court erred in permitting the State to reopen the case after each side had rested, and in permitting the court stenographer to read from the testimony of appellant at a former trial, for the purpose of impeaching and contradicting him on an im-

material matter. The stenographer was called and the court said: That they could read that part only which related to appellant's testimony for the purpose of impeaching or contradicting. Whether it does or not, that is for the jury to say and to consider in weighing his testimony at this trial. The State then asked the stenographer this question: In Mr. Floyd's testimony given in this trial before, the following question was asked him on cross-examination: "Now, can you figure for us about how many doses you gave him?" and his answer was, "Well, they gave him—Mrs. Brogdon gave him the second capsule after I got there, and then we gave him the other medicine every two hours." Then he was asked, "Well, you gave all the medicine that was given after you got there?" and his answer was, "No, sir." Then he was asked, "Who else gave him some? His answer was, "Well, I don't know, we both gave the medicine to him. He would carry the medicine and I would carry the water." This testimony was competent. This testimony of statements appellant had made before, which tended to contradict his testimony given at this trial, was competent for the purpose of contradicting him.

It is next contended by appellant that the court erred in giving instruction No. 9. Said instruction reads as follows: "I instruct you, gentlemen, that it rarely happens that one person kills another without some motive, such as hatred, fear, hope of gain, etc. The State may prove the motive if it can, and when it does so, the evidence with respect to motive often serves to throw light upon the mental condition of the slayer, with respect to malice. And such evidence may tend to prove express malice referred to in these instructions; but it is not necessary for the State to prove the motive, in order to warrant a conviction. It may happen that there are no external conditions capable of proof of express malice; but the prosecution does not necessarily fail for that reason, for in many cases there is implied malice without that proof, and the implied malice as the word indicates is

malice inferred or implied from all of the facts and circumstances of the death, or when the facts and circumstances of the death show a wicked and abandoned disposition."

Appellant cites and relies on *Scott* v. *State,* 109 Ark. 391, 159 S. W. 1095. The instruction given in that case, however, was wholly different from the instruction given in this case, and that case does not sustain appellant's contention. The court there told the jury: "You are instructed that the proof of the presence of a motive, or the absence of a motive, upon the part of the defendant with reference to the killing of his wife has absolutely nothing to do with this case. It is not incumbent upon the State to prove either the presence or the absence of a motive for the killing; and the presence or the absence of a motive has no bearing whatever upon an issue of insanity as a defense to the crime of murder."

The above instruction was condemned, because it singled out the proof of motive or absence of motive, and told the jury that the presence or absence of motive had absolutely nothing to do with the case; that by doing so undue weight is given to the proof, thus invading the jury's province; that it is error to single out the question of motive for the commission of the crime, and point to it as a proper subject of consideration as an evidence of defendant's guilt, and it is equally erroneous and improper to point to the want of motive as an evidence of his innocence.

In the instant case, the court simply told the jury that the proof of motive often serves to throw light upon the mental condition of the slayer with respect to malice, and that such evidence may tend to prove express malice referred to in these instructions, but it is not necessary for the State to prove the motive in order to warrant a conviction.

The court further said in the case of *Scott* v. *State*: "The instruction is erroneous in stating that the proof of the presence or absence of a motive on the part of de-

fendant for killing his wife had absolutely nothing to do with the case. It is true it is not incumbent upon the State to prove either the presence or absence of the motive, but the jury had the right to consider such testimony in determining the guilt or innocence of defendant, and the court in the instruction is in error in declaring that the presence or absence of a motive had no bearing whatever upon an issue of insanity as a defense to the crime of murder. The instruction virtually told the jury that they could not consider the proof relative to the presence or absence of a motive for the killing; that that had absolutely nothing to do with the case and no bearing whatever upon an issue of insanity as a defense to the crime charged." An examination of the instruction in the instant case will readily show that it is not subject to the objection pointed out in the Scott case.

In the next case cited and relied on by appellant, *Ince* v. *State*, 77 Ark. 418, 88 S. W. 818, the court simply held that the lower court did not commit error in refusing an instruction which told the jury that, if no motive was shown, it was a circumstance in favor of defendant's innocence to be considered by the jury. The court held that it was improper to tell the jury that the evidence singled out was a circumstance in defendant's favor.

In the case of *Hogue* v. *State*, 93 Ark. 316, 124 S. W. 783, cited and relied on by appellant, the court simply held that the instructions offered in that case were not objectionable, and that a careful consideration of the whole record showed that the defendant had a fair trial. It is true there is a dissenting opinion in that case, and the judge writing the dissenting opinion thought the instruction was wrong, but the court held that it was proper.

The case of *Tillman* v. *State*, 112 Ark. 236, 166 S. W. 582, referred to and relied on by appellant, refers to the other cases above mentioned, and approves the instruction that called attention to motive and affirmed the case. Appellant is correct in stating that, where a prose-

cution and claim for conviction is based solely on circumstantial evidence, it is the duty of the court to give an instruction, as suggested by appellant. But this case does not depend solely on circumstantial evidence; it depends partly on circumstantial evidence and partly on direct evidence.

It is next contended that special counsel, in making the closing argument to the jury, made certain remarks which were prejudicial and called for a reversal of the case. We think any prejudice which might have been created was corrected by the statement of the court.

It is finally contended that the court committed error in the manner in which it passed on the objections, mildly and by stating that counsel had the right to make his conclusion, etc. So far as the record shows, there is nothing in the manner of the court, or in what he said, which could be construed as prejudicial to appellant. The evidence in this case is not very strong. It is sufficient, however, if believed by the jury, to authorize it to find a verdict of guilty. We do not pass on the weight of the evidence nor the credibility of witnesses. This is the province of the jury, and if there is any substantial evidence to support the verdict, this court cannot set it aside on the ground that it is insufficient to support the verdict. We have carefully examined the entire record, and have reached the conclusion that there is substantial evidence to support the verdict, and that the instructions as a whole correctly stated the law to the jury.

The judgment of the circuit court is therefore affirmed.

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

Opinion delivered March 3, 1930.

E. T. Miller and *Warner & Warner,* for appellant.

E. D. Chastain, for appellee.

MEHAFFY, J. The appellee brought suit in the Crawford Circuit Court against appellant in June, 1928, to recover damages for injury to mules. He bought some mules at Park Hill, Oklahoma, and also some mules at Springdale, Arkansas, and both lots were shipped to Van Buren, Arkansas. The mules shipped from Park Hill, Oklahoma, arrived at Van Buren at 2 A. M., February 25, 1928. They had been shipped from Park Hill on February 24. When they reached Van Buren, instead of placing the car on

the switch adjacent to the stock yards, so they could be unloaded, appellant switched said car of mules to a loading switch for fruit and produce, placing the car alongside the shed and platform, and on a different track from that extending to the stock yards, and left said car of mules standing upon the fruit shipping track about three hundred yards from the point on the other track for unloading stock. The mules could not be unloaded at said place. The appellee reached the railroad station at Van Buren at eight o'clock in the morning after the carload of mules had arrived at two o'clock in the morning. The car was not moved to the track where it could be unloaded until four or five o'clock in the afternoon, and the mules were without water or food from the time they were loaded in Park Hill, Oklahoma, until after they were unloaded at Van Buren. The appellee did not pay the freight on the mules until after they were unloaded. The undisputed testimony shows that it was the custom to pay the freight after the mules had been unloaded or placed on the track for the purpose of being unloaded, and the railroad agent said the company did not fail to remove them to the stock-yard track because of appellee's failure to pay freight, but because they had no engine with which to move them. The evidence shows that the mules were damaged by not having any food or water from the time they were shipped at Park Hill, Oklahoma, until they were unloaded at four or five o'clock in the afternoon of the next day.

The second shipment was from Springdale, Arkansas, a distance of sixty-five miles. This shipment left Springdale on February 18, 1928, and arrived at Van Buren on February 19, and this car was switched to the unloading track, and one of the mules in the car was dead. Neither of the cars was overloaded. Appellee alleged that the damage to the mules shipped from Oklahoma was $400, and that the mule shipped from Springdale, which was dead, was worth $125. The jury returned a verdict for $290 damages to the mules shipped from Okla-

homa, and $110 as the value of the mule which was killed. Judgment was entered accordingly. Motion for new trial was filed and overruled, and this appeal is prosecuted to reverse said judgment.

It would serve no useful purpose to set out the evidence in full. The undisputed proof shows that the mules shipped from Park Hill, Oklahoma, reached Van Buren next morning at two o'clock, and were not switched to the track where they could be unloaded until four or five o'clock in the afternoon, and that they were without feed and water all this time. One of the employees of the company said he hired a negro boy to water them, but he does not know whether the boy watered them. There is therefore no proof that the mules were fed or watered from the time they left Oklahoma until they were unloaded at Van Buren, and, while the evidence as to damage is slight, as to whether they were damaged by reason of this delay to feed and water them was a question of fact, and there was sufficient evidence to submit this question to the jury.

About the mule from Springdale being dead, there is no dispute, and there is no dispute about its value. The witnesses for the railroad company testified that they handled the trains properly, and there was no rough handling, but the undisputed fact is that this was a good mule, weighed about twelve hundred pounds, in a car with the other mules, and a car that was not crowded, and that it was down and was dead when it got to Van Buren.

There is some controversy about the payment of freight, but the railroad agent himself testifies that he did not refuse to place the car where it could be unloaded because the freight was not paid, but because they had no engine with which they could move the car.

Appellant insists that it is not liable for delay or damage to the Park Hill shipment, and insists that before the shipper had a right to demand that the car be placed on the unloading track it was his duty to pay the freight. The undisputed proof, however, shows that it was custo-

mary to unload the mules before the payment of the freight, and this had been the practice as to shipments made by appellee. The undisputed proof is that appellee had at other times shipped mules over the Frisco, and, after having had them unloaded, paid the freight. Appellant calls attention to the case of *St. Louis-San Francisco Railway Company* v. *Vaughan*, 84 Ark. 311, 105 S. W. 573, and quotes from said case as follows:

"The law does not require railroads to keep engines and cars at stations at all times to move freight offered for shipment. It would be unreasonable to require that. All that the law requires is that reasonable care and diligence be exercised in furnishing facilities, and in transporting freight (2 Hutchinson on Carriers, § 652 *et seq.;* Moore on Carriers, p. 104; *Chicago, R. I. & T. Ry. Co.* v. *Kapp*, (Tex. Civ. App.) 83 S. W. 233)."

It is true that all the law requires is reasonable care and diligence, but we think the jury was justified in finding in this case that the failure to put the car of mules where it could be unloaded for the length of time the evidence shows in this case that it did, was negligence, for which the company is liable. The appellant could have placed the car of mules at the unloading track at the time it brought them to Van Buren. If it did not want to do that, it could have had the mules watered and fed. It did neither and the failure to do either was sufficient to justify the jury in finding the appellant guilty of negligence. It is true that the carrier has a lien on goods transported for its freight charges, but it is also true that the carrier can waive this lien, and the proof shows that it did waive it in this case. It is contended by appellant that there was no sufficient evidence of damage to this shipment, there being no proof of the market value, either before or after the shipment. As we have already said, the evidence as to damage was slight. The appellee testified that he saw the mules late in the afternoon before they were loaded the next day; that they were in good condition; that when they were unloaded at Van Buren

they did not look like the same mules; that they had done without water and feed for forty hours. He testified that he thought the mules were $400 off; that he knew they were in good condition when put in the car.

G. A. Ethridge testified that he purchased the mules, that they were good mules, but gaunt and lacked feed and water.

Appellant next contends that it is not liable for loss of the mule in the Springdale shipment. The appellant was bound to use reasonable care to transport said mule, and deliver it in good condition. He was not required to deliver it in good condition, but required to use ordinary care to do this. The mule, according to the evidence, was in good condition when it left Springdale, the distance from Springdale to Van Buren being only sixty-five miles, and it was down in the car dead when it got to Van Buren. The jury evidently reached the conclusion that, the mule being in good condition when shipped and being killed on the way, this could not have happened without negligence in handling the car. Appellant contends that, upon proof that suitable cars were used and that the carrier performed the duties incumbent upon it, an unexplained loss or injury to the live stock is presumed to have been due to the natural propensities of the animals. It is true that the company is not liable for any injury caused by the inherent vices of the live stock, and the proof of negligence in the shipment of this mule is very slight. We cannot say, however, that it was not sufficient to justify the jury in finding appellant guilty of negligence.

It is next contended that the court erred in giving instructions. But the objection urged to instruction No. 1, is "that there was no evidence that the defendant failed to use ordinary diligence to unload the mules after plaintiff demanded same and offered to pay the lawful charges." We have already stated that the evidence shows that the delay was not because of the failure to pay the freight charges, but, as the agent himself testified, it was caused by waiting for placement. Defendant

also urges a reversal because of the court's failure to give instructions requested by it. We think the court fully and fairly instructed the jury, and that there was no error in refusing to give the instructions complained of. It is urged that the evidence with reference to the custom in delivering shipments before the payment of freight was incompetent, and also that the evidence on the part of appellee as to damages was incompetent. We do not agree with appellant in these contentions. In the first place, the evidence of the custom was proper, and that, together with the evidence of the appellant's agent, shows that the failure to pay the freight was not the cause of the delay. The evidence as to the damages, as we have already said, is slight, but sufficient to sustain the verdict. While the writer does not believe there is sufficient evidence of negligence on the part of appellant causing the death of the mule shipped from Springdale, yet a majority of the court think the evidence is sufficient to sustain the verdict, and the judgment of the circuit court is affirmed.

ARKANSAS VALLEY BANK *v.* MCCLENAHAN.

Opinion delivered March 3, 1930.

Warner & Warner and *Daily & Woods*, for appellants.

Evans & Evans, Ratcliffe & Ratcliffe, Lee Miles, H. M. Jacoway, O. M. Young and *A. M. Dobbs*, for appellees.

MEHAFFY, J. This action was begun in the Sebastian Chancery Court by appellees to recover from the Arkansas Valley Bank and others, alleging misappropriation of moneys and securities and cashing checks without authority. On October 23, 1927, the court, on application of the appellees, appointed a master to hear and take testimony, and make his report to the court, and to do and perform all things, and to possess and have all powers usually possessed by masters in chancery. Both parties consented to the appointment of Hon. C. M. Wofford as master. The master took testimony, filed his report, together with the evidence taken by him, and in addition to reporting the evidence, made the following finding: "I find from the facts: (a) That Mr. M. M. Hayes acted as the special agent of Mrs. Jessie D. McClenahan and her daughter, Miss Marianna McClenahan, to invest their funds, and that he did not represent the bank. (b) That he had authority to sign the names of Mrs. McClenahan and her daughter to checks, and that the Arkansas Valley Bank was authorized to cash the six checks testified to as having been signed by M. M. Hayes, and amounting to the total sum of $5,900.67." No additional testimony was taken in court, but the case

was heard on the testimony taken before the master, including depositions of witnesses, documentary evidence, and the pleadings in the case. After the master had filed his report, both parties filed exceptions to the report, and the court, after a hearing on the exceptions filed by both parties, sustained the several exceptions of the defendants to the report of the master, and sustained the plaintiff's exceptions number 10 and number 18, and found the issue of facts as well as of law in favor of appellees, and against appellants, and entered a decree in favor of appellees for the sum of $19,300.37 with 6 per cent. interest from November 1, 1928, until date, amounting to $19,636.83 on May 20, 1929, the date of the decree. Appellants prosecuted this appeal to reverse said decree.

The appellees moved from Oklahoma to Fort Smith in December, 1912. Mrs. McClenahan and her husband were separated, and as the result of a property settlement, she received through her attorney, Judge W. A. Falconer, a check for $5,000, three notes aggregating $19,000, bearing six per cent. interest, and $6,000 in Liberty bonds, a total of $30,000 received in the settlement. When Judge Falconer received this, he told appellees, and they met him at the Arkansas Valley Bank May 12, 1920, and Judge Falconer advised them to deposit the money and securities with the Arkansas Valley Bank, telling them that he did business at that bank, and that, if they would let the bank attend to their matters, the income or interest from the $30,000 would make them a living.

Of the $5,000 cash received, $4.500 was deposited in the bank as a savings account, and $500 as a checking account. The Liberty bonds and notes were put in a safety deposit box, which was secured by appellees upon the advice of the officers of the bank.

John C. Gardner was president of the Arkansas Valley Bank at the time, M. M. Hayes was active vice-president, and G. H. Sexton was vice-president and cashier. Both appellees were ignorant of business

methods, knew nothing whatever about what to do with their moneys and securities except as they were advised by the officials of the bank and Judge Falconer, and Judge Falconer advised them to deal with that bank, and that they would be properly taken care of. At the time the deposit was made, the Arkansas Valley Bank and the Arkansas Valley Trust Company occupied the same room. The officers of the Arkansas Valley Bank were the officers of the Arkansas Valley Trust Company. M. M. Hayes, the active vice-president, had lived in Oklahoma, and the appellees had been acquainted with him in Oklahoma, and they did not know any other officers of the bank. Hayes was more active in attending to their affairs than any other person in the bank; in fact their business was transacted by him almost entirely. In September, 1920, the Arkansas Valley Bank and the Arkansas Valley Trust Company separated, and thereafter occupied offices in different buildings. M. M. Hayes remained as active vice-president of the Arkansas Valley Bank until sometime in 1922, at which time he ceased to be active vice-president, and ceased to draw a salary from the bank as vice-president. He still remained a director and vice-president, however, and signed letters written by him as vice-president of the Arkansas Valley Bank. In 1926 Hayes was arrested, charged with forgery and embezzlement and placed in jail, and appellees wanted to make his bond and drew a check for $3,000. The sheriff called on the bank, and the bank said they did not have money there to pay it. They expressed surprise at not having the money and went to the bank and wanted to see their securities, claiming that, if the money was not there, the securities should be. They then discovered that, while there was a list of the securities in the deposit box, no securities or notes were found, except one $1,000 note executed by Hendrix, and a $2,000 note was found in Hayes' desk. Three notes for $1,000 each were found in the Merchants' National Bank, and had been used by Hayes as collateral to a note of his for

borrowed money. When the Merchants' National Bank learned that Hayes had used these notes as collateral without authority, it surrendered them to Mrs. McClenahan. The total amount found at the Arkansas Valley Bank, and the notes at the Merchants' National Bank was $6,000. The agreement, when the appellees deposited $4,500 in the savings account was that their money deposited in that way should bring 4½ per cent. interest, but it was understood that it would be invested in securities at a higher rate of interest. The McClenahans had bought a home and furniture and used some of the money in this way, however Miss McClenahan had worked, received a small salary, and the money she received as salary was also used in making payments on the home and furniture. The master found that the amount of the loss of appellees was $22,731.77. Hayes, in his testimony admitted that he embezzled $12,000 or $13,000 of the McClenahans' money, and embezzled the money of the Arkansas Valley Bank. Each of the appellees was given a key to the safety box. No one, however, could get into the safety box, even with the key, without some person from the bank going with them and using the master key. After some time, Hayes, stating that he wanted to get into the deposit box to get some notes, or to make an investment, secured the key of Miss McClenahan and never returned it. The evidence is entirely too long to set out. It would, in fact, make a considerable volume, but such evidence as appears to be necessary will be mentioned in the opinion.

The appellant contends for a reversal, first, on the ground that the master's findings not only must be given due weight, but that, since both sides consented to the particular individual named as master, his findings are conclusive. Attention is called to the case of *Carr* v. *Fair*, 92 Ark. 359, 122 S. W. 659, 19 Ann. Cas. 906, and in that case the court said, quoting with approval from the case of *Tilghman* v. *Proctor*, 125 U. S. 136, 8 S. Ct. 894: "In dealing with these exceptions, the conclusions of the mas-

ter, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake upon his part," and, continuing, the court said: "The findings of the master appointed by the court of its own motion should not be lightly disregarded by the court; they should be highly persuasive; and when the findings are based upon conflicting evidence, they should be accorded the great weight to which they are entitled. And if the court does not give to the findings of such master that weight which the evidence shows they are entitled to, its action will be reversed upon appeal." The doctrine announced in the case relied on by appellants has been several times approved by this court.

In the instant case, however, the master reported the evidence, and at the close of his report made the findings relied on by appellants. These findings, however, do not purport to be findings of fact. The master states: "I find from the facts that M. M. Hayes acted as the special agent of Jessie and Marianna McClenahan, and did not represent the bank." This is the conclusion reached by the master from the facts in evidence. He also finds from the facts that Hayes had authority to sign the checks. The rule is, as announced by this court, that the findings of fact by a master are persuasive, when such findings are based on conflicting evidence. When the findings of a master are based on conflicting evidence, they should have great weight, but they are not conclusive even when based on conflicting evidence. In the instant case, the undisputed evidence shows that Judge Falconer and the McClenahans went to the Arkansas Valley Bank. They were requested to meet Judge Falconer at the bank, not at the trust company, and they were introduced to the officers of the bank and not to the officers of the trust company. It is true that there is some evidence that Gardner said, "We have the Arkansas Valley Trust Company here to attend to those things."

There is but one reasonable conclusion we think from that statement, if Gardner made it, and the proof tends to show that he did, and that conclusion is, that "we" meant the Arkansas Valley Bank, so he said the bank has this trust company here. The appellees being inexperienced in business, we think they would necessarily conclude that Mr. Gardner meant that the bank would attend to their business. It was all the same building, the deposit was made in the bank, the securities were left with the bank, all the dealings were with the officers of the bank, and this is the testimony with reference as to whether Hayes was acting as their agent or whether the bank was, and we think the testimony conclusively shows that the bank was the agent of the McClenahans and not Hayes.

It is next contended, that the appellees' testimony precludes a recovery for any amount in excess of $5,900.67. We do not agree with appellants in this contention. On the other hand, we think the testimony conclusively shows that the McClenahans went to the bank for the purpose of dealing with the Arkansas Valley Bank, and with no one else, and that they at least thought that the bank was attending to their business. They were justified in this belief, because they were introduced to the officers as officers of the Arkansas Valley Bank, and while it is true the same men were officers of the Arkansas Valley Trust Company, the McClenahans did not at any time do business with them, or with Hayes, as an officer of the Arkansas Valley Trust Company, but dealt with them as officers of the Arkansas Valley Bank.

Appellants rely on a statement, or answer to a question by Miss McClenahan, which is as follows: "The conversation was held between my mother, Mr. John C. Gardner and Mr. M. M. Hayes. My mother said to Mr. Hayes and Mr. Gardner: 'Now you will see that this money is kept invested; that it will be kept in circulation.' and Mr. Gardner said: 'That is my business, and I will. We have the Arkansas Valley Trust Company.

That is what it is here for, and that money, as nearly as we can, will always be kept out bringing in interest.' " This was the statement of Mr. Gardner, president of the bank. He had been introduced to the parties as the president of the bank, and, when asked if the money would be kept invested, he answered, "That is my business, and I will"; that is, the business of the Arkansas Valley Bank, or Gardner as president of the Arkansas Valley Bank. The evidence nowhere discloses that at that time appellees, or either of them, knew that there was an Arkansas Valley Trust Company, and, if they had known it, they were inexperienced and knew nothing about what Gardner meant except what his statement indicated, that he, president of the Arkansas Valley Bank, would keep the money invested. Mr. Gardner died before the case was tried, and of course his testimony could not be had. We do not agree with the appellants that Miss McClenahan's testimony showed at that time that she knew anything about two institutions. All the business was done with the bank, or its officers, and the testimony nowhere discloses that anything was said by anybody as an officer of the Arkansas Valley Trust Company.

Appellants argue at length that the Arkansas Valley Bank was a banking institution and did not have authority to do what was done in this case, and, for that reason, it is not liable. This question of authority of the bank was discussed in the case of *Sullivan* v. *Arkansas Valley Bank,* 176 Ark. 278, 2 S. W. (2d) 1096, 57 A. L. R. 296. In that case it was earnestly contended that for the bank to undertake to do the things it there did would be *ultra vires,* and for that reason the bank would not be liable, and we there said: "That it made and published false statements about the condition of the mortgage company; that it induced these persons to invest their money in worthless bonds when they knew they were worthless, and the suit is based on torts, so far as the bank is concerned, and it has been many times held that the doctrine

of *ultra vires* does not apply to a corporation's torts, but only to its contracts or contractual relations. Suits are maintained against corporations every day, and recovery is had for negligence, willful wrong, and all kinds of torts, and it has never been contended, so far as we know, that a corporation was not liable for these things because it was *ultra vires.* * * * Is the doctrine of *ultra vires* applicable to this case? The doctrine of *ultra vires* has never been held to apply to a corporation's torts, but is limited to its contractual relations. Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application." *Sullivan* v. *Arkansas Valley Bank,* 176 Ark. 278, 2 S. W. (2d) 1096, 57 A. L. R. 296.

We also said in the above case, "In *Bissell* v. *Mich. So. & N. I. R. Co.,* 22 N. Y. 258, a leading case, the court held that corporations, like natural persons, have the power and capacity to do wrong. The corporations have no right to violate their charters, but they have the capacity to do so, and are to be bound by their acts where a repudiation of such acts would result in manifest wrong to innocent parties; that the plea of *ultra vires,* according to its just meaning, imports not that the corporation could not make the unauthorized contract but that it ought not to have made it; that such a defense is not to be entertained where its allowance will do a great wrong to innocent parties; that, although corporations cannot rightfully do any act not authorized by their charters, yet such acts when done are to be regarded as the corporation's acts; and if in the course of their performance others are injured by the negligence of the officers of the corporation, the corporation is responsible; such liability arising from the duty which every railway company owes to persons within its cars with its consent."

We have carefully read and considered the entire testimony in this case and have reached the conclusion that the McClenahans, appellees here, were dealing with

the Arkansas Valley Bank, that the officers of the Arkansas Valley Bank committed the wrongs complained of by them. They had access to this money and security because they were officers of the Arkansas Valley Bank, and we think the testimony clearly shows they are liable. There is some conflict of testimony as to whether the vice-president, M. M. Hayes, had authority to sign the checks of the McClenahans. Hayes himself testified that he had authority, he also testified, however, that he embezzled $12,000 or $13,000 of their money, he also pleaded guilty to stealing the money of the bank and to forgery. Mrs. McClenahan and Miss McClenahan both testified that he did not have authority to sign their names to checks. All the authority he ever had was to invest their money in interest-bearing securities, and he had this authority because he was vice-president of the Arkansas Valley Bank. It is true that Miss McClenahan talked to him and not to others, because she knew him, but this does not signify that she was dealing with him personally or that she ever made him her agent. Persons go to a bank to deal with a bank. It often happens that they would prefer to talk to a particular officer of the bank, but this does not make that particular officer their agent, and we therefore conclude that the chancellor was correct in finding that Hayes did not have this authority.

It would serve no useful purpose to extend this opinion by reviewing all the testimony and authorities presented by the parties. We have carefully examined the entire record, and reached the conclusion that the chancellor's findings are correct, and supported by a preponderance of the evidence. The decree is therefore affirmed.

SPECIAL SCHOOL DISTRICT NO. 50 *v.* DEASON.

Opinion delivered March 3, 1930.

Rice & Dickson, for appellant.

Beasley & Beasley, for appellee.

McHANEY, J. Based upon a petition signed by a majority of the electors in the territory affected, the county board of education of Benton County made an order changing the boundary lines of Gentry Special School District so as to absorb or consolidate all the territory in appellant district with the Gentry district, and transferring the control, property, and funds of appellant to the Gentry district. From this order an appeal was taken to the circuit court and appeal bond given.

Thereafter, while this appeal was pending in the circuit court, appellants brought this suit in the chancery court to have the order of the county board of education declared void, and its enforcement enjoined. On a hearing the judge's docket shows that a decree was granted staying the order of the county board of education and maintaining the *status quo ante* until the matter could be determined by the circuit court. The decree entered by the clerk, however, dissolved the board's order, which was then pending on appeal to the circuit court. This decree was entered at the April term, 1929. Thereafter, on October 24, 1929, on the petition of appellees to cor-

rect the former decree, an order *nunc pro tunc* was entered correcting the decree so as to speak the truth and conform to the order actually made, but erroneously entered. Appellants have appealed from this latter judgment.

Without deciding the jurisdiction of the chancery court to act in the premises, since it does not appear that appellees raise the question, and appellants have invoked it, we are of the opinion that the court was correct in making the latter order speak the truth as reflected by the notation on the judge's docket. No decree was entered regarding the merits of the controversy, and apparently no more was accomplished by the order than had already been obtained by the appeal and supersedeas bond filed. Appeals lie to the circuit court from the final orders of the county boards of education by making the necessary affidavit and bond, as provided in Acts 1925, c. 183, p. 546. If the order of the county board is void, certiorari may be resorted to. *McCrory Special School Dist.* v. *Curtis,* 174 Ark. 343, 295 S. W. 971.

We do not feel constrained to enter upon a discussion of the merits of the controversy. We hold, however, that the chancery court had the power to correct his judgment record so as to make it conform to the judgment actually rendered, even after the lapse of the term.

Affirmed.

SOUTHWESTERN BELL TELEPHONE *v.* CARTER.

Opinion delivered March 3, 1930.

Schoonover & Schoonover and *Edward B. Downie,* for appellants.

George M. Booth and *Walter L. Pope,* for appellee.

McHaney, J. This action was instituted by appellee against appellants to recover special damages which he alleged he sustained by failure of appellants to complete a long distance telephone call placed by him at Pocahontas, Arkansas, for Mr. Reed of the Reed Harlin Grocery Company, West Plains, Missouri, by which he intended to cancel a contract for the sale of flour theretofore made. The facts, briefly stated, are as follows: appellee, a resident of Pocahontas, is engaged in the brokerage business, buying and selling flour and feed, and does a considerable portion of his business by telephone, through the exchange at Pocahontas owned by appellant, Southwest Telephone Company. The other appellant owns the toll lines over which the call in question would have been handled. Appellee is acquainted with the employees of appellants, and has discussed with them the nature of his business, and told them to place his calls promptly, or let him know, so that he might use the telegraph, else it was likely to cost him money. On September 18 or 19, 1928, he called Mr. Reed, and sold him 1,050 barrels of flour at $5.25 per barrel, provided he did not notify him to the contrary. He then called the mill from which he purchased flour, and was advised that flour had advanced. The call in controversy was then placed for Mr. Reed to advise him that he could not deliver at the price quoted, but failed to get him, and he was compelled to complete his contract at a loss of 35 cents per barrel on the flour. Appellee gave no

notice to appellants, or either of them, as to the nature of his call, its purpose, or that he would suffer special damages if it was not promptly completed. He waited nearly all day or until about 5 P. M., before making complaint about delay, and was advised they had no record of the call.

At the conclusion of the testimony appellants requested a directed verdict which was refused. The case was tried to a jury, resulting in a verdict and judgment for appellee for $150.

It has long been the rule in this State that special damages are not recoverable for breach of contract, in the absence of notice to the party in default that more than ordinary damages will be sustained in the event of failure to perform, nor unless such knowledge "be brought home to the party sought to be charged under such circumstances that he must know that the party he contracts with reasonably believes that he accepts the contract with the special condition attached to it." This rule harks back to the old case of *Hadley* v. *Baxendale*, 9 Exch. 341, discussed by Judge RIDDICK, speaking for the court, in *Hooks Smelting Co.* v. *Planters' Compress Co.*, 72 Ark. 275, where it is said: "Now, where the damages arise from special circumstances, and are so large as to be out of proportion to the consideration agreed to be paid for the services to be rendered under the contract, it raises a doubt at once as to whether the party would have assented to such a liability, had it been called to his attention at the making of the contract, unless the consideration to be paid was also raised so as to correspond in some respect to the liability assumed. To make him liable for the special damages in such a case, there must not only be knowledge of the special circumstances, but such knowledge 'must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.' In other

words, where there is no express contract to pay such special damages, the facts and circumstances in proof must be such as to make it reasonable for the judge or jury trying the case to believe that the party at the time of the contract tacitly consented to be bound to more than ordinary damages in case of default on his part."

The same rule has been applied to telephone companies, *Southern Tel. Co.* v. *King,* 103 Ark. 160, 146 S. W. 489, 39 L. R. A. (N. S.) 402, Ann. Cas. 1914 B, 780, where it was said: "We are of the opinion that the testimony does not warrant a recovery of more than nominal damages. Even if the negligence of the operator in failing to respond to appellee's call could be said to have been the proximate cause of his injury, resulting from exertion and exposure in walking uptown to the central office, appellant is not liable, for the reason that it had no notice of the special circumstances out of which the damages might arise." And to telegraph companies, *Western Union Tel. Co.* v. *Raines,* 78 Ark. 545, 94 S. W. 700; *Western Union Tel. Co.* v. *Hogue,* 79 Ark. 33, 94 S. W. 924. This court, in *Southern Telephone Co.* v. *King, supra,* recognized a distinction in the business done by a telephone company from that done by a telegraph company when it was said: "A telephone company does not receive a message, nor does it transmit and deliver it in the ordinary acceptation of those words. It merely furnishes to the patron facilities for carrying on a conversation at long distance." This is a correct statement of the fundamental difference in their respective business. A telegraph company receives, transmits and delivers messages, while a telephone company furnishes the "facilities" for conversation at a distance. Knowledge of the contents of the message is brought home to the telegraph company from the written message itself, unless it be in code, which is sometimes held to suggest its importance; whereas, the only knowledge brought home to a telephone company is that one person desires to converse with another per-

son, unless notice is given of the nature and importance of the conversation desired, and that injury will be sustained from a failure to furnish the facilities. Here the undisputed proof is that no such notice was given. A number of telegraph cases were called to our attention in oral argument by counsel for appellee which sustained recoveries for special damages, but all of them gave notice of their special importance on the face of the messages from which notice of special damages might be inferred. We do not feel constrained to follow such cases under the facts in this case.

It necessarily follows from what we have said that only nominal damages were recoverable, and the court should have so instructed the jury. Judgment reversed for a new trial.

MID-CONTINENT LIFE INSURANCE COMPANY *v.* PARKER.

Opinion delivered March 3, 1930.

Rittenhouse, Lee, Webster & Rittenhouse, J. M. Shinn and *W. B. Foster,* for appellant.

V. D. Willis and *Shouse & Rowland,* for appellee.

McHaney, J. Appellee sued appellant, as beneficiary in a life insurance policy issued by appellant to George N. Parker for $2,000. The application was dated February 9, 1929; the policy was issued dated March 1, 1929; and the insured died April 29, 1929.

Appellant defended on the grounds, (1) that the insured falsely and fraudulently misrepresented the condition of his health by stating he was in good health, that no physician had ever expressed an unfavorable opinion as to his insurability, and that he had not suffered any illness or consulted any physician during the past seven years; (2) that the premium had not been paid, in violation of the policy; and (3) that he was in bad health when the policy was delivered in violation of another provision of the policy.

There was a trial to a jury, which resulted in a verdict and judgment for appellee. For a reversal it is urged that the insured gave his note for a portion of the premium to the agent who took the application, and that this note had not been paid prior to the death of the insured, in violation of a provision of the policy that the premium must be paid prior to the death of the insured. Appellant does not contend that it was not paid its share of the premium, but only that the note given the agent was not paid. If it were important (and we do not think so), the undisputed proof shows the amount of the note was paid to the agent before the insured's death.

It is next urged that the court erred in permitting appellee to prove what occurred at the time appellant's

agent took the application for the policy. She and her daughter, who were both present, were permitted to testify over appellant's objections and exceptions that, when Waterfield, the agent, came to write the application, the insured told him that he had been sick with the flu, that his heart was weak, and that he was taking medicine; showed him the medicine he was taking, and the agent said: "This is digitalis; my wife takes that; that don't amount to nothing." According to appellee and her daughter, the agent asked the questions, and the insured gave him correct answers, held back nothing about any illness or consultation with physicians, but that the agent wrote answers in the application to suit himself, stated his illness didn't amount to anything, that what the company complained of was such diseases as tuberculosis, typhoid fever, etc.

It is contended that this and other similar evidence is incompetent, as also the statement of appellee to the agent when the policy was delivered that the insured was all right or improving. We cannot agree with appellant. The undisputed proof is that correct answers regarding the condition of his health and the physicians he had consulted were given the agent; that he filled out the blanks and told the insured to sign without reading it over to him or allowing him to read the statements made therein. Under such conditions the knowledge of agent was the knowledge of the company, and, if it chose to write a policy having all such information, it cannot after death prevent the facts from being proved by showing an application to the contrary. *Am. National Ins. Co.* v. *Hale,* 172 Ark. 958, 291 S. W. 82.

The policy provided that "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statements shall void this policy unless it is contained in such application." In *Old Colony Life Ins. Co.* v. *Julian,* 175 Ark. 359, 299 S. W. 366, we said: "The burden is upon appellant to establish the fraud by proving affirma-

tively the falsity, materiality and bad faith in the representations made by the insured in the application regarding his health." Here the proof is that the agent wrote the answers, not as they were given him, but as he thought best after obtaining full information of the real facts, and that the insured signed the application without knowledge that correct answers had not been given. We think appellant wholly failed to establish fraud in making the application. See also *Bankers' Reserve Life Co.* v. *Crowley,* 171 Ark. 135, 284 S. W. 4, and cases there cited.

As to the delivery of the policy at a time when insured is in good health, we think there is no showing that he was in any worse condition than at the time of the taking of the application, in fact, the proof is that he was better. Appellant has not seen proper to abstract all the evidence, but only such parts as it deemed favorable. Appellee has supplied this omission by an abstract of the testimony regarding the insured's health at, before, and after delivery of the policy, which we think at least made a question for the jury as to whether the policy was delivered at a time when his health was good.

We find no error, and the judgment must be affirmed.

MERIWETHER SAND & GRAVEL COMPANY *v.* STATE EX REL. ATTORNEY GENERAL.

Opinion delivered March 3, 1930.

Ned Stewart, Searcy & Searcy and *McKay & Smith,* for appellant.

Hal L. Norwood, Attorney General, *Walter L. Pope,* Assistant, *R. T. Boulware* and *Guy Amsler,* for appellee.

BUTLER, J. The appellant, some years ago, secured leases on lands underlaid with gravel situated about four or four and a half miles from Bodcaw creek in Lafayette County, Arkansas. The waters from the said lands, in their natural flow by means of depressions, sloughs and

branches, entered said creek at a point above the lands of the appellees, F. M. Shewmake and E. D. Brown. The appellant erected on its leasehold equipment for the mining of the gravel and for washing a part of it so as to separate the sand and other foreign matter therein from the gravel. The gravel mined was sold by the appellant to various persons, a considerable quantity being sold to the Highway Department of the State of Arkansas. A part of the gravel was sold in its natural state as when taken from the pits, some was sold after having been washed, and the sand extracted was also marketed for various purposes. As a part of appellant's equipment, railway tracks were constructed for the purpose of bringing the gravel in its natural state to its washing plant and delivering it at points where it might be transported for use in the building of highways, etc.: A well was sunk from which water was procured. The total amount of money expended by the appellant in erecting and equipping its plant was a large sum. In washing the gravel the detritus held in suspension by the water flowed across the low-lying ground and finally was discharged into Bodcaw creek.

On the 13th day of July, 1929, the State, on relation of the Attorney General (F. M. Shewmake and E. D. Brown joining with it), filed a bill in equity asking that the appellant be permanently enjoined from discharging the washings from its gravel beds into Bodcaw creek—the State on the ground that said creek was a stream in which fish bred and were accustomed to frequent, and that same had been used as a public fishing and outing stream for many years by the citizens of Arkansas, and that the operation of appellant's equipment had rendered the stream unfit for a spawning and breeding ground, and that the fish had been destroyed and driven from its waters; and Shewmake and Brown on the ground that they were owners of a part of the stream, its pools and lakes, and the land adjoining the same for a considerable distance, and that the deposits from the

washing of gravel were filling the stream, that silt and other material were being deposited in increasing quantities and over increasing areas each season over their meadows and farms adjacent to the stream, and that the waters of the stream had been rendered unfit for domestic use or for the use of their horses and other domestic animals, and that their fishing rights in said waters were valuable and had been destroyed.

The appellant filed its motion to strike the cause of action alleged by Shewmake and Brown because, as it said, they were improperly joined with the plaintiff, the State, and also filed a demurrer, which motion and complaint being overruled, defendant answered denying the allegations of the complaint and denying that it had violated any public or private right or encroached upon the property of plaintiffs by doing or omitting to do any act by which commission or omission an injury resulted.

The court heard the testimony on the evidence, which was sharply conflicting, and found the issues in favor of the plaintiffs and rendered a decree holding that the operation of appellant's plant caused "slush, mud and silt to be discharged through natural drainage into the waters of Bodcaw creek which follows through and across the lands belonging to the plaintiffs, Shewmake and Brown, and that by reason of the same the waters of the stream were rendered unfit for domestic use for the watering of their animals and for other purposes, and that such discharge constituted a continuing private and public nuisance, and that appellant ought and should be restrained and enjoined from discharging any further quantities of silt, etc., into said creek or into any stream or drainage that would convey the same into the creek."

For reversal of the decree as to the appellees, Shewmake and Brown, the appellant contends that their several causes of action are barred by the statute of limitation, and for further reason, that they have been guilty of such laches as would bar the relief sought. Appellant further contends that the State is not entitled to the

relief granted; that the damages are shown to be slight, while the relief sought would work great damage to the appellant and great inconvenience and loss to the public; that the relief ought not to have been granted because the operation of appellant's plant was of importance to the State, and that a dangerous precedent would be set by the upholding of the judgment of the court below.

The testimony on the part of the appellant tended to show that the appellees, Shewmake and Brown, were the owners of the lands alleged to have been damaged, and of the stream at and before the time of the erection of the appellant's plant; that they knew of the preparations made by the appellant and of the erection by it of its various equipment, and that it was laying tramroads at great expense, making purchases of gravel *in situ* from the various landowners, and entering into extensive contracts with the State Highway Department and others for furnishing both washed and unwashed gravel; that its plant was erected and operations begun in the year 1925, more than three or four years before the date of the filing of the complaint in this case, and that shortly after the erection the detritus from the washing plant began to make its way down the lower lying lands and branches, and soon began to discolor the waters of the creek, and to load it with quantities of various kinds of earth held in suspension, which gradually, as these substances settled, began to fill the stream and to deposit sediment on adjacent lands. These facts, it is argued, bring the case within the rule announced in *Brown* v. *Arkansas Central Power Co.,* 177 Ark. 1064, and that the appellees' cause of action is barred because of limitation. To this conclusion we cannot assent. In order for the rule announced in the Brown case, *supra,* to apply, the erection of the plant and its operation must have been of such nature that the consequences resulting therefrom could have been known and the damage ascertained and fully compensated at the time the injury first occurred. It is shown by the testimony that the injury to

the stream was progressive in its nature, being greater or less with the recurring seasons. The deposits of mud in the flats were precipitated in greater quantities in times of flood than under normal weather conditions. Therefore, it cannot be said that the full extent of the injury could have been foreseen or the damage ascertained at the time of the beginning of the operations of appellant's plant.

In *Brown* v. *Arkansas Central Power Co., supra,* it is said: "If it was known the damage was probable, or even though some damage was certain, the nature and extent of that damage could not be reasonably known and fairly estimated, but would be speculative and conjectural," then the rule announced by the court as applicable to the facts of that case would not apply. Bodcaw creek is a well-defined stream, and the owners of lands across which it runs are entitled to see it maintained in its natural state, and this right is a continuing one, and, by virtue of § 3663 of C. & M. Digest, such right may be exercised by the landowner in removing from the stream anything which tends to obstruct it in its natural flow and to have a cause of action against any one whose acts might have occasioned the injury. Having a continuing right, it follows that the appellees would not be barred by the statute of limitations. *Beck* v. *State,* 179 Ark. 102-110. We are of the opinion that the appellees, Shewmake and Brown, were not guilty of such laches as would prevent them from invoking the aid of a court of equity. "Laches signifies not only an undue lapse of time, but also negligence in failing to act more promptly. It is therefore of the essence of laches that the party whose delay is in question shall have been blamable therefor in the contemplation of equity, and accordingly it must appear that he had knowledge, actual or imputable, of the facts, which should have prompted a choice either diligently to seek equitable relief or thereafter to be content with such remedies as a court of law might afford; * * *" 10 R. C. L., § 153.

The knowledge necessary to be had before laches will be imputed is not only the knowledge of the commission of an act, but of the extent and effect of the consequences which would follow. In this case it could not reasonably be said that the riparian owners should have foreseen when the gravel plant of the appellant was erected in 1925 that the consequences of its operation would destroy the beauty and utility of the stream in question which watered their grounds and afforded recreation for them and their friends. It is shown that a considerable quantity of gravel—indeed, the greater part—was sold and carried away in its natural state, and washing operations did not begin until some time after the erection of the plant. Under the facts in this case and the peculiar nature of the appellant's operations it cannot be said that equity imposed upon the appellees, Shewmake and Brown, the duty to make complaint of anticipated evil, or that a court of conscience would bar them because of their silence. When the doctrine of laches is invoked, each case must be governed by its own peculiar facts. In this case the chancellor has found the facts against the contention of the appellant in this regard, and we cannot say that this finding is against the preponderance of the testimony.

It is next contended by the appellant that the State is not entitled to the relief sought because the injury to the stream in question and to the fish therein is slight, and the advantage to the public by the operation of its plant is great. It is also contended that great damage would be inflicted upon the appellant, and great inconvenience incurred by the public if the judgment of the lower court should be affirmed. We will consider these several contentions together.

As to what Bodcaw creek was before the appellant began its operations in 1925 or 1926 there can be little doubt; it took its rise some miles above the lands of Shewmake and Brown, and from the peculiar nature of the ground over which it flowed, the waters, from time to

time, would disappear in the body of the stream to arise again a little further on, making disconnected pools, but, as it continued on its way gathering volume from its affluents, and from the springs along its shore, when it reached the lands of the appellees, it had become an ever-running brook rippling across the shallows and deepening into the pools, which in places reached the proportions of small lakes. This stream was, beyond the memory of the oldest inhabitant, the home of numerous fish of various species natural to the waters of southern Arkansas—several varieties of perch, the famed rock bass known locally as the goggle-eyed perch, and indeed, all other varieties of fish common to our streams. The creek meandered through the lands of the appellees and on below for many miles, taking its winding course into the State of Louisiana, and in all its length it was the resort of the inhabitants either for fishing or for disporting themselves in its waters. In short, as stated by one of the witnesses, "It was a very pleasant stream."

The chancellor has found, and we think not against the preponderance of the evidence, that the operation of the appellant's gravel plant has caused a marked change in the character of the stream in question and rendered it unfit for the propagation or habitat of fish. The water is no longer limpid and pure, but muddy and turbid, to the extent that fish are unable to live there, and those that reach this stream from below must come to the surface to obtain necessary oxygen, and after a time sink into the water only to die and be cast upon the shore. The pools and lakes in which the urchins and grown folks were wont to bathe are now so discolored and befouled by the foreign matter brought from the gravel plant above and held in suspension in the water, that they are no longer clean and clear, but discolor and coat the bodies of bathers with an unpleasant slime. Consequently, bathing is no longer indulged in. The fish have abandoned the waters and the fishermen can only make an occasional catch, where once fish abounded in plenty.

These facts, we think, call for the exercise of the regulatory power of the State so as to protect and restore this stream to its original state. Such power has been recognized from earliest times to inhere in the State. As has been stated in 11 R. C. L. 1047, cited in brief of appellee, "The regulatory power of a State extends not only to the taking of its fish, but also over the waters inhabited by the fish; its care of the fish would be of no avail if it had no power to protect the waters from pollution; it is immaterial whether the water is navigable or not; to the extent that streams are common passageways for fish to and from their breeding and feeding grounds, they are public waters and subject to governmental regulations. Thus, for the preservation of fish, the casting of sawdust or other mill refuse into streams may be forbidden. Moreover, the placing of mill refuse in a stream inhabited by fish may be considered a nuisance, and the Attorney General of a State, without the information of a private relator, may procure an injunction against the continuance of such a pollution of the stream. When the unrestrained right to run a sawmill on the bank of a stream conflicts with the right of the public to have fish live and increase in the water, the right of the mill proprietor must give way to the right of the public; nor can the owner of such a mill, by lapse of time, acquire a prescriptive right to discharge sawdust in the stream, so as to preclude the State from forbidding the practice. So the operator of a coal mine may be forbidden to drain sulphur or mine water into a stream though the stream be the natural receptacle of such drainage, and it is not practicable to drain the mine otherwise."

Counsel for the appellant, in their very able brief, insist that this rule would not apply to the operations of the establishment for the recovery of natural resources at the place where they are found, because the locality where such resource exists determines the place of the operation, and that where a lawful business is properly operated, and is engaged in the recovery of natural re-

sources, the courts will not enjoin the conduct of that business. In support of this contention, the appellant cites the case of *Pa. Coal Co.* v. *Samderson,* 133 Pa. St. 126, 6 Atl. 453, 57 Am. Rep. 445, and the case of *Barnard* v. *Shirley,* 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568. These two cases may be distinguished from the case at bar in this particular; in *Pennsylvania Coal Co.* v. *Sanderson, supra,* the rights of the lower riparian owners to the use of the waters of a stream for domestic purposes was held to be inferior to the transaction of the business of mining coal where the operation of a mine in the ordinary and usual way polluted the stream by reason of drainage along its natural courses from the lands on which the mine was situate to the stream, on the theory that the rights of a private individual must give way to the interests of the community. In *Barnard* v. *Shirley, supra,* an owner of an artesian well upon his own land, who used the water for his patients in a sanitarium upon his own premises was not liable to injunction on the part of his neighbors for allowing the water to flow in its natural course upon their lands. In both of these cases it was the right of the individual that was denied, while in the instant case it is the right of the State which is being asserted—it is the community that is seeking relief against the operations of an individual injurious to such community.

As to the appellees, Shewmake and Brown, these cases are in conflict with the general rule and the decided weight of authority. See case note, 27 R. C. L. 1214. The general rule as to the rights of riparian owners may be thus stated: Every such proprietor is entitled to the usual flow of a stream in its natural channel over his land, undiminished in quantity and unimpaired in quality, subject to the reasonable use by upper proprietors, and with the right to make any reasonable use of the water necessary for his convenience or pleasure, including in non-navigable waters, the exclusive privilege of taking fish from the stream. Riparian rights inhere in

the owner of the soil and are part and parcel of the land itself, and are vested and valuable rights which no more may be destroyed or impaired than any other part of a freehold. 40 Cyc., p. 593 *et seq.; Miss. Mills Co.* v. *Smith,* 69 Miss. 299, 11 So. 26, 30 Am. St. Rep. 546; *McLaughlin* v. *Hope,* 107 Ark. 442, 155 S. W. 510, 47 L. R. A. (N. S.) 137; *El Dorado* v. *Scruggs,* 113 Ark. 239, 168 S. W. 846; *Taylor* v. *Steadman,* 143 Ark. 486, 220 S. W. 821, and cases cited in last case.

It is insisted, however, that the appellees have an adequate remedy at law by an action for damages. In this contention, the appellant errs for the reason that the injury, as shown by the testimony which was accepted by the chancellor, is a continuing and progressive one, and to remit them to their remedy at law would result in unnecessary expense and inconvenience to the litigants and lead to a multiplicity of suits. "The remedy at law, to be adequate and complete, and attain the full end and justice of the case, must reach the whole mischief, and secure the whole right of the party in a perfect manner, *in praesenti* and *in futuro.*" *Ex parte* Conway, 4 Ark. 338. See also *Lawton* v. *Herrick,* 83 Conn. 417, 76 Atl. 986; *Peterson* v. *Santa Rosa,* 119 Cal. 387, 51 Pac. 557. But the appellant says the injury shown is slight and the resulting damage to it, by reason of the injunction, would be great. In this contention, appellant is concluded by the finding of the court below that the waters of Bodcaw creek have been so polluted as to destroy the fish therein and to render it unfit for the use or pleasure of the riparian proprietors. It would serve no useful purpose to detail the testimony of the several witnesses relative to this question. As before stated, it was conflicting, and we cannot say the chancellor's finding was against its preponderance. Whether the damage to the appellees was great or slight depends largely upon the point of view. In the eyes of those who burrow into the earth for inert and dull ores, whose value lies only in use, it may so appear; but value lies also in something more, and that is

valuable, whatever it may be, in proportion as it tends to promote not only a utilitarian purpose, but also contentment and rational pleasure. Certainly, a trout stream would add considerable value to a farm—the brook alone with its shining shallows and its deep quiet pools would necessarily add much to the charm of any farmstead, and considerably enhance its market value. Living water has always been deemed a valuable and desirable thing, and when that is sullied, as in this case, the injury is not slight, but substantial, and of which a court of equity will take cognizance and remedy by its injunctive power. Where the injury is a recurring one, and the damages sustained are of a substantial nature, equity will restrain its continuance by injunction. *Gus Blass Co.* v. *Reinman,* 102 Ark. 287, 143 S. W. 1087; *Lawton* v. *Herrick, supra; Peterson* v. *Santa Rosa, supra.* Neither is it an answer to the contention of the appellees that the business engaged in by the appellant is a lawful and useful one which is being conducted in a proper and customary manner, for the maxim, "So use that which is thine own as not to injure the rights of another," applies regardless of the character of a business. This rule is founded on good morals and natural justice, and applies to conflicting rights of every description (*Hitchman Coal Co.* v. *Mitchell,* 245 U. S. 229, 38 S. Ct. 65, referred to with approval in *Local Union, etc.,* v. *Stathakis,* 135 Ark. 86-93, 205 S. W. 450, 6 A. L. R. 894), among which are the rights of the State and riparian proprietors to have the waters of streams maintained free from pollution. 11 R. C. L. 1047, *ante,* and *Drake* v. *Lady Ensley Coal Co.,* 102 Ala. 501, 14 So. 749, 24 L. R. A. 64, 48 Am. St. Rep. 77, 24 L. R. A. 64.

The contention of the appellant that the decision of the lower court would result in destroying its business to its very great damage is not justified. It is true that some additional expense must be incurred by which the water flowing from appellant's plant must be freed from its impurities so that it might reach Bodcaw creek clear and pure. While the appellant's manager stated, if the

prayer of appellees' bill was granted his company would be forced to abandon its works and move away, in view of the magnitude of the plant and its remunerative character and the relatively small cost of the installation of settling basins, taking into consideration the amount already invested, we think the conclusion hardly justified. If the appellant should cease the operation of its plant, it would perhaps be caused more on account of the exhaustion of the gravel beds or the lack of purchasers for its output than on account of the additional investment of $10,500, which is shown to be about the amount required to install the settling basins in which the sediment from the operation of appellant's plant might be deposited. We recognize the importance of business enterprises, and where such are established at the only place where it is practical to operate such businesses, and they are conducted in the only practical manner, their right to operate will not be destroyed for trivial causes or for slight damage resulting to others. Where such interference would cause serious injury to them or loss to the community, a lawful business ought not to be destroyed or seriously inconvenienced except for the most serious cause. *Durfee* v. *Thalheimer,* 85 Ark. 544, 109 S. W. 519. But, as is said in the case of *Strobel* v. *Kerr Salt Co.,* 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, "While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trivial causes, they will not permit substantial injury to neighboring property with a small but long established business for the purpose of making a new and great industry flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule, every man must so use his own property as not to injure that of his neighbor; and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land does not change the rule."

We cannot say that the facts developed in this case would lead to the conclusion that any great injury would result to the appellant, or any loss to the State, by reason of the requirement of the court that the appellant cease to operate its business to the injury of others. The appellant complains that "the affirmance of this case would say, not only to the appellant, but to the entire world, that, notwithstanding Arkansas has wonderful natural resources, when you come into Arkansas and invest large sums of money for the purpose of developing these resources, you can be enjoined if in the course of your operations you damage any landowner, however slight, or if because of the natural drainage you necessarily permit water to flow into any branch or any creek, however small, or unimportant. The world will be told that any landowner so damaged will not be required to seek redress at law, but that he may go into a court of equity and restrain the operations entirely. Such a policy, if adopted in this State, would be ruinous, and would retard the very progress of the age." This conclusion by no means follows, nor is it the effect of the principles herein announced as applied to the testimony before the chancellor. Neither are the authorities cited by the appellant (except perhaps the cases of *Barnard* v. *Shirley,* 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568, and *Robb* v. *Carnagie Bros. & Co.,* 145 Pa. St. 324, 22 Atl. 649, 14 L. R. A. 329, 27 Am. St. Rep. 694) in conflict with the principles announced. The rules herein stated are neither novel nor dangerous; they recognize the rights of private or corporate enterprise, but do not overlook the rights of the humble and less important citizens. The maxim, "*Sic tuo utere,*" etc., must still be the rule of conduct. In a case where the facts were similar in their more important particulars to those of the instant case, a farm was injured from sediment cast upon it, and the waters of the stream flowing through it were polluted from the washing of iron ore, the court, in granting relief, said: "Under the provisions of the Constitution private property can-

not be taken for public use or by corporations without just compensation being first made to the owner, except by his consent. The courts—and it was never intended to be otherwise understood—are not the 'masons' to chisel away vested rights of property of private individuals, however humble and obscure the owner, for the benefit of the public or great corporations. It is the pride of this Republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to the courts of this country." *Drake* v. *Lady Ensley Coal Co.*, 102 Ala. 501, 14 So. 749, 751, 24 L. R. A. 64, 48 Am. St. Rep. 77.

We are of the opinion that the finding of the court below was not against the preponderance of the testimony, and, applying the principles of law hereinbefore stated to the facts as found by the chancellor, we concur in the judgment rendered, and it will be affirmed.

FARMERS' BANK OF GREENWOOD *v.* MACKEY & GILLEN COAL COMPANY.

Opinion delivered March 3, 1930.

A. M. Dobbs, for appellant.

Warner & Warner, for appellee.

BUTLER, J. Mackey & Gillen Coal Company, appellee, sold eleven cars of coal of the value of $1,663.50 to one W. C. Caudle who was engaged in the business of

buying and selling coal. Caudle did business with the Farmers' Bank of Greenwood, appellant garnishee. On May 25, 1929, the purchase price for the coal aforesaid remaining unpaid, the appellee brought suit against Caudle, and garnished the Bank of Greenwood, alleging that the garnishee was indebted to the defendant Caudle in the sum of $2,100, and that it had in its hands and possession goods, chattels, moneys, credits and effects belonging to said defendant of said value, and propounded interrogatories seeking to elicit proof of these allegations.

On the 13th of June, the garnishee filed its answer denying that it was indebted to Caudle in any sum, except $2.90, or that it had in its hands any credits and effects belonging to the defendant except the sum named. A denial to the answer was filed on July 1, 1929, and on said day the cause came on for trial which resulted in a verdict in favor of the plaintiff against the defendant and garnishee for the sum sued for. The garnishee defended on the ground that, while on the date of the issuance of the garnishment it had in its hands, or before the return day for its answer to the garnishment, a sufficient sum to the credit of Caudle on its books to pay the judgment, this was not in reality the property of Caudle, but was held by the bank as a special fund to secure the payment of certain indebtedness due by Caudle for money advanced in the following manner: that in January preceding it had an arrangement with Caudle by which it was to handle the invoices of coal bought by Caudle, and by him sold to other parties; that these invoices were pledged as collateral security to the bank, the bank advancing 85 per cent. to Caudle at the time of their delivery with the understanding, that when the invoices were paid 85 per cent. should be applied to the payment of the indebtedness then existing, and 15 per cent. should be placed in a special account to secure the money advanced for invoices, the amount of which had not yet been collected.

On trial of the case the cashier of the bank testified as to the above state of facts and understanding, and stated further that on the 24th day of May there was the sum of $1,477.05 in the special account, and that since that date he had collected $367.58, making a total of $1,844.63; that on the 18th day of June he checked against this special account to pay the bank for the amount of the debt owed on the invoices; that he drew this because he thought he had a right to do so; that on the day that he testified in court, July 1, 1929, Caudle was not indebted to the bank in the matter of the invoices, and that he had on hand in the bank belonging to Caudle invoices of the face value of $1,807.61, and cash sufficient to make a total of $1,974.55, and that the bank was not entitled to such invoices or such cash.

There was other testimony tending to show that, at the time the appellee was about to sell the coal to Caudle, its representative called on the bank, and the cashier stated, in reference to paying for the coal, that the bank would pay it when it collected the bills of lading, and that Caudle would have $2,100 to his credit if nothing was lost on the invoices. The cashier of the bank was asked how many of the invoices of the eleven cars of coal had been paid for, and stated that he could not tell without his books. Later, after having got the books, he still did not say whether any of these invoices for the eleven cars of coal had been paid, or, if so, how many. Therefore, we cannot gather from the testimony whether the bank ever collected any of the invoices of appellee or not, but this, in view of the statement of the cashier as to the state of Caudle's account on July 1, 1929, we deem unimportant.

The court gave the following instruction for the plaintiff: "If you find that the time of the service of the garnishment herein, or thereafter, the Farmers' Bank had in its possession or under its control any goods, chattels, moneys, credits or effects belonging to the said defendant, or if the said bank was indebted to the said

defendant in any sum or amount, then you are instructed that plaintiffs would be entitled to recover from said bank for the amount thereof, if any, not to exceed the amount of the indebtedness due from defendant to the plaintiff."

The court refused to instruct the jury at the request of the defendant as follows: "You are instructed that you should find against the garnishee in whatever sum the bank admits that it has in its possession belonging to W. C. Caudle, but it is not your duty to find against the Farmers' Bank in any sum for the money that W. C. Caudle has stipulated and agreed that the Farmers' Bank shall hold to protect itself against any loss or claim that may be made against W. C. Caudle for the reason that under the law the bank would be entitled to hold whatever per cent. that was agreed to between the defendant Caudle and the bank, in order to protect the bank until all cars shipped under this agreement were finally paid for under the contract above mentioned."

The giving and refusing of the above instructions the appellant assigns as error. We do not think, under the facts in this case, that the appellant's position is well taken, nor do we think the authorities cited by the appellant have any application. The only question before the jury was, did the garnishee bank have in its possession at that time any credits or effects to which the defendant Caudle was entitled? This question was answered by the garnishee bank itself in the testimony of its cashier to the effect that there were invoices in its hands amounting to more than $1,800, and cash making the total sum about $1,900. In view of this testimony, we think the instruction given for the plaintiff was correct, and that requested by the defendant properly refused.

It is argued by the appellant that the invoices in the bank were not money, and that the court might, by some order, have impounded them for the benefit of the appellee, and that it would be manifestly unjust to render a money judgment upon assigned invoices which may never

be collected. The answer to this argument is that the statute has provided for just such a contingency. Section 4914 of C. & M. Digest provides that the garnishee may surrender the chattels, moneys, credits or effects in its hands belonging to the defendant to the plaintiff, and in the case of *Patterson* v. *Harland,* 12 Ark. 158-163, the court, referring to this statute which was then in effect, said: "The last section quoted, it will be perceived, gives the garnishee an election either to surrender or to retain the goods and effects, and in case he shall choose to make the surrender, he is thereby entitled to a release from all responsibility in relation thereto. It is very clear that he makes his election at his peril, and that, in case he shall fail to avail himself of his privilege to surrender on the return day of the writ, he is liable for the value of the property found in his possession belonging to the judgment debtor, at least to the extent of the judgment in case it shall amount to so much." It will be seen that on the return day of the writ the appellant had in its hands credits, effects and cash more than sufficient to pay appellee's claim, and indeed, it has not been shown that such invoices were not worth their face value.

Finding no error, the judgment will be affirmed.

BIEATT *v.* ECHOLS.

Opinion delivered March 3, 1930.

Brundidge & Neelly, for appellant.

Bogle & Sharp, for appellee.

BUTLER, J. Dr. R. R. James of Cotton Plant, Arkansas, was the owner in his lifetime of a large estate, consisting of lands and personal property, of the aggregate value of $200,000. He executed a will, and, having died in 1926, the will was duly probated in the probate court of the Southern District of Woodruff County, Arkansas. In this will the Bank of Cotton Plant & Trust Company was named as executor and trustee. The bank duly qualified as such executor, and proceeded to administer the estate until the 17th day of June, 1927, when it failed and was taken over by the State Bank Commissioner. On the 19th day of September, 1927, the chancery court of the Southern District of Woodruff County appointed D. H. Echols trustee in succession, who qualified and proceeded with the administration of the trust created by the terms of the will.

The will, after making a number of specific bequests, left the residue of the estate to the wife of the testator for life. By paragraph VI of the will, after the death of the wife, all of the remainder of the estate of whatever kind was devised and bequeathed to the Bank of Cotton Plant & Trust Company, as trustee, for the uses thereafter set forth, and the testator, after naming the trustee, made the following provision: "I hereby direct that the said trustee shall hold and manage said property for a period of twenty years, and that said trustee shall annually distribute all income derived from said property as follows:

"It shall pay to the said Bank of Cotton Plant & Trust Company twenty per cent. of said income as pay-

ment for its services in administering this trust; second, to pay to the trustee of Galloway College fifteen per cent. of the said income; third, to pay to the trustees of Hendrix College fifteen per cent. of said income; fourth, to pay to the trustees of the Methodist Episcopal Church South of Cotton Plant, Arkansas, ten per cent. of said income; fifth, to pay to the trustees of the Methodist Orphanage at Little Rock, Arkansas, ten per cent. of said income, and ten per cent. of said income shall be held by said trustee for the benefit of the poor people of the town of Cotton Plant, Arkansas, to be paid out and distributed by said trustee as it may deem best, and at such times as it may deem proper.

"I direct that twenty per cent. of said income shall be paid to John M. James during his life or until the termination of this trust, but, if the said John M. James should die before the termination of this trust, then in that event this payment shall cease, and the said twenty per cent. shall be distributed *pro rata* to the other beneficiaries named above in this paragraph.

Section VII of the will is as follows: "I direct that at the end of each year that the said trustee shall file with the chancery court for the Southern District of Woodruff County, State of Arkansas, a report showing in full all amounts received by it, and the amounts disbursed by it, with the proper vouchers therefor.

"After the end of said twenty years the said trustee shall file in said court a report in full showing a complete inventory of all property held by it as such trustee under this trust and the conditions of the same. And if it shall appear to said court that it would be for the best interest of the beneficiaries in this trust to terminate the same, then the same may be done under the order and directions of said court, but if it shall appear to the court that it will be for the best interest to continue this trust, then the same may be done under a proper order of said court. When this trust is terminated and the property sold, I direct that the proceeds arising from the sale shall

be distributed as follows: Forty per cent. of same shall be paid to the trustees of Galloway College, and forty per cent. shall be paid to the trustees of Hendrix College, and twenty per cent. shall be paid to the trustees of the Methodist Orphanage at Little Rock, Arkansas."

Section VIII of the will provided that: "If, at any time during the life of the trust above provided for, it shall appear to the trustee that any property held by it under this trust is not profitable to hold, and that it would be for the best interest of the trust to sell the same, then the said trustee shall have the right and power to sell the same in such manner as may be deemed best. And said trustee shall have the right to sell the same and convey the legal title thereto, and do all things necessary to be done to complete the sale of said property.

"When any property held by such trustee shall be sold, as above provided, the said trustee shall make a report of such sale to the chancery court above designated, and shall set forth the reason for said sale."

Section IX of the will is as follows: "I request and desire that the Bank of Cotton Plant & Trust Company shall accept this trust and execute the same, but if the said Bank of Cotton Plant & Trust Company shall fail or refuse to accept and execute the same, or if, after having accepted the same, it should resign, it shall make a report to the said chancery court, and the said court shall appoint a trustee to carry out the purpose of this trust.

"I hereby nominate and request the Bank of Cotton Plant & Trust Company, of Cotton Plant, Arkansas, to act as the executor of this, my last will and testament."

After the failure of the bank, the probate court of Woodruff County appointed D. H. Bieatt administrator of the estate on the.....day of January, 1928. This case involves the power of the chancery court to restrain the administrator *de bonis non* from interfering with the trustee in the management of the estate. The chancery court of Woodruff County, on complaint of the trustee, rendered judgment enjoining the administrator from tak-

ing charge of any of the property belonging to said estate, or interfering with the trustee in the management of the same. The case was tried on an agreed statement of facts which, as far as they are material to the question presented to this court, are as follows:

After reciting the execution of the will and the death of James, the partial administration of the estate by the trustee and executor bank, its failure, the appointment of Echols trustee and successor, his giving bond, and that his appointment "was made by the chancery court over the objection of a majority both in number and interest of the legatees in said will," the appointment on January 17, 1928, by the probate court of Woodruff County of Bieatt, administrator, his qualifying and giving bond, the filing of suit by the trustee, and the issuance of a temporary injunction, the statement of facts continued as follows: "That assets of the said R. R. James estate, consisting not only of land, but of several thousand dollars of notes and accounts due said estate; that several thousand dollars of said notes and accounts, some of them secured and many of them unsecured, are still due and uncollected; that all of the claims probated against said estate at the time the trustee, D. H. Echols, took charge of same have been paid, but the trustee has paid several thousand dollars of indebtedness against said estate for claims not probated against said estate, the amount of payment made by him, together with the assets coming into his hands, are shown from his settlement filed with the chancery court on the 14th day of September, 1928, a copy of which is hereto attached as part hereof. That there are still claims against said estate outstanding and unpaid. That all claims now outstanding which are due and owing by the estate, and all claims which have been paid that were not probated are those which have arisen in the administration of the estate by the trustee or which have come into existence since the time for probating claims against the estate expired, and which are made a charge against the estate by law. That the trus-

tee, D. H. Echols, at the time he was appointed trustee of said estate, owed said estate, as evidenced by his promissory note, in the sum of $11,888; that said trustee was co-indorser with R. R. James on the following notes probated, and held against the estate of the said R. R. James (here are listed the notes, one of the International Coal Company, upon which there appeared no indorsement, four other notes of said coal company indorsed by R. R. James and D. H. Echols, aggregating the sum of $17,-303.58). That the said trustee has not paid his *pro rata* part as indorser on said notes, and the trustee is still due the estate, on his own individual note, in the sum of $....."

It is the theory of the appellant, Bieatt, administrator, that by the order and judgment of the chancery court that court has usurped the duties and powers of the probate court to proceed with the administration of the estate, which power rests solely in the probate court. The appellant contends that, when the Bank of Cotton Plant & Trust Company failed, it left the estate in the same condition that it would have been had Dr. James named an individual as executor in the will, and that he is entitled to take over the administration of the estate by virtue of the provisions of § 42 of Crawford & Moses' Digest, which provides, "If all of the executors or administrators of any estate die or resign, or their letters be revoked, in cases not otherwise provided for, letters of administration in succession shall be granted to the persons to whom administration would have been granted if the original letters had not been obtained, or the person obtaining them had renounced the administration or to such other person as may be appointed by the court; and such administrator shall perform the like duties and incur the like liabilities as the former executor or administrator." This contention would be unassailable but for the fact that, since all of the claims existing at the time of the death of the testator have been probated and paid, there is no longer any necessity for an administration.

There are a number of claims that are now due by the trustee which have been incurred in the management of the estate, but these are not such claims against the estate as would require the intervention of the probate court, but are such as should be paid by the trustee under the orders of the chancery court in the administration of the trust. Upon the death of a person his estate passes into the hands of the law to be administered for the benefit of creditors (*Merrick* v. *Blitton,* 26 Ark. 496), and when that purpose has been accomplished and there remain no debts, there is no longer need of an administrator. *Rainwater* v. *Harris,* 51 Ark. 401, 11 S. W. 583, 3 L. R. A. 845; *Adamson* v. *Parker,* 74 Ark. 168, 85 S. W. 239.

Since all of the claims probated against said estate had been paid at the time the trustee first named had ceased to function; as the time for probating claims when the appointment of Bieatt as administrator had lapsed, there was nothing further to be done regarding the estate except to administer the same under the trust and in the manner prescribed by the will. By the terms of the will an express trust was created for the benefit of certain named beneficiaries, and the trustee clothed with wide power for carrying into effect the purposes of the testator. He was given authority to hold and manage all of his property. This necessarily included all debts of every kind which might be due the estate, no matter in what way they might be evidenced, and impliedly he had the authority to collect the same and to invest the proceeds. In fact, by paragraph VIII of the will express power was given to make sale of any property held under the trust not profitable to hold, and which it would be to the best interest of trust to sell. The will provided that the trustee should administer the trust under the direction of the chancery court, and account to said court at stated times by a report showing all amounts received and disbursed in the administration of the trust; and, in addition, the chancery court was clothed by the testator with authority to name a trustee in the event the one named in the will should fail or cease to act.

Independent of any provision in the will, the chancery court was clothed with the power to appoint a trustee in succession, and to supervise his conduct. "Courts of equity have always claimed and exercised exclusive jurisdiction in cases of trust, and over the conduct of those appointed to execute them. This has never been disputed ground. No other tribunal can so properly direct the manner of executing or inquiring into or correcting abuses where there has been or is likely to be a mismanagement by the trustees." 10 R. C. L., § 99.

This court has always recognized and from time to time announced the above rule. In *Ex parte* Conway, 4 Ark. 337, it is said: "It has ever been held that the most appropriate remedy in all trusts is to be found in a court of equity. * * * The jurisdiction of courts of equity, if not created, was soon afterwards extended, for the purpose of protecting and enforcing the execution of trusts," and, after quoting a number of authorities, the court continued as follows: "It is the duty of the trustees to preserve the estate, and every assistance will be granted by the court of equity in support of the trusts, and to aid them in its due performance. These authorities unquestionably show that courts of equity entertain jurisdiction to protect the trust, and that they will assist the trustees in its management and execution. Now, according to the authority of Garth and Cotton, equity makes it the express duty of the trustees to preserve the estate. If it is their duty to preserve the estate, how can they do this, unless they can acquire possession of the property? We ask, how is the trust to be protected or upheld if the funds or assets that constitute the estate are not delivered into their hands and placed under their management? This is all that is asked for in the present instance."

This court has reiterated this doctrine from time to time. *Robinson* v. *Robinson,* 45 Ark. 482; *Bland* v. *Talley,* 50 Ark. 71, 6 S. W. 234; *Spradling* v. *Spradling,* 101 Ark. 451, 142 S. W. 848; *McClelland* v. *Linton,* 121 Ark. 85, 180

S. W. 482; *Hall* v. *Webb*, 150 Ark. 71, 233 S. W. 821. While the chancery court had the inherent power, as well as that expressly given by the will, to appoint a trustee, this was not one to be used arbitrarily but with sound legal discretion.

The appellants complained that Echols was appointed over the protest of the majority in number and interest of the beneficiaries, and set up, as a further reason why he should not have been appointed, that he himself was a large debtor of the estate. The chancellor, for reasons given by him, ignored the request of the beneficiaries, but this question is not now before us, the only question before us being whether the court, after having appointed the trustee, could by injunction restrain the administrator *de bonis non* from interfering with the administration of the trust. But, see on this question, the following authorities, *Re Timpest,* 14 Law Times Rep., N. S. 688; *Re Cramer,* 31 Nova Scotia 477; *Re Welch,* 20 App. Div., N. Y., 412, 46 N. Y. S. 689, affirmed in 154 N. Y. 774, 49 N. E. 1145; and *Re Lafferty*, 198 Pa. 433, 48 Atl. 301. We do not think that the action of the court below was to lift the administration of the estate out of the probate court. This it did not do or attempt to do, for the reason that there was nothing to administer in that court. The effect of its judgment was merely to protect its officer in the discharge of his duty.

No error appearing, the judgment of the trial court will therefore be affirmed.

BANK OF SHIRLEY *v.* SMITH.

Opinion delivered March 3, 1930.

Brundidge & Neelly and *Opie Rogers,* for appellant.

Garner Fraser and *Williamson & Williamson,* for appellee.

BUTLER, J. We adopt the statement of facts set out by the appellant in its brief as a fair presentation of the same. On the 22d day of February, 1924, the appellee, J. T. Smith, who had worked for the appellant bank a short time prior to that date, made an agreement with Albert Couch, cashier of the Bank of Shirley, that he would pay the Bank of Shirley $1,000, and that Couch would select $1,000 worth of notes for Smith and collect them for him; that on that day, at the time the arrangement was entered into, Couch delivered to the appellee a memorandum in writing as follows: "I have this day selected notes aggregating $1,000 for you, said notes bearing interest at the rate of 10 per cent. which notes are to be collected by this bank for you. Yours very truly, Albert Couch, Cashier."

On or about the same date for the years 1925 and 1926 following, Smith would collect from the bank $100 as interest and Couch would redate the memorandum, making it the same day of the month and changing the year. Some time in June, 1926, Couch left the employment of the Bank of Shirley, and when Smith presented himself to the new cashier to collect the interest on the $1,000 he was told that there was no record of any such transaction in the bank, and payment of the annual interest due was refused. The president and some of the other officials of the bank were also interviewed by Smith regarding the transaction, all of whom denied any knowledge of it, and refused to recognize it. Afterward Smith went to Morrilton, to which place Couch had removed, and there Couch paid him $15.

There is no dispute about the transaction except as to what took place at that time and at the time the interest payment in February, 1926, was made. Smith testified that there was no change at all in the arrangement, while Couch testified as follows: "Later he

(Smith) was there at the bank and said he would like to continue the arrangement, and I told him it was an unusual transaction, and that I didn't know whether we could handle it on that basis or not, and he said, if we couldn't, that he would be glad if I could handle the money myself for him. I agreed that I could use the money. He came to Morrilton to see me, said that he would like to have the interest, but that I might continue to use the money, but would like for me to make a note. I paid him $15 interest. He said that that was all right." Couch further testified, "The personal deal was made with him some three or four months before I went out of the bank."

Smith testified that in accordance with the agreement first made he drew a check on the First State Bank of Marshall for $1,000, payable to the Bank of Shirley, the proceeds of which were collected by the latter bank. The notes were never delivered to witness but were kept in the bank. When he made the arrangement with Couch he looked over the notes that were to be given him. These were notes made payable to the Bank of Shirley, but he never saw them any more, and he did not know where they were. He had never received them or collected them, and didn't know whether they were good or bad.

The cashier Couch testified that he was not positive whether the $1,000 worth of notes were ever delivered to Smith or not, or whether they were left at the bank for safe-keeping. Later on in his testimony, the witness stated, "I did not collect the notes—just interest—or some of the notes might have been collected—I don't remember. I suppose I made a record of it—do not remember. I do not know whether the notes selected in 1923 were collected, or just the interest. The notes were originally selected at the time he put the money in the bank and as they would be collected or renewed other notes were substituted in their place. The notes in 1924 were collected or renewed, as were the ones in 1925." Couch further stated, "I never made a loan of this kind

before, and the bank never made one that I knew of." Witness stated that he was at that time under indictment, but did not know whether the Bank of Shirley or the prosecuting attorney had had him indicted; that before the transaction out of which this suit arose Smith had worked for a short time in the Bank of Shirley, and was well acquainted with witness, and witness never knew or heard of the bank making a deal similar to the one made with Smith.

Stevens, the president of the Bank of Shirley, and Williams, its cashier who succeeded Couch, testified to the effect that the records of the bank did not disclose the transaction between Smith and Couch, and that they had no knowledge of such transaction until the early part of 1927 when Smith asked for the payment of the interest; that there was no resolution passed by the board of directors of the bank authorizing the sale of the notes to Smith.

The jury returned a verdict for the plaintiff, and the appellant bank contends that the case should be reversed because the testimony is insufficient and that the court should have given a peremptory instruction for the appellant. Appellant also contends that the court erred in refusing to give instructions Nos. 6, 3 and 5, as follows:

"No. 6. I instruct you that you are the judges of whether or not the instrument sued on was a pledge of the notes of the bank or a sale, and if you find said transaction was a pledge same would be void; and your verdict will be for the defendant.

"No. 3. The jury are instructed that if you find from a preponderance of the testimony that Albert Couch, cashier of the Bank of Shirley, was authorized to sell to the plaintiff $1,000 worth of notes, and that he did sell said notes to the plaintiff on February 22, 1923, plaintiff would only be entitled to recover the value of the notes sued for at this time, unless the plaintiff has

proven by a preponderance of the testimony the value of the notes, then your verdict will be for the defendant.

"No. 5. The jury are instructed that if you find from the testimony in this case the transactions between Couch and the plaintiff, Smith, relates to the sale or pledge of the notes, was out of the ordinary and not customary with the bank, and that the bank had no notice of said transaction and did not ratify the same, then your verdict will be for the defendant."

Appellant cites the rule laid down in 7 C. J., p. 527, and in 3 R. C. L., at page 78, in support of the position taken. The jury, by their verdict, found the issues of fact for the appellee, which we must now treat as true and give to them their strongest probative force. From the facts set forth, we conclude that the bank received $1,000 for a number of its notes aggregating in face value that amount, which face value is *prima facie* measure of their real value, and, in the absence of testimony to the contrary, we must indulge the presumption that they were in fact worth the amount which the makers of said notes agreed to pay to the bank, *i. e.*, $1,000. *Second National Bank* v. *Bank of Alma,* 99 Ark. 386, 138 S. W. 472. It might also be said that it has not been shown by the appellant bank that the notes had not been collected and, certainly, it would be the duty of the bank, having retained the notes for collection, to show that they were not collected or that they were uncollectable.

In *Arrington* v. *King,* 179 Ark. 587, 17 S. W. (2d) 302, we said: "There is nothing in the appellant's contention that the sale and indorsement of the note to the appellee was void, being made by the cashier without written authority from the board of directors authorizing it. Under the law as amended the cashier could sell and indorse this note owned by the bank, in due course, without any authority first given by the board of directors of the bank and reflected in a written record made thereof. Section 700, C. & M. Digest, § 34 of act 113 of 1913, was amended by § 18, act 647 of 1923. * * *" It will be seen

therefore that Couch, in selling the notes to Smith, was acting within the scope of his authority. Moreover, having received the benefit of this transaction by accepting and appropriating the $1,000 paid to the bank by the appellee, and having retained the custody of the notes with the agreement to collect the same, and having failed to account for the same, the appellant bank is in no position to deny the authority of its cashier. *Wilson* v. *Davis,* 138 Ark. 111, 211 S. W. 152; *Bank of Booneville* v. *Clements,* 172 Ark. 1023, 291 S. W. 439. See also, *State National Bank* v. *First National Bank,* 124 Ark. 531, 187 S. W. 673; *Morgan* v. *State,* 162 Ark. 257, 257 S. W. 364; *Bank of Rison* v. *Layne & Bowler Co.,* 173 Ark. 368, 292 S. W. 126; *James* v. *Board, etc.,* 173 Ark. 517, 292 S. W. 983. We are therefore of the opinion that the trial court did not err in refusing to give the instructions requested as above set out, and that the testimony was sufficient to warrant the submission of the case to the jury.

It is insisted that the appellee should have made demand for the delivery of the notes, and should be required to show the value of the notes purchased from the bank in 1926, what the notes were, and that the bank still had the notes, and that they were valuable, before he could recover. A part of this contention has been already answered by the authorities hereinbefore cited, and it may be further said that when demand was last made by the appellee for the interest, he was informed that the bank knew nothing of the transaction, that its records disclosed no such transaction, and liability was denied. Any further demand would have been futile. It may be true, as claimed by the appellant, that the bank was in reality not benefited by this transaction, but, if such was the case, it was not the fault of the appellee who paid the money into the bank but the fault of its agent, for which the appellee is in nowise responsible.

The judgment of the trial court must therefore be affirmed. It is so ordered.

HOWELL *v.* TODHUNTER.

Opinion delivered March 3, 1930.

[redacted]

PER CURIAM. This is an original petition for a writ of mandamus filed in this court on behalf of W. H. Howell, who is under sentence of death for murder, and is now confined in the State Penitentiary awaiting execution, to compel S. L. Todhunter, as warden of said penitentiary, to summon a jury under the authority given him by § 3251 of Crawford & Moses' Digest to inquire into the sanity of said Howell. The petitioner alleges that Dr. L. R. Brown, State Superintendent of the hospital for nervous diseases, has stated and is of the opinion

that said Howell is now insane. Petitioners further allege that the warden of the penitentiary has already summoned a jury on the 24th day of January, 1930, for the purpose of inquiring into the insanity of said Howell, and that the jury was divided, seven being of the opinion that he was sane and five finding that he was insane. Petitioners allege that said warden has refused to empanel another jury for the purpose of inquiring into the present insanity of said Howell and presenting its finding thereon.

We are of the opinion that we have no jurisdiction in the matter. Under our Constitution, the Supreme Court has a general superintending control over all inferior courts of law and equity: and, in aid of its appellate and supervisory jurisdiction, it has the power to issue remedial writs, including writs of certiorari, *habeas corpus*, mandamus, and others specifically named. Art. 7, § 4, of the Constitution.

In *Ex parte Dame,* 162 Ark. 382, 259 S. W. 754, it was held that the Supreme Court has no authority to supervise or control the action of courts inferior to the circuit court except by reaching back through the decisions of the latter court. The court expressly held that a hearing on *habeas corpus* before a judge is the exercise of judicial power which may be reviewed on certiorari, but that the proper forum to review the exercise of this judicial power by a county judge was in the circuit court and not in the supreme court. Hence we would have no power by writ of mandamus, or otherwise, to review the discretion of the warden of the State Penitentiary under the authority given him by § 3251 of Crawford & Moses' Digest, as construed in the case of *Howell* v. *Kincannon, ante* p. 58.

It does not follow, however, in a case like this that there is no remedy in behalf of an insane prisoner. A suggestion of insanity after conviction and sentence and the lapse of the term at which the defendant was tried only appeals to humanity to have the punishment post-

poned until sanity is recovered. The guilt of the prisoner has already been determined. In *Howell* v. *Kincannon, supra,* this court held that under the provisions of § 3251 of the Digest the warden as custodian of a prisoner sentenced to death, if he has reasonable grounds for believing that the defendant is insane, may summons a jury of twelve persons to inquire into the sanity of said defendant, that this statutory remedy excludes the jurisdiction of the trial court with proceedings of this nature, and that the trial court no longer has jurisdiction in the proceeding to inquire into the insanity of the prisoner after sentence.

In a proper case, however, the circuit court of the county where the State warden holds such prisoner would have jurisdiction to review the action of the warden according to the practice laid down in *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041, and other cases.

This brings us to a consideration of the question, whether the facts alleged in the petition call for the exercise of jurisdiction by the circuit court. It will be observed that § 3251 provides that, when the custodian of the prisoner is satisfied that there are reasonable grounds for believing that the defendant is insane, he may summons a jury of twelve persons to inquire into the present insanity of the defendant. This does not mean that there shall be such an inquisition merely on the suggestion of the insanity of the defendant. If it were true that a suggestion of insanity, after the death sentence had been pronounced, created on the part of the convicted person an absolute right to an inquisition for insanity, it would be within the power of the convicted person, or his friends, to indefinitely delay the execution of the sentence of death by repeated suggestions of insanity, followed by inquisitions in each instance. Hence the statute has given the custodian of the prisoner a discretion in the matter, and he is only required to act when he thinks there are reasonable grounds for believing the prisoner to be insane.

In the present case, however, the allegations of the petition show that the warden has already acted in the matter under the provisions of § 3251 of the Digest, and that the jury were divided in opinion as to whether the defendant was insane or not. The warden of the Penitentiary by acting in the premises declared that he had reasonable grounds for believing that the defendant was insane, and it became his duty to impanel another jury for the purpose of securing a verdict on the question.

We have gone thus fully into the practice in the matter, because our law in the interest of humanity does not allow an insane person to be executed, and because of the public interest in the matter. For the reasons above given, however, the writ of mandamus in this court will be denied.

(1) SPECIAL SCHOOL DISTRICT No. 60 *v.* SPECIAL SCHOOL DISTRICT No. 2 (No. 1483).

(2) ELKINS *v.* UNION CONSOLIDATED SCHOOL DISTRICT (No. 1558).

Opinion delivered March 10, 1930.

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

George M. Booth, for appellant.

Tom W. Campbell and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

HART, C. J. These two cases were consolidated for hearing on appeal because the issues of law are the same. In case No. 1483 a patron of one of the school districts seeks to reverse a judgment of the circuit court affirming an order of the county board of education consolidating two school districts in Nevada County, Arkansas. In case No. 1558, a patron of one of the school districts seeks to reverse a judgment of the circuit court affirming an order of the county board of education con-

solidating four school districts in Randolph County, Arkansas.

The correctness of the judgment of the circuit court in each case depends upon the construction to be placed upon Act 156 of the Acts of 1927, authorizing the county board of education to consolidate school districts. The first two sections of the act reads as follows:

"Section 1. That § 8823 of Crawford & Moses' Digest of the Statutes of the State of Arkansas be amended to read as follows:

"Section 8823. Upon a petition being filed with the county board of education signed by a majority of the qualified electors in the territory to be affected, said county board of education of any county within the State of Arkansas shall have the right to form new school districts and to change the boundary lines between any school district heretofore formed where, in the judgment of such board of education, it would be for the best interest of all parties affected, provided, however, that no change shall be made that would impair any outstanding indebtedness of any school district now formed.

"Section 2. This act shall not repeal or affect Act 247 of the Acts of the General Assembly of 1915. And is cumulative to all other laws and parts of laws defining the powers and prescribing the duties of county boards of education and of school districts, boards of directors thereof, and all other officers and persons mentioned in this act; and, except in cases of irreconcilable conflict herewith, it shall not be so construed as to repeal any other law or part of a law; and any and all acts and proceedings heretofore done and had by county boards of education are hereby ratified and declared valid."

Section 3 provides that all laws and parts of laws in conflict with it are repealed.

The act was approved March 18, 1927. See Acts of 1927, p. 549.

At the outset, it may be said that it is the settled rule in this State that the statute creating the county

board of education substituted the board for the county court, and only transferred the power to the board without repealing or in any way affecting the statutory procedure with respect to matters theretofore within the power of the county court with regard to the formation, changes, and the regulation of school districts. *Mitchell* v. *School District No. 13,* 153 Ark. 50, 239 S. W. 371; *Acree* v. *Patterson,* 153 Ark. 188, 240 S. W. 33; and *Manley* v. *Moon,* 177 Ark. 260, 6 S. W. (2d) 281; *Swift* v. *Common School District No. 8,* 163 Ark. 150, 259 S. W. 375.

It is earnestly insisted, however, that the act is a local or special act, and is therefore unconstitutional under the principles of law declared in *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617. This contention is based upon the first clause of the second section of the act which provides that it shall not repeal or affect act 247 of the Acts of 1915. This latter act by its terms organizes and provides for the operation of a special school district in Lonoke County. We do not agree with contention of counsel. In the case cited, two counties were expressly excepted or exempted from the provisions of the act in the enacting clause of it. The Legislature, by so doing, exempted these two counties from the provisions of the act; and they could never by any act of their own take advantage of its provisions. The clause exempting them from the terms of the act was so interwoven with the remainder of the enacting clause as to become and constitute a part of the act itself. Hence we held that the act under consideration in that case was a local or special act and in violation of amendment No. 17 of our Constitution, prohibiting the passage of local or special acts.

In the case now under consideration, no exemption or exception of any part of the territory of the State is made in the enacting clause of the statute. Indeed, there is no exemption of territory from the provisions of the act in the second section. All parts of the State fall

within the provisions of the act and may take advantage of its provisions. The act is framed in general terms, and is not restricted in locality, but operates equally and uniformly throughout the State. The second section only provides that an act of the Legislature of 1915 creating a special school district was not repealed. This simply left the special act in force. It is one thing for the Legislature to say that a part of the territory of the State is expressly exempted from the provisions of an act, and quite a different thing to say that a special act, passed at a time when it was lawful to do so, was not repealed. We are of the opinion that the act under consideration is a general and not a local or special act, because the act applies to and affects alike all persons and things of the same class and condition who elect to bring themselves by proper procedure within the terms of the act.

It is next insisted that the act is invalid because no method has been provided for the appointment of directors after the consolidated school district is formed by the county board of education under the provisions of the act. Our Constitution makes it the duty of the Legislature to provide by general laws for the support of common schools by taxes. Article 14, § 3, of the Constitution. This court has always recognized that the Legislature has full and complete power in the matter except as restricted by the Constitution. No useful purpose could be served by reviewing the numerous and changing laws of the State upon the subject of public schools, their management, the means of selecting their boards of directors, and the various modes of creating and changing school districts and apportioning territory and pupils among them. Our Legislature acts for itself, having in view the changing standards of education and the means of providing for the comfort and health of the pupils. All of the various acts relating to these matters must stand unless they are expressly repealed or are plainly repugnant to the provisions of a later act.

Tested by this rule, we do not think that the act under consideration must fail because there is no express provision in it for the appointment of directors when two or more districts are first consolidated. In such cases the provisions of § 8847 of the Digest would apply, and between the date of consolidation and the first annual election thereafter the consolidated school district would be governed by a board of directors composed of all of the directors of the several school districts entering into the consolidation. After the first annual election, the consolidated school district shall be governed by a board of six directors to be elected in the manner provided for in § 8953 of the Digest by the qualified voters of the consolidated district.

It is next insisted that in case No. 1558, the judgment must be reversed because under the order of the board of education whereby common school districts No. 49, 61 and 83, and Rural Special School District No. 5 were consolidated, it was ordered that the consolidated school district should assume and pay the bonds of Rural Special School District No. 5 as they mature. The order also recites that Rural Special School District No. 5 is indebted in the sum of $6,500 on some bonds issued by it payable $500 annually from January 1, 1930. The order recites that the owner of the bonds is willing to surrender them and accept the principal and interest thereon as of this date. The order further recites that there is enough money on hand belonging to Rural Special School District No. 5 to pay all of said bonds and the interest thereon.

This court has held that the power of the Legislature in enacting laws for the formation or dissolution of school districts is plenary, provided the obligations of their contracts are not impaired. *Special School District No. 33* v. *Howard*, 124 Ark. 475, 187 S. W. 444; *Krause* v. *Thompson*, 138 Ark. 571, 211 S. W. 925: and *Chicago Title & Trust Co.* v. *Hagler Special School District*, 178 Ark. 443, 12 S. W. (2d) 881.

There would seem to be no violation of any principle of law in the order made by the board. The act itself provides that no change shall be made that would impair any outstanding indebtedness of any school district now formed. No effort was made to impair the outstanding indebtedness of any of these districts. On the other hand, the board expressly intends to take care of the indebtedness of one of the districts of the consolidated district. An agreement to that effect has been made with the holder of the indebtedness. The board in its discretion might provide for the present payment of the indebtedness out of the funds on hand belonging to the district which was indebted, or it might have made the consolidated district liable for the indebtedness of one of the districts which had become a component part thereof.

In case No. 1483, it is sought to reverse the judgment because several signers of the petition for consolidation had asked to have their names withdrawn from the petition after it had been filed. On this question but little need be said. We are of the opinion that the circuit court was right in holding that no good or sufficient reason was given by the petitioners for withdrawing their names. The only excuse they gave was that they would not have signed the petition if they had thought that a majority of the patrons of the school did not want consolidation. That was a matter left to their own judgment and discretion, and to ascertain what the majority wanted was the object of preparing the petitions and submitting them to the county board of education.

In conclusion it may be said that the validity of act No. 156 now under consideration has been upheld in previous decisions of this court, and some of its provisions construed. *Manley* v. *Moon,* 177 Ark. 260, 6 S. W. (2d) 281: *School District No. 14* v. *County Board of Education,* 177 Ark. 734, 7 S. W. (2d) 798; and *Consolidated School District No. 2* v. *Special School District No. 19,* 179 Ark. 822, 18 S. W. (2d) 349.

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

QUINN *v.* MURPHY.

Opinion delivered March 10, 1930.

[redacted]

J. D. Cook, Sr., and *F. S. Quinn*, for appellants.

Will Steel, for appellees.

HART, C. J., (after stating the facts). We are of the opinion that the decision of the chancellor was correct. Prior to the bringing of this suit, another suit had been brought to enforce the stockholders' agreement for contribution to pay the losses of indorsers on the paper of the old corporation, and this case is reported in 175 Ark. 10, 299 S. W. 361, under the style of *Murphy* v. *Winham*.

By stipulation of the parties, the record of the testimony in that case is made a part of the present suit. Upon appeal, it was said that the chancery court in that case correctly held that the value of the assets of the old corporation was duly made and free from fraud, and that the price obtained $100,000 was the reasonable value thereof. The court stated further that this was the fair market value of the assets of the corporation at the time of the sale. It was further stated in the opinion that the organization of the new corporation was not made under such circumstances as to show that it was a continuation of the old corporation. It was stated that the facts showed it to be a separate corporation, and that the conveyance was made to the new corporation instead of to the liquidating agent for the sake of convenience, and that there was no fraud in organizing the new corporation for the purpose of buying the assets of the old corporation at a fair market price.

Several of the directors and stockholders of the old corporation testified in the present suit. Each of them

stated that $100,000 was the reasonable market value of the assets of the old corporation, and that it was intended by them that, if any one should bid more than the sum of $100,000 for the assets of the old corporation, they would not bid higher, and that such purchaser might have all of the assets of the old corporation for the sum so paid. The sum of $100,000 which was the capital stock of the new corporation was paid and used by the directors of the old corporation in paying off its debts. The directors and stockholders of the old corporation were liable for the balance of the indebtedness of that corporation in the sum of about $139,000. There is nothing whatever to show that they were actuated by fraud in liquidating the affairs of the old corporation, and they merely organized the new one for the purpose of purchasing the assets of the old corporation at a fair price and reimbursing themselves, if possible, for losses to the management of the old corporation. They testified that all of the stockholders were given an opportunity to take stock in the new corporation in the same proportion to that owned by them in the old corporation. Some of them testified that they were willing now to sell their stock to appellants at par value with six per cent. interest added. Two of them testified that they were willing to let appellants have their stock at par value without interest, and that the amount of stock owned by them in the new corporation was more than that owned by appellants in the old corporation. Therefore, we are of the opinion that the chancellor properly decided the issues in favor of appellees on the complaint of appellants.

Appellees have prosecuted a cross-appeal, and but little need be said on that phase of the case. The court properly held in favor of appellants on the issues raised by the cross-complaint of appellees. The cause of action of appellees against appellants arose from the stockholders' agreement in the old corporation which was signed by Mrs. Isabella Quinn, the widow of Thomas Quinn, after his death. Of course, the remaining appel-

lants, who were children and heirs at law of Thomas Quinn, were not bound by any agreement signed by his widow. Mrs. Isabella Quinn signed the agreement as administratrix of her husband's estate. The stockholders' agreement which she signed is copied in full in the transcript, but is too lengthy to be inserted in this opinion. We deem it sufficient to state that we have read and considered it in its entirety; and from it, and from the testimony of Mrs. Isabella Quinn, we are convinced that she did not sign it for the purpose of becoming personally liable, but only signed it in order to pledge her husband's interest in the assets of the old corporation, in so far as his interest would go for the payment of its debts. We are of the opinion, when the stockholders' agreement, the testimony of Mrs. Quinn, and all the surrounding circumstances are considered together, that the chancery court was warranted in holding that the administratrix was not liable personally by signing the stockholders' agreement. This would have been to make her liable on a promise which she never intended to make and which the parties to the stockholders' agreement never intended she should make. It is clear that it was only intended that she should pledge her dead husband's interest in the assets of the old corporation to the payment of its debts. *Altheimer* v. *Hunter,* 56 Ark. 149, 19 S. W. 496.

Finally, it is contended that the court erred in transferring the case to equity and in not retransferring it to the circuit court. We cannot consider this question. After the case was transferred from the circuit court to the chancery court, a motion was made to retransfer it to the circuit court. This motion was overruled by the chancery court, and no exception was taken to the ruling of the court. Therefore any alleged error in refusing to transfer the case back to the circuit court was waived, and the chancery court had jurisdiction to determine the issues raised by the pleadings.

We have carefully examined the record. It shows that the old corporation was duly organized and prose-

cuted its business in the State of Texas. When it became involved in financial difficulties, its affairs were wound up under the laws of the State of Texas, and no fraud in doing so has been established. The new corporation was duly organized and purchased the assets of the old corporation at a fair valuation. No fraud is shown either in the liquidation of the affairs of the old corporation or in the organization of the new corporation to purchase the assets of the old one. A careful consideration of the whole record leads us to the conclusion that the decision of the chancery court was correct, and it will therefore be affirmed.

A. B. JONES COMPANY *v.* DAVIS.

Opinion delivered March 10, 1930.

Hawthorne, Hawthorne & Wheatley, for appellant.

Aline Murray and *N. F. Lamb*, for appellee.

SMITH, J. C. H. Davis sued the A. B. Jones Company, a corporation, alleging that he had an exclusive contract for the distribution of the Anheuser-Busch products in the Jonesboro, Arkansas, territory, and that he thereafter

entered into a contract with the Jones company, whereby the company was to handle the products and divide the net profits equally with him in consideration of his transferring his agency contract to the Jones company.

Davis offered testimony supporting these allegations. The contract was made in June, 1916, and for four and one-half years the profits were equally divided, except that in one year no profits were made. In February, 1921, Davis received a letter from the corporation, written by Jones, its president, in which it was proposed that thereafter, instead of dividing the profits equally, a royalty of $500 per year be paid. This proposition was accepted by Davis, and the royalty agreed upon was paid annually up to and including the year 1926.

Payment of the 1927 royalty was refused, and this suit was brought to collect it. Liability was denied upon the grounds that (a) that was no such contract, and (b) if made, it was void as having been made without the knowledge or consent of the corporation, and its execution was in excess of the power of the president, without authority so to do having been conferred by the corporation. By way of counterclaim, the corporation prayed judgment for the amount of the payments which had been previously made Davis.

We think the testimony clearly shows there was such a contract. The payments under it are reflected by the books of the corporation extending over a period of about twelve years, and these books had been audited annually.

Jones ceased to be in active charge of the business of the corporation about August 1, 1927, and was succeeded as manager by J. S. Long, who had previously been the credit manager of the corporation. Long testified that he had been with the Jones company continuously since its organization, and that he knew nothing of the contract. He admitted, however, that the books of the company show the payments which had been made under it, and that he had himself drawn these checks under the direction and upon the order of Jones, the president. Two

directors of the corporation testified that they were directors at the time the alleged contract was made, and that no such contract had been submitted to or acted upon by the directors, and no authority had been conferred upon Jones to make it.

The court rendered judgment for the amount sued for, to-wit: one year's royalty amounting to $500, and dismissed the counterclaim.

For the reversal of this judgment it is insisted that the contract, if made, between Davis and the corporation, created, in effect, a partnership between Davis and the corporation, and was therefore an *ultra vires* act and void.

We do not agree that the effect of the contract was to create a partnership, as by its terms Davis merely assigned his agency and thereafter had no control over it. For this assignment he was to be paid one-half of the net profits of the agency, and later he was promised a royalty of $500 per annum, without liability for any losses that might be sustained.

We do not find it necessary to determine whether the contract was an *ultra vires* one or not. *Browne-Brun Wholesale Grocery Co.* v. *Hinton,* 179 Ark. 831, 18 S. W. (2d) 369. But, even if so, it has, so far as this lawsuit is concerned, been fully performed, and the corporation has received the benefits of its performance, and it cannot now repudiate the contract after having received the profits derived from its performance. *Ouachita Valley Bank* v. *Pullen, ante* p. 38; *Wilson* v. *Davis,* 138 Ark. 111, 211 S. W. 152; *Richeson* v. *National Bank of Mena,* 86 Ark. 594, 132 S. W. 913; *Bloom* v. *Home Ins. Agency,* 91 Ark. 367, 121 S. W. 293; *Western Dev. & Inv. Co.* v. *Caplinger,* 86 Ark. 287, 110 S. W. 1039; *Arkansas & La. R. Co.* v. *Stroude,* 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130; *Arkadelphia Lbr. Co.* v. *Posey,* 74 Ark. 377, 85 S. W. 1127; *Minneapolis F. & M. Mut. Ins. Co.* v. *Norman,* 74 Ark. 190, 85 S. W. 229, 109 Am. St. Rep. 974, 4 Ann. Cas. 1045; *El Dorado Pipe Line & Supply Co.* v. *Penguin Oil*

Co., 174 Ark. 843, 296 S. W. 713; *Layton* v. *Central States, etc., Co.*, 147 Ark. 355, 227 S. W. 415.

The decree is correct, and is therefore affirmed.

COLLATT *v.* BOWEN.

Opinion delivered March 10, 1930.

N. A. McDaniel, for appellant.

Arthur C. Thomas, for appellee.

SMITH, J. This suit was brought to cancel a deed executed by J. A. Bowen to his sons, Clyde and Luther, and his daughter, Mrs. Lera Opitz, as having been executed in fraud of the grantor's creditors. It was alleged in the complaint that plaintiffs and J. A. Bowen were formerly partners in the mercantile business, and that plaintiffs sold their interest in the partnership to Bowen on February 1, 1926, for a cash payment and a deferred payment of $1,401.29, which was to be paid in the fall of that year. The time of payment was not more definitely fixed. That default was made in the deferred payment, and suit was filed on August 26, 1927, in the chancery court, in which a judgment was prayed for the balance due, and that this balance be decreed to be a lien on the partnership property, and that it be ordered sold in satisfaction thereof. There was a controversy as to whether Bowen had bought certain real estate held as

partnership assets, and this issue was decided in Bowen's favor. But the court found that Bowen was indebted to plaintiffs in the sum of $928.81, and decreed that a lien be declared upon the one-half interest of Bowen in certain real estate, and upon the three-fourths interest in the furniture and fixtures, and a commissioner was appointed to make a sale if the judgment was not paid, and, as it was not paid, a sale was made and duly reported by the commissioner. The proceeds of the sale amounted to $250. Thereafter an execution issued for the balance then due, and on the.....day of May, 1928, a return *nulla bona* was made.

The complaint further alleged that at the time of the sale of the partnership business Bowen owned certain lots in the town of Haskell and a seventy-four-acre farm, which he undertook to convey to his sons, Clyde and Luther, and his daughter, Mrs. Lera Opitz, by a deed dated November 6, 1926. It was alleged that there was no consideration for this deed, and that it was executed in fraud of the grantor's creditors. An error was made in the description of the land conveyed, to correct which a second deed was executed February 19, 1927. It was prayed that both these deeds be canceled.

The answer admitted the execution of the deeds, but denied that they were fraudulent. It was alleged in the answer that Bowen was solvent when the first deed was made, and that it was executed upon a valuable and sufficient consideration.

Depositions were taken, and, upon the final submission of the cause, it was dismissed as being without equity, and this appeal has been prosecuted to reverse that decree.

The testimony establishes the fact that before the purchase of the plaintiff's interest in the partnership business Bowen agreed with his children to divide his real estate among them, and, pursuant to this understanding, he conveyed twenty acres of the land to his son, Clyde. This deed is not questioned, but the agreement

to convey appears to have been voluntary and was never further consummated for the reason that Bowen was unable to agree with his wife, who was the stepmother of the children, as to the apportionment of her homestead and dower rights. She was later placated by the payment of a sum of money and joined in the execution of the deeds here sought to be canceled. These deeds conveyed all the real estate owned by Bowen except his homestead, and it is admitted that Bowen is now insolvent. If the lands conveyed by Bowen to his children cannot be subjected to the payment of plaintiff's judgment, it cannot otherwise be collected.

The deed to Clyde Bowen for the twenty-acre tract of land was not offered in evidence, but we do not understand that plaintiffs question its execution or validity. This tract of land was excluded from the conveyances sought to be canceled, and it appears that it was an error in its description which made the deed dated February 19, 1927, necessary to correct the description employed in the deed of November 6, 1926. The suit therefore involves only the lands conveyed by these deeds.

After a careful consideration of the testimony, we have concluded that the conveyances were voluntary, and that the relief prayed should be granted. The present insolvency of the grantor is unquestioned, and we are convinced that he was insolvent when these deeds were made, and, if not, their effect was to make him so.

It is true the foreclosure suit was not filed until August 26, 1927, and that the first deed was made November 6, 1926, but this was in the fall, and the payment of the balance on the purchase price of plaintiffs' interest in the partnership business was then due, and plaintiffs were insisting on payment. Bowen had taken his son, Luther, into the partnership business, which had not prospered, and an offer was made to return this property in satisfaction of the debt, and the offer had been refused. An offer had also been made to pay the debt by the assignment of certain accounts, and this offer had

likewise been refused. The value of the accounts was not shown. If they were collectible, no reason is given why Bowen did not collect them and pay the debt which the court found was due the plaintiffs.

The deeds were to the children as tenants in common, and there was no conveyance to any one of the children of any particular portion of the land. They recited a consideration of one dollar and love and affection. The grantees testified that they paid the dollar, which was, of course, a mere nominal consideration, and the testimony is not at all satisfying that they paid anything more. The value of the land was variously estimated at from one thousand to three thousand dollars. Clyde Bowen testified that his father owed him $500, but he gave no detailed account as to how or when this indebtedness was incurred. He was asked if he would accept the $500 due him and surrender his interest in the land, and he stated that he would not. Luther Bowen testified that his father was indebted to him in the sum of $1,000, but his explanation of this indebtedness was more vague and less satisfying than was the testimony in regard to the indebtedness due Clyde. Luther testified that he had done some work for his father, but he did not explain when it was done, or the amount thereof, or the price therefor. He did admit, however, that he had made no charge for this work when it was performed. Bowen, the grantor, testified that he was also indebted to his daughter, Mrs. Opitz, but she did not testify in the case, and there was no testimony as to the amount of this indebtedness or as to how or when it was incurred.

It also appears that there was no change in the possession of the land, and the tenants continued to attorn to the grantor. His sons, the grantees, testified that it was understood between them and their father that he might collect and appropriate the rents as long as he wished after paying the taxes and repairs.

The law of this subject has been so often stated and restated that it would be a work of supererogation to re-

view the cases on the subject. A single quotation from the opinion in the case of *Norton* v. *McNutt,* 55 Ark. 59, 17 S. W. 362, will suffice. In that case Mr. Justice HEMINGWAY, speaking for the court, said: "Every gift of property by one indebted is presumptively fraudulent as to existing creditors; and upon proof of the gift, the burden is cast upon those asserting it to show that the donor's intentions were innocent, and that he had abundant means left to pay all his debts. Wait, Fraudulent Conv., §§ 93-5; Bump, Fraudulent Conv., 276; *Pratt* v. *Curtis,* 2 Lowell 90. The plaintiff was a creditor prior to the asserted transfer of the mule, and the jury was warranted in finding that it was made without any valuable consideration. In that case it was presumptively fraudulent; and, as there is no evidence that the donor retained sufficient property to satisfy his creditors, the presumption becomes conclusive. *Driggs* v. *Norwood,* 50 Ark. 42, 6 S. W. 323."

Under the facts as we find them to be, and under the law as thus declared, the deeds were fraudulent, and the decree of the court below will therefore be reversed, and the cause remanded with directions to cancel them as having been executed in fraud of the grantor's creditors.

NEWELL CONTRACTING COMPANY *v.* LINDAHL.

Opinion delivered March 10, 1930.

McMillan & McMillan, for appellants.

John L. McClellan, for appellee.

SMITH, J. Appellee, plaintiff below, brought this suit to recover damages to his automobile resulting from a collision with a truck driven by L. D. Corn. The complaint alleged that the defendants, Newell Contracting Company and Henry Allison, had employed Floyd Glover to use his and other trucks in hauling and placing gravel on a public highway which was being improved under a contract with the State Highway Department, and that Glover employed Corn to drive and use his truck for the same purpose.

In the separate answer of the Newell Contracting Company and Allison, they alleged that "It is true that these defendants had a contract with the State Highway Department of the State of Arkansas for surfacing with gravel a certain part of State Highway No. 67 between Malvern and Donaldson, in Hot Spring County, Arkansas," and it was on this road the collision occurred. They then adopted the answer of Glover and Corn, denying that the injury had been occasioned by Corn's negligence, and alleging that appellee had been guilty of contributory negligence.

There is a controversy, which, for the reason hereinafter stated, we do not review, in regard to the opening statement to the jury of counsel for the defendants. It is insisted on the one hand and denied on the other that counsel then stated that the Newell Contracting Company had a contract with the Highway Department to do this work, and had sub-let a portion of it to Allison, who was doing the work as an independent contractor, and when testimony was offered to this effect the court refused to admit it upon the ground that the pleadings raised no such issue. A request was then made for permission to amend the answer to set up this defense, and an exception was saved to the action of the court in refusing to grant it. Under the circumstances we are unable to say that the court abused its discretion in this respect. *Butler* v.

Butler, 176 Ark. 126, 2 S. W. (2d) 63; *Old American Ins. Co.* v. *Deloney,* 178 Ark. 1194, 13 S. W. (2d) 825; *Hughes, etc., Co.* v. *McWilliams, etc., Co.,* 172 Ark. 79, 287 S. W. 580. But, as the case is to be remanded for another reason, we think this permission should be granted upon the remand, if an offer to amend is made in apt time.

It is very earnestly insisted that the undisputed testimony shows that plaintiff's own negligence caused or contributed to the collision, and that there can be no recovery for this reason. The testimony on the part of the defendants tends to establish this defense, but the conflict in the testimony which usually appears in cases of this character is present here. The testimony on the part of the plaintiff is to the effect that he was driving along a public road which had been graded and was being surfaced with gravel, and was being used by the public as the work progressed. That, as he met some wagons loaded with gravel and was passing them, going in the opposite direction, a truck driven by Corn drove rapidly between his car and the wagons, in the same direction the wagons were moving, and in a cloud of dust which had arisen the vision of all the drivers was obstructed, and a violent collision occurred, and plaintiff's car was wrecked. Judgment was rendered in plaintiff's favor for the damage to his car, from which is this appeal.

The cause of action was defended by the Newell Contracting Company upon the ground that Allison was an independent contractor; and by Allison upon the ground that Glover was also an independent contractor, and that they had no control over Glover or his employee as to the manner in which they should haul the gravel, and that the engineer of the Highway Department gave directions as to spreading it, and that the collision occurred while gravel was being hauled, and not in spreading it, but that they were without authority to direct the manner in which it was hauled or spread.

The recent case of *Ellis & Lewis* v. *Warner,* 180 Ark. 20 S. W. (2d) 320, arose out of facts sufficiently similar

to those of the instant case to be controlling as to the law upon the question whether Allison and Glover were independent contractors, and we adhere to the statement of the law there appearing, and we do not again review the authorities upon this question, as it was there fully considered. The testimony in the instant case was sufficient to present the issue for the decision of the jury whether Allison and Glover were independent contractors, and the instructions on this issue appear to conform substantially to the law as announced in the Ellis case, *supra.*

We would therefore be constrained to affirm the judgment of the court below except for the error appearing in instructions numbered 2 and 4, given at the request of the plaintiff and over the objections of all the defendants. Instruction numbered 4 reads as follows: "You are instructed that it is the law of the road that drivers in meeting each other shall bear and keep to the right in passing, and, if you find from a preponderance of the evidence in this case that the defendant, L. D. Corn, negligently and carelessly failed to bear or keep to the right when attempting to pass the plaintiff, and on account of his negligence and carelessness in so failing to keep to the right, as aforesaid, a collision resulted between the car of plaintiff and the truck driven by said defendant, and the plaintiff's car was damaged as a result of said collision, then it will be your duty and you are instructed to find for the plaintiff." Instruction numbered 2 is of similar purport.

These instructions undertook to tell the jury the conditions under which a verdict should be returned for the plaintiff, and they should therefore have been each complete in itself. *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676.

These instructions told the jury under what conditions they might find the defendant Corn guilty of negligence, and then, if the collision occurred on account of this negligence, to find for the plaintiff. It was, of course,

necessary for the jury to find that Corn was negligent before returning a verdict for the plaintiff, but this showing alone was not sufficient to support a verdict even against Corn. It was essential also that it be found that plaintiff's negligence did not contribute to the damage to his car, and the instructions did not impose this requirement. That the instructions in this respect were erroneous is elementary law and requires no citation of authority.

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

RECTOR *v.* HILL.

Opinion delivered March 10, 1930.

Sam E. Leslie, for appellants.

Feazel & Steel, for appellees.

HUMPHREYS, J. Appellees purchased lots 13, 14, 15, 16 and 17, in block 5, of the incorporated town of Nashville, Arkansas, for $5,000, from W. A. Beauchamp, executor of the last will and testament of J. N. Rector, deceased, under authority conferred by the testator upon his executor in the second paragraph of the will, which is as follows:

"And I hereby desire that, without the necessity of legal action or sanction, my executor be authorized and

empowered to make, execute and complete any and all transfers and deeds of conveyance necessary to fully and effectually control, manage and dispose of or sell or alienate any or all of my real or personal estate, if such should be necessary in the discharge of his duties."

The executor was also made a party defendant, and filed a separate answer expressing a willingness to have the will construed, but agreeing with appellees that the will conferred full power upon him to sell and convey the real estate.

Appellants filed separate answers expressing a willingness to have the will construed, but joined issue with appellees and the executor as to his authority to sell and convey said real estate.

The cause was submitted to the court upon the pleadings and testimony adduced by the parties, which resulted in a decree that it was within the authority of the executor to sell and convey the land to appellees and quieting their title thereto against appellees, from which is this appeal.

Appellant contends that paragraph three of the will bequeathing one-half of all the testator's property to his child, Mary Ellen Rector, and vesting same in her absolutely when she should become twenty-one years of age, and bequeathing his wife, Della Lambert Rector, one-half of all his property, during her natural life, or as long as she remained his widow, and directing that at her death all the property so bequeathed should be given to his child, Mary Ellen Rector, and further providing that in the event of the marriage of his wife she should be given absolutely one-third of the personal property at such time belonging to his estate, and that the real property at such time belonging to his estate should vest in his child, Mary Ellen Rector, is in conflict with the power and authority conferred in paragraph two upon said executor to sell and convey the real property belonging to said estate. The argument is made that paragraph three, devising the property as therein set out to his child and wife, is the last expression of the will and, in

view of the conflict between the two paragraphs, must prevail.

The testator was engaged in the drug business and, incidental thereto, quite extensively in the real estate business. His executor had been in his employment for about thirty years, assisting him in his business, and, owing to his illness the last fifteen years, had been his chief adviser and manager of his business. In opening the second paragraph of the will, the testator expressed a desire that the property should be kept intact as far as possible and that the executor should continue the business just as he had done as long as he could possibly do so, handling the income just as he would have done, and then providing that he might sell or alienate any or all of the property of the estate if it should be necessary in the discharge of his duties. It is apparent that the intention of the testator was to confer a large discretion upon his executor who had been with him for many years, and the language used clearly meant that he might sell or alienate any or all of the property of the estate if in his judgment he deemed it necessary to do so. The correctness of this construction of the second paragraph is emphasized by the fact that it is provided in the third paragraph that, in the event of the marriage of his wife, she should be given absolutely one-third of all personal property at such time (meaning the date of the marriage) belonging to his estate; and to his daughter, Mary Ellen Rector, all the real property belonging to the estate at such time. The second paragraph, thus construed, in no way conflicts with the third paragraph bequeathing the property of his estate to his wife and daughter. By reading both paragraphs together, it is apparent that the intention of the testator was to place all his property in a trust to be managed with broad discretionary powers by his executor, and that his devisees should take what was bequeathed to each at the expiration of the trust. It is unnecessary to a decision of the point involved in this case to determine when the trust will expire. We think

during the execution of the trust full and complete authority was given to the executor of the testator to sell and convey any property belonging to the estate if, in his judgment, he deemed it to the interest of the estate to do so. This was the construction placed upon the will by the trial court, and the decree is therefore affirmed.

CLAIBOURNE *v.* SMITH RICE MILL COMPANY.

Opinion delivered March 10, 1930.

W. A. Leach, for appellant.

G. W. Botts, for appellee.

HUMPHREYS, J. This is an appeal from a default decree rendered against appellant on the cross-complaint of appellee in a suit brought by the Arkansas Rice Growers' Agricultural Credit Association in the Chancery Court of Arkansas County, Southern District, against W. B. Fulton, Missine Fulton, his wife, and appellee, to foreclose a mortgage executed to it by the Fultons on a rice crop for a balance due thereon, and to recover from

appellee the value of the mortgaged rice purchased by it. The rice in question was raised by appellant, as the tenant of the Fultons, upon lands owned by Missine Fulton, and other lands leased by W. B. Fulton. Appellee purchased the rice from appellant, Will Claibourne, and paid him therefor by check, one-half of which amount he paid to the Fultons, less $80 for their part of the threshing.

The Fultons filed an answer pleading payment of the mortgage indebtedness to the Rice Growers' Agricultural Credit Association. Appellee filed an answer denying that it purchased rice from the Fultons mortgaged to the Rice Growers' Agricultural Credit Association, and a motion to make appellant, Will Claibourne, a party; and a cross-complaint against him alleging that he and the Fultons had conspired to defraud it by selling it mortgaged rice, and praying for judgment against appellant in whatever sum the Rice Growers' Agricultural Credit Association should recover from it.

In accordance with the prayer of the motion and cross-complaint the following summons was issued by the clerk of the court and served by the sheriff upon appellant, to-wit:

"In the Chancery Court.

"Arkansas Rice Growers' Agricultural Credit Association, Plaintiff, v. No. 2608, W. B. Fulton, et al., Defendants. Arkansas County, Arkansas in the Southern District thereof.

"SUMMONS.

"The State of Arkansas, to the sheriff of Arkansas County:

"You are commanded to summon Will Claibourne, to answer in twenty days after the service of the summons upon him motion to make Will Claibourne, party defendant, a complaint filed against him in the Chancery Court of Arkansas County, Arkansas, Southern District, and warn him that upon his failure to answer said complaint that same will be taken for confessed; and will

make due return of this summons on the first day that said court is in session after twenty days after the date of the issuance hereof.

"Witness my hand and seal of said court, this 22d day of March, 1929. F. E. Stephenson, Clerk.

"Chancery court, summons, *Arkansas Rice Growers' Agricultural Credit Ass'n., Plaintiff, No. 2608,* v. *W. B. Fulton, et al., Defendants.* Filed the 23d day of March, 1929. F. E. Stephenson, Clerk.

"State of Arkansas, County of Arkansas—ss.

"On the 22d day of March, 1929, I have duly served the within writ by delivering a copy, and stating the substance thereof, of the within named Will Claibourne

Ser.	$ .75
Mi.	1.40
Ret.	.10
	$2.25

as I am hereby commanded; C. C. McAllister, Sheriff, J. R. G. D. S."

The cause was tried upon the pleadings and testimony which resulted in a decree in favor of the Arkansas Rice Growers' Agricultural Credit Association for a balance of $1,365.69 due upon the mortgage, and in its favor against appellee for $771.16, the value of the mortgaged rice purchased by it; and at a subsequent date a decree by default in favor of appellee against appellant on its cross-complaint against him for $771.16. The decree recites that the cause was submitted upon certain pleadings, naming them. There is no mention of any pleading having been filed in the case by appellant, so it must be presumed from the recital in this decree that no answer to the cross-complaint of appellee was filed by him. The decree also recites that the cause was submitted upon the depositions of certain witnesses, naming them, and upon other proof. All of the depositions are omitted from the record, except the depositions of W. B. Fulton on recall, and of William Claibourne and Otto

Leibrock. The other proof submitted in the case according to the decree is also omitted from the record.

Appellant makes two contentions for a reversal of the decree, one being that the summons was insufficient to bring him into court, and the other that the evidence was insufficient to warrant the court in rendering a decree by default against him.

(1) The alleged insufficiency of the summons is because it failed to set out the name of appellee therein, and that the purport of the summons itself was notice to appellant to answer a complaint against him by the Arkansas Rice Growers' Agricultural Credit Association, and not Smith Rice Mill Company, the appellee herein. It is true that the summons did not mention the Smith Rice Mill Company as the plaintiff, but it did state that in the case of the Arkansas Rice Growers Agricultural Credit Association against W. B. Fulton *et al.* a complaint had been filed against appellant, as well as a motion to make him a party. The summons gave the number of the case in which such complaint had been filed. By reading the pleadings in that case appellant would have discovered that the motion and complaint referred to were filed by the Smith Rice Mill Company, which was mentioned as a defendant in the case referred to in the summons. The summons was issued under § 1136 of Crawford & Moses' Digest, which is as follows:

"The summons shall be directed to the sheriff of the county, and command him to summon the defendant or defendants named therein to answer the complaint filed by the plaintiff, giving his name, at the time stated therein, under the penalty of the complaint being taken for confessed, or of the defendant being proceeded against for contempt of court on his failure to do so. The summons shall be dated the day it is issued, and signed by the clerk."

A substantial compliance with this statute was sufficient to give the court in which the case was pending jurisdiction over the defendant mentioned in the original

suit or over the defendant against whom a cross-complaint had been filed. 32 Cyc. 438. Appellant does not contend that the rule is otherwise, but makes the argument that the summons does not substantially comply with the statute. We think it is a substantial compliance with the statute. The case of *Ex parte* Cheatham, 6 Ark. 532, 44 Am. Dec. 525, cited by appellant, is not in conflict with our construction of the statute. In that case no complaint was pending in the court out of which the summons issued, in which case William Cunnington was plaintiff and Robert Carrington was defendant. In the instant case a suit was pending in the court out of which the summons issued in which the Arkansas Rice Growers' Agricultural Credit Association was plaintiff, and W. B. Fulton *et al.* were defendants, and in which the defendant mentioned therein, the Smith Rice Mill Company, filed a motion to make appellant a party and a cross-complaint against him praying in the alternative that, if the plaintiff in that case recovered judgment against it, then for a judgment over against him in its favor. It was impossible for appellant to have read the pleadings in the case mentioned in the summons without discovering the fact that a cross-complaint had been filed against him by one of the defendants in that case.

(2) Appellant's further contention that the evidence was insufficient to warrant the court in rendering a judgment by default against him is, we think, without merit. The record does not purport to bring up all the evidence that was heard in the case, so it must be presumed by this court that the evidence was sufficient to justify the rendition of the decree by default against appellant. *Hershy* v. *Baer,* 45 Ark. 240; *Matlock* v. *Stone,* 77 Ark. 195, 91 S. W. 553; *Hardie* v. *Bissell,* 80 Ark. 79, 94 S. W. 611; *Floyd* v. *Booker,* 161 Ark. 87, 255 S. W. 288.

No error appearing, the decree is affirmed.

JOHNSTON *v.* LOWERY.

Opinion delivered March 10, 1930.

[redacted]

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[redacted]

G. L. Grant, for appellant.

Hardin & Barton, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that he is entitled to the custody of his child as against the child's aunt under the circumstances of this case, and that the order of the judge holding otherwise should be quashed. The general rule is well understood and well established that the father is the natural guardian of his child and entitled to its custody. *Mantooth* v. *Hopkins,* 106 Ark. 197, 153 S. W. 95. The law recognizes the preferential rights of parents to their children over relatives and strangers, and where not detrimental to the welfare of the children, they are paramount, and will be respected, unless special circumstances demand that such rights be ignored. *Herbert* v. *Herbert,* 176 Ark. 858, 4 S. W. (2d) 513; *Loewe* v. *Shook,* 171 Ark. 474, 284 S. W. 726.

The courts will not always, however, award the custody of an infant to the father, but, in the exercise of a sound discretion, will look into the peculiar circumstances of the case, and act as the welfare of the child appears to require considering primarily three things:

"(1) Respect for parental affection, (2) Interest of humanity generally, (3) The infant's own best interest." *Mantooth* v. *Hopkins, supra; Verser* v. *Ford*, 37 Ark. 29; *Coulter* v. *Sypert*, 78 Ark. 193, 95 S. W. 457. The majority of the court is of opinion, in which the writer does not concur, that there was only an exercise of sound discretion by the judge, and not an abuse of it, in awarding the custody of the infant child, under the circumstances of this case, to the aunt, to whom she was much attached, with whom she had long lived, and with whom she expressed a decided preference to remain.

Appellant pursued the correct practice by bringing the action or decision of the judge upon the *habeas corpus* proceeding to this court by certiorari for a review, revision or correction. *Ex parte Good*, 19 Ark. 410; *State* v. *Williams*, 97 Ark. 243, 133 S. W. 1017; *Ex parte Dame* 162 Ark. 382, 269 S. W. 754.

Having found the petitioner is not entitled to the relief sought, the petition will be dismissed. It is so ordered.

WHARF IMPROVEMENT DISTRICT NUMBER ONE OF HELENA *v.* UNITED STATES GYPSUM COMPANY.

Opinion delivered March 10, 1930.

[redacted]

[redacted]

Bevens & Mundt and *J. G. Burke,* for appellant.

A. D. Whitehead, W. G. Dinning, amici curiae.

KIRBY, J., (after stating the facts). Appellant insists for reversal that the court erred in overruling its demurrer to the complaint of appellee, and that the funds due from the appellant improvement district to the contractors were not subject to garnishment for debts due

from the contractors to appellee company for materials furnished, and used in the construction of the improvement when the suit was brought, and the decree rendered. It has long been the established rule that an improvement district or governmental agency is not subject to garnishment prior to the completion of the improvement to construct which it is created. *Newell Contracting Co.* v. *Elkins,* 161 Ark. 625, 257 S. W. 54, and cases cited. It is likewise true that insolvency of the debtor must be alleged or shown before funds due from the improvement district to the debtor are subject to garnishment. Appellant's contention that the court erred in not sustaining its demurrer to the original complaint of appellee, which did not allege the insolvency of the debtors sued, and did allege that the buildings of the improvement district have never been completed and remain uncompleted at the present time, avails nothing here. A hearing was had wherein it was shown that the buildings the contractors were bound to construct, and for which materials were furnished them by appellee company, were substantially completed, as the chancellor found, and had long been in the possession of the district before the bringing of the suit. The insolvency of the contractors was also alleged by way of amendment to the complaint, which was not denied, before the hearing was had. Appellant's answer also disclosed that it would be the contention of the contractors that the improvement was completed, although it denied that such was the case. Conceding that the complaint as filed was demurrable, the facts themselves shown on the hearing supplied any defects of the complaint existing because of the allegations thereof not having been made therein.

In answer to the contention by the brief of *amici curiae* for the surety company, that the appeal should be dismissed, not having been taken in the time allowed by law, appellant insists that such brief cannot be considered, since no appeal was taken by the surety company, upon whose part the brief and motion was filed, and also

that the contention is without merit. It is true that upon the first hearing the court decreed on the 23d day of July, 1928, that appellee company was entitled to recover the sum claimed from the insolvent contractors, and judgment against the garnishee district subjecting the amount due from it to the insolvent contractors to the payment of the judgment recovered by appellee against the contractors for materials furnished which was impounded and ordered paid to appellee in satisfaction of said indebtedness, and from which no appeal was taken. It also held that it was necessary to have an account stated in order to determine the amount due from the district to the contractors and appointed a master for the purpose. No appeal was taken from this decree by the appellant, but only from the one called a final decree entered the 23d day of May, 1929. An appeal must be taken from final judgments and decrees within the time prescribed by the statute for perfecting appeals, six months in this instance. Section 2140, C. & M. Digest. This first decree determined the rights of the appellee to recover the amount of its claim against the insolvent contractors, and to have the balance remaining due such contractors from the improvement district ascertained, impounded and paid on the garnishment in settlement thereof. There was nothing further left for adjudication but only an ascertainment of the amount due, which was subjected to the payment of the judgment rendered, and the last decree appears to have recognized that such was the case in making the first decree perpetual. It was a final decree adjudicating the rights of the parties, and the appeal should have been taken therefrom. *Flanagan* v. *Drainage District,* 176 Ark. 31, 2 S. W. (2d) 70.

Appellant insists further that the decree sustaining the equitable garnishment and fixing a lien on the funds due from the district to the insolvent contractors is void under the provisions of the National Bankruptcy Act, § 67, paragraph F (11 U. S. C. A., § 107f). There is no evidence in the record of the time of the adjudication in

bankruptcy of the insolvent contractors, or that there has been such adjudication, and there is no indication that any claims have been or will be made against the improvement district for collection for the bankrupt estates of the money that was due from it to the contractors under the contract for the construction of the improvement. If appellant feared that there was any liability on its part for the payment of the money due from it to the contractors upon a claim by the trustee for the benefit of the bankrupt estates, it should have made the trustee a party to the proceeding, that all the rights might be finally adjudicated. It neither did this nor made any allegation showing the condition or asking any relief against the contingency of a liability to payment of the money due the contractors to the estates of the bankrupts for the benefit of its creditors, and cannot, under this contention, avoid or evade the force and effect of appellee's judgment.

We find no error in the record, and the decree must be affirmed. It is so ordered.

KETTLE CREEK REFINING COMPANY, INC., *v.* SCALES.

Opinion delivered March 10, 1930.

Ragsdale & Matheney, for appellant.

MEHAFFY, J. On September 17, 1929, the appellant filed its complaint in the Union Circuit Court against

J. M. Scales, or Jim Scales, and his wife, Tillie Pauline Scales, doing business as the Terminal Cleaners, or the Owl Cleaners & Dyers, alleging an indebtedness of $256.09. Summons was served September 18, 1929. At the same time of the filing the complaint, the appellants filed allegations and interrogatories, naming as garnishees the First National Bank of Huttig, Arkansas, and the Exchange Bank & Trust Company, El Dorado, Arkansas, alleging that the garnishees, and each of them are indebted to the defendants in the sum of $300. Garnishment bond was filed and approved by the clerk. On September 17, 1929, a writ of garnishment was issued by the clerk directed to both banks as garnishees. The clerk signed and affixed his seal to three copies of the writ, each copy being identical, and containing the names of both garnishees. The writ was served on the Exchange Bank & Trust Company on the 17th of September, and on the First National Bank of Huttig on the 18th of September.

On September 18, 1929, the appellees filed their bond for the release of the garnishment, with R. K. Landreth and Frank Hodges as sureties, and on that day the clerk issued a supersedeas, releasing the garnishees. Nineteen days thereafter appellees filed a motion to quash the writ of garnishment, alleging that it was void because it included more than one garnishee without alleging a joint liability or indebtedness. On November 13, 1929, the court sustained the motion, quashed the garnishment, discharged the garnishees, and released the sureties on the garnishment bond, from which ruling of the court, this appeal was taken. Judgment by default was rendered against James M. Scales for $271.45, including interest to October 16, 1927.

On October 9th the First National Bank of Huttig filed an answer admitting an indebtedness of $3.00.

The only question presented for our consideration is whether the court erred in releasing from liability the

sureties on the bond executed for the release of garnishment.

On September 18, 1929, the appellees filed a bond for release of said garnishments with R. K. Landreth and Frank Hodges as sureties, and the garnishees were thereupon released. The motion to quash the writ of garnishment was several days after this bond was given. Without passing upon the question as to whether the allegations were sufficient for the writ in the form it was issued, the appellees and the sureties on their bond waived any irregularity in the issuance or service of the writ of garnishment.

"As, by force of statute, a garnishment proceeding is discontinued and eliminated on the giving of a statutory dissolution bond, it cannot thereafter be quashed or dismissed on motion. Any inquiry as to its regularity or validity ceases to be material. By giving the bond, defendant waives defects and irregularities in the proceedings and estops himself from setting them up. However, the giving of a dissolution bond does not amount to a waiver of a positive lack of jurisdiction which renders the entire action and proceeding illegal and void, and which cannot be supplied by any act of defendant. After the dissolution of the garnishment by the giving of the security, the main action proceeds in due course as at common law." 28 C. J. 365.

"While the giving of a statutory bond is essential to dissolve a garnishment as a matter of right under the statute, and the filing of a bond which differs in its terms from the statutory bond presents no legal obstacle to the entry of judgment against the garnishee, yet, where a common-law bond has in fact accomplished the purpose for which it was executed, and there has been a breach thereof, liability thereon may be enforced by action as distinguished from a statutory summary remedy." 28 C. J. 366.

Here the appellees, themselves, executed and filed the bond with sureties for the purpose of releasing the

garnishees, and this action on their part estopped them and the sureties on their bond from denying the validity of the garnishment.

"The sureties on such a bond are estopped from denying the validity of the garnishment." 12 R. C. L. 861.

Act 177 of the Acts of 1925, page 538, provides, among other things, that the defendant may have such garnishment discharged and all funds or property of his in the hands of the garnishee released therefrom by filing with the clerk of the court or the justice of the peace before whom such action may be pending a bond in double the amount for which the garnishment was issued, that he will pay any judgment which may finally be rendered against him in the action. Upon judgment being rendered against the defendants, summary judgment may be rendered against the sureties in such bond. Castle's Supplement to Crawford & Moses' Digest, § 4907 A; *Wilkinson* v. *U. S. F. & G. Co.,* 119 Wis. 296, 96 N. W. 560; *Dierolf* v. *Winterfield,* 24 Wis. 143; *Billingsley* v. *Harris,* 79 Wis. 103, 48 N. W. 108; *Rich* v. *Sowles,* 65 Vt. 135, 26 Atl. 585; *St. Louis Cordage Mills* v. *Western Supply Co.,* 54 Okla. 757, 154 Pac. 646; *Gist* v. *Johnson Corey Co.,* 161 Wis. 179, 151 N. W. 382.

Many authorities might be cited to the effect that, when the defendant in a garnishment or attachment suit executes and files a bond with sureties, the defendant and his sureties are estopped from claiming any irregularity in the attachment or garnishment. If the garnishment proceedings were erroneous, this could and would have been determined by the court on a proper proceeding. But, without any regard to whether there was any irregularity or not, when the defendant secured the discharge of the garnishees by giving the bond in this case, he estopped himself and sureties from taking any advantage of any irregularity, if such existed. It has been many times held, that in attachment suits, after the giving of the bond to release the attachment, the validity or regularity of the attachment cannot be inquired into. After

the giving the bond mentioned, the garnishees were no longer in court, and the lower court should have directed judgment against the sureties on the bond.

The cause is therefore reversed and remanded, with directions to enter judgment against the sureties on the bond.

[redacted]

GASTER *v.* HICKS.

Opinion delivered March 10, 1930.

[redacted]

Rescoe R. Lynn and *June P. Wooten*, for appellant.

Sam T. Poe, Tom Poe and *McDonald Poe*, for appellee.

BUTLER, J. This suit was brought by the appellee to recover damages for personal injuries claimed to have been received while working in the employ of R. L. Gaster, now deceased, which injuries were received on June 3, 1925. The appellee was working on a grader used to spread gravel upon the highway, the grader being drawn by a tractor, and in attempting to start the tractor the

appellee's arm was caught in a large fly-wheel attached to the same, and was so badly injured as to render it useless and deformed. The appellee seeks to hold the appellant liable because of appellant's failure to furnish him reasonably safe equipment with which to work, in that, first, the tractor had been equipped with a cranking device which, at the time of the injury to the appellee, was out of repair and not being used, and that the appellant's failure to maintain such cranking device made the tractor dangerous to start; and, second, the ignition and timing device was not properly arranged, the result of which was to cause the tractor to improperly function in starting; that these defects were unknown to the appellee, and were not of such an obvious character as to impute to him the knowledge of their unsafe condition.

The appellant denied any defect in the equipment or negligence on his part and pleaded contributory negligence and assumption of risk on the part of the appellee, and alleged that the negligence, if any, was that of appellee's fellow servant for which appellant was not liable.

It may be said that prior to the institution of the suit, R. L. Gaster, appellee's employer, died, and this suit was brought against Dorothy E. Gaster, as administratrix. Appellant's intestate was engaged in building a gravel highway, and the appellee was employed by him as a grader operator. Appellee reached the place where he was to work on June 2nd, and there found the Rumley tractor, which was to pull the grader, being worked on. Appellee assisted to some extent the mechanic and one Fowler, the tractor man, and in the afternoon, after some repairs had been made on the tractor, they tested it to see if it could be started and found that it would run. At the time the tractor had no starting device, and this made it necessary for whoever "cranked" it to do so by standing in front of the flywheel, between it and the front of the tractor, and pull the flywheel over. This was done by grasping it with the hands and pulling it forward so that it would revolve, and this was called "cranking" the

tractor. Several cranked it on the afternoon of June 2d and also in the forenoon of June 3d, including appellee, when it would start all right. When Fowler, who was running the tractor, and the appellee got ready on the afternoon of June 3d to start on their work, Fowler operated what was called the "choke"—an equipment with which to let the gasoline into the proper part of the mechanism so that it might explode when the wheels turned. Appellee started to crank the engine in the usual way, when, for some reason, as the engine began to run, appellee's arm was caught in the flywheel and was broken and badly mangled.

As to just how this injury occurred, the testimony is in conflict. It was agreed that one of the witnesses who was absent would testify, if present, that the injury was occasioned by appellee's foot slipping, causing him to fall forward with his hand into the flywheel just as he started the engine. This witness was Lowell Miller, who, the appellee testified, was about one hundred yards from the place of the accident handling some rock at the time of the injury. Fowler, the only other witness as to the manner of the accident, except the appellee, stated: "Hicks and I went to the machine to start our day's work after lunch. Mr. Hicks went around to crank the machine while I was choking it—it was the same as a car; it had a throttle with gas on it. In some manner his hand slipped, or, in other words, it got away from him and made a backfire. * * * In this instance it seems it happened that, instead of bringing it over the firing point, he brought it most to the top point, and instead of firing it turned backwards; it turned back, and this explosion ignited. Couldn't say whether he didn't turn it quite far enough or turned loose too quickly. The tractor kicked with me. His arm got caught on a part of the frame."

The appellee testified, in relating how the injury occurred, as follows: "After dinner was when it happened. It didn't seem to want to start. * * * I stood on the ground

and turned the flywheel to crank it; had seen Fowler crank it that way. * * * I had hold of the spoke and the wheel when it fired and jerked out of my hands backwards. It came back, and that put my hand through the spokes—jerked it there. By jerking you it would throw you out of balance and throw you in there. I fell into the wheel. My hand got caught between the spoke and the cross-bar; that is, the side part of the frame. Really, I don't know where it was caught, whether it was on the frame or inside of the water pipe or cooler. Had my hands way down by this thing when it happened. My hands were close to the frame when it fired and went back the other way. I don't know how far it went around."

The above is substantially all of the testimony relative to the circumstances attending the operation of the tractor at the time of the injury, and the manner in which said injury occurred.

Ellis was in charge of the job and testified, among other things, that the tractor had a starting device, but that it was out of order. Fowler stated, in one part of his testimony, as follows: "I was under the impression that it had a safety cranking device on it. You see, this has been about four or five years ago, and my memory on some things isn't good, but the same model tractor I had operated before this one was equipped with a safety cranking device." And later on in his testimony he was asked if he had examined a tractor that had been shown him the day before he testified, and he stated that it was the same tractor in use at the time of the accident; that it was the same tractor; that he identified it by a camshaft that he had put in there, and that there were lots of parts missing—removed from the tractor; that on examining the flywheel he did not find any notches or lugs on the inside, and that he had been under the impression that it had starting lugs on it, but when he went out to the machine on the day before testifying he found it had no lugs. "I believe it did have on the other machine, and

I was of the impression that this one did too. I can be mistaken about it."

The tractor was a six-thirty model, and Joe Lyon, a salesman for the Runley people, introduced a catalogue showing the lugs or indentations on the inside of the flywheel in which a part of the starting device fitted when a tractor was so equipped, and this witness stated that some six-thirty model tractors had starting devices on them and some did not; that he had examined the flywheel of a tractor shown him the day before the giving of his testimony represented to be the tractor in use at the time of the injury, and that the flywheel had no notches in which the end of the arm of the safety device would be inserted when it was being used to start the tractor. The witness stated that, when the starting device was in use, the tractor could be started without one having to put his hands upon the flywheel or coming in contact with it.

The testimony was given on the 13th day of March, 1929. The tractor was used after the accident in June, 1925, until sometime in August of that year, when it was set aside and had not been used since. The evidence shows that the tractor was old and worn and had to be continuously repaired in order to keep it in working order, and that on the day before the injury to the appellee it was being repaired and the timer was being adjusted. The evidence shows that the ignition system was poor, Fowler explaining that, if it had not been, the tractor could have been started easily by one individual, but that it required, in its condition, the efforts of two to get it started. A gasoline engine mechanic was doing the repair work, and Fowler was helping him. The extent to which the appellee assisted was to hand them tools or parts as required. The mechanic did not testify, but Fowler stated that a change was made from a low tension to a high tension magneto, and the spark was accelerated to fire a little early to get more power; that the timing mechanism, the ignition and the magneto on the tractor were not visible; that a "backfire" is where the spark is

advanced, and when you crank it fires early, and instead of turning the right way or forward, it turns backward—it is simply where the spark is advanced too far, and it fires before the piston gets in the right position."

F. A. Ussery was called as an expert witness and testified that he had been in the automobile repair business for twenty-three years, and had had experience with internal combustion gas engines. He was asked this question:

"Q. I wish you would tell the jury what the effect of setting up the timing gears on one of the internal combustion engines is as to whether it is likely to cause backfire more frequently than if retarded? A. Well, did the magneto have a spark control on it? Q. It had an impulse starter on it. A. It had an impulse starter but no spark control? Q. No, no spark control. Well, in timing an engine of that kind a man should be pretty careful to get his pistons at the proper place, his valves at the proper place, in order to determine when it is in time."

Continuing his testimony, the witness stated, "There wouldn't be any difference in a low-tension magneto and a high-tension magneto. Any time you put an impulse starter on any kind of machine, it clearly indicates to you, or any other man, that that car is hard to start. In other words, the compression is so great that a man can hardly turn it over or get momentum without it kicking back on him. By putting an impulse starter on there, or a car—an automobile gas engine—they are a danger to a man cranking that car any time, and he wasn't careful in pulling up on the crank—even if he moved it slow—even a Ford car you retard the spark and pull up the crank. You pull up slow on it. The piston will get to the top, and there will be a variation in time—in fact, it would backfire before it goes there itself, and it is likely to kick back at the top of dead center as to go the other way." He further stated that if the timing mechanism is set to fire before it gets to dead center, it is bad; that "that is not backfire—it is firing too early; it comes back. If it fires before it gets

to dead center, it will reverse itself, and the crank will run around with the motor.'' He further stated, in speaking of cranking a tractor which might backfire, that if one was accustomed to the motor, or tractor, and if he is a pretty good gas engine man, he might ''rock it'' on compression and get by, and that if an engine fired too early, or backfired, it was because of some fault in the timing mechanism.

There was other testimony introduced tending to show that gasoline engines would backfire without any apparent cause, and there were circumstances narrated by the witnesses as to the blood on the tractor in question after the injury which indicated that, when said injury occurred, the flywheel was not going backward, but forward. The testimony, as abstracted, is fragmentary, and indeed that appears to be true when the record is examined. Also the testimony is very meager as to just what was done with reference to setting the timing equipment, and as to whether or not the tractor in question had ever been equipped with a starting device. We have endeavored to gather from the disconnected statements of the witnesses their testimony relative to the question of the manner in which the injury occurred, and that relative to the starting device and the ignition. After a careful consideration of the testimony as abstracted, and as revealed from an inspection of the original record, we have concluded that there was substantial testimony upon which to submit the question of the negligence of appellant's intestate to the jury.

This court cannot weigh the evidence or pass upon the credibility of the witnesses, that being the sole province of the jury. The jury has found, by its verdict, that there was negligence, and in considering the evidence we must give to it its highest probative force in favor of the appellee and indulge every inference which is reasonably deducible from the testimony in support of the finding of the jury. Thus viewing the testimony, it may be said that there is substantial evidence to the effect that

the appellee was not experienced in the mechanism of gasoline tractors, and that, while he had worked for a number of years where tractors were used, his work was not of such character as to render him a skilled gasoline engine man. In fact, the reasonable inference is that he knew but little of them except that they would run. He was entirely unacquainted with the particular type of tractor that caused his injury, never having worked about one before. The tractors about which he had worked before were equipped with starting devices, and he did not know at the time of his injury whether the Rumley tractor which caused his injury had ever been equipped with such a device. The experience he had had with this tractor was only that acquired on the day before the accident when he had but a casual connection with the repair work being done upon it. Appellee had seen Fowler start the engine in trying it out on the afternoon of the 2d and perhaps in the forenoon of the 3d, and he himself had tried it out, starting it one or more times as he had seen Fowler do, each time the engine starting without a backfire. He knew nothing of the ignition or timing equipment. It was covered so that he could not observe it, and, if it had not been covered, his experience and knowledge of such equipment would not have been sufficient to apprise him of any existing defect.

It is manifest that the tractor was old and worn and required constant attention in order to make it run, and, if the starting equipment had been attached to the tractor, it could have been started without danger to the operator, or if the ignition had been in good condition, the tractor man could have started it without aid of the appellee, who was the grader man. Because the tractor was old and worn, the timing equipment was so arranged as to make it "fire early," the reason for this being that by so doing the engine would operate with more power, and this made the starting of it a dangerous operation. For, by firing early, the electric spark was emitted and exploded the vaporized gasoline before the piston reached

a point known as "dead center," which would have a tendency when the explosion occurred to cause the wheels to revolve the wrong way—that is, to go backward instead of forward. One acquainted with a particular engine in this condition and so timed, by using care and "rocking it" at a particular point could start the engine without injury to himself. When the time came for the tractor man, Fowler, to start the tractor attached to the grader which was to be operated by the appellee, it became necessary for him to have appellee's assistance in order to get his engine started, and this the appellee conceived to be, and in fact it was, his duty. He went to the flywheel at a point where he had been shown, and where he had seen others take hold of it to revolve it or crank it, and in the course of that operation the engine fired too early, or backfired, causing the flywheel to suddenly revolve backward instead of forward, as it should have done, causing the appellee to fall forward, so that his arm was thrust between the spokes of the wheel and caught in some manner as the wheel revolved backward, breaking and mangling his arm. The jury concluded that this would not have occurred, had the wheel moved in the proper manner, and it did not so move because of the negligence of the appellant in not having the proper adjustment of the timing and ignition system on the tractor.

It is contended by the appellant that the injury resulted from the ordinary dangers incident to the operation, and that the appellee assumed this risk when he entered his employment. We fully agree with the appellant as to the rules of law governing the question of assumed risk, and that the rule cited is the one applicable to the facts of this case, but we draw a conclusion different to that of learned counsel. "The rule is well settled in this State that, when it appears to be clear that the servant has knowledge of and appreciates the dangers incident to the work, or that the danger is so obvious or apparent that knowledge of the danger and appreciation thereof should be imputed to him, then the court should

declare, as a matter of law, that the servant is not entitled to recover. It is equally well settled that assumption of risk is not predicable from knowledge of the conditions alone. It must further appear that the danger was, or should have been, appreciated by the servant in order that it may be said that there was an intelligent consent on his part. While the appreciation of the danger is often inferred from complete knowledge on the part of the servant, yet, if the knowledge possessed by the servant is not such as to necessarily make him appreciate the danger of his work, his action for injuries will not be barred." *Brackett* v. *Queen*, 162 Ark. 525, 258 S. W. 635, and a number of other cases cited in appellant's brief. We think, from an application of this rule to the testimony in the instant case, that it could not be said as a matter of law that it was clear that the appellee appreciated the danger incident to the cranking of the tractor. This was the first time he had ever worked about a tractor of this description; he was not aware that it had, at any time, been equipped with a safety device, and therefore could not have been aware that the engine might be dangerous to start without such device; he had only seen this engine started a very few times; he was not a gasoline engine mechanic, and there is nothing to show that he would have known, had he inspected the ignition system and timing equipment, that the same was not in good condition. Moreover, this equipment was all concealed, and, having just been overhauled by a skilled mechanic, the appellee had the right to assume that it was in proper working order, and that no danger would result to him therefrom. Therefore, the assumption of risk would not be predicable from a knowledge of these conditions, nor were they such that from the experience of the appellee he would, or could, have appreciated the danger, and it cannot be said as a matter of law that he had assumed the risk.

We think the question of the appellee's contributory negligence was properly submitted to the jury, and that it

was for the jury to say whether or not the appellee, from his knowledge of cranking a Rumley tractor, was careless in the manner in which he undertook to do so. The testimony of one of the witnesses, if believed, might have led to the conclusion that the appellee was negligent, and that because of such negligence he slipped and fell into the flywheel, and that the injury was occasioned by that and not by the backward movement of the flywheel. But there was testimony that this witness was a hundred yards away from the accident, and also testimony contradicting his statements, so that it was for the jury to determine this issue. It cannot be said, as a matter of law, that in attempting to crank the tractor in question the appellee did not undertake the operation as an ordinarily careful and prudent man would have done under similar circumstances.

The court fully and fairly instructed the jury on the questions of negligence, assumed risk and contributory negligence, none of which instructions are complained of, but it is contended that the court erred in refusing to give appellant's prayer for instruction No. 15, as follows: "You are instructed that the defendant is not responsible for the negligence of a fellow servant or employee, even in the event you find that such negligence may have been proven in this case."

It was not error to refuse the above instruction for the negligence complained of and proved, if any, was not the negligence of a fellow servant, but of the master himself. If it had been some negligent act of Fowler at the time of the injury which in any way caused the appellee to fall into the flywheel, then the instruction would have been proper, but the negligence, if any, was in the failure of the master to furnish reasonably safe machinery with which to do the work. This is a duty of the master, which he cannot delegate so as to avoid liability. *Bryant Lumber Co.* v. *Stastney,* 87 Ark. 321, 112 S. W. 740.

All of the questions noted were dependent upon conflicting testimony, and submitted to the jury under proper

instructions. The rules of law governing are so well settled as to render the citation of authorities unnecessary.

As we view this case, it depended merely on questions of fact which, on substantial testimony, have been settled by the jury adverse to the contentions of the appellant.

It is evident that the testimony of Fowler as to the repairs on the tractor other than that to the timing mechanism, if improper, was not prejudicial, because it was shown that such repairs had no connection with the defects complained of, and there was other testimony introduced, without objection, relative to the same matter.

We do not deem it important to discuss the objections made to the testimony of the witness Eshe, because it is apparent from the record that his calculations were disregarded by the jury.

On a consideration of the whole case, we are of the opinion that the trial court committed no prejudicial error, and, giving the testimony its strongest probative force, there is some substantial evidence tending to support the verdict. The jury awarded appellee $15,000.

On the question of the amount of the verdict and judgment, there were three elements of damage to be considered by the jury—pain and suffering endured and likely to be suffered in the future, the embarrassment and humiliation from the maimed limb, and the loss of earning power. The pain and suffering in this case must have been intense and endured over a long period of time. From the testimony of the physician it is apparent that the appellee's arm can never be restored in any way approaching its normal condition, and that the bones are still not united and perhaps will never be. They are heard to grate as appellee moves his arm, and he testified, and it seems reasonably true, that he continues to suffer pain and perhaps always will. We cannot measure human suffering in dollars and cents, but we have in numbers of cases held that it entitled the sufferer to a substantial recovery in damages. The mental anguish appellee will suffer through the years is to be considered,

and it is clearly demonstrable from the testimony that the appellee is unfit to earn a living except by physical labor. We have only to apply common sense to the state of the case where a laborer has lost the use of his right arm to conclude that the injury to him is serious indeed. The evidence in this case shows that the appellee was a comparatively young man, strong and healthy, earning the equivalent of $5.00 a day. He was increasing in efficiency in his particular line of work, and his wages had been raised from time to time. Since he had been injured, he only has been able to earn very much less, and some of the money he has earned has been derived from casual jobs which we have no reason to believe will be permanent. We think it reasonably certain that the loss of the use of a laboring man's right arm—especially if he is a right-handed man—necessarily prevents him from following a vocation that would require any degree of skill, and he is reduced from the grade of a skilled or semi-skilled workman to take up those occupations that are called common labor. We see nothing in any of our former decisions that would compel us to reduce the judgment in this case, for, as pointed out in the case of *Missouri Pacific* v. *Elvins*, 176 Ark. 737, 4 S. W. (2d) 528, a dollar is worth much less than formerly, and a recovery of a sum held to be excessive some years ago would not necessarily mean that for a similar injury now such verdict would be deemed excessive. See cases cited in *Mo. Pac. Rd. Co.* v. *Elvins, supra.*

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

HUFF *v.* FREEMAN.

Opinion delivered March 10, 1930.

David L. King, for appellant.

Smith & Blackford, for appellee.

McHaney, J. The school directors of School District No. 3, in the southern district of Sharp County, entered into a contract with Clayton Nicholson to teach the school in said district for a period of three months, beginning July 8, 1929, at a salary of $60 per month. Nicholson is related to one or more of the directors within the fourth degree of consanguinity or affinity. He presented a petition to the directors, purporting to be signed by the patrons of the district, in an effort to comply with § 9029, C. & M. Digest, which prohibits the employment of any person as teacher within that degree of relationship, unless two-thirds of the patrons shall petition them to do so. Appellants opposed his employment by the directors, and brought this suit to enjoin the appellees, who are the directors, and the teacher from carrying out such contract, alleging that the petition presented to the directors did not contain two-thirds of the patrons of the district. The case was tried before the chancellor, and a decree entered on August 8, 1929, denying the prayer of the petitioners, and dismissing the petition for want of equity.

The record discloses that Professor Nicholson began teaching the school on July 8, 1929, and the presumption is, although not definitely shown in the record, that he carried out the terms of his contract with the district by teaching the school for three months, and was paid his salary as stipulated in the contract. No bond was given at the time the suit was filed, and the judgment of the chancery court has not been superseded on appeal. It

appears, therefore, nothing can be accomplished by this appeal, and that the questions presented have become moot. This court will not decide questions which have ceased to be an issue by reason of facts having intervened, rendering their decisions of no practical application to the controversy between the litigants, though the dismissal of the appeal would leave the costs of the litigation on the appellant. *Henry Quellmalz Lumber & Mfg. Co.* v. *Day,* 132 Ark. 469, 201 S. W. 125. In *Kays* v. *Boyd,* 145 Ark. 303, 224 S. W. 617, it was held that it was the duty of this court to decide actual controversies by judgment which can be carried into effect, and not to give opinions on abstract propositions, or to declare principles of law which cannot affect the matter in issue in the case at bar.

A decision of the questions raised in the brief of appellant would be of no practical importance to the parties since the contract to teach the school has been fully executed, and we therefore decline to decide them. The appeal will therefore be dismissed.

PAGE *v.* STATE.

Opinion delivered March 10, 1930.

[redacted]

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

McHaney, J. Appellant and two others were charged in the indictments, each containing two counts, with burglary and grand larceny. On his motion to sever, appellant was tried separately, and by consent the two cases were consolidated. He was convicted on both counts in both indictments, and sentenced to two years in the penitentiary.

He has not favored us with a brief in his behalf. The first three assignments of error in the motion for a new trial challenge the sufficiency of the evidence to support the verdict. We have read the abstract of the evidence prepared by the Attorney General, and find it amply sufficient without reference to the testimony of the two accomplices who were jointly indicted with him. We think it would serve no useful purpose to review it, and therefore refrain from doing so.

The next assignment of error is "that the court erred in permitting the prosecuting attorney * * * to prove statements made by other persons when the defendant was not present at the time of the alleged statements." The record fails to disclose any such statements, but, even conceding that it did, this assignment is too indefinite to bring to the attention of the court any particular statement complained of. A witness was permitted to testify that the two accomplices had made statements in appellant's presence, but the witness did not state what the statements were. There is no merit to this assignment.

It is next assigned that the court erred in permitting the State to prove that various stolen articles were found in the possession of persons other than appellant.

Some of the stolen articles were found in possession of appellant, and some in possession of the other accomplices. The rule that the acts, conduct and declarations of one co-conspirator, after the accomplishment of the purpose of the conspiracy, are not admissible as against another conspirator has never been extended so as to exclude proof of such facts. The exact question was decided against appellant in *Wiley* v. *State,* 92 Ark. 586, 124 S. W. 249.

The last assignment that the court erred in giving instructions numbered "....." to the jury cannot be considered, as it points out no particular instruction, is too general, and is the same as if it had said the court erred in giving instructions.

Judgment affirmed.

THOMAS *v.* STATE.

Opinion delivered March 10, 1930.

Walter J. Hebert, for appellant.

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

PER CURIAM. Richard Thomas prosecutes this appeal to reverse a judgment of conviction against him for the crime of pandering, in violation of the provisions of § 2705 of Crawford & Moses' Digest. The State has confessed error on the ground that the trial court erred in refusing to sustain the motion of appellant in arrest of judgment.

The section of the digest under which the indictment was found provides, in substance, that any person who shall knowingly receive any money without consideration from the proceeds of the earnings of any woman engaged in prostitution shall be deemed guilty of a felony. The indictment left out the words "without consideration." It will be observed that the exception in the statute, "without consideration," is so incorporated in the enacting clause that one cannot be read without the other, and the exception becomes one of the essential ingredients of the offense. In other words, the exception is contained in the clause of the statute creating the offense, and it is so interwoven with the definition of the crime as to constitute a material part thereof. If the State were not required to negative the exception in the statute, it would not be required to prove that the person appropriating the money from the proceeds of the earnings of any woman engaged in prostitution must do so without consideration. This would make an offense not created by the statute.

The rule is well settled in this State that when an exception contained in a statute defines an offense and constitutes a part thereof, an indictment for such crime must negative the exception; but when the statute contains a proviso exempting a class therein referred to from the operation of the statute, the indictment need not negative the proviso; for the reason that the accused in such a case must make the exemption a ground of defense. *McIntire* v. *State,* 151 Ark. 458, 230 S. W. 619; *Hodgkiss* v. *State,* 156 Ark. 340, 246 S. W. 506; and *Tumbelson* v. *State,* 159 Ark. 266, 251 S. W. 868.

The indictment in this case does not allege that the appellant received or appropriated money from the earn-

ings of the woman engaged in prostitution without consideration. As we have already seen, the offense lies in receiving such money without consideration. It follows that the judgment must be reversed; and, inasmuch as the appellant has not been put in jeopardy, the cause will be remanded for further proceedings according to law.

LENON *v.* STREET IMPROVEMENT DISTRICT No. 512.

Opinion delivered March 17, 1930.

[redacted]

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Henry C. Reigler and *John F. Clifford,* for appellants.

Dillon & Robinson and *Murray O. Reed,* for appellees.

HART, C. J., (after stating the facts). Appellants were property owners within the proposed street improvement district, and appealed to the city council for relief from the assessment of benefits, on the ground that it was excessive. Having been denied relief by the city council, appellants brought this suit in equity against the commissioners of the improvement district to have the assessment declared void on the ground that the assessment of benefits was excessive, and practically amounted to a confiscation of their property. The suit was brought within the time provided by statute, and constitutes a direct attack upon the assessment of benefits filed with the city council. *Turner* v. *Adams,* 178 Ark. 67, 10 S. W. (2d) 41.

There was a presumption in favor of the validity of the assessment of benefits, and the burden was upon the property owners who assailed it to show that it was excessive. *Ahern* v. *Paving & Improvement District No. 32 of Texarkana,* 168 Ark. 385, 270 S. W. 513.

The purpose of the assessment of benefits is to determine the effect of a proposed local improvement upon the market value of the real property in the proposed district, including the buildings on the lots. This is clearly a matter of the judgment of witnesses; and, in testing the correctness of their testimony, regard may be had to the value, area, and location of the lots, the improvements on them, their relation to other property in the district and out of it, the value of the improvements, their character and everything else which might be considered in deter-

mining the value of the benefits assessed. This court has uniformly held that the only sound principle upon which the assessment of benefits for a local improvement can stand is that the property assessed is specially and peculiarly benefited by the improvement. Consequently, when it is found that the cost of the improvement exceeds the total value of the assessment of benefits, the proposed improvement must fail.

Tested by these principles of law, we are of the opinion that the chancery court erred in refusing the testimony offered by appellants. In no other way could appellants get before the court their theory that their property had been assessed too high. They had a right to show that the assessment of benefits made by the assessors was greater than any special and peculiar benefit which would be received by their property from the proposed improvement. The record shows that there was already a good street of gravel and cinders. The buildings in the district consisted chiefly of negro residences of comparatively little value. It was proposed to change the street from one of gravel and cinders to a paved one. The assessed value of the property as shown by the last county assessment amounted to $50,700. The estimated cost of the improvement was something over $25,000. The witnesses for appellants testified that this character of property would not support a paved street. They all agreed that the cost of the improvement would greatly exceed a proper assessment of benefits made against the property. When the topography of the district, the character of residences in it, and everything which goes to make up the value of property is considered, we are of the opinion that the proposed evidence would have established that the cost of the improvement would exceed the value of the special benefits which might be derived from paving the street.

Under these circumstances, the city council should have ordered a reassessment of the property; and, not having done so, the chancery court should have admitted

the proof offered by appellants and have rendered a decree in accordance with the views herein expressed. Having failed to do so, the decree of the chancery court will be reversed, and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

OPINION ON REHEARING.

HART, C. J. Counsel for appellee insist that the original opinion is in conflict with *Kirst* v. *Street Improvement District No. 1,* 86 Ark. 1, 109 S. W. 526, but we do not think so. On the contrary, we think it is in conformity with the principles of law there decided, as well as those in *Turner* v. *Adams*, 178 Ark. 67, 10 S. W. (2d) 41, cited in our original opinion.

The record shows that the property owners sought to attack the assessment before the city council on the ground that it was arbitrary and made for the purpose of making the assessment of benefits exceed the cost of the improvement without any regard being had to the actual benefits received by the property. The assessment as a whole was attacked on the ground that each piece of property in the district was assessed at a sum greatly in excess of any actual benefit it might receive, and testimony was offered which tended to establish the fact that the assessment of benefits was made in an arbitrary manner without any relation to the benefits received. Evidence to that effect was offered.

If this cannot be done, there is no use in holding that the individual owner shall never be required to pay a greater sum than the actual value of the benefits received. Assessments for street improvements can only be upheld on the ground that the property assessed is enhanced in value to an amount equal to the sum assessed against it. An allegation that the assessment on the property is substantially in excess of the benefits received raises a con-

stitutional question; and, if the allegation is true, then the assessment is contrary to the Constitution. On a direct attack, this is a question of fact, and we pointed out in our original opinion that the proof offered showed that the assessment made upon each piece of property was shown to be greatly in excess of any special benefit it might receive. The common council of the city had jurisdiction to pass upon the validity of this assessment; and, if the proof showed that it was arbitrary within the meaning above indicated, the council should have refused to confirm the assessment and have set it aside. This would have left it within the power of the assessors to have made a new assessment conformable to law, which would be subject to attack in the manner provided by statute as in the case of the first assessment. If the council fails to give the landowners the relief to which the proof shows they are entitled, they have the right to bring a suit in the chancery court within thirty days to accomplish that result. Therefore, the motion for a rehearing and to modify the opinion will be overruled.

[redacted]

TOWNSEND *v.* WATER & SEWER DISTRICT NO. 1.

Opinion delivered March 17, 1930.

[redacted]

J. S. Townsend, for appellant.

Millard Alford and *McMillan & McMillan,* for appellee.

HART, C. J., (after stating the facts). Appellant insists that he is entitled to recover for the labor, time, and trouble involved to him in the preparation of the petition, ordinances, and in the performance of the other work done by him in the formation of the improvement district in the sum of two per cent. on the amount of the bond issue, which was $115,000. He testified himself that this was the customary fee in cases of this sort and was the reasonable value of his services. His testimony was corroborated by that of another attorney who had much experience in the formation of local improvement districts. Hence he invokes the rule laid down by this court that, where no compensation is fixed by contract, the attorney is entitled to recover for the reasonable value of the services rendered. *Jacoway* v. *Hall,* 67 Ark. 340, 55 S. W. 12; *Lilly* v. *Robinson Mercantile Co.,* 106 Ark. 571, 153 S. W. 820; and *Bayou Meto Drainage District* v. *Chapline,* 143 Ark. 446, 220 S. W. 807.

We do not think the record brings the case within the principles of law above announced, and we do not deem it necessary to decide whether or not appellant or Graves rendered more valuable services in the formation of the improvement district. The record shows that, when the commissioners organized, they unanimously passed a resolution appointing Graves and Townsend as attorneys for the district, and expressly recited in the resolution that they were to receive $250 each for their entire compensation as attorneys. It is true that there was another clause providing for additional compensation in case of litigation, but there was no litigation in the organization of the district. Hence, under the resolution, which

was accepted by the attorneys, they were only entitled to receive $250 each.

It is true that appellant testified that he did not accept the terms of the contract when he was informed by one of the commissioners of the passage of the resolution. He did, however, accept the fee provided for in the resolution, and this amounted in practical effect to an acceptance of the terms of the contract. The last warrant which was drawn for the payment of his services expressly recited that it was for the balance of his attorney's fee. He accepted this without protest, so far as the record discloses. His acts and conduct amounted at least to a ratification or acceptance of the terms of the contract, and he was not thereafter in a position to ask for additional compensation. Therefore, the decree will be affirmed.

HOLLAND *v.* MYERS.

Opinion delivered March 17, 1930.

Cochran & Arnett, for appellant.
White & White, for appellee.

SMITH, J. This is an appeal from a decree dissolving a co-partnership, which had operated under the name of the Paris Transfer Company. The partners were appellant Holland and appellee Myers. Prior to the formation of the partnership, they had been separately engaged as competitors in the transfer business in Paris, Logan County. Appellee had the older and larger business, and, upon the formation of the partnership, they each contributed two trucks, which they owned, and took over another truck owned by appellee, upon which there was a balance of unpaid purchase money, and it was agreed that this balance should be paid out of the earnings of the partnership. Balances due on the other trucks contributed to the firm business were to be paid by the partner owing the debts. In addition, it was agreed that appellant should pay the sum of $50 per month until $1,250 was paid for the privilege of entering an established business.

After operating for about three months, a disagreement arose, it being claimed by Holland that Meyers had not devoted his entire time to the business as had been agreed; that he bought oil and gas at a profit to himself, and a loss to the partnership, from a filling station, which he had sold on a credit; that he operated a transfer business at Charleston in competition with that of the partnership, and had used the partnership trucks in his private business; that he had used partnership funds for his private purposes, and refused to discharge employees who were discourteous to appellant and refused to obey instructions which he gave.

There was a general denial of these allegations, and appellee acquitted himself of any improper use of the partnership funds, but the prayer of the answer was that the partnership be dissolved and an accounting ordered.

As both parties prayed a dissolution, and neither complains of that portion of the decree dissolving the partnership, it will not be necessary to discuss the sufficiency of the testimony to support that order.

The cause was heard by a master, who took testimony and made a report of his findings, and the cause was tried upon exceptions to this report. A sale of the partnership assets was had under the order of the court, and this appeal involves the distribution of the proceeds of the sale.

Only two errors are assigned for the reversal of the decree. One is that the court erred in refusing to allow appellant to withdraw the trucks, or the value thereof, which he had contributed to the partnership, and to allow appellee the same privilege.

Appellant cites cases to the effect that, where, on an accounting, it appears that the two owners of a partnership business were to advance capital and share the profits equally, the amount advanced by one partner in excess of another should first be given him out of the assets, and the balance then divided equally between them.

In the application of this principle appellant points out that the testimony shows that the net value of the trucks contributed by him exceeded by $752 the net value of those contributed by appellee, and that upon the sale of the assets his trucks sold for $656 more than the trucks contributed by appellee sold for, and that he should have credit for one item or the other.

The court found, however, that this difference in value was not taken into account when the partnership was formed, and that each contributed his truck without regard to their value, and we think that finding was not contrary to the preponderance of the evidence. There was therefore no error in refusing to take into account the difference in value of these trucks in distributing the proceeds of the sale of the assets.

Appellant also insists that the court erred in holding that the $1,250 was a part of the consideration agreed to be paid upon the formation of the partnership without regard to the length of time it continued in existence; and we think he is correct in this contention.

Upon this question the master found as follows: "The plaintiff is also to be charged at the rate of $50 per month from the inception of the partnership until the partnership ceases its business, but credit is to be given the plaintiff for the $150 already paid. The defendant is to be credited with the amount charged to the plaintiff on this account. The defendant is not allowed the full $1,100 balance claimed by him on this account, as in the master's opinion this part of the partnership contract is executory and depends upon the continuance in the partnership of the plaintiff."

We concur in the finding of the master on this question. The testimony is conflicting, but we think the master's finding is more consonant with the spirit of the agreement. While the partnership was not formed for any definite period of time, it was clearly contemplated that it should continue long enough for $1,250 to be paid at the rate of $50 per month. No one contends that it was to be paid otherwise than at the rate of $50 per month. Grounds for the dissolution of the partnership arose before the payments were completed, and the partnership has been dissolved by order of the court. It appears inequitable, therefore, to compel appellant to continue payments the consideration for which has failed.

The master, in stating the account, charged appellant with the monthly payment of $50 until the partnership ceased to operate as such, which we understand amounted to $150, but allowed a credit against that amount of $150, which was the agreed value of a cash register which appellant had sold the partnership. One item extinguished the other. The question, therefore, is whether the balance of $1,100 should also be charged to appellant in stating the account. As we think it should not, the decree must be modified in this respect, and, as thus modified, it will be affirmed.

ROSS *v.* STATE.

Opinion delivered March 17, 1930.

John Mayes, for appellant.

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

HUMPHREYS, J. Appellant was indicted in the circuit court of Washington County for the crime of murder in the second degree, and, as a punishment therefor, was adjudged to serve a term of two years in the State penitentiary. An appeal has been duly prosecuted to this court from the judgment.

Appellant unintentionally killed Rube Phillips, an innocent bystander, when shooting at Toney Eden, with whom he was fighting.

Two assignments of error are urged for a reversal of the judgment; the first for excluding certain evidence, and the other for giving instructions numbered 7 and 11.

1. The evidence excluded had relation to the details of a recent altercation between appellant, on the one part, and Mose and Cliff Brown on the other in which appellant received wounds which the court refused to let him exhibit to the jury. Cliff Brown was in company with Toney Eden on the night the homicide occurred for which he was indicted, and was heard to say to Cliff Brown: "Leave the son-of-a-bitch to me; I will attend to him" (meaning appellant). This association and remark were made the basis for the request to testify in detail concerning the former difficulty and to exhibit appellant's knife wounds to the jury for the alleged purpose of showing appellant's state of mind, and whether Eden or himself was the aggressor. The rule is that previous trouble, threats, etc., between parties are admissible to show the state of mind of either party, and which likely was the aggressor in the subsequent difficulty. *Crafford* v. *State,* 169 Ark. 225, 273 S. W. 13; *Crews* v. *State,* 179 Ark. 98, 14 S. W. (2d) 261. This rule, however, can have no application in the instant case, because appellant did not offer to connect Eden with the difficulty between the Browns and himself. The trial court allowed appellant to testify that he and the Browns had had a serious difficulty a short time prior to the difficulty with Eden, and we think the admission of this testimony was more favorable to him than he was entitled to under the rule.

2. Appellant assails instruction number 7, advising the jury of its duty to reconcile the testimony of all the witnesses, if possible, so that it might stand and be taken as true, because he emphasized the difficulty of doing so. The court remarked, in advising the jury to reconcile the testimony of the several witnesses, if possible, "that there is not one case in a million where you can"; then proceeded to inform it of its duty in case it should be unable to reconcile the testimony. It is not

contended that the instruction is erroneous in any other particular. We think the objectionable language should have been met by a specific objection, and not a general one. The instruction was not inherently defective, and the attention of the court should have been called particularly to the objectionable language. It is true the language was an exaggeration, but we do not think it was prejudicial.

Appellant also assails instruction No. 11, relating to the law of self-defense, because the alleged effect thereof was to deprive appellant of his defense. The instruction complained of had relation to the law of self-defense applicable to one who provoked a difficulty. The rule announced was a correct declaration of the law in the instant case because the evidence was conflicting as to whether appellant or Eden was the aggressor in the difficulty. The testimony on behalf of the State showed that appellant attended a dance at the home of Charles Goldman, where the homicide occurred, and, in the course of a quarrel with Eden, cursed and charged him with being "one of Mose Brown's men"; that Eden struck him several times and drew a knife whereupon appellant drew a pistol; that Goldman ordered them out of his house; that Eden and Brown left the room first, and that appellant stopped near the door and fired an automatic pistol at Eden three or four times striking him in the arm, and killing Rube Phillips.

The testimony introduced by appellant was to the effect that, as he walked out of the door, Eden attacked him with the knife, and was attempting to cut him when he fired upon Eden.

Under the conflict in the evidence, the instruction complained of was not inapplicable or erroneous.

No error appearing, the judgment is affirmed.

Justices Kirby and Butler dissent.

WM. R. MOORE DRY GOODS COMPANY *v.* LAMMERS.

Opinion delivered March 17, 1930.

[redacted]

M. F. Elms, for appellant.

Ray & Ray, for appellee.

HUMPHREYS, J. Appellant brought suit against J. B. Blackstone in the chancery court of Arkansas County, Southern District, to foreclose a second mortgage on a small tract of land given to secure an indebtedness of about $700 for goods and merchandise, and, deeming the mortgage security insufficient, filed an affidavit for a vendor's lien on the stock of goods, attachment and bond for attachment, and caused a writ of attachment to be issued and levied upon the stock of goods owned by Blackstone which was located in a building owned by appellee. The building was retained by the sheriff or receiver until the goods were sold, the rent thereon amounting to $305, for which amount appellee filed a claim in the attachment proceeding as follows:

"STATEMENT OF INTERVENER, APPELLEE HERE,

A. E. LAMMERS.

"Statement of amount due on 12-18-28.

"To Albert Lammers, of Stuttgart, Ark.

"By Wm. R. Moore Dry Goods Company, of Memphis, Tennessee.

"For amount of rental on store building, located at 225 North Main Street, Stuttgart, Arkansas, occupied by J. B. Blackstone, but which was taken possession of by you on June 15, 1928, under a court foreclosure order:

Rental for June, 1928	$25.00
Rental for July, 1928	50.00
Rental for August, 1928	50.00
Rental for September, 1928	50.00
Rental for October, 1928	50.00
Rental for November, 1928	50.00
Rental for December, 1928	50.00
Rental (to 12-18-28)	30.00
Total	$305.00

"Note.

"Interest is due on this amount at the rate of 8 per cent. per annum as rental is payable monthly in advance.

"Albert Lammers.

"Subscribed and sworn to before me this 3d day of June, 1929.

"J. E. Ray, Notary Public.

"My commission expires 2-10-1930."

Upon a hearing of the intervention, the trial court made a finding that appellant retained the building in question through its receiver until the rent thereon amounted to $305, and rendered a judgment in favor of appellee against appellant for said amount, from which is this appeal. The testimony introduced on the hearing of the intervention was not incorporated in the transcript on appeal, hence appellant relies for a reversal of the judgment upon alleged error apparent on the face of the record. Appellant contends that appellee's exclusive and only remedy was to present his claim for rents to the sheriff, and for the sheriff in turn to ask that the claim be taxed as costs. In support of the contention it cites § 523 of Crawford & Moses' Digest, which provides:

"The sheriff or other officer shall be allowed by the court necessary expense of keeping the attached property to be paid by the plaintiff, and taxed in the costs."

The account for rent filed by appellee contained the statement that appellant took possession of the building on June 15, 1928, and the itemized statement for the rents indicates that possession of the building was retained until the 18th day of December, 1928. The court found that it retained possession thereof during this time through its receiver. This court on appeal must presume that the testimony adduced on the hearing, and omitted from the record, supported the finding of the court. If it did, the court was warranted in treating the intervention as a motion to tax the costs, either on the retention of the building by the sheriff or receiver. It may have appeared from the testimony that the sheriff or receiver retained the building under the direction of the appellant. In this view the proceeding adopted constituted a substantial compliance with the statute.

No error appearing, the decree is affirmed.

JONES *v.* STATE.

Opinion delivered March 17, 1930.

Harney M. McGehee, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy, Assistant*, for appellee.

KIRBY, J. This appeal is prosecuted from a conviction of violation of the statute on a charge of possessing burglary tools.

Appellant was indicted jointly with Hollis Ponder for violation of the statutes, § 2438, C. & M. Digest, the indictment charging in the language of the statute, "accuse the defendants, of the crime of possession of burglary tools," and specifically that the defendants "unlawfully and feloniously did have in their custody and possession a certain false key, which was then and there adapted, designed and commonly used for breaking and entering into store buildings, dwelling houses, etc." A demurrer was filed and overruled, and appellant elected to sever and was separately tried.

The testimony shows, that about 4:45 in the morning of October 23, 1929, two officers of the police department of Fort Smith saw the appellant and Hollis Ponder with their car parked in the Cash Oil filling station at Fort Smith. As the officers turned the corner, they saw Jones, the appellant walk away from the filling station and his companion was stooped over the lights of the car. The officers stopped and questioned the appellant and his companion, and were told that they were on their way from Henrietta, Oklahoma, to Little Rock, and had stopped to fix their lights. One of the boys said they had purchased the car in Little Rock, and explained how it came to have an Oklahoma license on it, and the officers said one admitted that it was a stolen car. They got into a row, and one of the boys drew his gun on one of the officers, who took guns off of both of them. One of the officers struck one of the boys on the side of the jaw. The officer who stated that appellant had drawn his gun on him drew his gun, and said, "Drop your gun, you son-of-a-bitch, or I will kill you," "and he dropped whatever he had in his hand at the time." The officers carried appellant and his companion up town and put them in jail, and sometime afterwards (the evidence does not disclose how long) one of them went back to the filling station to get his flash-

light that he had dropped near the door of the station between the car of appellants and the door, and then discovered a piece of a skeleton key. Next morning it was discovered that the end of the skeleton key had been broken off in the lock of the door of the filling station, and, being taken out and matched with the part of the key recovered on the ground, it was shown to be the same key. Neither of the officers stated that appellant or his companion at any time had the key or any part of it in his possession, and they did state that they did not see the key in the possession of either of them. There was testimony showing that the broken key was "a false key" or a skeleton key, and was of the kind the burglars used. They also said skeleton keys—"they are keys that open many locks," could be used by any one, and were used by a great many people in the opening of doors.

It is insisted for reversal that the court erred in overruling the demurrer to the indictment, and especially that the testimony is insufficient to support the verdict. The indictment charges the offense committed in the language of the statute, which does not provide that the person shall have the key to or implement in his possession with intent to commit the crime of burglary, etc., and was sufficient, and the demurrer was properly overruled. *Satterfield* v. *State,* 174 Ark. 733, 296 S. W. 63.

No witness saw or testified, however, that the appellant, his companion, or either of them, "had in his custody or concealed about his person" this false key or any part of it. The broken key was not in the lock when the filling station was closed the evening before, nor any part of the key discovered, the piece on the ground or in the lock, before the return of the officers to the filling station after having arrested appellant and carried him to jail. The key could as well have been inserted and broken off in the lock between the time of the closing of the filling station the night before and the time appellant stopped the car at 4:45 the next morning, or between the time of his arrest and the return of the officer after taking

him to jail. Circumstances at most raise an inference or suspicion against appellant, but such suspicion is no substantial evidence of the commission of a crime, and is not sufficient to support the verdict. *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604; *Cook* v. *State,* 173 Ark. 711, 293 S. W. 32; *Holford* v. *State,* 173 Ark. 989, 294 S. W. 33.

The judgment must accordingly be reversed, and the cause remanded for a new trial.

HUMPHREYS, J. The circumstances are sufficient in my opinion to connect appellant with the skeleton key. Therefore I dissent.

COMER *v.* COMER.

Opinion delivered March 17, 1930.

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Roy D. Campbell, for appellant.
W. J. Dungan and *Jones & Wharton,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the chancellor correctly held that the transaction, the deed and contract of sale, did not constitute a mortgage, but erred in holding that he had waived his right to declare a forfeiture of the contract and resume possession of the lands. The contention that the deed and contract of resale constituted a mortgage was not supported by clear, unequivocal and convincing testimony, as the law requires, and the chancellor correctly held that it did not constitute a mortgage. *Rushton* v. *McIlvane,* 88 Ark. 300; 114 S. W. 709; *American Mortgage Co.* v. *Williams,* 103 Ark. 484, 145 S. W. 234; *Edwards* v. *Bond,* 105 Ark. 314, 151 S. W. 243; *Henry* v. *Henry,* 143 Ark. 607, 221 S. W. 481; *Mathews* v. *Stevens,* 163 Ark. 157, 259 S. W. 736.

The court erred, however, in holding appellant had waived his right to declare a forfeiture of the contract by accepting benefits thereunder after his right to do so had accrued. Appellee failing to perform the conditions of the contract and make the payments necessary for the repurchase of the lands in accordance with its terms, appellant had the right thereunder, also in accordance with its terms, to accept payments of the rent for the use of the lands which would in no wise be regarded a waiver of his claim of forfeiture of the right to purchase. *Ish* v. *Morgan. McRae & Co.*, 48 Ark. 413, 3 S. W. 440; *Quertermous* v. *Hatfield,* 54 Ark. 16, 14 S. W. 1096; *Haus* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027; *Carpenter* v. *Thornburn,* 76 Ark. 578, 89 S. W. 1047.

It is not claimed that the contract was not fairly entered into, did not express the intention of the parties or that there are grounds for reformation thereof. The testimony is virtually undisputed that appellee, W. M. Comer, failed to perform his agreements to pay the installments of purchase money in accordance with the stipulations in the contract of sale and, having failed to perform the conditions, was bound to the payment of rent under the terms of the contract. Having failed to meet

this contingency, plaintiff was entitled to the possession of the lands after giving notice to quit and judgment for the rents due. The chancellor erred in holding otherwise, and the decree is reversed, and the cause will be remanded with directions to enter a decree in accordance with this opinion. It is so ordered.

McCrory Special School District *v.* Rural Special School District No. 22.

Opinion delivered March 17, 1930.

Roy D. Campbell, for appellant.

Elmo CarlLee and *W. J. Dungan,* for appellee.

Kirby, J. In *McCrory Special School District* v. *Curtis,* 174 Ark. 343, 295 S. W. 971, this court held that the county board of education was without jurisdiction to annex territory within a rural special school district, created by special act of the Legislature, to another special school district, and that its order of annexation could be quashed upon certiorari, the order being void, notwithstanding the parties could have appealed from it.

In *Rural Special School District No. 22* v. *McCrory Special School District,* 179 Ark. 195, 14 S. W. (2d) 1110,

in a suit to recover the funds transferred from the special school district attempted to be annexed to the McCrory Special School District, this court held, on appeal from the judgment of the lower court, that the rural special school district attempted to be annexed to the McCrory Special School District had a cause of action against the last-named district to recover all funds transferred to its credit and not expended in or for the benefit of the rural special school district, and that the court erred in sustaining the demurrer to the complaint therefor and dismissing the cause of action. Upon remand of the cause for a new trial and new hearing, judgment was rendered against the McCrory Special School District for most of the funds so transferred by the treasurer from the rural special school district's account, and from this judgment the appeal is prosecuted.

It appears that, upon the order of annexation made by the county board of education on September 21, 1926, the funds of district No. 22, in the sum of $3,773.80, were ordered transferred to the appellant district. On September 24, 1926, the directors of district No. 22 filed a petition in the chancery court for an injunction to restrain the county treasurer from transferring the funds, and that the funds were transferred by the treasurer on the 25th day of September, 1926, before the service of summons in the injunction suit was had upon him, and the suit was dismissed. No other suit was filed or attempt made against the treasurer or the McCrory Special School District to prevent the expenditure of any of the transferred funds by appellant district until after all the funds had been expended, when this suit was brought for their recovery. Upon remand of the cause the demurrer was overruled, and upon the hearing the court instructed the jury to return a verdict for $2,327.54, the appellee district conceding in its complaint that the sum of $1,701.81 of its funds wrongfully transferred to appellant district had been expended for the schools in the territory of

district No. 22, and from this judgment this appeal is prosecuted.

It is conceded that the amount of $3,773.80, funds of appellee district, was transferred to appellant district upon the order of the county board of education when the consolidation was made, and appellant in its answer contended that the whole amount was expended for school purposes, and considerable more for the benefit of the children of school age in appellee district No. 22. That district had employed a teacher at a salary of $100 per month for nine months. Appellant district maintained schools at Beard schoolhouse, in the territory of appellee district, at a cost of $640; at Chapel Grove, in said district, at a cost of $474.50, and at Possum Creek, in said territory, at a cost of $310. It purchased for the purpose of transporting the children in appellee district, 50 in number, to school in appellant district two busses at a cost of $1,447.55, and paid the drivers of same $441.86. $147.76 was expended for miscellaneous expenses. It claimed an error in the transfer of funds repaid of $2,388, and a total amount of expenses for school purposes in appellee district of $4,711.55. Because of the transfer of the children from the schools in the territory of district No. 22 to the schools in McCrory, it became necessary to employ another teacher, and Miss Wilson, who had already been employed to teach school in district No. 22, was used, although all the pupils transferred were not taught by her, the others being in their respective grades under different teachers.

Appellant insists that the court erred in not directing a verdict in its favor upon the undisputed testimony, and in rendering judgment against it for any amount, and this contention must be sustained. Although it appears from the record that the petition for annexation of the territory of district No. 22 was signed by four of the six directors of the district and some 80 to 85 per cent. of the patrons of the district, the order of annexation was void, and the amount of funds of the district wrongfully

transferred to appellant district. The undisputed testimony shows, however, that the entire amount of funds so transferred was expended for school purposes, maintaining schools at three of the school houses in the territory of district No. 22, and for transportation of, and teachers for, the other pupils who attended school in town. Of course, it would not have been necessary to provide the busses and operate them in transporting the children of school age from the old territory of district No. 22 to the schools in McCrory, if the wrongful annexation of the territory had not been made; but their addition to the McCrory schools necessitated the employment of another teacher, and appellant district used for this purpose a teacher who had already been regularly employed by the directors of school district No. 22 to teach in the schools there. Schools were maintained by appellant district at three of the schoolhouses in the old district as usual except for slightly longer terms at the expense of appellant district. Appellee concedes that appellant district is entitled to a credit of $1,701.81 against the amount of funds sought to be recovered, $3,773.80, leaving a balance of $2,071.99; but the court instructed a verdict in the sum of $2,327.54, an amount in excess of what could be recovered after the credit given of $255, and directed that it draw interest from September, 1926, instead of from August 2, 1926, when a demand was made therefor; this, notwithstanding the undisputed testimony, showed that there had been expended by appellant district for education purposes in the schools of district No. 22, and in transporting the children therefrom and teaching them in the schools of McCrory, $863.87 in excess of the total amount of funds which had been transferred from appellee district to appellant district upon the order of the county board of education in annexing the territory thereto and consolidating the districts. This money was expended for school purposes in the district and for education of the pupils of the district for which the taxes constituting the fund were levied and appropriated, and

could not therefore be recovered from appellant district. *Mabelvale Special School District* v. *Halstead School District,* 169 Ark. 645, 276 S. W. 584; *Lepanto School Dist.* v. *Marked Tree School Dist.,* 173 Ark. 82, 291 S. W. 1006.

It is undisputed, that while the funds in controversy were transferred to appellant district on the 21st day of September, 1926, none of it was spent until from and after the middle of October, 1926, to June, 1927, and that appellee made no effort after the transfer was made to prevent the expenditure of the money, but waited and brought suit for its recovery after it all had been expended for school purposes within the territory of its district or for the pupils resident there; and appellant was entitled to have its instruction No. 1 given to the jury, and, the evidence being undisputed, to an instructed verdict in its favor. The case thus made as stated was altogether different from the case on appeal on demurrer to the complaint. In *Lepanto School Dist.* v. *Marked Tree School Dist., supra,* it was said:

"This court is committed to the doctrine that school taxes erroneously levied and distributed, pursuant to the levy, to a school district and consumed in educational purposes, cannot be recovered by the school district rightfully entitled thereto. The district to which the taxes rightfully belonged should have proceeded by injunction or other proper remedy to prevent the wrongful assessment, levy and distribution of taxes, or else have brought suit for the recovery of such taxes before they were expended for educational purposes by the district wrongfully receiving them. *Mabelvale Special School Dist.* v. *Halstead Special School Dist.,* 169 Ark. 645," [276 S. W. 584].

It follows, from what we have said, that the court erred in instructing the verdict against appellant district which should have, upon the undisputed testimony, been directed for appellant. The judgment is reversed accordingly, and, the suit appearing to have been fully developed, the cause will be dismissed. It is so ordered.

TRIMBLE *v.* TRIMBLE.

Opinion delivered March 17, 1930.

[redacted]

Sam W. Trimble and *Reinberger & Reinberger,* for appellant.

Wooldridge & Wooldridge, for appellee.

MEHAFFY, J. Robert W. Trimble and Hazel P. Trimble were husband and wife, and in 1923 the Mutual Life Insurance Company of New York issued a policy of insurance upon the life of Robert W. Trimble, Hazel P. Trimble being named as beneficiary. The amount of the policy was $2,000.

Hazel P. Trimble brought suit in the Jefferson Chancery Court against Robert W. Trimble, and was granted a divorce in November, 1927. At the time of the decree for divorce there was a property settlement between Robert W. Trimble and Hazel P. Trimble, but nothing was said at the time about the insurance policy. Premiums had all been paid since the policy was issued in 1923. After the divorce was granted in November, 1927, Robert W. Trimble died on the 29th of June, 1928.

This suit was begun by Sam W. Trimble, as next friend of David L. Trimble, against the Mutual Life Insurance Company and Hazel P. Trimble, asking that the insurance policy issued in 1923 on the life of Robert W. Trimble be reformed so that the beneficiary would be David L. Trimble, instead of Hazel P. Trimble.

It was alleged that at the time of the divorce decree Hazel P. Trimble had possession of the insurance policy, and at that time requests were made for her to deliver said policy to Robert W. Trimble.

The Mutual Life Insurance Company answered, admitting the validity of the contract, and paid the face value of the policy into the court to be distributed to proper parties.

David L. Trimble is a minor, and a nephew of Robert W. Trimble, deceased, and the defendant, Hazel P. Trimble, is the divorced wife of Robert W. Trimble, deceased.

The insured, Robert W. Trimble, had the right under the policy to designate a new beneficiary. The policy, however, provided that he might do this by filing written notice with the home office, accompanied by the policy for suitable indorsement; that the change in beneficiary should take effect upon the indorsement of the same on the policy by the company.

The only question for this court to determine, as stated by the appellant, is who is entitled to the proceeds of the policy? The chancery court found in favor of the divorced wife, Hazel P. Trimble, and the decree was entered accordingly.

It is contended by the appellant that the deceased, Robert W. Trimble, intended to change the name of the beneficiary under the policy, and that he filled out and signed the necessary papers and delivered them to the representative of the company. It is conceded that he did not deliver them to the home office, as required by the policy, and that he did not deliver the policy for the indorsement to be made on it by the company. Appellant says that it is true that the testimony is disputed as to whether deceased ever tried to obtain the policy from appellee, but that the preponderance of the testimony shows that the insured did make repeated requests and demands upon appellee for the policy, and that appellee gave as an excuse for the failure to deliver the policy that it was lost. The only evidence offered by appellant

as to any requests made of appellee were statements of witnesses that the deceased, Robert W. Trimble, had told them that he intended to change the policy and make David L. Trimble the beneficiary, and that the deceased had also told some of the witnesses that the appellee claimed the policy was lost, and refused to make the affidavit required in case of lost policies. There is no witness who testifies that a request was ever made to appellee to deliver the policy or to make an affidavit, but, on the contrary, she swears positively that no such request was ever made of her. She swore she did not know where the policy was, but it was afterwards found in her mother's safety deposit box.

Appellee testified that she had never been called upon by the deceased during his lifetime to do anything relative to changing the beneficiary in this policy. The deceased had from November, 1927, until June, 1928, to get the beneficiary changed, and he did not do this. The evidence of the witnesses who testify to statements made by him, fix the time as some time in the spring of 1928, and there is no evidence of his ever making any other effort. There would have been no difficulty in deceased securing the policy at the time of the divorce decree and the property settlement if he had desired to do so. Moreover, he had ample time, after witnesses say that he announced his intention to change the beneficiary, to do so before his death, and did not do it.

The chancery court had jurisdiction to reform the instrument, but we do not agree with appellant that the evidence shows any fraud upon the part of the appellee, or any mutual mistake, or any mistake on the part of any of the parties.

It is contended by appellant that the evidence clearly shows the intention of the deceased to change the beneficiary. The most that can be said of this is that some time in the spring deceased talked to several witnesses, stating to them that he intended to make the change. The undisputed fact, however, is that he did not make the

change, and, so far as the record shows, no further effort was made on his part to do this. Not only this, but the appellee testifies positively that he never called on her for the policy, or for the affidavit, or for anything with reference to changing the beneficiary. It is, however, contended that what he did constituted an equitable assignment of the policy, and the case of *Webster* v. *Telle,* 176 Ark. 1149, 6 S. W. (2d) 28, is cited and relied on as supporting this contention. But the court said in that case:

"But, as we construe the change of beneficiary clauses in these insurance contracts, there has been no change of beneficiary since the change was made from the refining company to that of executors, administrators or assigns of the insured. The beneficiary in the policies at the time of Telle's death, if there had been no assignment of the policies, was his executor, the appellant. But, if the policies had been assigned by Telle to his wife, then the beneficiary was his assignee, Bernice Phillips Telle, the appellee."

There was in the above case, we think, much stronger evidence of an intention to change the beneficiary than in the instant case, and yet this court held outright that there had been no change in the beneficiary, and, if the policy had not been assigned, that the beneficiary was the executor of the appellant. The court in the *Webster* v. *Telle* case further said:

"The appellee testified that the policies had been in her possession ever since three or four days before she executed a mortgage to the National Bank of Commerce, on January 5, 1926, at which time she examined each of the policies, and they are the policies which were delivered to her. She kept the policies a few days, but did not have any place to lock them up. She next saw the policies of insurance after her husband's death. The mortgage she referred to secured a loan by her from the National Bank of Commerce at El Dorado, Arkansas, in the sum of $7,500, due six months from date. The property contained in the mortgage constituted her individual prop-

erty. She did not get the $7,500, for which the mortgage was executed, but her husband took the money and used it in carrying on his business. The insurance policies were delivered to her by Mr. Webster, after her husband's death, wrapped in his will, in a package sent to her from Little Rock, Arkansas, and addressed to her, and, when she opened it, there were these two policies and the will. No part of the $7,500 which she loaned her husband in 1926, which was borrowed from the National Bank of Commerce of El Dorado, and for which he gave a mortgage on her El Dorado home property, had ever been paid to her."

And the court, after quoting some further of the testimony in the case, said:

"We are convinced that the above testimony is amply sufficient to justify a finding that, as between Telle and his wife, Telle had assigned the insurance policy to her. It was unquestionably the intention of Telle that the amounts due under the policies at the time of his death should be paid to his wife, the appellee. The evidence is susceptible of no other conclusion."

It will therefore appear from the decision in the case of *Webster* v. *Telle, supra,* that there was no change in the beneficiary, but that Telle had borrowed $7,500 from his wife, and had delivered to her the policy to secure the payment of this money to her. The court held that there was an equitable assignment, although it was held that there was no change of beneficiary except by the assignment.

Numerous cases are cited to the effect that the requirement of an insurance policy as to the change of beneficiary must be complied with strictly before the change will be binding. In the instant case there is no contention that the provisions of the policy were complied with. It is conceded that they were not complied with.

"The cause being in equity for the purpose of determining the rights between the two sets of claimants, the

proceedings must be governed by equitable principles. Hence it is unnecessary to discuss or determine what the rule at law is or should be. The established rule and the one adopted in this State is that the change of the beneficiary cannot be made by the insured unless there is substantial compliance with the by-laws and regulations of the society." *Robinson* v. *Robinson,* 121 Ark. 276, 181 S. W. 300.

In another case decided by this court, it was said: "It is not claimed that the insured changed the beneficiary during his lifetime. Indeed, the statement of facts show the contrary to be true." *Watkins* v. *Home Life Ins. Co.,* 137 Ark. 207, 208 S. W. 587, 5 A. L. R. 791.

In the instant case, the undisputed facts show that there was no change of beneficiaries during the lifetime of the insured, and of course there could be no change of beneficiary after his death.

It is next contended by the appellant that the doctrine of equitable estoppel is applicable, and it is stated that the undisputed facts show that appellee had possession of the policy from the time of the divorce decree until after the death of the deceased; that repeated requests were made to her by the deceased and by her own attorney for the delivery of the policy to the deceased, and that she refused to deliver it. We do not agree with appellant in this contention. The undisputed facts did not show that any request was ever made to her by the deceased, and there is nothing in the evidence to show an estoppel.

It cannot be said that any of the contentions made by appellant are established by the undisputed facts in the case. The undisputed facts, however, do establish the fact that the deceased, during his lifetime, never effected a change of beneficiary.

We do not deem it necessary to either set out the testimony or to discuss the authorities further that are cited and relied on by the parties. The undisputed facts in the case show that there was no change in the ben-

eficiary made during the lifetime of the insured, and none could be made after his death. There is no evidence tending to establish fraud or misconduct on the part of the appellee that would have prevented the deceased during his lifetime from making the change. Some witnesses, to be sure, testify that the deceased told them that he had requested the policy to be delivered to him and appellee had refused, but her testimony contradicts this, and we think the overwhelming weight of evidence supports the finding of the chancellor, and the decree is therefore affirmed.

MERCHANTS' NATIONAL BANK OF FORT SMITH *v.* TAYLOR.

Opinion delivered March 17, 1930.

Daily & Woods, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

MEHAFFY, J. The People's Bank of Ozark was a State bank, and Walter E. Taylor, as Bank Commissioner of the State of Arkansas, took charge of the People's Bank of Ozark on February 25, 1926, for the purpose of administering same pursuant to the laws of Arkansas, and is administering the property and affairs of said bank pursuant to the statutes of Arkansas.

The People's Bank of Ozark was indebted to the Merchants' National Bank of Fort Smith, the appellant herein, on a promissory note, bearing date of January 12, 1926, in the sum of $14,915. The appellant was the owner and holder of said note at the time of the failure of the People's Bank of Ozark, and presented its claim on said note for the sum of $14,915 to the Bank Commissioner, and said claim was allowed by him as a valid general claim. Said note was secured by collateral notes aggregating the sum of $23,742.36, and the proof of the claim showed that the note of the People's Bank was secured by this collateral.

The Bank Commissioner, with a view to declaring a dividend, ascertained from the appellant the balance due upon the note held by appellant, and was informed that the balance due upon said note after crediting collections from collateral was $11,928.56. On July 8, 1926, the Bank Commissioner filed a petition in chancery court, wherein he set out the amount of claims then outstanding against the People's Bank of Ozark, including as plaintiff's claim $11,928.56. The Bank Commissioner asked for an order authorizing him to pay a 10 per cent. dividend on the amount of the claims filed, and he did pay 10 per cent. to appellant on the $11,928.56, but did not pay a dividend on the $14,915. In other words, the Bank Commissioner paid a dividend on the amount of plaintiff's claim at the time of the distribution or payment of the dividend.

Before another dividend was paid appellant's claim had been reduced by collections from the collaterals to $5,177.40 and an 8 per cent. dividend was declared and paid on this amount. Thereafter, another dividend of 10 per cent. was paid, but at the time it was paid appellant's claim had been reduced by collections of collateral to $2,638.59, and the 10 per cent. dividend was paid on this amount.

It is the contention of the appellant that all dividends should have been paid on the full amount of the proved

claim, without deducting the collections made from collateral between dividends. In other words, it contends that at the time it filed its claim there was due from the People's Bank of Ozark $14,915, and that the dividends each time should have been paid on this amount, and not on the amount as reduced by payments from collaterals.

The question to be decided by this court is whether dividends should have been paid on the full amount of plaintiff's claim filed with the Bank Commissioner, or whether it should have been paid on the actual amounts due it at the time the dividend was paid.

There is considerable conflict in the authorities as to whether a creditor holding collateral must first seek satisfaction out of such collateral, some jurisdictions holding that a secured creditor is entitled to prove his entire claim as though he had no collaterals, and to take a dividend like other creditors, and afterwards to apply the proceeds of the collaterals to the unpaid balance of his claim, turning over the excess, if any there be, to the trustee or receiver or Bank Commissioner for the benefit of other creditors. This is the rule contended for by appellants. And this rule for the payment of a dividend on the full amount of the creditor's claim without deducting anything received from the collateral held is supported by decisions of the Supreme Court of the United States, and other Federal courts and some State courts.

The case of *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 19 S. Ct. 360, and *Aldrich* v. *Chemical National Bank,* 176 U. S. 618, 20 S. Ct. 498, and other authorities cited, are relied on by appellant in this case. The authorities referred to support appellant's contention. In the case of *Merrill* v. *National Bank of Jacksonville, supra,* the court said that counsel agree that four different rules have been applied in the distribution of insolvent estates, and held that rule No. 4 was applicable, and that rule is as follows:

"The creditor can prove and receive dividends upon the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided, that he shall not receive more than the full amount due him."

The rule contended for by appellant and sustained by the authorities referred to, is known as the chancery rule. It is contended by the appellant that our statute or banking act is, in effect, a borrowed act, and that it largely follows the National Banking Act of the United States, and that, for that reason, this court should follow the opinion of the United States Supreme Court construing the National Banking Act.

There are several important differences in the statutes which would justify this court in adopting a different rule than that adopted by the Supreme Court of the United States. We have a statute prohibiting preferences among creditors of all insolvent corporations, except for laborers and employees. And Mr. Justice WHITE, in a dissenting opinion in the case of *Merrill v. National Bank of Jacksonville,* points out very clearly how the application of the chancery rule would result in preferences to secured creditors. Of course, it is important in matters of this sort that there be uniformity, and, for that reason, where this court has not decided the question, it will follow the decision of the United States Supreme Court where the statutes are similar, or where it is a question involving general business dealings of the citizens of different States. As said by this court:

"In such matters it is important that uniformity should obtain in the different jurisdictions, and that but one rule should be applied to the business dealings of the citizens of the different States with each other, so closely interwoven is such business activity and association with the vast commercial life of the nation; and since the United States Supreme Court is the highest

court of last resort, and does not follow the decisions of the State courts upon general banking and commercial questions, we will follow it." *Sims* v. *American National Bank of Fort Smith*, 98 Ark. 1, 135 S. W. 356; *Exchange Natl. Bank* v. *Coe*, 94 Ark. 387, 127 S. W. 453, 31 L. R. A. (N. S.) 287, 21 Ann. Cas. 934.

We think this question has been settled by the decision of this court in the case of *Jamison* v. *Adler-Goldman Commission Co.*, 59 Ark. 548, 28 S. W. 35, and that the rule there adopted is applicable here. The statute there construed was not the Banking Act, but the rule adopted by this court is applicable under the Banking Act, the same as under the statute construed in the Jamison case. In that case the court, speaking through Judge BATTLE, said:

"Creditors are required to present their claims for the amount due them when it is presented, and to swear that nothing had been paid or delivered towards the satisfaction of it, except what is credited thereon, and that the sum demanded, naming it, is justly due. They may present their claims within one year and 364 days after the grant of the first letters—upon the close of the administration—but they must make this oath before their demands can be allowed; the statute thereby showing clearly an intention that they shall not share in the assets of the estate, except upon the basis of what is actually due after all payments are deducted. This being the manifest intention of one, it is presumed that it pervades the other statutes upon the same subject, and that when they say, if there be not sufficient to pay the whole of one class, such demands shall be paid in proportion to their amounts, according to an apportionment made by the court, they mean by "amounts" the sum actually due at the time of the apportionment. When money is received from collaterals or mortgages held as security, in part payment of claims, they are certainly diminished accordingly, and their amounts become the balances due on them."

So we have the construction placed upon a similar statute by this court, expressly holding that when money is received from collaterals or mortgages held as security in part payment of claims, they are certainly diminished, and their amounts become the balances due on them. This is in harmony with the dissenting opinion by Mr. Justice WHITE in *Merrill* v. *National Bank of Jacksonville,* and we think it is decidedly the most equitable rule.

Numerous authorities are reviewed in the opinion in the Jamison case, and also in the *Merrill* v. *National Bank of Jacksonville* case, and we do not think it would be of any importance to review the authorities here. There are the different rules, but we think the one heretofore adopted by this court is the most just and equitable rule. The injustice of the rule adopted by the Supreme Court of the United States is pointed out by Mr. Justice WHITE in his dissenting opinion, as follows:

"Let me illustrate the unavoidable consequence of the doctrine now recognized. A loans a national bank $5,000, and takes as the evidence of such loan a note of the bank for the sum named, without security. The lender is thus a general or unsecured creditor for the sum of $5,000. B loans to the same bank $5,000, without security. He is applied to for a further loan, and agrees to loan another $5,000 on receiving collateral worth $5,000, and requires that a new note be executed for the amount of both loans, which recites that it is secured by the collateral in question. While theoretically, therefore, B is a secured creditor for $10,000, he practically has no security for $5,000 thereof. Insolvency supervenes. The general assets received by the Comptroller equal only fifty per cent. of the claims. Now, under the rule which the court establishes, A on his unsecured claim of $5,000, collects a dividend of but $2,500, thereby losing $2,500; B, on the other hand, who proves $10,000, taking no account whatever of his collateral, realizes by way of dividends $5,000, and by collections on collaterals

a similar amount, with the result that, though as to $5,000 he was, in effect, an unsecured creditor, he loses nothing. B is thus in precisely as good a situation as though he had originally demanded and received from the borrowing bank collateral securities equal in value to the full amount loaned. It is thus apparent that the application of the rule would operate to enable B,—who, I repeat, virtually held no collateral security for $5,000 of the sums loaned—to be paid his entire debt, though the assets of the insolvent estate of the borrower paid but fifty cents on the dollar, while another creditor, holding an unsecured claim for $5,000, fails to realize thereon more than $2,500."

The illustration by Mr. Justice WHITE shows clearly how the rule might operate. We think that the rule adopted by this court, as announced in the Jamison case, and the rule contended for in the dissenting opinion of Mr. Justice WHITE, is decidedly more equitable and fairer than either of the other rules, with reference to distribution of the estate of insolvent corporations. The rule is that when one files a claim, he files it for the full amount due at that time. If his claim is secured by collateral, and he collects anything from the collateral before a dividend is paid, then his dividend is calculated on the amount, reduced by the amount of the collateral collected. If there is still another collection from collateral before another dividend, the creditor is entitled to a dividend on the amount, reduced by the amount of the collateral received. In other words, he is entitled to a dividend on the amount of his debt at the time the distribution is made, and not entitled to a dividend on the claim as originally filed if anything has been realized from collateral.

Other questions have been argued by attorneys, but the conclusions we have reached make it unnecessary to discuss or decide those questions. We do not think it worth while to review the authorities any further, be-

cause the only question here is whether a creditor holding collateral can receive dividends each time on the amount of his original claim or whether the other rule applies, permitting him to receive dividends on his claim, as reduced by payments of collateral. We think the latter rule is the most just, and the one adopted by this court, and we therefore conclude that the decree of the chancellor was correct, and it is affirmed.

SHACKLEFORD *v.* ARKANSAS BAPTIST COLLEGE.

Opinion delivered March 17, 1930.

John D. Shackleford, for appellant.

Booker & Booker and *Frauenthal, Sherrill & Johnson,* for appellee.

MCHANEY, J. The question presented for our determination in this case is the reasonableness of the fee allowed appellant by the chancery court for his services as attorney for appellee, Arkansas Baptist College, an

institution of learning for negroes in Little Rock, under the following facts: W. W. Wheeler, colored, died testate in Malvern, Arkansas, leaving an estate of from $15,000 to $20,000. By his will, the income from the whole estate, after payment of debts and two specific bequests, was left to his brother and two sisters during their lives, share and share alike, the survivors taking the whole income on the death of either. When all were dead, the corpus of the estate was to be divided equally between the appellee, Arkansas Baptist College and Shorter College (Colored) of North Little Rock. One clause in the will further said: "And especially request that my administrator, working in harmony with trustees of said institutions, use my said estate in a manner that shall assist worthy colored boys and girls in obtaining a college education."

This will was admitted to probate in Hot Spring County. A contest was threatened by the collateral heirs, and appellant was employed by the Arkansas Baptist College to represent its interests, he being at the time the regularly retained counsel of said college. No agreement was had between them as to what the fee should be for this special service coming outside of his retainer. No contest developed, however, and, as above stated, the will was probated. Negotiations for an immediate settlement and division of the property were then begun among counsel representing the different interests, the collateral heirs contending for a one-half interest in the whole estate, and the two colleges contending for a larger share. The record does not disclose the ages of the heirs, but appellant testified their expectancy, based upon experience tables, was from thirty to thirty-five years. A settlement was finally agreed upon, whereby the two colleges received 29 1/6 per cent. each of the estate, and the three heirs the remainder or 41 2/3 per cent., to be divided among them. Appellant prepared the order admitting the will to probate, drew the deeds making the division, as above stated, filed exceptions to the execu-

tor's report and settlement which resulted in a saving to his client of approximately $150, and has filed exceptions to the second report and settlement. The proof shows that at the time of trial appellant had collected from said estate for the account of his client $1,878.58. He could not agree with his client as to the amount of his fee, and brought this action to have the chancery court determine a reasonable fee to be paid out of the funds in his hands. The court allowed a fee of $1,527.77, to be paid on a basis of part cash, and the balance as the real estate was converted into cash for which a lien was fixed on the real estate. From this decree comes this appeal and cross-appeal by the college, and a judgment creditor.

This case was tried on the theory that appellant was entitled to a contingent fee. He contended for a contingent fee of 35 per cent. of the amount coming to the Arkansas Baptist College under the will. Two reputable attorneys testified that 33 1-3 per cent. would be a reasonable fee. We think there is no basis for a contingent fee, and that his recovery must be limited to the reasonable value of his services. The general rule is as stated in 2 R. C. L., p. 1048: "In the absence of an express contract of employment between an attorney and his client fixing the amount of the attorney's compensation, it is generally held that the attorney is entitled to what his services are reasonably worth, or what has usually been paid to others for similar services." Neither the trial court, nor this court on appeal, is bound by the testimony of appellant and his expert witnesses in determining the value of his services. Especially is this true on appeal from chancery courts. In *Jacoway* v. *Hall,* 67 Ark. 345, 55 S. W. 12, it was held that the judge could act upon his own knowledge in fixing reasonable compensation, and that this court would not overturn his finding unless clearly erroneous, but this was an appeal from the circuit court. See also *Lilly* v. *Robinson Mercantile Co.,* 106 Ark. 571, 153 S. W. 820. In *Valley Oil Co.* v. *Ready,* 131

Ark. 531, 199 S. W. 915, it is said: "This court, trying the cause *de novo,* may apply to the facts proved its own general knowledge of the subject-matter of inquiry in determining the value of the services that were rendered by the attorneys." *Lilly* v. *Robinson Mercantile Co., supra.* In *Sain* v. *Bogle,* 122 Ark. 14, 182 S. W. 515, it was held that, in determining what is a reasonable fee for an attorney, "it is competent and proper to consider the amount and character of the services rendered, the labor, time and trouble involved, the nature and importance of the litigation or business in which the services are rendered, the amount or value of the property involved in the employment, the skill or experience called for in the performance of the services, and the professional character and standing of the attorneys." In that case an allowance of $4,000 was reduced by this court to $1,000. In *Valley Oil Co.* v. *Ready, supra,* the allowance was reduced from $2,500 to $250. In *Bayou Meto Drainage Dist.* v. *Chapline,* 143 Ark. 446, 220 S. W. 807, an allowance of $6,000 was reduced to $4,000.

Upon a review of all the evidence, and applying the foregoing rules of law, we are of the opinion that the allowance made by the chancery court is excessive, and that an allowance of $500, payable out of the funds in possession of appellant, is ample compensation for the service rendered, in the absence of any agreement as to what the fee should be, and that a judgment should go against appellant for the balance with interest from May 27, 1929, at 6 per cent., each party to pay his own costs of this appeal.

The judgment of the chancery court is therefore modified in accordance with the foregoing, and, as modified, will be affirmed. It is so ordered.

SHEPPARD *v.* SHEPPARD.

Opinion delivered March 17, 1930.

S. W. Garratt, for appellant.

C. T. Cotham, for appellee.

McHANEY, J. Appellant and appellee are husband and wife, having been married in Benton, Arkansas, September 23, 1927. They lived in Hot Springs from that time until June, 1928, when they removed from thence to Centerville, South Dakota. They first lived at 104 Dower Street, and later moved to a house on Rector Street. Both of them had previously been married, and each had children by such former marriage. In February, 1928, as a result of a quarrel, they separated. Appellee worked for the telephone company, but appellant was not employed. The separation arose over a trivial matter, and in a few days they went back together again. In July, 1928, after they had removed to South Dakota to make it their home, they began having trouble again, and separated on the 18th day of that month. Appellee brought an action for separate maintenance against appellant in South Dakota, and, while that action was pending, appellant returned to Hot Springs, and on August 23 instituted this action for divorce against appellee, alleging cruel treatment and

general indignities such as to render his condition intolerable. Appellee then came to Arkansas, filed an answer to appellant's suit, denying the existence of a ground for divorce in his favor, and also filed a cross-complaint against him, alleging a similar ground for divorce. The court made a temporary order for support money, attorney's fees and court costs against appellant, the order for support being made on September 18, awarding to appellee all the rents and income accruing from the house located at 233 Henderson Avenue, which is located on lot 9, block 6, of Oaklawn subdivision of Hot Springs. Appellant was also ordered to pay certain expenses appellee had incurred in moving back to Hot Springs, and, on his failure to comply with this order, his complaint was dismissed. The case proceeded to trial on the cross-complaint of appellee, and the court refused to grant a divorce to either party on the ground that neither had been a *bona fide* resident of the State of Arkansas for one year next before the commencement of the action, and for that reason the court held that it was without jurisdiction. The court, however, made the temporary order of September 18, 1928, awarding her the rents and income from the house at 233 Henderson Avenue permanently, the decree stating "that said defendant and cross-complainant, Willie Sheppard, continue to have the rents and income from said home at 233 Henderson Avenue, or the right to the free use and occupancy of the same, as permanent maintenance." From this decree there is an appeal and cross-appeal.

We think the chancery court correctly refused to grant a decree of divorce to either party. Regardless of whether the parties had been residents of the State for one year next before the commencement of the action or not, a question we do not find it necessary to decide, there was no substantial corroboration of the testimony of either party to justify the court in granting the divorce. We do not review the testimony, as it would serve no useful purpose, but we have examined it very carefully and find it insufficient.

Appellant owned the property at 233 Henderson Avenue, as well as a home in South Dakota. On July 19, 1928, he conveyed his property in Hot Springs to his father, O. C. Sheppard, for an expressed consideration of $1 and love and affection. Appellee alleged that this conveyance was voluntary, and in fraud of her marital rights. She made the father, O. C. Sheppard, a party, and asked that the deed be canceled. He failed to appear and make any defense to the action, but wholly made default, and we think the court should have canceled said deed as having been made in fraud of her rights.

Appellant contends that the court erred in awarding appellee support money to the extent of the rents and profits in said property, but he is in no position to complain about this allowance. By his own voluntary deed he attempted to divest himself of any interest therein by a conveyance to his father. If his deed conveyed anything to the father, the father was the proper party to make objections. By his failure to appear in the chancery court and by his failure to appeal to this court, he is presumably consenting thereto, in so far as any interest he may have in the property is concerned. Therefore, appellant is in no position to complain about the allowance made for separate maintenance.

It appears that appellee's counsel has been allowed a fee of only $25 for his appearance in her behalf in the chancery court. We think an additional allowance for $25 should be made for his services in this court. The decree will be affirmed on the appeal, and reversed and remanded on the cross-appeal, with directions to cancel the deed from appellant to his father, appellant to pay all costs of this appeal, including a fee of $25 to appellee's counsel. It is so ordered.

RHODES *v.* CARTER.

Opinion delivered March 17, 1930.

[redacted]

W. A. Leach, for appellants.

M. F. Elms and *Joe Morrison,* for appellee.

BUTLER, J. The statement of the case prepared by the attorney for the appellant H. H. John is a fair statement of the various contentions of the parties, and of the essential parts of the decree rendered, which statement we adopt as follows:

This action was brought by the appellant H. E. Rhodes against Chickasaw Animal Food Company, M. O.

Carter, H. H. John, G. A. Meyer, H. D. Dilday, Clarence Weiman and Joe Rosencrantz, as partners, formerly trading as Rimol Food Company, to recover rent alleged to be due upon a building owned by the appellant Rhodes. The gist of the complaint is that the parties named as defendants were operating in the appellant's building a business as partners under the firm name of Rimol Feed Company, and that they were indebted to him in a certain sum for past due rent.

It appears that M. O. Carter and R. F. Tate were partners doing business under the firm name of Chickasaw Animal Food Company in the city of Memphis, in the State of Tennessee. They were the owners of the right to install and cause to be operated in Arkansas, certain machinery to be used in the manufacture of feed from rice straw, and other like materials. The particular purpose of this machinery was to bale the straw, and inject into the bales molasses or other like substance.

If the process proved successful, the rice straw then of no value could be used to advantage and profit, and a large and profitable business built up. Tate and Carter were especially interested in getting the machinery installed and the business going, on account of the large royalties that would come to them from the business.

They first took the matter up with the Rice Growers' Association, and were by it referred to H. H. John, with whom they immediately began negotiations. A subscription agreement was prepared, and was signed by thirty rice growers who agreed conditionally to take stock in a corporation to be formed. H. D. Dilday was named as agent or trustee to collect the stock subscriptions, and H. D. Dilday, G. A. Meyers, H. R. Weiman, J. L. Rosencrantz and H. H. John were named as a committee to negotiate with Tate and Carter for the machinery.

A contract was entered into with reference to the machinery, in which was set forth the terms and conditions under which the machinery and business was to be operated. This contract was signed by H. H. John, one

of the committee, and contained a provision that the corporation when formed would take it over, and that all rights and obligations under the contract would pass to the corporation when formed.

The subscription agreement was conditioned upon the happening of two events, viz.: 1. That stock in the proposed corporation at least to the amount of $5,000 be subscribed. 2. That satisfactory arrangements be made with Tate and Carter for the necessary machinery.

Tate and Carter refused to guarantee the successful operation of the machinery, so an agreement was entered into whereby the machinery was to be tested, the sum of $2,000 to be put up for that purpose.

Tate and Carter contend that Dilday and his associates had agreed to form a corporation, and had agreed to take stock in the corporation to be formed, and that they (Tate and Carter) as an evidence of their faith in the machinery, agreed to take stock in this corporation to the amount of $1,000, and that they paid the full amount of their subscription; that Dilday and his associates paid only a part of their stock subscription; that the amount unpaid was more than sufficient to pay the rent alleged to be due, and that Dilday and his associates should be required to pay in the unpaid subscription. They filed a cross-complaint against all persons who signed the subscription, and asked that all such persons be required to pay what they alleged to be the unpaid balance subscribed.

Dilday and his associates contended that they were not liable under the subscription agreement, for the reason that the contingencies upon which liability was to attach had not happened. They contend that, upon the refusal of Tate and Carter to warrant the machinery, another agreement was entered into whereby the machinery was to be tested, and the possibilities of the proposed project ascertained. Tate and Carter agreed to match dollars with Dilday and his associates in paying the expenses incident to the test. It being estimated that

$2,000 would be sufficient for the test, Tate and Carter paid in $1,000, and Dilday and his associates paid in a like amount. It was understood that, if the project was successful, the corporation would then be formed; that Dilday and his associates would receive stock in the corporation of the par value of the amounts paid in, and that Tate and Carter at the option of Dilday and his associates could have stock or their money refunded. Dilday and his associates used the subscription agreement as a basis for collecting the $1,000 required to make the test, and they paid in a total of $1,435, making a total of $2,435 paid in to defray the expenses of the test. The test operations were carried on under the name of Rimol Feed Company.

Dilday and his associates further contend that the lease contract aforesaid and the subscription agreement were not to become effective until the test had been made showing successful operation of the machinery and the business, and that the agreement for the test, in so far as operations for the test were concerned, was a subsequent agreement, and that such operations and contributions of money were not under the subscription agreement nor the lease contract. The project failed, and, when operations ceased, the total outstanding indebtedness, including the rent, was $915.89.

Dilday and his associates contend that by reason of this agreement a partnership relationship existed in which Tate and Carter were interested to the extent of one-half, and Dilday and his associates one-half; that for each dollar put up by them Tate and Carter were to put up a like amount, and that for any debts contracted Tate and Carter were liable for one-half and they the other. They further contended that, since they had paid in $435 more than Tate and Carter, Tate and Carter should be required to first pay in a like amount to be applied in payment of the debts which would leave a balance of $480.89, one-half of which or $240.45, should be decreed against Tate and Carter, and the balance against them.

Dilday and his associates further contended that the contributions on their part had been unequal, some paying a certain amount and some another; that it required $365 to make these contributions equal, and that the parties who should have paid this in should be required to do so. Dilday and his associates conceded the right of appellant Rhodes to recover jointly and severally of and from them and from Tate and Carter.

It was decreed that the plaintiff H. E. Rhodes, have judgment against all defendants and cross-defendants, as follows:

1. All persons who signed the subscription agreement who have not so paid shall first be required to pay in sixty per cent. of the sum set forth in the subscription agreement, as being subscribed by each of them.

2. All persons who signed the subscription agreement shall pay in 100 per cent. of the sum set forth in the subscription agreement as being subscribed by each of them.

3. In the event the amount thus paid in should not be sufficient, then all parties including Tate and Carter shall pay the balance, ratably according to the amount subscribed.

"It is to reverse this judgment that the plaintiff, Rhodes, and the defendants, Dilday and his associates, have appealed."

The trial court found that the Rimol Feed Company was a partnership composed of H. H. John, and the other stock subscribers including Carter and Tate, and, as such, "liable for the debts of said concern in proportion to the amounts each had subscribed or agreed to pay into the capital stock of said concern," and that Tate and Carter subscribed of said capital stock the sum of $1,000, and had paid this amount in full.

Carter and Tate contended that there never existed a partnership relation with respect to them and the others, and that such was never the intention, but, as they have not appealed from the finding of the trial court hold-

ing them liable as partners, it is unnecessary to discuss the sufficiency of the evidence in this particular. As to the others, that relation is admitted. Since the decree is equivalent to a finding that a partnership resulted from the acts of the parties and inferentially against the contention of the appellant John and others that the liability of Tate and Carter was not by reason of any agreement on their part to become partners, but, because of their subscription to the capital stock of the proposed corporation, John and his associates are concluded by the finding, as, in our opinion, the preponderance of the evidence does not show any express understanding between Carter and Tate on the one hand, and John and the remaining defendants on the other, that a partnership was created for testing the machinery, and that Carter and Tate should bear one-half of the expense of such test, and therefore this finding of the lower court must stand. While it was in the mind of John and the others to form a corporation for the manufacture of food products, using the machinery to be acquired from Carter and Tate, and a partial subscription to the capital stock was made, the prospective incorporators had not proceeded to that point where, under our decisions, a corporation *de facto* would exist, and in the conduct of the test preliminary to the incorporation the relation assumed by the parties, according to the rule laid down in *Rainwater* v. *Childress,* 121 Ark. 541, 182 S. W. 280, was that of partners. In that case it is said: "The effect of our decisions in *Whipple* v. *Tuxworth,* 81 Ark. 391, 99 S. W. 86, and *Bank of Midland* v. *Harris,* 114 Ark. 344, 170 S. W. 67, Ann. Cas. 1916B, 1255, is to hold that a strict or substantial compliance with the laws regulating the organization of corporations is necessary to constitute a corporation *de jure.* To constitute a corporation *de facto,* there need not be a strict or substantial compliance with the statute, but there must be a colorable compliance with the statute; that is to say, there must be color of a legal organization under the statutes, and user of the supposed

corporate franchise in good faith. Courts differ among themselves as to how much must be done in order to constitute a corporation *de facto*. But all of the courts agree, that some of the statutory steps must be taken in an honest attempt to comply with the requirements of the law, and exercise by the associates of the corporate powers. (Citing cases)."

It is unnecessary to determine whether the parties defendant in this case were partners within the rule laid down in *Doyle-Kidd Dry Goods Co.* v. *A. W. Kennedy & Co.*, 154 Ark. 573, 243 S. W. 66, and the cases therein cited, because, as we have seen, Carter and Tate have not appealed, and the testimony of John, which was not disputed by any of the other signers of the subscription list, was that he acted for himself and the other proposed incorporators in making the rental contract with the appellant Rhodes.

In *Doyle-Kidd D. G. Co.* v. *Kennedy & Co., supra,* the court referring to the case of *Rainwater* v. *Childress,* said: "That case is certainly authority for the doctrine, that where parties associate, intending to form a corporation, and join hands and capital in the conduct of the business under a name assumed by them, but without attempting to incorporate, they are liable as partners to third parties for the debts incurred."

We do not desire to be understood as in any sense extending the doctrine announced in *Rainwater* v. *Childress,* as construed by this court in *Doyle-Kidd D. G. Co.* v. *Kennedy & Co., supra,* for, as we have seen, an application of that doctrine is unnecessary for the determination of the liability of the defendants in this case. The court, in directing that the defendants should share liability in proportion to the amount of their subscription to the capital stock of the proposed corporation, doubtless treated the subscription list as an agreement by the subscribers between themselves as to their respective rights and liabilities, and since, as we shall presently show, plaintiff was entitled to collect his rent from all

or any one of them, the subscribers are in no position to complain as to the finding of the chancellor, which seems to be most just and equitable.

However, the plaintiff Rhodes could not be bound by any agreement between the defendants as to their respective rights and liabilities, when it is not shown that he assented to any such limitations. The evidence discloses that he merely rented a building to John as agent for the defendants in which to install and operate the machinery during the test to be made. Therefore, as to Rhodes, by their voluntary acts they were liable jointly and severally as partners in their relation to him. This rule is so well settled that the citation of authority is unnecessary.

It appears, on the whole case, that the chancellor in determining the rights and liabilities of the conflicting interests has worked out a method which, to our minds, does substantial justice, protecting the rights of part of the litigants without undue hurt to any one, but, as the plaintiff Rhodes must not be deferred in the collection of his debt to an accounting between the various defendants, the cause must be reversed, with directions to the trial court to render a judgment in favor of the plaintiff Rhodes for the debt due him against each and all of the defendants, jointly and severally, without limitation as to the time or manner in which the judgment shall be enforced, and as to any of the defendants paying the judgment in whole or in part, that they have contribution from their co-defendants in the manner and to the extent heretofore decreed by the trial court.

HUMPHREYS and KIRBY, JJ., dissent.

RIGGS *v.* HOT SPRINGS.

Opinion delivered March 17, 1930.

C. T. Cotham, for appellant.
A. T. Davies, for appellee.

BUTLER, J. The appellant was tried before the circuit court of Garland County sitting as a jury, charged with having violated the occupation tax ordinance of the city of Hot Springs, by failing to pay an occupation tax under item No. 213 of the city ordinance, which item is as follows: "Item 213. Patent Medicine Companies: Meaning those persons or companies that manufacture patent medicines, or agents for patent medicines, $100."

The entire ordinance, which is very lengthy and deals with all of the occupations engaged in the city of Hot Springs, in addition to the item first mentioned, provided that where persons are engaged in business the following schedule should apply as to the amount of tax: This schedule, entitled "schedule A," undertakes to fix occupation taxes for businesses with stock averaging less than $250 at $5, and increases the tax in proportion to the amount of stock up to $200,000 and over, when the tax reaches $550.

Items 91, 92 and 182 of the ordinance are as follows:

"Item 91. Druggist: Each retail druggist or dealer in druggists' sundries. Schedule A."

"Item 92. Druggist: Each wholesale druggist or dealer in druggists' sundries. Schedule A."

"Item 182. Merchandise: Each dealer in any article or articles of line or lines of merchandise not specified in this schedule. Schedule A."

There is no complaint as to the validity of the occupation tax, the contention of the appellant being, first, that the evidence does not show that he comes within the terms of item No. 213, *supra,* and that he was neither a manufacturer of, nor an agent for, patent medicine; second, that that item of the ordinance as enforced was discriminatory, in that it was not attempted to be enforced against others engaged in like business, and for that reason was unenforceable against him; and, third, that the appellant had effected a compromise agreement with the city and its officers by which he was allowed to and did pay $50 a year in full settlement of his occupa-

tion tax due the city, and this agreement had continued through a number of years.

Seven witnesses, including the appellant, testified in the case. From this testimony it developed that the appellant was engaged in business in the city of Hot Springs under the name of Lopez Medicine Company; that his remedy was compounded from roots and herbs grown in various parts of the world and brought to St. Louis by different chemical companies and mixed with alcohol, and sent to the appellant; that he compounded all this into a medicine called "Lopez," mixing it in a laboratory conducted by him, which occupies the entire upstairs of the building known as the Spencer Building; that the medicine is put in containers with labels, and dispensed to the public to be used in the treatment of certain diseases. This remedy has been sold for a number of years in Hot Springs, and was represented to the public as prepared from a secret formula, but the word "cure" was taken out of the advertisement because of governmental regulations. Not including bottles, corks, or things of that kind, but the ingredients only, the average stock carried by appellant out of which the Lopez remedy was compounded amounted to about $300. The amount of sales ranged from ten thousand to fifteen thousand dollars per annum. The medicine has no trademark, and is not protected by letters patent.

From all of the testimony it is fairly inferable that the article compounded and vended by the appellant was prepared from a secret formula, as a medicine for the treatment of certain diseases, put up in packages or bottles, and labeled with a name for immediate use. This was sufficient to constitute it a patent medicine in the sense in which that term is generally used, and in which it was used in the city ordinance in question. While originally the word "patent" was attached to an article, because it was the subject of a patent, it has lost that significance by usage, and has become merely a part of the name of the article, and where any article intended to

be used for medicinal purposes is prepared from a secret formula, and is placed in containers, either packages or bottles, for sale to be used without further preparation, and is labeled so that it may be for immediate use, it is a matter of common knowledge that such remedies are called "patent" or "proprietary" medicines. Certain enamel leather is spoken of as "patent leather," and undoubtedly the word "patent" was originally attached to an article because it was the subject of a patent, but it has lost that significance, and, by usage, has become merely a part of the name of the article. In view of the general use of the word "patent" in this connection, it is employed in the proprietary sense. The natural inference is that the medicine is made according to a secret formula, and not that it is manufactured under letters patent. *Bucham* v. *Jacobs,* 159 Fed. 129, affirmed in 221 U. S. 263, 31 S. Ct. 555. To the same effect, see *State* v. *Donaldson,* 41 Minn. 74, 42 N. W. 78; *State* v. *Kendig,* 133 Iowa 166, 110 N. W. 463; *McHenry* v. *Royal,* 211 Mo. 230, 242 S. W. 147.

As the herbs used in appellant's formula were gathered from various sources by different chemical companies in the city of St. Louis and shipped to the appellant in Hot Springs, and there mixed in his laboratory, he is a manufacturer, under the authority of *Chattanooga Plow Co.* v. *Hays,* 125 Tenn. 148, 140 S. W. 1068, where it is said, "A manufacturer is one engaged in making materials, raw or partly finished, into wares suitable for use."

The effect of the judgment of the trial court was that the ordinance, as applied, did not discriminate, and, as the finding of such court has all the weight of a verdict of a jury, such finding must stand, unless there is no substantial evidence upon which to base it. It was shown that there were perhaps five individuals or corporations in Hot Springs engaged in a similar business to that of the appellant, The Yaqui Medicine Company, Comar Medicine Company, Lower Drug Store, and the Moore Drug

Store, and that these companies had heretofore been paying about the same as the appellant—$50 per year—but the city clerk testified that the city had sought to collect $100 from each of them, and that he did not know why appellant alone had been arrested as the witness was not the collecting officer, and the warrant had been issued by witness at the request of the collecting officer because appellant had refused to pay the occupation tax. At just what time the city decided to collect the full $100 from the above-mentioned individuals and companies is not shown, whether before, at, or after, the time that amount was sought to be collected from the appellant. It was shown that various drug stores handled patent medicines, but it is apparent that these medicines were bought and sold by such stores in the usual course of business, some of them being sold under particular names, such as "Pollard's So Easy," "Hot Springs Liver Buttons," and "Johnson's Cough Syrup"; that this was done for trade purposes. None of these stores are agents for any patent medicine companies but, as stated, buy and sell in the usual course of business, and would be neither manufacturers nor agents under the terms of item No. 213, *supra,* of the ordinance.

Moreover, the contention of the appellant that he was being discriminated against, because the tax was sought to be collected from him and not from others, and that therefore the ordinance as applied would be invalid, cannot be sustained. It would certainly be a novel proposition that the validity of laws and ordinances is to be affected by what police officers and city officials do, or do not do, in regard to their enforcement. If the position of the appellant in this particular was sound, then many of the most wholesome laws might, in particular cases, be held to be invalid, because it is a matter of common knowledge that officers clothed with the enforcement of the law not infrequently enforce such law as to some, and not as to others. To sustain his position in this regard, appellant cites 19 R. C. L., § 255, to the

effect that a municipality cannot tax occupations so as to discriminate between persons engaged in the same occupation when the distinction is based upon an immaterial fact, or is an attempt to favor one class at the expense of another, and it "cannot accomplish the same result covertly by enacting an ordinance imposing a license tax, which is fair on its face, and enforce it against one class and persistently fail to enforce it against another class." Only one authority is cited by the author to support the text, and that is a case where the facts have little resemblance to those in the instant case. It is from the Texas Supreme Court, the case of *Hoefling* v. *San Antonio,* 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608, where the plaintiff set up two private markets upon his own property, and was forced to pay a tax of $75, which he did under protest, and brought suit to recover same because others doing business in stalls at the general market were not required to pay any tax in addition to an amount each paid for the privilege of using a stall. The ordinance, by virtue of which the tax was collected from the plaintiff, is as follows: "The city council may grant to individuals the right of establishing in any designated locality within the city stalls for the vending of meat, granting general market privileges. Each person or firm granted such right shall pay therefor to the market master, for the use of the city, seventy-five dollars per annum, quarterly in advance, and shall post the receipts in a conspicuous place in said stall." The court held, that the failure by the market master to collect $75 from each individual doing business at the public market made the collection from the plaintiff invalid because in conflict with § 1, article 8, of the State Constitution, providing that "the occupation tax levied by any county, city or town, for any year, on persons or corporations pursuing any profession or business shall not exceed one-half of the tax levied by the State for the same period on such profession or business," as the State had not levied any occupation tax, and therefore the tax

attempted to be levied by the city was invalid. This seems to be the question upon which the decision turned, but there is language in the opinion which would seem to support appellant's view, and which was based upon § 2, article 8, of the State Constitution providing that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limit of the authority levying the tax."

In 1 Dillon on Municipal Corporation, § 311, after laying down the rule that inquiry may not be made into the motives governing the Legislature in the enactment of laws, the author, continuing, says: "In analogy to this rule it is doubtless true that the courts will not, in general, inquire into the motives of the council in passing ordinances. But it would be disastrous, as we think, to apply the analogy to its full extent. Municipal bodies, like the directories of private corporations, have too often shown themselves capable of using powers fraudulently, for their own advantage or to the injury of others. We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may be impeached for fraud at the instance of persons injured thereby." But in the case of *People* v. *Gardner,* 143 Mich. 104, 106 N. W. 541, the inaccuracy of the rule laid down by Mr. Dillon is clearly pointed out. The court there said: "It is noticeable that he supports the first proposition of his text by the citation of Cooley, Const. Lim. 186, 187, where many cases are collected, but expressed the opinion that 'the acts of a council may be impeached for fraud at the instance of persons injured thereby.' No authority supporting this opinion is cited, except it be the case of *State* v. *Gaslight & Coke Co.,* 18 Ohio St. 262. That case recognizes the rule, and says: 'As the Legislature is a coordinate branch of the government, the jurisdiction of the judiciary to declare its acts of legislation within its constitutional sphere invalid on account of the improper motives which induced their enactment may well be denied. And the same rule should,

perhaps, govern in the case of an ordinance passed by a city council in the exercise of the legislative powers conferred upon it for the purposes of police regulation or municipal government. But this immunity from impeachment for fraudulent motives, or abuse of power, does not attach to all the acts of a city council which may assume the form of an ordinance.' This distinction is sufficient to except the present case from the rule there applied, but the case has little support. The suggestion of Dillon has not received the approval of the courts or jurists of the country."

Mr. Cooley, in his work on Constitutional Limitation, 6th edition, page 220, states the rule broadly that the motives of the Legislature cannot be inquired into, but the courts must presume that they were passed for proper reasons, and, continuing on page 257, uses the following language: "And the same presumption that legislative action has been devised and adopted on adequate information, and under the influence of correct motives, will be applied to the discretionary action of municipal bodies, and of the State Legislature, and will preclude, in the one case as in the other, all collateral attack."

With the exception of the authority cited by appellant, *supra,* and Dillon on Municipal Corporations, *supra,* it appears that the great weight of authority is to the effect that the validity of an ordinance cannot be questioned because of any alleged improper motive of the city authorities in the enactment of the same, either as shown by any circumstance prior to, or attending, the enactment or any circumstance regarding its application, and that the failure of the authorities to properly enforce the ordinance, or to enforce it against some and not against others, is no defense in a prosecution for its violation. *Chimine* v. *Baker,* 32 Tex. Civ. App. 520, 75 S. W. 330; *Hines* v. *Bay City,* 115 Mich. 204, 73 N. W. 116; *Centralia* v. *Smith,* 103 Mo. App. 438, 77 S. W. 488. Neither is it any defense that the city authorities acquiesced in the payment of a less sum than that due under the or-

dinance, or that by agreement appellant and others paid for a number of years the sum of $50 when under the ordinance they should have paid $100. The authorities *supra* support this, and to the same effect see also *Poe* v. *Gardner,* 143 Mich. 104, 106 N. W. 541; *Alexander* v. *Greenville,* 54 Miss. 659.

It follows that the appellant was engaged in the manufacture of a patent medicine, that as such he was liable for the payment of the occupation tax under item No. 213, *supra,* that the facts as found by the trial court failed to show any discrimination in fact against the appellant and in favor of others, that, had there been such discrimination, this would be no defense, nor would it be a defense that the appellant had for some years past compounded with the city officials for a less sum than that actually due the city.

Judgment affirmed.

HUMPHREYS and KIRBY, JJ., dissent.

HUMPHREYS, J. I dissent because the medicine compounded and sold is not a patent medicine within the meaning of the statute.

SILLIN *v.* HESSIG-ELLIS DRUG COMPANY.

Opinion delivered March 24, 1930.

[redacted]

Joseph Morrison and *M. F. Elms*, for appellants.

W. A. Leach, for appellee.

HART, C. J., (after stating the facts). Counsel for appellants contend that appellee is a foreign corporation, and is not entitled to maintain this suit, because it has not complied with the statutory requirements relating to the right of foreign corporations to do business in the State of Arkansas. On the other hand, counsel for appellee contend that the transaction here involved does not constitute doing business within the State of

Arkansas by a foreign corporation within the meaning of our statute. The record shows that appellee was engaged in the wholesale drug business at Memphis, Tennessee, and Webb & Son, a retail drug store at Stuttgart, Arkansas, purchased drugs from it during a period of twenty years, and became indebted to it in a considerable sum. The drugs sold by appellee to Webb & Son were shipped on orders sent in by Webb & Son or by traveling salesmen who secured the orders at Stuttgart, Arkansas, and sent them to appellee at its place of business in Memphis, Tennessee.

In the first place, it may be said that no effort was made to show that the traveling salesmen had any special authority from his principal, and his authority was limited to receiving and transmitting orders. *Markstein Brothers Millinery Co.* v. *J. A. White & Co.*, 151 Ark. 1, 235 S. W. 39. All orders were sent in by Webb & Son from Stuttgart, Arkansas, to appellee's place of business at Memphis, Tennessee.

Under these circumstances, appellee cannot be said to have come into the State in the sense of transacting its own business here. The general rule deducible from our decisions and from those of the Supreme Court of the United States is that the business transacted must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and that the transactions were intrastate in character. Hence it is insisted that, since appellee is a foreign corporation and has never complied with the laws of this State so as to authorize it to do business here, it has no standing in court and should be denied relief. We are of the opinion that all of the transactions between the parties were interstate, and that their legality as objects of interstate commerce was not affected by the fact that appellee has not complied with the laws of this State. *Rose City Bottling Works* v. *Godchaux Sugars*, 151 Ark. 269, 236 S. W. 825; *L. D. Powell Co.* v. *Rountree*, 157 Ark. 121, 247 S. W. 389;

30 A. L. R. 414; *Linograph Co.* v. *Logan,* 175 Ark. 192, 299 S. W. 609; and *People's Tobacco Co.* v. *American Tobacco Co.,* 246 U. S. 79, 38 S. Ct. 233.

In a case-note in 60 A. L. R. at page 996, the rule is stated as follows: "The soliciting of orders for goods within a State by the agent of a foreign corporation and the shipment of goods pursuant to such orders by the corporation from another State to the purchasers do not constitute doing business within the State, so as to subject the corporation or its agent to a local statute prescribing conditions of doing business within the State; since such transactions are in interstate commerce, and are not subject to regulation by the State."

Among the numerous cases cited in support of the rule is *Coblentz & Logsdon* v. *L. D. Powell Co.,* 148 Ark. 151, 229 S. W. 25.

These authorities also sustain the principle of law that a foreign corporation has a right to take a mortgage, and to foreclose it for the purpose of collecting its account resulting from interstate commerce without complying with the laws of the State regulating the admission of foreign corporations for the purpose of doing business within the State. The underlying principle is that, if the indebtedness was incurred in transactions growing out of interstate commerce, the foreign corporation could come into the State and collect its debts, and that such act would not amount to doing business in the State. Appellee purchased the stock of drugs of Webb & Son at the bankrupt sale, and continued the business for a space of time between ten days and two months, until it could sell the same. Appellee never intended to engage in the retail drug business in the State of Arkansas, and the fact that it kept the store open selling at retail until it could dispose of the whole stock was a mere incident to the collection of its debt, and did not amount to doing business within the provisions of the statute in regard to foreign corporations It is perfectly obvious that, if it had closed the store up, it could not have sold it to as much advantage as if it

had kept the store open, and thereby kept it as a going concern. Only in this way could it have fully preserved the good will of the business, which frequently adds materially to its value.

Again, the record shows that appellee purchased at two different places in the State of Arkansas a stock of drugs for the purpose of collecting its debt against a retail drug store. In each instance, it only operated the drug store until it could dispose of the stock of drugs and thereby collect its debt. This, as we have already seen, was a mere incident to the collection of the debt, and did not constitute doing business within the State. In each of the instances cited above the buying in of the stock of drugs by appellee was for the purpose of collecting an account resulting from an interstate transaction, and the practice complained of did not involve doing business in the State which would subject appellee to the regulation of the State concerning foreign corporations. This court has expressly held that our statute prohibiting foreign corporations from doing business in this State without complying with its terms does not prohibit such corporations from taking a note or mortgage to secure a past due indebtedness for goods sold in interstate commerce. *Simmons-Burks Clothing Co.* v. *Linton,* 90 Ark. 73, 117 S. W. 775; and *Linograph Co.* v. *Logan,* 175 Ark. 194, 299 S. W. 609.

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

WILSON *v.* MAGNOLIA PETROLEUM COMPANY.

Opinion delivered March 24, 1930.

Barber & Henry and *Troy W. Lewis,* for appellant.

Marsh, McKay & Marlin, Mahony, Yocum & Saye, and *Patterson & Rector,* for appellee.

HART, C. J., This appeal is prosecuted to reverse a decree of the chancery court removing the disabilities of a minor for the purpose of signing an oil and gas lease with his adult brothers and sisters.

On June 12, 1923, Walter Wilson by next friend filed a petition in the Union Chancery Court, asking that his disabilities as a minor be removed in order to enable him to join with his adult brothers and sisters in executing an oil and gas lease. The chancery court granted the petition, and the decree recites that the petition was duly presented, and that, after hearing the testimony of witnesses, the court found that Walter Wilson was a minor over the age of eighteen years, and that he was a resident of Union County, Arkansas, that he was an owner of an undivided one-fifth interest in thirty acres of land in Union County, Arkansas, which is specifically described in the decree, that said Walter Wilson has no mother or father living, and is capable of attending to his own affairs. His disability of minority was removed for the purpose of enabling him to join with his adult

brothers and sisters in the execution of an oil and gas lease.

The record shows that the order removing his disabilities in all respects complied with the requirements of the statute as to age, residence and all jurisdictional matters as laid down in *Hindman* v. *O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490; and *Young* v. *Hiner*, 72 Ark. 299, 79 S. W. 1062.

It is first insisted that our statute conferring jurisdiction upon the circuit court and the chancery court to remove the disabilities of minors is unconstitutional. We do not deem it necessary to discuss this question for this court has decided in numerous cases including the ones cited above down to *Gilmore* v. *Union Sawmill Co.*, 178 Ark. 297, 10 S. W. (2d) 517, that the act is constitutional. No doubt numerous rights have grown up under these decisions, and the holding of the court has become a rule of property. Then, too, it may be stated that no good reason has been shown for overruling these cases.

It is next insisted that § 5745 of Crawford & Moses' Digest, providing that chancery courts shall have concurrent jurisdiction with the circuit court to remove the disability of minority in the same way and manner as provided for the removal thereof by circuit courts under § 5744 of the Digest, is unconstitutional, because it violates the provisions of article 5, § 29, of the Constitution which provides, in effect, that no act may be amended by reference to its title, but that the act, as amended, must be set forth at length. We do not agree with counsel in this contention. The two sections of the statute exist as separate and distinct legislative enactments. The later act in no manner attempts to amend or change the existing requirements as to the removal of the disabilities of minors. It simply confers the power upon the chancery court to remove their disabilities, and provides that it shall be done under an existing statute as to the procedure. In other words, it confers upon the chancery court the power to remove the disabilities

of minors, and provides the same procedure in executing the power as already existed in the case of circuit courts. *State* v. *McKinley,* 120 Ark. 165, 179 S. W. 181; *Farris* v. *Wright,* 158 Ark. 519, 250 S. W. 889; *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41.

It is next insisted that the act conferring upon chancery courts the power to remove the disabilities of minors is unconstitutional. In making this contention, counsel rely upon the principle of law decided in *Hester* v. *Bourland,* 80 Ark. 145, 95 S. W. 992; and *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579, to the effect that under our Constitution the Legislature can only vest chancery courts with jurisdiction in matters of equity, and that the power to remove the disabilities of minors was not a matter of equity jurisdiction at the time of the adoption of the Constitution. We do not agree with counsel in this contention. In the first place a proceeding to remove the disability of minority is not strictly a judicial proceeding. At the common law, both men and women became *sui juris* at twenty-one years. There being no constitutional restriction, it became a matter of legislative will to fix the age at which minors reach their majority. 31 C. J. 986; and 14 R. C. L. 269, paragraph 43.

The Legislature provided, that males of the age of twenty-one years and females at the age of eighteen years shall be considered of full age for all purposes. Crawford & Moses' Digest, § 4986. In addition to fixing the period of minority by general law, it provided for the removal of such disabilities in special cases at a shorter period. Crawford & Moses' Digest, §§ 5744-5. The general rule is that when this power is conferred upon courts the exercise of the power is not strictly judicial in character. The reason is that it may be exercised by the Legislature itself, or be committed to other tribunals having no judicial authority. *Marks* v. *McIlroy,* 67 Miss. 545, 7 So. 408; and *Brown* v. *Wheelock,* 75 Tex. 385, 12 S. W. 111.

This court has in effect held that courts in cases like this act merely upon the status of the petitioner, and that its action is only *quasi*-judicial in the premises. For this reason it is necessary that the record of the court should contain an affirmative recital of all the jurisdictional facts upon which it acts. *Gilmore* v. *Union Sawmill Co.,* 178 Ark. 297, 10 S. W. (2d) 517.

In the second place, this court has always recognized the general jurisdiction of courts of equity from the time of their establishment over the persons and property of minors. *Myrick* v. *Jacks,* 33 Ark. 425; *Shumard* v. *Phillips,* 53 Ark. 37, 13 S. W. 510; and *Kirk* v. *Jones,* 178 Ark. 583, 12 S. W. (2d) 879.

In *Marvel* v. *State,* 127 Ark. 595, 193 S. W. 259, it was held that an action of the Legislature authorizing chancery courts to abate a nuisance caused by the selling of intoxicating liquors illegally is valid. In that case it was contended that chancery courts only had jurisdiction in cases where civil or property rights were involved. In the majority opinion the court held otherwise, and said that courts of equity had always had jurisdiction to abate public nuisances, and that the act in question had not conferred upon the chancery court any additional jurisdiction. It had only prescribed new conditions upon which the court might act. This court has expressly recognized the power of chancery courts under the statutes to remove the disability of minority. *Bickle* v. *Turner,* 133 Ark. 536, 202 S. W. 703; and *Gilmore* v. *Union Sawmill Co.,* 178 Ark. 297, 10 S. W. (2d) 517.

Finally, it is insisted that the court could not remove the disability of minority for the purpose of enabling the minor to sign an oil and gas lease on his homestead. In the case at bar, the minor was over eighteen years of age, as shown by the record, and was the youngest child. The court removed his disabilities so that he could join his adult brothers and sisters in the execution of an oil and gas lease on thirty acres of land which was the home-

stead of their deceased father. Under our Constitution, as construed by this court, infants are entitled to hold a homestead until the youngest child arrives at the age of twenty-one years, and the rights of the other children and of the widow yield to the rights of the infant. *Burel* v. *Baker,* 89 Ark. 168, 116 S. W. 181; and *Colum* v. *Thornton,* 122 Ark. 287, 183 S. W. 205.

It is insisted by counsel for appellants that, inasmuch as the minor was entitled to his share of the rights and profits of the homestead until he reached twenty-one years of age, his disabilities as a minor could not be removed for the purpose of allowing him to execute an oil and gas lease which might have the result of taking from him the greater part of his interest in the homestead. In *Hargett* v. *Hill, Fontaine & Co.,* 101 Ark. 510, 142 S. W. 1137, it was held that, while the homestead rights of a female child do not cease until she arrives at twenty-one years of age, she might relinquish or abandon her homestead as soon as she reached the age of eighteen years where there were no younger children. This was in recognition of the rights conferred upon her under our general statute removing her disabilities for all purposes, or, in other words, making her of full age when she arrived at eighteen years.

Reasoning by analogy, if the general statute making females of full age for all purposes at eighteen years enables them to sell or abandon their homestead rights, we cannot perceive why the statute which enables the court to remove their disabilities in special cases at a shorter period would not have the same result. In the case cited, the court held that the minor might relinquish her homestead rights because under the statute she had become of full age, and the disability of minority had been removed. In other words, she had become emancipated by a general act of the Legislature. In the instant case, the disabilities of the minor were removed for the express purpose of enabling him to sign the oil and gas lease under statutory authority conferred upon the court.

This order of the court emancipated the minor to the same extent as if the Legislature by a general act had fixed his majority at eighteen years, the same as it did the majority of females.

This was the effect of the decision of the court in *Grimes* v. *Luster*, 73 Ark. 266, 84 S. W. 223, 108 Am. St. Rep. 34. In that case it was held that where a father died possessed of a homestead, and leaving a widow and minor children, and the widow subsequently acquired a homestead in her own right, and died leaving one of such children still a minor, the latter is entitled to claim either homestead, but both cannot be enjoyed at the same time. It was further held that where a minor is entitled to claim either of two homesteads he cannot, unless his disabilities have been removed, waive, select or abandon either, and it becomes the duty of his guardian, under the superintending control of the probate or other competent court, to make the selection for him. In that case the court held that an election could be made of one homestead to the exclusion of another. The court further said that such selection could not be made by the minor, as he was incapable of this, just as he was incapable of managing and controlling his other property and rights. It will be seen that his right to act in the case of a homestead was placed upon the same basis as his right to act about his other lands, and that was solely upon the ground of minority. The court pointed out that there were appropriate methods to preserve that interest, which it was to the advantage of the minor to preserve. This court said that under the record in the case under consideration the disability of minority had been removed, and that on this account there was no occasion for a guardian or next friend to take the initiative. If the removal of the disability of minority enabled the minor to make a choice of homesteads, we can perceive no good reason for holding that the removal of such disability would not enable him to join with his adult brothers and sisters in the execution of a gas lease

on the homestead. As we have already seen, a female may sell or abandon her homestead rights when she becomes of full age under the statute, and there is no reason why, when a minor's disabilities are removed by a court pursuant to statutory authority, he may not have the same right. Therefore, the decree will be affirmed.

[redacted]

ADAMS *v.* STATE.

Opinion delivered March 24, 1930.

[redacted]

Coleman & Reeder, for appellant.

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

SMITH, J. Appellant was indicted and tried in the Independence Circuit Court upon a charge of having

made or caused to be made a false entry upon the books of the Union Bank & Trust Company, of which institution he was the president, whereby he was falsely given credit for a deposit of $75,000, which was not in fact made, with the intention to deceive the State Bank Commissioner, the bank examiner, and the directors and stockholders of said bank, as to the true condition of the account of the said Adams with said bank. He was convicted, and appealed to this court, where the judgment was reversed, and the cause remanded for a new trial. The facts out of which the prosecution arose, and upon which the conviction was had, are fully stated in the opinion rendered on that appeal. *Adams* v. *State,* 179 Ark. 1047, 20 S. W. (2d) 130.

It was assigned as error on that appeal, that the court should have granted a change of venue as prayed, but we held that no error was committed in this respect, for the reason that the petition for a change of venue was not supported by the affidavits of two credible persons as the statute requires, but the judgment was reversed for another reason.

Upon the remand of the cause a new petition for a change of venue was filed, and the prayer thereof was denied by the court, as was the former petition, upon the ground that the affiants were not credible persons within the meaning of the statute. Upon the first petition the court held that only one of the affiants was credible, whereas, at the trial from which this appeal comes, there was only a general finding upon the subject that the petition did not meet the requirements of the law in respect to the credibility of the supporting affiants.

W. L. Seymore, an affiant held credible by the trial court at the first trial, was one of four affiants who supported the petition for a change of venue at the second trial, and he and three others were examined at the trial from which this appeal comes at great length touching the extent and source of their information upon which they based the opinion that the defendant could not obtain a fair and impartial trial.

No affirmative testimony was offered affecting the credibility of any of the affiants, and it is only contended that they were not sufficiently advised as to the state of the public mind to afford a substantial basis for the opinion that a fair and impartial trial could not be obtained.

The law of this subject was clearly and sufficiently stated in the opinion on the former appeal, and no useful purpose would be served by a restatement.

Seymore's testimony was even more comprehensive upon his examination at the second trial than it had been at the first. W. J. DeCamp was an affiant who signed only the second petition for a change of venue. He testified that he was a former sheriff of the county, was in the insurance business, and had heard the case discussed practically all over the county by people who resided in different sections thereof; that there were but few days when he was out in the country that he did not hear the case discussed, and that it appeared to be the principal topic of conversation, that is, the failure of the bank of which defendant was president, and his connection with the bank and its failure, and that nothing had ever occurred in the county which had been more generally discussed or had aroused more feeling. This affiant and the others gave names of persons in each township about which they were asked who had discussed the prejudice existing against defendant, and among others named as having expressed the opinion that great prejudice existed were the prosecuting attorney and special counsel employed in the prosecution.

As the witnesses, Seymore and DeCamp, testified as to the state of the public mind throughout all parts of the county, and do not appear to have sworn recklessly or without knowledge of the facts, and there was no fact or circumstance adversely affecting the credibility of these affiants, the venue should have been changed as prayed. We find it unnecessary to review the testimony of the other affiants.

The second trial, like the first, resulted in a verdict of guilty, and it is now insisted that certain questions presented on this appeal were also raised on the former appeal but were not there discussed or dispoesd of. We do not think so. The former opinion discussed and disposed of all the assignments of error which we thought were sufficiently important to require discussion, and this opinion appears to have been substantially followed at the trial from which this appeal comes.

The defense is threefold: (1) That there was no false entry within the meaning of the statute under which the indictment was drawn; (2) if there was, defendant did not make it or cause it to be made; (3) the entry was not made with the intention of deceiving the Bank Commissioner or the examiners representing his department.

The testimony in the present case is not substantially different from that offered at the first trial, and in the former opinion we defined a false entry, and held that the testimony was sufficient to support a finding that a false entry was made, and we adhere to what was there said on that subject.

It is earnestly insisted, however, that the undisputed testimony shows that the defendant did not make a false entry, nor cause it to be made, and that a verdict of not guilty should have been directed for that reason; but we do not agree with counsel in this contention. It is true the testimony affirmatively shows that defendant did not personally make the false entry upon the books of the bank, and gave no specific directions that it should be made, but the testimony does show that defendant presented the draft to Kennard, the cashier and bookkeeper, with a deposit slip covering the draft. Defendant, as president of the bank, did not keep the books, but he knew, of course, how they were kept, and they were kept under his supervision or at least the jury might have so found. The testimony shows the manner of handling items of this character. An entry of the transaction must necessarily have been made upon the books of the bank

before defendant could receive credit for the deposit, and when defendant, as president of the bank, presented the draft and a deposit slip covering it to the cashier, there was an implied direction from defendant, as chief executive officer of the bank, that the transaction in which he participated be handled in the usual and ordinary way, and its entry on the books of the bank was a part of this routine.

It was, of course, necessary for the State to show that the purpose of the transaction was to deceive the Bank Commissioner, or the examiner, but this was a question of fact which the instructions submitted to the jury.

The judgment of conviction on the former appeal was reversed, because the court had excluded testimony tending to show the good faith of the defendant and the absence of any intention to deceive, and this testimony was admitted at the trial from which this appeal comes. The defendant testified that he thought, and had good reason to believe, that the draft would be honored and paid in due course. As tending to rebut this contention, the State was permitted to show the relation of defendant to the account against which the draft was drawn, and the admission of this testimony is assigned as error.

We think this testimony was competent as bearing upon the important question of the defendant's good faith. If defendant had the right, as we held on the former appeal he did have, to show a reasonable expectation that the draft would be paid, it was competent for the State to show in rebuttal that such was not the fact, and this could only be done by showing defendant's lack of authority to draw and deposit the draft, and to cause an entry thereof to be made.

Certain other assignments of error are discussed, but we think the present and former opinion sufficiently dispose of them without further discussion being necessary.

No error appears except the refusal to change the venue as prayed, but for this error the judgment must

be reversed, and the cause remanded, with directions to enter an order changing the venue, and for further proceedings according to law.

HUMPHREYS, J. I dissent because the trial court did not abuse his discretion in reaching the conclusion that the affiants in support of the petition for a change of venue were not credible persons within the meaning of the statute.

MADDOX *v.* HAMP WILLIAMS HARDWARE COMPANY.

Opinion delivered March 24, 1930.

J. R. Long, for appellant.

Walter J. Hebert, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant for a balance of $300 due upon a note executed by appellant to appellee for a used Ford truck.

Appellant filed an answer and cross-complaint, in which he admitted the execution of the note, alleging the return of the truck, stating that he was not bound by the contract because he was a minor at the time he executed the note and praying for judgment for $180 which he had paid appellant on the truck.

The cause was submitted to the court without the intervention of a jury upon the pleadings and testimony, resulting in a judgment in favor of appellant for $180, the amount he had paid appellee on the contract; and against him for $300, the balance due on the note.

From the judgment against him, appellant has duly prosecuted an appeal to this court.

Appellant and his mother testified that he was a minor at the time he purchased the motor truck and executed the note therefor. Appellee objected to the introduction of the testimony as a defense to the note on the ground that he had not pleaded his minority as a defense thereto in his answer. The court admitted the testimony over the objection and exception of appellee.

Porter Wilson, secretary-treasurer of appellee, testified that appellant had been working for himself about two years; that he represented that he was twenty-one years of age when he signed the note, and that he was buying the motor truck for his brother to use for business purposes and profit; that neither appellee nor any of its employees accepted the truck in satisfaction of the debt when returned by appellant, and notified him it would not do so; that when it was left there appellee put the truck in storage to protect it from the weather.

The undisputed testimony showed that before the truck was returned appellant paid appellee $180 on the purchase price thereof.

In order to render judgment in favor of appellant for $180 on account of the money paid by him to appellee under the contract, it was necessary for the court to find appellant was not bound on the contract because of his minority. There is ample testimony in the record to sus-

tain this finding which the court necessarily made. After rendering a judgment in favor of appellant for said sum upon the theory that he was not bound upon the contract, it was inconsistent on the part of the court to render a judgment against him for the balance due on the note or under the contract.

Appellee argues that the judgment against appellant for the balance due on the note was correct, because he had not affirmatively set up in his answer that he was an infant or minor when he signed the note. The answer and cross-complaint were filed under one cover, and, when treated as one pleading, appellant sufficiently interposed his minority as a defense to the action. It is true this defense was set forth in the cross-complaint proper, but it was set forth therein as a defense to the action as well as a basis for the recovery of the $180 he paid to appellee under the contract. It would indeed be very technical to hold otherwise. We think in the pleading filed appellant's minority was affirmatively pleaded as a defense to the cause of action.

Appellee also argues that the contract was for a necessity, and that the judgment rendered by the trial court against appellant is correct for that reason. The record reflects that appellant did not buy the truck for himself or for his individual use, but on the contrary bought it for his brother. Certainly it cannot be said that a minor can buy anything for the use of his relatives and be bound on the contract on the theory that it was a necessity for himself.

On account of the error indicated, the judgment in favor of appellee against appellant for $300 is reversed, and the cause of action dismissed.

RAINEY *v.* RAINEY.

Opinion delivered March 24, 1930.

[redacted]

R. M. Hutchins and *Coulter & Coulter*, for appellant.

Marsh, McKay & Marlin, for appellee.

HUMPHREYS, J. The only question for decision presented on this appeal is the priority between two chattel mortgages, both of which were executed by W. P. Rainey, the first in point of time to appellee, J. G. Newkirk; and the second in point of time to appellant, R. T. Rainey. The question of priority, if raised at all in the trial court, turned upon whether the J. G. Newkirk mortgage had the proper indorsement thereon at the time it was filed in the office of the circuit clerk and ex-officio recorder of Union County. Section 7384 of Crawford & Moses' Digest provides, in substance, that a mortgage of personal property shall become a lien upon the property therein described against strangers from the time of filing, provided the following words are indorsed thereon, "This instrument is to be filed, but not recorded," and which indorsement is signed by the mortgagee, his agent or attorney.

The trial court decreed the J. G. Newkirk mortgage prior and paramount to the R. T. Rainey mortgage.

Appellant contends for a reversal of the decree upon the alleged ground that the record reflects at page 110 of the transcript that the R. T. Rainey mortgage, filed after the J. G. Newkirk mortgage, had the following notation on the back thereof: "This instrument is to be filed but not recorded. R. T. Rainey, mortgagee"; whereas, the J. G. Newkirk mortgage, found on pages 6 to 11 of the transcript, had the following notation on the back:

"Filed but not recorded," which, it is claimed, was not a proper filing for a chattel mortgage under the section of the statute referred to.

It is true that a purported copy of the Newkirk mortgage appears as an exhibit to appellant's complaint on the pages of the transcript referred to, and that the copy does not reflect the indorsement required by the statute, but page 76 of the transcript reflects that the original J. G. Newkirk mortgage on file in the clerk's office of Union County had the following notation on the back thereof: "This instrument is to be filed but not recorded," which is signed by J. G. Newkirk.

The indorsement complies with the statute, and fully sustains the decree of the trial court to the effect that said mortgage was prior and paramount to the R. T. Rainey mortgage.

No error appearing, the decree is affirmed.

SUPREME LODGE OF WOODMEN OF UNION *v.* WALKER.

Opinion delivered March 24, 1930.

J. D. Shackelford, for appellant.

Arthur D. Chavis, for appellees.

KIRBY, J. This appeal is prosecuted from a judgment against appellant, upon a policy of insurance or a benefit certificate for $500 issued to William Walker, colored, naming appellees beneficiaries therein. The insured was required to pay $1.25 per month for his membership and insurance, which provided a sick benefit of $5 per week for total disability, and $3 per week for

partial disability. Walker was taken sick about the first Sunday in April, 1927, while in good standing in the Union, and continued sick until his death in October, 1927. During the sickness in the last of August, 1927, appellant paid Walker sick benefits amounting to $8 through the local lodge of Pine Bluff, under the policy for which credit was given when suit was brought for the balance of $492, and for which judgment was recovered.

Appellant company claimed that insured had failed to pay his dues or premium for the month of August, during that month, and his policy had lapsed on that account, and denied any liability.

The testimony is in conflict: that on the part of appellees tending to show that the August premium was paid in August within the time designated therefor by the by-laws of the Union, while the evidence upon appellant's part conduced to show that the August dues or premium was not paid to the local agent until early in September, after the time for payment had expired; that it was never sent to the treasurer of the Union at Hot Springs at all, but later on, after the death of the insured, was returned by the local agent to one of the beneficiaries, the widow declining to accept it. The check for the sick benefit, $8, was for the month of August, and was delivered to the insured sometime during the last of that month.

The question for determination is one of fact, whether the August dues were paid. Although the insurance company could not declare a forfeiture of the sickness or accident policy for nonpayment of installments of premiums or dues while it had in its own hands due the insured on account of sickness a larger amount of money than was required to pay the installments of premiums or due thereunder (*Continental Casualty Co.* v. *Baker,*) and could have deducted from the benefit or indemnity due the member for August the amount of his dues or premium—$1.25—for that month unpaid on the 15th, it did not do so, but paid the whole amount, none of which

was returned to it. It may be conceded, that the preponderance of the testimony shows that the dues for August were not given to the local agent of the Union at Pine Bluff until after the month of August had expired, and on September....., but, as already said, the testimony was in conflict on this point, and the jury found in appellees' favor on instructions not complained of, and upon substantial testimony sufficient to support the verdict, which cannot be disturbed on appeal.

The judgment is accordingly affirmed.

[redacted]

DAKE *v.* WOODCOCK.

Opinion delivered March 24, 1930.

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O. H. Sumpter, for appellant.

C. T. Cotham, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in decreeing a foreclosure upon the mortgage and the rendition of the decree against the executor, the claim against the estate of Emily Dake not having been probated and being barred by the statute of nonclaim. The suit was properly brought for foreclosure of the lien against the property mortgaged or conveyed by the deed of trust without probation of a claim against the estate of one of the makers, deceased, of the secured note. No judgment was sought against the

estate of the decedent, but only foreclosure of the lien of the mortgage executed by the decedent as security therefor. *Hall* v. *Denckle,* 28 Ark. 506; *Arkmo Lumber Co.* v. *Cantrell,* 159 Ark. 456, 252 S. W. 901.

There is no contention that the debt secured by the mortgage was barred by the statute of limitations, § 7408, C. & M. Digest. *Mueller* v. *Light,* 92 Ark. 522, 123 S. W. 646, 31 L. R. A. (N. S.) 1013.

The executor of the estate of deceased, maker of the note, was a necessary party to the suit for the determination of the amount due on the note for payment of which the lien was to be foreclosed. Under the allegations of the complaint, the money borrowed by Charles Dake, $533, was for payment of taxes, interest, etc., the payment of which was also secured under the terms of the mortgage, and, Charles Dake having succeeded to the ownership of the property mortgaged under the provisions of the will of his wife, and expressly agreed that the payment of the notes was secured by the terms and conditions of the original deed of trust, there was no error in foreclosing the lien of the mortgage for its payment.

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

AUSTIN *v.* HUIE.

Opinion delivered March 24, 1930.

M. Rountree, for appellant.

R. W. Huie, Jr., for appellee.

MEHAFFY, J. This is an action in ejectment begun by appellee for the recovery of the possession of certain lands described in the complaint. Appellee had recovered judgment against the appellant for four hundred and twenty-five dollars ($425), execution was issued, the land described was sold by the sheriff, and appellee became the purchaser. The sheriff's sale was June 28, 1928. The sheriff executed a deed to appellee on July 3, 1929, more than a year after the sale. The suit was begun on July 3, 1929, the day the sheriff's deed was executed. Appellant filed a general demurrer which was overruled, and appellant filed motion to dismiss on the ground that the complaint showed on its face that it was filed on the same day of the sheriff's deed, and that the action could not be maintained until the expiration of ten days after the execution of the deed. This motion was overruled, and appellant excepted. Appellant then, without waiving his demurrer, filed answer denying the allegations of the complaint, and alleging that he was a married man, and that the land in controversy was his homestead, and that he and his family had occupied it as a homestead for the past twenty years. He also alleged that the action was prematurely brought. Appellant requested the court to direct a verdict in his favor, which the court refused. There was a verdict and judgment for appellee, and this appeal is prosecuted to reverse said judgment. Appellant concedes that the court properly instructed the jury on the question of homestead, and that the verdict on this question is conclusive. Appellant contends, however, that his demurrer should have been sustained because the statute gives the purchaser his remedy. The following section is cited and relied upon: "Upon the execution of the deed, the grantee, if possession is not delivered within ten days, may proceed, by forcible detainer, to be put in possession thereof." C. & M. Digest, § 4340.

Appellant also cites and relies on the following section: "Upon the execution by a sheriff of a deed to real

estate sold under execution, the grantee, if possession is not delivered in ten days, may proceed, by forcible detainer, to be put in possession thereof." Section 4841, C. & M. Digest.

While appellant discusses the demurrer, the motion to dismiss and the court's refusal to direct a verdict separately, he relies on the above quoted section of the digest to sustain his contention as to each. Appellant would be correct if the remedy suggested by him was made exclusive by the statute. But it is not exclusive, but cumulative. As to suits in ejectment the statute provides: "Such action may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises." Section 3686, C. & M. Digest.

"The fact that a summary remedy is given by statute will not prevent the bringing of a suit in ejectment, where there is nothing in the statute from which it may be inferred that the statutory remedy was intended to be exclusive. Thus ejectment lies where the remedy by forcible entry and detainer is not exclusive, but merely cumulative; but it is otherwise where such remedy is made exclusive." 19 C. J., p. 1032.

"The contention is urged, that plaintiff had mistaken his remedy in bringing ejectment in this suit, and in not proceeding under § 1020 of the Code of Civil Procedure, by action of forcible entry and detainer. It can hardly be possible, that this contention is seriously relied upon, as it has long been held that, where the holder of the legal title to real estate is dispossessed, his proper remedy is by ejectment. *Gregory* v. *Bank,* 16 Neb. 411, 20 N. W. 286. While § 1020 of the Code would have permitted plaintiff in this case to proceed by forcible entry and detainer, yet such provision is plainly cumulative, and not an exclusive remedy." *Abbott* v. *Coates,* 52 Neb. 247, 86 N. W. 1058.

"It is true that by §§ 2233-2236, a summary remedy is given, where the unlawful entry and detention is the result of physical force, by a proceeding in a district

court, but the plaintiff is not restricted to such a course, any more than in a case where a tenant in possession refuses to surrender upon the expiration of his tenancy. He may, if he so elects, resort to his action of ejectment, and in the same suit recover his damages, which may be trebled if the wrongful entry and withholding are shown to be of the character described in § 1669." *Compton* v. *The Chelsea,* 139 N. Y. 538, 34 N. E. 1090.

Sections 4340 and 4841 of Crawford & Moses' Digest do not provide an exclusive remedy. Plaintiff could have pursued the remedy therein provided, but he was not required to do so. He had the right to bring his suit in ejectment, as the other remedies are not exclusive but cumulative.

The judgment of the circuit court is affirmed.

MECHANICS' LUMBER COMPANY *v.* YATES AMERICAN MACHINE COMPANY.

Opinion delivered March 24, 1930.

[redacted]

Cravens & Cravens, for appellant.

Clinton R. Barry, for appellee.

MEHAFFY, J. This action was begun by appellee to recover on a written contract for goods and machinery sold and delivered to appellant by appellee. A copy of the contract sued on is attached to complaint, and made a part thereof.

Appellant filed answer denying the material allegations of the complaint. He admitted the execution of the contract sued on, but stated that on the same date, at the same time, and as a part of the same transaction and contract, he entered into a written contract with appellee by which appellee sold him No. 2 4-in. x 8-in. Yates American Sash Clamp Figure 8855, single motion clamp with sash attachment, nearly new, at and for the price of $260 to be in fine running condition with all regular equipment; a copy of which contract is attached to appellant's answer, and made part thereof. Appellant further alleged in its answer that at the time plaintiff's representative, H. J. Flanders, called upon it

on March 14, 1928, and induced it to purchase machine as described in appellee's exhibit "A" and appellant's exhibit "A," the appellant declined and refused to purchase said machine or any part thereof unless it could be assured that the contract marked exhibit "A" to appellant's answer should be considered a part of the purchase contract, and that appellant should be assured of the sale and delivery of the machine mentioned in its exhibit "A", otherwise it refused to purchase any of the said machinery, and that thereupon the appellee's representative, H. J. Flanders, sent to it the following telegram: "C93 13 Collect XU-Fort Smith, Arkansas 14 150P Yates American Machine Company Beloit, Wisconsin. Advise if rebuilt item naught seven naught four four available answer quick. Signed H. J. Flanders." To which the said representative of appellee received the following reply: "Beloit, Wisconsin, March 14, 1928 2:55 P.M. H. J. Flanders, Fort Smith, Arkansas, Retel item No. 07044 Clamp is available. Signed, Yates American Machine Company." Which telegram from Flanders to the Yates American Machine Company was shown to the appellant, also reply telegram, whereupon the contract for the sale of all of the machinery as shown in appellee's exhibit "A" and appellant's exhibit "A", were entered into upon the assurance by the duly authorized representative of the appellee, H. J. Flanders, that the contract for the sale of said machine would be considered as one contract although evidenced by two different writings. It was further alleged in the answer, that it was understood, and so placed in said contract, that the order should be rushed, and that the same rush order applied to appellant's exhibit "A", but that appellee in shipping the machinery described in its exhibit A failed to ship the two motors described therein, and delayed shipping the same for some five or six weeks, thereby preventing the appellant from the use of said machinery for said period of time, to its damage in the sum of $100, and that when the one No. G-44 cut off saw

motor was received by appellant, it was found to be defectively wired, which defects the appellant had to have remedied at an expense of $....., a reasonable charge therefor, and further deprived the appellant of the use of said machine until the same could be properly conditioned, to the appellant's damage in the sum of $100, and that the appellee failed and refused to ship the Yates American Sash Clamp Machine with equipment as described in appellant's exhibit "A", which was sold to the appellant for the price of $260, and that, upon the failure of the appellee to ship said machine and equipment, the appellant was advised by the appellee, that such a machine as the appellant had purchased could not be furnished for less than $560, which was $300 in excess of the sale price made by the appellee to the appellant, and said machine at the time the appellee refused to ship same to the appellant was of the reasonable value of $560 to its damage in the sum of $300, and that appellant later had to go into the market to purchase such a clamp sash machine as it had contracted to purchase from the Yates American Machine Company, and paid therefor $480, but that said machine so purchased was not of the same quality or value as the machine appellant had contracted to purchase from the appellee, and was worth $80 less than said machine, and could not be delivered at the time the appellant was advised by appellee it would not ship the sash clamp machine sold by it to appellant; that at the time of the purchase of said sash clamp machine from the appellee, appellant advised appellee's representative that it had at that time certain large contracts which required the manufacture of a large bill of sash and doors, and that said machinery was needed by said appellant at once in the manufacture of said required stock, and upon the failure of the appellee to ship said machine the appellant was required to manufacture said sash and doors which it had contracted to deliver, by the use of hand clamp machines, which made said sash and doors cost said appellant in filling the orders which had

already been contracted for and which the appellee had been advised had been contracted for, in excess of what it would have cost, had the sash clamp machine ordered from the appellee been delivered, in the sum of $500. Appellant admits that it is indebted to appellee in the sum of $1,181 less the amount it claims to have been damaged, and tenders into court the sum of $181 and accrued costs.

The appellant introduced evidence supporting the allegations of its answer.

Appellant contends first that the court should have directed a verdict for it, for the reason that it denied in its answer that appellee was a corporation, and no proof was offered to establish the fact that it was a corporation, and also for the reason that there was no proof that the appellee ever approved or accepted the order for new machinery, and offered no proof as to the value of the machinery shipped. The denial that appellee is a corporation is in substance the same words as the denial in *Loose-Wiles Biscuit Co.* v. *Jolly,* 152 Ark. 442, 238 S. W. 613, and the court there said: "The effect of this allegation is not to deny that defendant is a corporation, but to deny that it is organized and doing business under the laws of the State of Missouri." Besides, in this case the appellant dealt with the appellee as a corporation, and sought to recover damages in the case against it as a corporation, and would therefore be estopped from denying that it was a corporation. *Wesco Supply Co.* v. *Smith,* 134 Ark. 23, 203 S. W. 6; *Jones* v. *Dodge,* 97 Ark. 248, 133 S. W. 828, L. R. A. 1915 A, 472; *Searcy* v. *Yarnell,* 47 Ark. 269, 1 S. W. 319.

Appellant claims that it was entitled to an instructed verdict also because the contract for new machinery does not show that it was ever accepted by appellee or any one duly authorized to act. A sufficient answer to this contention is that appellant signed the order, and the goods described in the order were shipped to appellant and accepted and retained by it and one-third of

the contract price was paid in cash. We therefore, do not think that there is any merit in this contention of appellant.

Appellant's next contention is that the court erred in directing a verdict for the appellee. It is contended that the two orders for machinery constituted one contract. It is argued that the only apparent reason for the contract to be evidenced by two separate writings is the fact that appellee's agent had two forms of contracts, one for the sale of new machinery and the other for the sale of second-hand machinery, and that proof offered upon the part of appellant shows conclusively that appellant refused to enter into the contract unless he could have the goods described in both contracts, and that thereupon the appellee's agent sent the telegram set out above and received the reply set out above and showed them both to appellant, but the order signed by appellant upon which the goods were shipped showed on its face that it was a mere proposal by the appellant, and subject to the approval of the appellee at its office in Chicago, Illinois. Each of the orders or contracts contains this provision. The appellant was therefore bound to know when he signed these orders that they were not binding on appellee until approved by it at its office in Chicago. It is true that the fact that a contract was evidenced by two different writings would not necessarily constitute two different contracts, but in the instant case we think it clear that there were two separate, distinct proposals, and, if accepted in the office in Chicago, would have been two separate contracts. The first case relied on by appellant is *Vaugine* v. *Taylor*, 18 Ark. 65. In that case, however, the court said: "Does the agreement made between Wilson and the heirs of Vallier by reference and recitation become a part of the deed from the heirs of Vallier to Wilson, so that, in construing the one, we may legitimately consider the other, or, in other words, should they properly be construed together for the purposes of this suit?" It appears therefore that, by ref-

erence and recitation, one of the contracts referred to the other, and it also appears that each instrument related to the same subject-matter. In the instant case, there is no reference in either instrument to the other, and the subject-matter is wholly different.

The next case referred to, that of *Pillow* v. *Brown,* 26 Ark. 249, appellant quotes from p. 249 of said opinion. The quotation itself, however, shows conclusively that the connection between the two transactions is established by their contents, without any necessity of referring to other matter to connect them together, and they will be taken as one entire agreement. If the instruments in the instant case referred to each other so as to show that they did constitute one contract, there would be a wholly different case here. There is no evidence, that any knowledge of the conversation or statements made between appellant's representative and the representative of appellee were ever made known to the appellee. Appellee's salesman only took orders. The orders signed by appellants themselves show that no sale was made until it was approved at the home office in Chicago. In other words, that the salesman had no right to consummate the sale.

"Where two or more written statements are executed on the same day and relate to the same subject-matter, and one refers to the other, the presumption is that they evidenced but a single contract; but it does not necessarily follow that this is the fact." 13 C. J. 530.

As we have already said, these two instruments do not relate to the same subject-matter, and neither of them referred to the other. Besides, these instruments referred to different transactions—one of them for the purchase of certain new machinery, and the other for the purchase of second-hand machinery. If both instruments related to the same subject-matter, and either referred to the other, they might be considered and interpreted together.

"But construing contemporaneous instruments together means simply that, if there be any provisions in one instrument limiting, explaining or otherwise affecting the provisions of another, they will be given effect as between the parties themselves, and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another contrary to the intent of the parties. They may be intended to be separate instruments and to provide for entirely different things." 6 R. C. L. 852.

We agree with the principles contended for by appellant that where two or more instruments are executed at the same time, relative to the same subject-matter, and one refers to the other either tacitly or expressly, they are to be taken together and construed as one instrument. Appellant calls attention to many authorities in support of this rule. We do not, however, think they apply in this case, because each contract in this case, or each instrument, was separate and complete, and neither referred to the other in any way. Moreover, there is no evidence that the appellee ever had any notice before the completion of the sale that appellant contended that the two had any connection. Appellant is correct in his contention that contracts may be made by telegrams and letters, and this court has several times held that, when so evidenced, it is the duty of the court to interpret the contract and declare its terms. In the instant case, however, the only telegrams introduced was a telegram from the appellee's salesman to appellee, and a reply to that telegram. In other words, an exchange of telegrams between appellee and its salesman, and these do not purport to make a contract. The contract sued on is plain and unambiguous, and both parties are bound by its terms, and it would serve no useful purpose to review the authorities to which attention has been called by the parties. If the second contract had been

executed, if it had been accepted at the Chicago office, then it would have been binding, and the appellant would have been entitled to damages for its breach, but the contract on its face shows that Flanders signed it as salesman for the Yates American Machine Company, stating on the contract itself that it was subject to approval at appellee's office in Chicago. Until accepted, neither of the instruments could be sued upon by either party, and neither party is entitled to damages for breach of a contract which has not been made. In this instance, each had not been accepted by the office in Chicago. Appellant contends that he had the agreement with the salesman, but, after he claims that agreement was made, he signed the separate orders, and in neither was there any suggestion that it was dependent on any other contract or any circumstances not stated in the contract, but the contract signed by appellant contains the following statement: "In case of rejection or return of the property for any reason whatsoever, the purchaser waives all claims, demands and charges against the seller except to claim recovery of purchase money paid; that a retention of the property forwarded after thirty days from the date of arrival shall constitute an acceptance, by a conclusive admission of the truth of all representations made by or for the consignor, and void all its contracts of warranty, express or implied." This is a plain, unambiguous statement, binding on both parties. The appellant might have put in the contract a condition that it was not binding unless the goods mentioned in the other order were shipped, but he did not do so. The contract also contains the following statement: "It is agreed that this contract is not modified or added to by any agreement not expressly stated herein." This statement was in the contract signed by appellant. No matter what the conversation with the salesman was prior to this time, when he agreed to this contract with the above statement in it, he thereby agreed that it was not modified or added to by any other contract. More-

over, the contract stated "that delivery at any specified time is waived; that all claims for damages, actual or speculative, because of delayed shipments are waived. If from any cause whatever you are unable to obtain delivery from the manufacturer, you shall not be held liable for any damages thereby resulting to the undersigned by reason of such non-delivery or delayed delivery." We think the above contract is so plain and unambiguous that the parties were bound to have understood its terms, and they were bound to understand that it was not modified or added to by any other contract, and under the terms of the contract, the damages claimed by appellant could not be recovered, and therefore the evidence tending to show the damages was not complete.

Appellant complains about the refusal of the court to give certain instructions. He does not abstract the instructions, but, the conclusion having been reached that the court correctly directed a verdict for the appellee under the evidence in the case, it was of course not error to refuse to give the instructions requested by appellant.

The evidence was sufficient to justify the trial court in directing a verdict, and the judgment is therefore affirmed.

SCROGGINS *v.* OSBORN COMPANY.

Opinion delivered March 24, 1930.

Morrow & Williams, for appellant.

Hugh Basham, for appellee.

McHaney, J. Appellant, as administrator of the Wm. Scroggins estate, on September 9, 1926, filed his report and settlement with the clerk of the probate court of Johnson County. On January 17, 1928, no exceptions having been filed by any heir or creditor, the probate court made an order approving same. The next day the appellees who claim to be creditors took an appeal to the circuit court, and at the May term, 1929, the latter court, on a trial *de novo* found that the probate court erred in allowing appellant $1,003.74 for expenses incurred in administering said estate, and also in allowing him credit for $2,698.25 paid on the fourth class claim of Beal-Burrow Dry Goods Company against said estate.

From this judgment of the circuit court there is an appeal and cross-appeal.

As to the first item above mentioned, it appears from the record that the probate court first allowed appellant $1,385.57 as commissions due for handling the estate, but on appeal to the circuit court, at the October term, 1926, the court found that appellant was only entitled to $381.83 as fees for his services as administrator, for which judgment was rendered, and disallowed the sum of $1,003.74. This judgment was certified back to the probate court, and no appeal was prosecuted to this court, and it has therefore become *res judicata* as to the amount of fees or commissions due the appellant as administrator. Thereafter on January 17, 1928, the probate court entered the order approving the report and settlement heretofore mentioned, in which the sum of $381.83 was allowed as commissions in compliance with the judgment of the circuit court. But the court also found "that the administrator has made numerous trips from his home to Lamar, Arkansas, in the handling of said estate, and that the said administrator has been put to great expense in said matter, it is therefore the order of the court that said administrator have the sum of $1,003.74, in addition to this said commission, to compensate him as expenses in the handling of said estate." The law fixes the administrator's compensation for his services, § 183, C. & M. Digest, and no additional compensation may be allowed, either as expenses or otherwise. True, he is entitled to his ordinary expenses actually incurred in the administration of the estate, but in such case he should file an itemized statement of such expenses showing the necessity therefor, and that they were incurred for the benefit of the estate. Here appellant did not file an itemized statement or any other statement showing the amount of his expenses. He merely stated in his report that he had "been to considerable expense * * * made numerous trips from DeQueen, Arkansas, to Clarksville, * * * and that he believes

* * * he ought to be paid for the expense of said trips." He asked the court to allow him such an amount for expenses as "the court may deem proper." This was an insufficient showing to justify the court to make an allowance for expenses, and the circuit court properly disallowed it on the face of the record, since there was no evidence introduced in the circuit court tending in any way to justify this allowance.

As to the second item for $2,698.25 paid to Beal-Burrow Dry Goods Company on a fourth-class claim, appellant's report and settlement does not show that he took credit therefor therein. The proof shows the claim was paid in February, 1926, and the report was filed in September, 1926. If appellant paid the claim, he should have taken credit for it in his account. Since he did not do so, we think it was error to surcharge his account in this respect.

Appellees have cross-appealed, contending that the court erred in allowing the widow dower in the sum of $5,776.07 and in allowing appellant credit in his account for the sum of $6,045.64 paid to various creditors on account as shown in his report. We do not agree with this contention. If appellees complained of these items in the circuit court, the record does not show it. They filed no exceptions to the report in the probate court, and none in the circuit court. It was not necessary that they do so in the probate court in order to appeal to the circuit court, as contended by appellants, as this court has held to the contrary. *Stricklin* v. *Galloway*, 99 Ark. 56, 137 S. W. 804. See also § 2258, C. & M. Digest. But in the circuit court on appeal we think the appellees should have filed exceptions in writing challenging the particular items objected to. 3 Woerner on American Law of Administration, p. 1848-1849.

Moreover, appellees did not file a motion for a new trial, and are therefore in no position to complain of the above items.

The case will therefore be reversed and remanded as to the item $2,698.25, and in all other respects it will be affirmed. It is so ordered.

[redacted]

ROBINSON *v.* HOLMAN.

Opinion delivered March 24, 1930.

[redacted]

Jno. A. Hibbler, Booker & Booker, and *Scipio A. Jones,* for appellant.

June P. Wooten and *D. K. Hawthorne,* for appellee.

McHANEY, J. Appellants brought this action to establish their right as negroes and Democrats to vote in Democratic primary elections in this State. The appellees are members of the Democratic City Central Committee of Little Rock, Democratic Primary election officials of said city in a primary election held November 26, 1928, for the purpose of selecting nominees of the Democratic Party for city officials, and the chairman and secretary of the Democratic State Central Committee. The case was submitted to the chancery court on an agreed statement of facts substantially stated as follows: That appellants are citizens, residents and taxpayers of the city of Little Rock, Arkansas, are qualified electors, and supported the Democratic nominees in the

general elections in 1926 and 1928; that they voted in the Democratic city primary held in Little Rock on November 26, 1928, by reason of a temporary restraining order issued by the chancery court, enjoining the primary officials from excluding them, without the consent or approval of the officials of the Democratic State Central Committee; that they have expressed and declared themselves in sympathy with the success of the Democratic Party, and are believers in its principles; that the following is one of the "Rules of the Democratic Party in Arkansas, adopted October 16, 1926, under the authority of the Democratic State Central Committee of Arkansas" which said rule is now in force, to-wit: "Whom to consist of § 2. The Democratic Party of Arkansas shall consist of all eligible and legally qualified white electors, both male and female, who have orally declared their allegiance to the principles and policies of the Democratic Party, as set forth in the platform of the last preceding Democratic National and State Convention, who have supported the Democratic nominees at the last preceding elections and who are in sympathy with the success of the Democratic party in the next succeeding election."

It was further agreed that, for the last 25 years in the State of Arkansas, all Democratic nominees had been elected at the succeeding elections for State officials, except members of the Legislature, and a few district officials.

The court dismissed the complaint for want of equity, and dissolved the temporary injunction theretofore issued. The case is here on appeal.

Appellants contend that a Democratic primary election is a public election under the Constitution and the laws of Arkansas, and that the above party rule deprives them of their right to vote solely because of color in violation of the Fifteenth Amendment of the Constitution of the United States. They further claim that they are being denied their rights as citizens of the United

States in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. Section 1 of the Fourteenth Amendment reads as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Section 1 of the Fifteenth Amendment reads as follows: "The rights of citizens of the United States to vote shall not be denied or abridged by the United States, or any State, on account of race, color or previous condition of servitude."

By the act of April 23, 1909, p. 505, now § 3754, C. & M. Digest, primary elections in this State were made legal elections in the following language: "Whenever any political party in this State shall, by primary election, nominate any person to become a candidate at any general election, regular or special, or for U. S. Senator, or for Congress, or any legislative, judicial, State, district, county, township or municipal office, the said primary election shall be, and is hereby made, a legal election." In 1917, the people of the State initiated and adopted what is commonly referred to as the Brundidge Primary Election Law, the objects and purposes of which were to safeguard the rights of candidates, to prevent fraud in primary elections, and to confer jurisdiction on the circuit courts in the matter of contests arising at the primary elections. This act fixed a definite time for holding elections, provided for printing of ballots, selection of judges and clerks, their duties and many other provisions and regulations set out in §§ 3757 to 3782, both inclusive, C. & M. Digest.

Nowhere is there to be found any provision in the statutes of Arkansas requiring any political party to hold

primary elections. The acts above mentioned are applicable only in the event the political party does hold a primary election.

It will be noticed that the prohibition in the Fourteenth Amendment is directed against the action of the State, "Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the law." Likewise the prohibition in the Fifteenth Amendment is directed against the action of the United States or of any State, "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color," etc.

The State of Arkansas has passed no law, depriving appellants or any other qualified electors, on account of color or for any other reason, of the right to vote. The party rule above quoted is merely a rule of the Democratic Party in Arkansas with which the State had nothing to do. A political party such as the Democratic Party in Arkansas is an unincorporated, voluntary association of persons sponsoring certain ideas of government or maintaining "certain political principles or beliefs in the public policies of the government." *Walls* v. *Brundidge*, 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C, 980; *Grigsby* v. *Harris*, 27 Fed. (2d) 942. As said by U. S. District Judge Hutcheson in *Grigsby* v. *Harris, supra*, (Texas): "But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and then only as members of the particular organization. They constitute no governmental agency. To provide nominees of political parties for the people to vote upon in the general elections is not the business of the State. It is not the business of the State, because in the conduct of the government the State knows no parties and can know none. Political parties are political instrumentalities. They are in no sense governmental instrumentalities."

The State has nothing to do with the holding of primary elections. The statute fixes the date for holding primary elections, but the State appoints no officers to hold a Democratic primary. It does not pay the cost thereof. The machinery for holding a Democratic primary election in Arkansas is entirely an instrumentality created by the party with which the State, as a State, has nothing to do. Whereas in a general election the entire machinery for holding such election is the creature of the State.

Appellants have cited no case that sustains their contentions. The cases cited and relied upon grow out of discriminations complained of in general elections with the exception of *Nixon* v. *Herndon,* 273 U. S. 536, 47 S. Ct. 446. That case was a suit for damages against the judges of elections for refusing to permit the appellants to vote in a primary election in Texas. The right to vote was denied them by reason of a statute of that State which provided that "in no event shall a negro be eligible to participate in a Democratic Party primary election held in the State of Texas." The Supreme Court of the United States undoubtedly was correct in holding the act unconstitutional as being in violation of the Fourteenth Amendment, and found it unnecessary to consider the matter under the Fifteenth Amendment. After the decision in this case, the offending statute was repealed, and the Democratic Party in Texas adopted a rule similar to the rule of the Democratic Party in Arkansas, above quoted, and the same Nixon, having been deprived of the privilege of voting in the Democratic primary in Texas, brought another action for damages against the election judges at a Democratic primary in Texas refusing him the privilege of voting therein. The case was tried before District Judge Boynton of the Western District of Texas, El Paso Division, on July 31, 1929. The style of the case is *Nixon* v. *Condon,* 34 Fed. (2d) 464. It is there held that the action could not be maintained for the reason that the members of the Democratic

executive committee or the judges at the election in question were not officers of the State of Texas, nor were they officials or agents of the State of Texas. It was further said: "The court also holds that the members of a voluntary association, such as a political organization, members of the Democratic Party in Texas, possessed inherent power to prescribe qualifications regulating membership of such organization, or political party." See also *United States* v. *Gradwell,* 243 U. S. 476, 37 S. Ct. 407; *Karem* v. *U. S.,* 121 Fed. 250; R. C. L., p. 1075; *Newberry* v. *U. S.,* 256 U. S. 232, 41 S. Ct. 469.

Being a voluntary political organization and not an agency of the State, the Democratic Party had the right to prescribe the rules and regulations defining the qualifications of membership, and to provide that only white people could become members, without coming within the prohibition of either the Fourteenth or Fifteenth Amendment. The fact that nominees of the Democratic Party in Arkansas are always elected at the general election does not alter the situation. Neither does the fact that appellants are Democrats, that they believe in the principles of the Democratic party, and that they supported the nominees in previous general elections. There is no more reason to say that the Democratic party in Arkansas cannot make the rule in question, than there is to say that the Masonic bodies in Arkansas may not exclude them on account of color.

It necessarily follows that the chancery court correctly dismissed the complaint for want of equity. Decree affirmed.

LINEBACK *v.* HOWERTON.

Opinion delivered March 24, 1930.

A. L. Smith, for appellant.

E. B. Hunt, for appellee.

BUTLER, J. On the 19th day of March, 1929, E. O. Howerton, a Cherokee Indian, member of one of the Five Civilized Tribes, died in Delaware County, Oklahoma, at his place of residence, leaving real estate and personal property in said county, and real estate in Benton County, Arkansas, and also certain government bonds of considerable value in the custody of the First National Bank of Siloam Springs, Benton County, Arkansas. Howerton had resided at Siloam Springs, Arkansas, for a short time, and there became indebted to the Producers' State Bank of Siloam Springs in the sum of $1,500, evidenced by two promissory notes executed, respectively, on the 19th and 21st days of December, 1927, due in 90

and 60 days after date. Payments had been made on the notes in question which reduced the amount due to $1,478.97. After the death of Howerton an effort was made to collect from Irene Howerton, the widow of E. O. Howerton, on the two notes, but payment had been refused on the ground that they were not just claims.

On the 20th day of May, 1929, the Producers' State Bank filed in the probate court of Benton County a petition for the appointment of an administrator on the estate of Howerton, deceased, setting forth his death in Delaware County, Oklahoma, the indebtedness due by the deceased to the petitioner in his lifetime, and that the deceased left no relatives in Benton County who would be entitled to administer his estate, but left a widow and two infant children in Delaware County, Oklahoma, and that the widow had refused to administer on the estate of deceased in Delaware County, Oklahoma, or elsewhere; that the deceased owned an estate in Benton County, Arkansas, and prayed that citation be issued to Mrs. Howerton to show cause why an administrator should not be appointed in Benton County, Arkansas. The hearing of the petition was set for June 17, and notice of the application given Mrs. Howerton, who, on the day set for the hearing of the application, appeared and filed objections to the appointment of the administrator for the reason that the court had no jurisdiction to hear the application or to grant the administration, and that the statutory time in which to have an administrator appointed in the State and county of the decedent's residence had not expired. On the hearing the court rendered judgment in favor of the petitioner, appointing W. L. Lineback administrator, who qualified and gave bond. Letters were duly issued to him by the clerk of said court, from which order and judgment Mrs. Howerton appealed to the circuit court of Benton County, and on the 18th day of September, 1929, renewed her motion to dismiss on the ground that the deceased died domiciled in, and a resident of, Delaware County, Oklahoma,

that he was a member of the Five Civilized Tribes and a Cherokee Indian by birth, and that the court was without jurisdiction to hear and determine the petition for administration, and that the order made by the probate court was void.

A response was filed to this motion, and the case was heard on the pleadings and the testimony of a number of witnesses, from which it appeared that Howerton was a member of the Five Civilized Tribes and enrolled as a citizen in the Cherokee Nation. At the time of his death he owned real and personal property in Oklahoma and in Benton County, Arkansas. Testimony was also introduced, to which objection was made because of incompetency, tending to show that after the application for, and the appointment of, the administrator in Arkansas, letters of administration had been issued by the proper court in Delaware County, Oklahoma, and that the estate of the deceased was then in the process of administration in said State. The judgment of the court, after reciting the filing of the motion of Irene Howerton to dismiss for want of jurisdiction and the response thereto by the administrator, found that, "since there is now an administration of the estate of E. O. Howerton duly established in Delaware County, Oklahoma, not a great distance from Siloam Springs where the plaintiff resides, and that due notice to creditors to present such claims as creditors may have against said estate has been given, and that plaintiff yet has ample time to present its claim to the administratrix, and if disallowed may try the issue before the probate court of Delaware County, Oklahoma, and the court, being advised, doth dismiss said cause of action at the cost of plaintiffs." From this judgment the administrator has duly prosecuted this appeal.

After the judgment and while the appeal therefrom was pending in this court, the Producers' State Bank on the 23rd day of December, 1929, filed its claim for the balance due on the notes aforesaid amounting to the sum

of $1,478.97, inclusive of interest to October 10, 1929, in the district court in Delaware County, Oklahoma, and the appellee filed in this court her motion to dismiss the appeal herein because by the filing of the claim in the Oklahoma court the jurisdiction of that court was recognized, and therefore the appellant was barred from further litigation of the claim in the courts of this State.

We find no merit in the motion to dismiss the appeal, as it is well settled that an action pending in a foreign court cannot be pleaded in bar or abatement of a proceeding upon the same cause of action in the courts of this State (*Grider* v. *Apperson & Co.*, 32 Ark. 332; *Moore & Co.* v. *Emerick,* 38 Ark. 203) and a resident of this State, it has been held, will not be enjoined from prosecuting an action in another State because a suit by him upon the same claim is already pending in this State. *Green* v. *Cook,* 88 Ark. 93, 113 S. W. 1009, 16 Ann. Cas. 671. See also *Williams* v. *Ayrault,* 31 Barb. 364; 1 C. J., 1165, § 426.

We are unable to discover anything in the acts of Congress referred to and quoted by the appellee regarding the jurisdiction of Indians and their property that would preclude the courts of this State from dealing with property of an Indian, whether alive or dead, which is situated within the borders of this State. At most, these statutes were intended to apply to the personal and property rights of Indians in the Indian Territory, now a part of the State of Oklahoma, reserving to the government of the United States the right to preserve by law the property and other rights of the Indians acquired by treaty or otherwise and could not have, and were not intended to have, any extra-territorial effect.

The judgment of the court appears to have been bottomed on the fact that at the time of its rendition there was an administration pending in the courts of Oklahoma where the appellant's rights might be enforced, and on this ground administration in this State was denied. In this holding the trial court erred. Without

passing on the question of the competency of the testimony presented to establish the existence of the administration in Oklahoma, as the determination of that question is not necessary, we are of the opinion that the probate court of Benton County, Arkansas, had jurisdiction, and it was its duty, on petition, regardless of the administration pending in a foreign State, to appoint an administrator to protect the rights of the domestic creditors, thus relieving them from the necessity of having to invoke the aid of foreign jurisdiction to establish and enforce the claims against a decedent estate to residents of Benton County, and having property therein. It was the duty of the administrator, thus appointed, after the claims had been allowed by the court, to proceed to collect out of the assets in this State the amount of the claims, to report his action to the court and pay whatever surplus, if any, to the administrator of decedent's domicile. As the appellee had failed and refused to administer upon the estate of the decedent, the appellant, Producers' State Bank, as a creditor, had the preferential right next to the widow and heirs to move for the appointment of an administrator. We think there is no doubt as to the correctness of the position taken, and it is in accord with our decisions. *Clark* v. *Holt,* 16 Ark. 257; *DuVal* v. *Marshall,* 30 Ark. 231; *Williamson* v. *Furbush,* 31 Ark. 539; *Shegogg* v. *Perkins,* 34 Ark. 117.

In the case of *Clark* v. *Holt,* 16 Ark. 257-268, where an administration was granted in the State of Tennessee on the application of local creditors, and afterward letters testamentary were issued by the probate court of Allen County, in the State of Kentucky, this court said: "We are not to suppose that the county court of Davidson County, Tennessee, granted letters to the appellant for the purpose of authorizing him to administer such of John Clark's estate as was in Kentucky, where he was domiciled, or in any other State, but for the purpose of taking charge of and administering such of his assets * * * as were found within the jurisdiction of that

court; and this, we have seen from the general principles of law above quoted, that court had the right to do, and no local law of Tennessee to the contrary is averred. On this hypothesis, there would be no necessary conflict between the administration in Kentucky and that granted to the appellant in Tennessee, though the latter would be ancillary to the former, and the appellant would have finally to account to the executor or administrator, with the will annexed, appointed in Kentucky, that being the domicile of John Clark, and the laws of the domicile controlling the disposition of his estate, subject to the provisions of his will."

This decision has been followed and approved in the cases cited *supra,* and is a sufficient answer to the contention of the appellee, and necessitates a reversal of this case. The cause is therefore reversed and remanded to the circuit court of Benton County with directions to enter judgment in accord with the findings and judgment of the probate court.

NATIONAL BANK OF COMMERCE *v.* RITTER.

Opinion delivered March 31, 1930.

G. B. Segraves, for appellant.

J. G. Waskom and *N. F. Lamb,* for appellees.

HART, C. J., (after stating the facts). It is conceded that the only question presented by the appeal is whether L. V. Ritter has a vested interest under the terms of his father's will which may in equity be subjected to the payment of appellant's judgment against him. Counsel for appellant insist that the proper interpretation of the

will is that L. V. Ritter took under the will a vested remainder upon the death of the testator, and that his interest could be sold under execution issued in favor of appellant under its judgment against him during the life estate of the widow. On the other hand, counsel for appellee insist that L. V. Ritter took only a contingent interest under the will in his father's estate depending upon his outliving the life tenant.

The correctness of the decree of the chancery court, therefore, depends entirely upon what estate the remaindermen took under the will. It is a cardinal rule in the construction of wills that the intention of the testator should be carried out, and that the intention must be gathered from the will itself whenever it is possible to do so. The general plan of the will is to be considered by reading all of its provisions together, so that the intention of the testator may be gathered from the language he used, and the court may not substitute a new will for the one so made. It has been frequently said that it is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent.

It is clear from the provisions of paragraph 10 of the will that the testator did not intend that his sons or daughter, living when he made his will but not living when his widow died, should take any interest in his estate, that he or she should dispose of in the meantime, cutting off the other children. The will expressly provides that the children of the dead sons or daughter shall take and be substituted *per stirpes,* and not *per capita* for their parents. This would be impossible if the parents of such children could convey away their contingent share in the estate or if the same could be sold under execution against such parent during the period of the life estate. By the express language of paragraph 10 of the will, unless L. V. Ritter survived his mother, whatever interest he would have taken in that event went to his issue who were substituted in his place under the

will. Harry Ritter is unmarried, and has no issue. If he should die without issue before the widow, his interest would revert to the estate. Under the terms of the will, there can be no termination of the trust until the death of the widow, and the settlement or distribution of the estate cannot take place until that time. Hence, it is a case where the persons who may take under the will are uncertain and cannot be known until the death of the widow occurs. The children do not take a vested remainder, but a contingent one. The objects of the trust, as created by the testator, have not been accomplished and will not be accomplished until the death of the widow.

Until that event occurs, it cannot be known who will be the beneficiaries under the will. L. V. Ritter has no interest which he could convey, because it is not certain what his interest will be, if any, until the death of his mother, and it is clear that no sale could be made under execution against him of any greater interest than he could convey by deed or will. Page on Wills, (2d Ed.) vol. 2, § 1119; *Liberty Central Trust Co.* v. *Vaughan,* 167 Ark. 219, 267 S. W. 361; *Eversmeyer* v. *McCollum,* 171 Ark. 117, 283 S. W. 379; *Hurst* v. *Hildebrandt,* 178 Ark. 337, 10 S. W. (2d) 491.

Counsel for appellant rely upon the case of *Jenkins* v. *Packingtown Realty Co.,* 167 Ark. 602, 268 S. W. 620. In that case there was a devise to a son and wife for their lives with remainder to their children. There was a contingent remainder in the afterborn children of the devisees, which became vested upon the coming into being of a child of such union.

In the present case the estate in remainder is limited to take effect upon the death of the widow, and it is limited to such of the children designated in the will as shall be living at her death. Whether any of such claims will vest, or, if so, how many, is uncertain and cannot be known until the event occurs. *Augustus* v. *Sebolt,* 3

Met. (Ky.) 155; and *Brandenburg* v. *Thorndike,* 139 Mass. 102, 28 N. E. 575.

Therefore, the decree will be affirmed.

[redacted]

AMERICAN COMPANY OF ARKANSAS *v.* WHEELER.

Opinion delivered March 31, 1930.

[redacted]

[redacted]

Saxon & Warren and *H. G. Wade,* for appellant.

McMillen & Scott and *Carmichael & Hendricks,* for appellee.

HART, C. J., (after stating the facts). Counsel for the insurance companies claim that they were entitled to file a suit in the nature of a bill of interpleader in order to avoid a multiplicity of suits between the conflicting claimants to the fund agreed to be paid by the insurance companies on the fire insurance policies in question. They rely on the case of *Chicago, Rock Island & Pacific Railway Company* v. *Moore,* 92 Ark. 446, 123 S. W. 233, where it was held that a bill in the nature of interpleader is one in which the complainant seeks certain relief of an equitable nature concerning the fund in dispute in addition to the interpleader of conflicting claimants. In that case it was also held that where a creditor sued in a court of one county, and subsequently was made a party to a bill of interpleader in the court of another county, and restrained from proceeding further in the former suit, he should have appealed in the latter court and set up all his rights there, and cannot litigate his claim in the former court. That case is determinative of the right

of the insurance companies to file a suit in the nature of a bill of interpleader, but it is not conclusive of the rights of the parties under such a suit.

The chancery court having jurisdiction in the suit in the nature of a bill of interpleader, according to the usual practice, could restrain the several parties to the suit from proceeding in other courts to have the same matters adjudicated; but it by no means follows that one of the defendants could be divested of rights which he had already acquired by judgment in another court of competent jurisdiction. Such a doctrine would entirely destroy the conclusive character of judgments between parties and privies as to the matters which were the subject of litigation. It is a rule of universal application that a question of law in issue in a former suit, and which was there judicially determined, is conclusively settled by the judgment thereon in so far as the parties to that action and persons in privity with them are concerned. The matter concluded by the judgment could not be again litigated in any future action between such parties or privies in the same court or in any other court of concurrent jurisdiction upon the same cause of action. The priority of the judgment upon the same cause of action in the determining test. *Sallee* v. *Bank of Corning,* 134 Ark. 109, 203 S. W. 276.

On the 7th day of May, 1929, the American Company of Arkansas secured a judgment against W. F. Conine in the garnishment proceedings to which the insurance companies had been made parties. This was before the insurance companies filed their interpleader in the chancery court. The judgment in the garnishment proceedings shows that the American Company of Arkansas had already secured a judgment against W. F. Conine, and that the garnishment proceedings were based on that judgment. Service of process was duly had upon the insurance companies, and this fact was recited in the judgment. The record shows that the case was heard upon the writs of garnishment, the interrogatories filed,

the answer of the garnishees, and the evidence introduced at the trial. The judgment in the garnishment proceedings was final and appealable. *Wilson* v. *Overturf,* 157 Ark. 385, 248 S. W. 898; *First National Bank* v. *Farmers' & Merchants' Bank,* 159 Ark. 384, 252 S. W. 34; *Bank of Eudora* v. *Ross,* 168 Ark. 754, 271 S. W. 703; and *Woods* v. *Quarles,* 178 Ark. 1158, 13 S. W. (2d) 617.

It is claimed by counsel for the insurance companies that they did not know that this judgment was rendered. This is no excuse. The judgment shows that service of process was duly had upon the insurance companies, and that they filed an answer. Thus, their appearance to the action was secured, not only by service of process, but also by their voluntary appearance in filing their answer. It then became their duty to follow the suit to the end, and they must take notice of all subsequent proceedings to the end of the action. *Trumbull* v. *Harris,* 114 Ark. 493, 170 S. W. 222; and *Farmers' Mutual Fire Ins. Co.* v. *Defries,* 175 Ark. 548, 1 S. W. (2d) 19.

No excuse whatever is offered on their part for allowing the judgment against them in the garnishment proceedings if they had any valid defense thereto. That judgment was final and appealable; and, not having appealed from it, the insurance companies are concluded now by it in so far as the rights of the American Company of Arkansas are concerned. It would be no answer whatever to say that Wheeler was not a party to that suit, and that they might have to pay the same claim twice on that account. It was their duty to have asked that he be made a party to that suit to the end that the rights of all interested parties and the conflicting claims might be litigated in the same suit.

C. B. Wheeler has been allowed to file an answer in the present suit in which he claims the insured property, and the American Company of Arkansas has contested his right to the proceeds of the insurance policies, so far as it is concerned, by alleging that the conveyance to him by Conine of the furniture and fixtures was in fraud of

their rights as a creditor of Conine. We agree with the American Company of Arkansas in its contention in this respect. The record shows that W. F. Conine and C. B. Wheeler were brothers-in-law. The furniture and fixtures insured formerly belonged to a partnership of which W. F. Conine was a member. The firm became financially embarrassed, and owed appellant in this action. About two years before the insurance policies were issued, it is claimed by Conine that he transferred the furniture and fixtures to C. B. Wheeler in payment of an indebtedness he owed Wheeler. Conine was permitted to remain in possession of the furniture and fixtures for the most of the time after the sale. This, in itself, was a circumstance indicating fraud. *Valley Distilling Co.* v. *Atkinson,* 50 Ark. 289, 7 S. W. 137; *Shaul* v. *Harrington,* 54 Ark. 305, 15 S. W. 835; and *Burke* v. *Sharpe,* 88 Ark. 433, 115 S. W. 145.

Wheeler was an unmarried man and lived with Conine most of the time after the sale. He worked for him for a part of the time. Both Conine and Wheeler were witnesses in the case; and, while they both testified that the sale was made, they did not give any satisfactory account of any indebtedness due Wheeler. They only stated that there was an existing indebtedness evidenced by a note. The note was not introduced in evidence, and the nature of the indebtedness was not explained. The property was not insured until nearly two years after they claim that the sale was made, and it was insured in the joint names of Conine and Wheeler. They also claim that the building belonged to Conine, and that the fixtures belonged to Wheeler, and that the policies were made in their joint names for their convenience. The property was destroyed by fire a short time after the insurance policies were issued. Wheeler lived with Conine, and was bound to know of the financial embarrassment of the firm of which Conine was a member. When all the attendant circumstances are considered, we are led to the conclusion that the transfer was made by Conine to

Wheeler to defraud the creditors of Conine, and that Wheeler had actual knowledge of the fact or was in possession of such facts as would constitute knowledge. *Harris* v. *Smith,* 133 Ark. 250, 202 S. W. 244.

The result of our views is, in so far as appellant is concerned, that the decree must be reversed and the cause remanded with directions to the chancery court to order the amount of its judgment and interest paid out of the funds deposited in the registry of the court by the insurance companies. Inasmuch as no appeal has been prosecuted by any of the defendants except appellant, the decree in other respects will be affirmed; that is to say, the remainder of the fund after satisfying the claim of appellant will be distributed by the chancery court in accordance with its former decree. It is so ordered.

FISHER *v.* TEXARKANA FOREST PARK PAVING DISTRICT NO. 3.

Opinion delivered March 31, 1930.

James D. Shaver and *James D. Head,* for appellant.

Gustavus G. Pope, for appellee.

SMITH, J. This appeal is from an order and judgment of the Miller Circuit Court establishing a rural paving improvement district adjacent to the city of Texark-

ana under the provisions of Act 126 of the Acts of 1923 (Acts 1923, page 84), and the amendments thereto.

The following findings of fact were made by the circuit court:

(1) That the last county assessment, by which the question of a majority in value of the property owners should be determined, is the assessment made by the county assessor of Miller County in 1927, as amended by the additional assessment made of Forest Park Addition by said assessor in September, 1928.

(2) "That in September, 1928, Joseph Eldridge, then the owner thereof, voluntarily went to the county assessor of Miller County, and assessed the lands forming what is known as Forest Park Addition, which said addition was platted in June, 1928, and filed with the circuit clerk, and which addition lies within said district, at the sum of twenty-five thousand ($25,000) dollars, which sum was in excess of the then market value of said lands, but that said assessment, having been made by the assessor, is binding on the court, and that the court cannot look to anything except to the assessment made by the county assessor."

(6) "The court finds that it is conceded by counsel for both sides that, without the additional assessment made by Joseph Eldridge of Forest Park Addition in September, 1928, a majority in value is with the remonstrants; and that including in the 1927 assessment the Forest Park Addition as made in September, 1928, by Joseph Eldridge, it is conceded that the petitioners have a majority in value in the district as petitioned for."

The finding of the court in regard to values is not questioned, and it is also conceded that, inasmuch as Forest Park Addition was platted into lots after the regular assessment had been made in 1927, §§ 7482 and 9918, C. & M. Digest, conferred authority to assess this property as lots in 1928, instead of as acreage property as had been done on the original assessment.

The section of the Digest first referred to provides that the circuit clerk shall certify to the county clerk, when any map or plat of any addition to any city or town has been filed in his office, the name of said addition and the date of the filing of the plat.

Section 9918, C. & M. Digest, provides that each assessor shall, at the time of taking the list of personal property, also take a list of all real property situated in his county that shall have become subject to taxation since the last previous listing of property therein.

It is also conceded that, had this supplemental assessment been made as the law contemplated it should have been made, it was the assessment of values which would have been used in determining whether or not a majority in value of the property owners had petitioned for the formation of the district.

It was held in the case of *Stevens* v. *Shull,* 178 Ark. 269, 10 S. W. (2d) 511, (to quote the syllabus): "Acts 1921, No. 395, p. 416, as amended by Acts 1925, No. 184, p. 548, providing that no single improvement shall be undertaken within paving improvement districts which shall exceed in cost 50 per cent. of the value of the real property therein as shown by the last county assessment, *held* to mean the assessment in force at the time the acts required to be done are performed, and not the assessment in force at the time the petition for such improvement was presented."

We think, however, that the supplemental assessment of the lots in the Forest Park Addition has been so far impeached that it cannot be used as the basis for determining whether a majority in value of the property owners petitioned for the creation of the district. The testimony clearly establishes the following facts. Eldridge, the promoter of the district, purchased in the early part of 1928 a forty-acre tract of land, which was then assessed at $1,300, and it was a portion of this land which was platted as the Forest Park Addition. The owner conceived the idea that the salability of these lots

would be increased if a paved road were constructed connecting the lots with the pavement in the city of Texarkana, and to that end the paving district here in question was petitioned for. The petition, as filed with the county clerk, did not contain the signatures of a majority in value of the owners of property in the district under the 1927 assessment, and the 1928 assessment was then made. The county assessor testified that he did not assess the value of the lots in the Forest Park Addition, but that he allowed Eldridge to fix the values, as he placed them far in excess of their actual market value. The result of this assessment was to increase the assessed value of Eldridge's property in the district to $25,000, and to give the petitioners for the improvement a majority in value according to that assessment. Eldridge frankly admitted that he had the lots adjacent to the road assessed at $800, and that their actual market value could not have exceeded $150 to $250 per lot. It was further shown that in 1929 Eldridge sought to assess these $800 lots at $10 each, saying that at the time he made the 1928 assessment he had a project to put over, which had been accomplished, and that he then desired to assess the lots at their true value of $10 per lot.

The circuit judge was of the opinion that, as the 1928 assessment referred to was the then outstanding assessment against the property in the district, it was the basis under the statute for the determination of the question of value, and that as a majority in value according to this assessment had petitioned for the district, he was required under the law to make an order establishing the district, thereby reversing the order of the county judge, who had denied the prayer of the petition.

We do not concur in the view of the learned circuit judge, for the reason that the 1928 assessment of the lots was fraudulent, and did not represent that fair assessment of values which the statute contemplated would be made by the county assessor for the usual taxation purposes which the improvement district statute pro-

vides shall be the basis for determining values. On the contrary, the undisputed testimony is that in making this assessment the county assessor had abdicated the function of his office and permitted Eldridge, for his own purposes, to place against the lots assessed a valuation far in excess of their market value, whereas it is a matter of common knowledge that the usual basis of assessment is 50 per cent. of the market value, and that in many cases even this value is not assessed.

The last preceding valid assessment was therefore that of 1927, in so far as this proceeding is concerned, and as it is conceded that the petition for the improvement does not contain a majority in value of the property owners according to the 1927 assessment, the judgment of the circuit court establishing the district must be reversed, and the petition will be dismissed. It is so ordered.

BAKER *v.* APPLEN.

Opinion delivered March 31, 1930.

Northcutt & Northcutt, for appellant.

L. B. Poindexter, for appellees.

HUMPHREYS, J. Appellees instituted this suit against appellant in the chancery court of Sharp County, Southern District, to cancel a deed executed by Joe Baker to said appellant on the 15th day of August, 1928, conveying the northwest quarter of the southwest quarter, section 10, township 15, north, range 4 west, in said county, and to have a resulting trust declared in said land in their favor. It was alleged, in substance, that the land in question was purchased by Joe Baker, appellees' and said appellant's father, in the year 1909 from a Mr. Gist with property of appellees, taking title in his own name, whereupon a resulting trust arose at once in favor of appellees to said land, and that on the 28th day of October, 1928, Joe Baker died intestate without having conveyed said land to them.

Appellant filed an answer denying each and every material allegation in the complaint, and specifically pleading laches on the part of appellees.

The cause was submitted to the court upon the pleadings and testimony adduced by the parties, which resulted in a finding that Joe Baker purchased said land with the property of appellees, and that a resulting trust therein arose in their favor, and a consequent decree cancelling the deed made by Joe Baker to said appellant for said land on the 15th day of August, 1928, and vesting title thereto in appellees, from which findings and decree is this appeal.

According to the preponderance of the evidence, reflected by the record, Leo Baker attained his majority in the year 1904, at which time his father, Joe Baker, gave him a horse, bridle and saddle which he took with him when he left home to make his own way in the world; that he did not return to reside again in the neighborhood until about six years; that during his absence each of his sisters, appellees herein, attained their respective majorities, whereupon, in order to equalize them with Leo

and each other, Joe Baker gave each a mule; that in the year 1909, by and with the consent of appellees and in their presence, Joe Baker traded the two mules, of the value of $300, for the land in question, with the avowed purpose and understanding that the land should become and be the property of appellees; that when Leo Baker returned to the neighborhood with his family he was in debt, and that, through the assistance of his father and sisters, he was enabled to make enough to pay his indebtedness and purchase a small home; that after the mules were traded for the land appellees with the assistance of their father, who was old, cleared up the land in question and built a home thereon; that the father, mother and two daughters continued to live in the home together as one family until each of the appellees married; that Malinda married Applen when she was thirty-one years of age, and Elneda married Britt when she was forty-one years of age; that after the mother died Joe Baker resided part of the time with each of his children in their respective homes; that in August, 1928, he left the home of Mr. and Mrs. Applen to live with his son, Leo, and on the following day after his arrival in Leo's home he conveyed the land to him because he conceived the idea that he was no longer welcome in his daughter's home; that at the time he was in a helpless condition physically, and died on the 28th day of October following; that the deed was placed upon record soon after its execution, and immediately after being recorded and before the death of Joe Baker this suit was commenced.

Appellant makes two contentions for a reversal of the judgment. The first being that there was no manual delivery of the mules by Joe Baker to appellees, and because of such failure the title to the mules never passed to them; and, second, that appellees are barred on account of laches.

(1). Although there was a slight conflict in the evidence, the overwhelming weight thereof is to the effect that Joe Baker gave each of appellees when they at-

tained their respective majorities a mule to equalize them with their brother, appellant herein; that appellees accepted the gift and thereafter used and exercised ownership over the mules; that Joe Baker recognized their ownership of the mules, and when he exchanged them for the land did so with their consent and in their presence. Both appellees testified that, in the event they had married before the mules were traded for the land, they would have taken the mules with them as their father had other mules for use on the place. Joe Baker told his neighbors that he had given the mules to the girls to equalize them with the brother on account of the horse, saddle and bridle he had given him. We think, as all parties lived in the same home, the gift was completed when appellees accepted and used the mules as their own. The rule laid down in 28 C. J., § 27, governs in the instant case. It is as follows: "The rule as to delivery is not so strictly applied to transactions between members of a family living in the same house, the law in such cases accepting as delivery acts which would not be so regarded if the transactions were between strangers living in different places. It is not required that the thing given should be removed from one common residence."

In the case of *Moore* v. *Cline,* 115 Ga. 405, 41 S. E. 614, a gift of a horse by a son to his mother was upheld, where they resided in the same house, and no actual delivery was made, but where the mother accepted the gift and exercised the rights of ownership and control over the horse thereafter.

A gift of horses by a father to his son was upheld in the case of *Horn* v. *Horn,* 152 Wis. 482, 140 N. W. 58, upon the declaration of the father that he had given the horses to his son, and the father's conduct thereafter in recognizing the son's ownership of them. There is no dispute that the mules which Joe Baker had given to his daughters were traded even, by their consent and in their presence, for the land in question. Their property was invested for them in the land, although the conveyance

was taken in the name of their father, so the law raised a resulting trust in the land in their favor. 26 R. C. L., p. 1214, paragraph 57.

(2). There is no merit in appellant's contention that appellees are barred by laches. Appellees resided upon this land with their father until their respective marriages. Elneda did not marry until she was forty-one years of age, so she resided thereon until a short time before the deed to the land was made to her brother, the appellant. It is only delay which works a disadvantage to another that operates as an estoppel against the assertion of a right. *Norfleet* v. *Hampton,* 137 Ark. 600, 209 S. W. 651. Filial respect and consideration prompted appellees not to insist upon their father executing a deed to them for the land. Within thirty days, or thereabouts, after Joe Baker made the deed to said property to appellant, and just as soon as they acquired the knowledge that he had done so, they filed a *lis pendens,* and instituted this suit to cancel the deed, and to enforce a resulting trust in said land. The suit was brought promptly after the execution of the deed, and no disadvantage resulted to appellant between the date of the deed and the institution of the suit. Appellant paid nothing for the land, so he acquired no equity under the conveyance superior to the equity of appellees therein. Under the facts in this case appellant's grantor could not have successfully pleaded laches as against the right of appellees in the land, and neither can appellant himself.

No error appearing, the decree is affirmed.

ROOT REFINERIES, INC., *v.* FORREST E. GILMORE COMPANY.

Opinion delivered March 31, 1930.

Marsh, McKay & Marlin, for appellant.

Mahony, Yocum & Saye, for appellee.

HUMPHREYS, J. This suit was instituted on August 1, 1926, in the Second Division of the chancery court of Union County, by appellee against appellant to recover $18,442.75, the alleged balance due it for furnishing the material and constructing an absorption gasoline plant, known as the Gilmore Gasoline Plant, for appellant adjoining its refinery plant near El Dorado, for the purpose of taking the gas arising from the other parts of its refinery plant and extracting the gasoline contents therefrom, and converting it into a merchantable article. Appellee agreed to furnish the material and construct the plant for $24,000, payable 25 per cent. on presentation of invoices, 25 per cent. in thirty days from date of the first payment, 25 per cent. sixty days from the date of the first payment, and 25 per cent. ninety days from the date of the first payment; the final payment to be dependent, however, on the plant showing by a ten-day test, conducted by appellant under the supervision of appellee, an efficiency of 105 per cent. as determined by standard charcoal tests.

The contract was made the basis of the suit; appellee alleged that it had complied therewith in every respect, but that appellant had failed and refused to make the three last payments provided for therein.

Appellant had refused to make the payments or conduct the test provided for in the contract on account of thirty-five alleged defects in the construction of the plant specifically set out in a letter delivered by it to appellee on June 13, 1926.

The contract provided that the plant should be constructed out of new materials, and specified the kind of

equipment to be used in the construction thereof which included 1 Bubble-Type Absorber.

Appellant did not file an answer to the original complaint referred to above for the reason that, after filing the complaint, the parties met to discuss and adjust, if possible, their differences, which meeting resulted in a supplemental contract providing for a ten-day test run which appellee guaranteed would produce certain results. The supplemental contract provided that, in case such results were not obtained by the ten-day test run, appellee should have the right to make a thirty-day test run to determine whether such results could be produced. One of the warranties on the part of appellee in the supplemental contract was that the test run would produce gasoline of good odor. At the conclusion of the ten-day test run on October 13, 1926, the appellant, acting through its vice-president, D. P. Hamilton, made the following indorsement upon the supplemental contract:

"Referring to above contract, of which this is a copy, at this date all obligations of Gilmore Company have been complied with, except odor. Gilmore is hereby granted an extension of thirty days from this date, or until November 12, to meet the odor requirement. Root Refineries, Inc. By D. P. Hamilton, V. P."

Immediately after this indorsement was made, appellee conducted the thirty-day test run in an effort to correct the odor of the gasoline, and the gasoline produced convinced appellant by actual use of same in two automobiles that the defect in odor had been cured, whereupon it directed appellee to call at its office in New Orleans, and get the balance of the purchase price for the plant. It did so, and on November 12, 1926, received $10,000, and on November 30, 1926, $5,000 more, leaving a balance due it on the contract price of $3,000. Subsequently, and, after making the last two payments, appellant discovered that the odor in the gas being produced by the plant had not been corrected, and refused to pay the unpaid balance of the purchase money.

Appellee then amended its original complaint praying judgment for $2,922.33 instead of $3,000, due to the fact that it had theretofore omitted to give a few small credits to which appellant was entitled.

Appellant filed an answer to the amended complaint denying any liability under the provisions of the contract, and a cross-complaint for $4,325 on account of deficient material used in the construction of the plant, $24,302.95 on account of losses sustained by reason of gasoline lost on account of being off color and of bad odor, penalties, etc., and $21,000, which had been paid upon the purchase price, making a total claim of $49,627.95.

Appellee then filed an answer denying the material allegations in the cross-complaint.

The cause was submitted to the trial court on June 24, 1929, upon the pleadings and testimony adduced from which the court found that appellant owed $2,922.33, representing the balance of the purchase price which it had not paid, but that appellant was entitled to an off-set amounting to $1,800 for the cost of a Bubble-Type Absorber which had not been used in the construction of the plant as provided in the original contract. A different kind of an absorber had been used which leaked and failed to give complete satisfaction. It was not discovered until after the last thirty-day test run, and after the last two payments had been made that the absorber used in the construction of the plant was not a Bubble-Type Absorber. As soon as this was discovered, the absorber used in the construction was torn out and a Bubble-Type Absorber installed by appellant at an expense of $1,800. After installing the new Bubble-Type Absorber appellant continued to use the plant.

Both appellant and appellee have appealed from the decree of the court, appellant contending that it should have been allowed $9,194.64 of its counterclaim from which should have been deducted a balance of $2,922.33 due on the contract price, and a judgment rendered in

its favor against appellee for the sum of $7,272.30; and appellee contended that the cross-complaint should have been dismissed for the want of equity, and judgment rendered in its favor for $2,922.33 with interest thereon at the rate of 6 per cent. per annum from November 12, 1926.

Appellant construes the contract as one expressly warranting the kind and character of materials to be used in the construction of the plant, and that when installed it would produce gasoline of water white color and of good odor, and relies for a reversal of the decree and a net recovery upon its cross-complaint of $7,272.30 under the rule or doctrine that a purchaser may retain machinery or other articles purchased under warranty, and either sue on the warranty for his damages or recoup damages when sued for the purchase price. The rule relied upon is a correct statement of the law, so announced in the cases of *Courtesy Flour Co.* v. *Westbrook,* 146 Ark. 17, 225 S. W. 3, and *Keith* v. *Fowler,* 169 Ark. 176, 273 S. W. 706, and reaffirmed in the case of *Siegel-King & Co.* v. *Penny & Baldwin,* 176 Ark. 336, 2 S. W. (2d) 1082; but, of course, the rule would have no application to acceptances or retentions of property by purchasers after tests had been made pursuant to provisions in the contract showing the fulfillment of the warranties or compliance with them; the test would conclude the purchasers right to a recovery upon the warranties except for defects not discoverable by the test. The very purpose of the test in the instant case was to determine whether appellee had complied with its warranties as shown by the contract itself, and the indorsement of appellant on the supplemental contract. It is not contended that any fraud was practiced by appellee upon appellant in making either the ten-day or the thirty-day test run. Appellant agreed to, and was bound by the result of the tests showing full compliance with its warranties, except as to latent defects not discoverable by the tests. The failure of appellee to install a Bubble-

Type Absorber was not discoverable by the test. In order to determine whether a Bubble-Type Absorber was installed in accordance with the contract, it was necessary to take it out and break it in two. The absorber installed leaked and failed to give satisfaction, so appellant took it out and installed a Bubble-Type Absorber, and in doing so discovered that it was not the type contracted for. This discovery was not made until long after both tests had been made, and after it had made the second and third payments on the contract price. Appellant was not estopped from recouping its damages in this suit for the balance of the purchase price on the warranty that appellee would use a Bubble-Type Absorber in the construction of the plant. The undisputed testimony showed that the cost of such a Bubble-Type Absorber was $1,800, so the trial court properly allowed the cost thereof as an off-set against the balance due on the contract price.

The decree is therefore in all things affirmed.

HOYLE *v.* HOYLE.

Opinion delivered March 31, 1930.

[redacted]

[redacted]

[redacted]

Wilson & Martin and *Compere & Compere,* for appellant.

Clary & Ball, for appellee.

KIRBY, J., (after stating the facts). The deed from C. T. Hoyle, to whom Chas. L. Hoyle and appellant, his widow, had conveyed the lands by a regular warranty deed, reconveying the land to C. L. Hoyle was not recorded until two or three years after C. T. Hoyle and his wife had conveyed the same tract of land to R. L. Hoyle by a warranty deed duly recorded for a recited consideration of $1,500. Appellant, the widow of Chas. L. Hoyle, the father of these two sons and the former owner of the land, was not entitled to the land in controversy as the homestead of decedent, her husband, since decedent was not the owner or in possession of same at his death if the deed from C. T. Hoyle to R. L. Hoyle was a valid conveyance of the property as it appeared to be.

She brought suit to cancel the conveyance and to secure possession of the property claimed as a homestead and her dower right therein, and the court decreed a cancellation of the deed from C. T. to R. L. Hoyle and her right to a homestead therein, as the widow of C. L. Hoyle, deceased, and also her dower.

The court did not err in holding she was not entitled to rents for use of the land, of which she was not in possession and the title of which appeared to be in R. L. Hoyle, until after she established her right thereto, and procured the cancellation of the deed to R. L. Hoyle, and a decree for the possession of the homestead premises.

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

PARKER *v.* KEENAN.

Opinion delivered March 31, 1930.

Parker & Parker and *W. P. Strait,* for appellant.

Majors & Robinson, for appellees.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not giving her requested instruction No. 1, directing a verdict in her favor for the amount of rent due, taking into consideration the contract price and adding to that amount, if they found the market price of cotton was 15 cents or more on October 1, 1928, the amounts additional as stipulated in the written contract.

The court properly refused to allow the terms of the written contract, unambiguous in its provisions, abrogated, contradicted or varied by the parol evidence. The undisputed testimony shows that the lessees, Keenan and Cowger, were familiar with the leased premises and had been for sometime, one of them owning lands in the immediate vicinity and both of them traveling the public roads through the lands.

The husband of appellant, her agent who made the contract and prepared the written instrument, testified that there were no terms of the contract other than as included in it, and that no representations whatever

were made about the character of the lands rented or assurances given that they were above overflow, or high and well drained.

Keenan testified that he had only discussed the matter of renting the lands with Mr. Parker, appellant's husband and agent, and that Cowger talked it over with him and did not think they should have to pay 24 bales of cotton as rent, suggested that 21 or 22 would be a reasonable rental, and told him to take up the matter of the price again with Parker, but also to agree to lease the lands if he could not get them for a less price than the 24 bales of cotton.

Keenan owned and cultivated lands within one and one-half miles of the lands leased herein, and Cowger did not dispute having made the statement and agreement with Keenan to rent the lands at the price at which Keenan told him they could be had, 24 bales of cotton, if he could not procure a less price, without ever having seen or discussed the matter of the rental with the landlord or her agent. Keenan was unable to procure it for a less price and agreed to take the lands for 24 bales of cotton rent, and the written contract was prepared and executed by the parties accordingly.

There is nothing in the contract indicating that the landlord gave any assurances about the quality or kind of land as it is now claimed was done, and certainly it was a matter of such great importance as would not have been left out of the contract for rental of the place, if it was agreed on. Keenan did not testify that any such warranty or guaranty of the condition or quality of the land was made before the agreement upon the terms of the contract, and it is shown from the undisputed testimony that there were no terms agreed on or representations made save those provided in the contract as executed.

The court erred in not directing a verdict in accordance with instruction No. 1, as requested, and the judgment will be modified accordingly, and a judgment

will be entered here for the amount the jury found was due appellant without any deduction therefrom of any amount of damages for alleged false warranty made as an inducement to the execution of the contract by appellees, and, as modified, will be affirmed. It is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY *v.* FORESEE.

Opinion delivered March 31, 1930.

Thomas B. Pryor and *Harvey G. Combs,* for appellant.

V. D. Willis, for appellee.

MEHAFFY, J. This action was begun by appellee against appellant to recover damages for killing a dog. It was alleged that the dog was killed in the night time and no one saw it killed. The evidence however, showed that it was found on the track, and there was blood and hair on the rails, and there seems to be no doubt that it was killed by the train. The evidence showed that the value of the dog was from $60 to $100. Neither the engineer nor fireman saw the dog at any time.

The jury returned a verdict for $25, and judgment was entered accordingly. Motion for new trial was filed, overruled and this appeal is prosecuted to reverse the judgment of the circuit court.

If the dog was killed by the operation of the train, 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. The engineer operating the train, testified that he was keeping a lookout and saw no dog at the place where this dog was killed. He also testified that there were weeds growing up by the side of the track, and, if so, a dog might have come out of the weeds immediately in front of the engine and been killed without the engineer seeing him. Another witness, however, testified that there were no weeds, that there had been, but they had been removed. If the only negligence relied on was failure to keep a lookout, then the appellant would have been entitled to a verdict because the appellant offered evidence which overcame this presumption. One witness testified that he heard the train, and that there was no warning given, no bell nor whistle. The fireman testified, that it was the duty of the engineer to give the signal, but that he did not remember whether it was given or not.

We said in a case recently decided: "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." *Mo. Pac. Rd. Co.* v. *Berry,* 179 Ark. 437, 21 S. W. (2d) 631.

The statute of Mississippi with reference to injuries caused by running trains was similar to the Arkansas statute, as was also the statute of Georgia. Each of these statutes was construed by the Supreme Court of the United States recently. The court held in the Mississippi case that: "The only legal effect of the 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 the jury upon all of the evidence. The statute

does not fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference. * * * The Mississippi statute created merely a temporary inference of fact, that vanished upon the introduction of opposing evidence. * * * That of Georgia, as considered in this case, creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate."

"The presumption raised by [Georgia Civ. Code] § 2780 is unreasonable and arbitrary, and violates the due process clause of the Fourteenth Amendment." *Western & A. R. R. Co.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445.

In the instant case, if the only evidence of negligence was failure to keep a lookout, the verdict would have had to be for the appellant under the engineer's testimony, but, since there was proof of failure to give the signal, and the appellant offered no evidence tending to show that it exercised care in this regard, the jury was justified in finding that, if the appellant had performed its duty by giving the signals, the injury might not have occurred. The statute creating a presumption authorizes a verdict only in cases where the company does not introduce evidence contradicting the presumption raised by the statute, and since the presumption of negligence in failure to give the signal is not contradicted, it was sufficient to justify the verdict, and the judgment is therefore affirmed.

MOFFETT *v.* TEXARKANA FOREST PARK PAVING, SEWER AND WATER DISTRICT NO. 2.

Opinion delivered March 31, 1930.

[redacted]

T. B. Vance, for appellant.

Gustavus G. Pope, for appellee.

McHANEY, J. Appellants brought this action in the chancery court attacking the validity of the organization of appellee district. The prayer was that it be declared void; that the commissioners be enjoined from proceeding further with the district; that the assessment of benefits be set aside and a levy of a tax thereon enjoined; that the water line proposed as a part of said improvement be eliminated, in the event the district be sustained; and that no assessments be levied for said purpose. The facts are that, in the summer of 1928, a petition, purporting to contain a majority in value of the owners of real property in the proposed rural improvement district, adjacent to the city of Texarkana, was filed

with the clerk of the county court of Miller County, praying an order of said court establishing the district for the purpose, 1st, of paving that part of County Avenue and 37th Street within the district; 2nd, of constructing a sewer system for the district; and 3rd, of building a water system therein, and to connect the water and sewer systems with those in the city of Texarkana. Thereupon the county clerk published a notice to property owners that the court would hear the petition on September 17, 1928. On that date the hearing was by agreement postponed to the 24th. Appellants appeared at the hearing, protested against the formation of the district, and the court denied the petition on the ground that a majority in value had not signed. An appeal was duly prosecuted to the circuit court, where, after a hearing, judgment was rendered establishing the district and naming the commissioners, which was certified back to the county court for further proceedings according to law from which no appeal was taken. Thereafter an assessor was appointed who made an assessment of benefits against the property, filed it, and notice was published that on a certain date the board would meet to equalize such assessments. This suit was brought prior to this meeting.

The chancery court entered a decree dismissing the complaint for want of equity as to the attack on the legality of the organization of the district. It found that the district was legally organized and not open to collateral attack. It further found that the assessment of benefits made by the assessor was arbitrary and void, and enjoined the commissioners from making any levy against the lands in the district, and from making any collection thereon. From this decree, both parties have appealed.

We think the court correctly held the organization of the district valid on collateral attack, and this suit constitutes a collateral attack on the judgment of the circuit court. The district was organized under act 126 of 1923, p. 84, and acts amendatory thereof, which provide an orderly course of procedure in the law courts to be pur-

sued in the establishment of the district. Appellants did not pursue the remedy provided. Instead of appealing to this court from the judgment and order of the circuit court, as provided in said act, they elected to abandon their direct attack by appeal and to substitute therefor this collateral attack in the chancery court. In *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390, 142 S. W. 836, this court said, relative to a collateral attack upon a domestic judgment of a court of general jurisdiction, that "It is well settled that every presumption will be indulged in favor of the jurisdiction of such court, and the validity of the judgment it enters. Unless it affirmatively appears from the record itself that the facts essential to the jurisdiction of such court did not exist, such collateral attack against the judgment rendered by it will not prevail. * * * It is true that a judgment may be attacked collaterally when, by the record, it is shown that there was want of jurisdiction in the court rendering it, either of the subject-matter or of the person of the defendant." Not only does the record in this case fail to show want of jurisdiction in the circuit court of either the subject-matter or the parties, but it affirmatively appears that it did have such jurisdiction, given it by statute and by the voluntary appearance of all the parties therein. Hence appellants are concluded relative to the regularity of the organization of the district.

Many interesting questions are argued which, on appeal or other direct attack, might be fruitful of results, but which, on collateral attack, cannot be considered.

Another argument made is that the regular circuit judge being ill, a special judge, Judge Arnold, was elected to hold the June term of court. He being disqualified to try this particular case, another special judge, Judge Jones, was elected. By consent of all parties Judge Jones heard the evidence and argument in the grand jury room while Judge Arnold was proceeding with the regular business in the court room. The court took this case under advisement, and some weeks later in

the June term of court, Judge Arnold vacated the bench and Judge Jones announced the judgment of the court in this case. This was a valid judgment under the authority of *Cox* v. *Gress,* 51 Ark. 244, 11 S. W. 416, where it was said, "that a trial had by consent before a special judge at his chambers, while the regular judge is upon the bench, may be the foundation for a subsequent valid judgment, when the special judge assumes the functions of his office in court."

It is also argued that the act under which the district was organized is unconstitutional. The act has been held to be constitutional and valid by this court in the following cases: *Moyer* v. *Altheimer,* 168 Ark. 271, 270 S. W. 91; *Newton* v. *Altheimer,* 170 Ark. 376, 280 S. W. 641; *Reed* v. *Paving Dist. No. 21 of Jefferson County,* 171 Ark. 710, 286 S. W. 829; and *Morehart* v. *Mabelvale Rd. Imp. Dist. No. 29,* 178 Ark. 219, 10 S. W. (2d) 856.

Other questions are argued by counsel for appellants, which we have examined and find not open for consideration on collateral attack.

The district has appealed from the decree canceling the assessment of benefits. The statute provides the procedure to correct the assessment by hearing before the board of commissioners and the assessor as a board of equalization. Section 6 of the act provides that they shall hear all complaints against the assessment, and shall equalize and adjust the same, and further that "their determination shall be final, unless suit is brought in the chancery court within thirty days to review it." Appellants did not follow this procedure, but brought this suit attacking the district and the assessment without waiting for a meeting of the equalization board, without presenting their complaints to it, and without having a hearing thereon. We are therefore of the opinion that appellants attacked the assessment prematurely, and that they should have followed the procedure provided by statute by first attempting to have the assessment corrected by the board of equalization, and, if not satisfied,

to have then had it reviewed in the chancery court. This we assume they may still do.

The decree will be affirmed on direct appeal, and reversed and remanded with directions to dismiss the complaint for want of equity on the appeal of the district. It is so ordered.

KORY *v.* EAST ARKANSAS LUMBER COMPANY.

Opinion delivered March 31, 1930.

W. E. Beloate, Jr., and *Robert C. Powell,* for appellant.

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

BUTLER, J. In the early part of 1917, W. E. Beloate became the agent of Ida Less Kory, then Mrs. Ida Less, to conduct for her certain litigation, and to take charge of her property, consisting principally of a farm, and to rent and manage the same for her. A written contract was entered into between them by which the authority of Beloate was set out, and a power of attorney executed authorizing him to perform the acts and duties mentioned in said contract.

On the 15th day of May, 1921, the following note was executed:

"$648.40 Walnut Ridge, Arkansas, May 15, 1921.

"November 1, 1921, after date, for value received, I, we, or either of us, promise to pay to the order of the East Arkansas Lumber Company six hundred forty-eight and 40/100 dollars at the office of East Arkansas Lumber Company, at Walnut Ridge, Arkansas, with interest at ten per cent. per annum from date until paid, and with costs of collection or an attorney's fee in case payment should not be made at maturity. If the interest be not paid when due, to become as principal and bear the same rate of interest. The consideration hereof is lumber and materials furnished the maker.....hereof for improvements upon.....in the city of .....,
county of..... and State of.....,
the property of.....,the last materials of this account being furnished on the.....day of
....., 19..... It is hereby expressly understood and agreed that, in the making or in the accepting of this note, the rights of a lien for the consideration hereof are not waived, but may be filed to preserve

and enforce the same. The makers and indorsers of this note hereby severally waive presentment for payment, notice of nonpayment, protest and consent that the time of payment may be extended without notice thereof.

"(Signed) Ida Less,
"By W. E. Beloate.
"W. E. Beloate.

"Due November 1, 1921. P. O. Walnut Ridge, Ark."

At the time of the filing of the suit hereinafter mentioned the above note bore the following indorsements on the back thereof:

"Paid October 31, 1921, $63, interest $29.88.
"Paid October 2, 1922, $25.88.
"Paid November 13, 1922, $40, interest $60.
"Paid February 28, 1927, $75."

Suit was brought against Mrs. Ida Less Kory and W. E. Beloate. Mrs. Kory being a nonresident, notice of the suit was given by warning order, and a garnishment issued and served on J. D. Doyle personally and as receiver, it being alleged that he was indebted to Mrs. Kory at the time of the filing of the suit in a sum equal to or in excess of the amount sued for. Mrs. Kory answered denying any indebtedness to the plaintiff, appellee here, or that the note sued on was executed with her authority or knowledge or that any person, by her order or with her authority or knowledge, received any of the several payments indorsed on the note, or that the same had been paid; that she had no knowledge of any of the alleged transactions until after the suit had been filed on the 8th day of February, 1928. As a further defense to the action, she pleaded the statute of limitations in bar of plaintiff's cause of action.

Witnesses for the appellee testified that the note sued on was a renewal note, and that at the time the original note was executed and at the time the renewal note was made W. E. Beloate stated that he had authority to sign the same, and that he had a power of attorney giving him such authority. There was testimony to the

effect that Beloate was the agent of Mrs. Kory for the management of her farm in Lawrence County, and that he executed rent contracts, and also a building contract with one Roscoe Carty, and that from time to time he had maintained actions on behalf of Mrs. Kory with respect to controversies arising over the transactions had relating to the plantation which he managed.

J. W. Trieschman, a witness for the appellee, testified that he was secretary and general manager of the appellee company, and that once a year for the last three years the books and accounts of the appellee had been audited by a firm of auditors, Ernst & Ernst; that this firm had sent out verifications of the accounts due the appellee; that directions had been given the auditors to send accounts or statements to all persons indebted to the appellee as shown by its books, and that it had been the custom of the auditors to report to the appellee any account or statement which had been returned to them as undelivered; that it was the custom to send out these statements with the return card of the auditors in the upper left-hand corner, and that they had made no report showing that any statement addressed to Mrs. Ida Less Kory had been returned. The witness did not himself mail the notices, but gave instructions that they should be mailed, and the witness testified that the records showed that they were mailed out. The letters were not written by the witness but were made up from a form letter by the stenographers with directions to mail them to those whose names appeared on the books as being indebted to the appellee company. According to this witness, the appellee did not know where Mrs. Ida Less Kory lived, but the postoffice to which the notices were addressed was Walnut Ridge.

Mrs. Kory testified that no notice of any indebtedness claimed to be due the appellee were ever forwarded to her at St. Louis, her place of residence or elsewhere, from Walnut Ridge and that she never received from any source any such notices, and did not know until

after suit was filed that the appellee claimed she was indebted to it. She attached to her deposition a copy of the contract entered into between her and Mr. Beloate in 1917, and testified that after the execution of this contract and power of attorney, which was of record in the office of the recorder at the county seat of Lawrence County, she had never visited Walnut Ridge but on one occasion, remaining there only a few hours, and that she knew nothing of the details of Beloate's transactions with respect to the management of her farm.

The contract, in so far as it is material to the issues involved in this suit, after providing for the employment of Beloate to attend to litigations affecting Mrs. Kory's dower and homestead rights, contains the following provision:

"And after the said one-third interest for life in said real estate is so set off, he shall rent, lease, repair, collect rents, pay taxes, both general and special, and manage the life interest in said real estate to the best interests of her, the said Mrs. Ida Less, and act and do all things necessary and expedient for and in her behalf as her business manager in the promotion, care and protection of the same, looking to the best financial returns thereon, * * *.

"He shall obtain and reserve, and in her name and behalf, enforce for her until duly satisfied under the terms and spirit thereof, a landlord's lien on all crops to protect her interest in rents. He shall make all rent contracts in his name as her agent, and may bring such actions as may be necessary or expedient, and shall defend all suits that may be brought against said Ida Less growing out of the ownership and control of her rights in the estate of said Isaac Less, deceased, and is to do any and all things necessary for the proper care and protection of said estate and her interest therein in having the same properly and expediently set off to her. He shall pay and advance all necessary repairs, court costs and taxes, both general and special, out of the

yearly rents hereinafter referred to, and take credit therefor out of the annual return of said property."

On the same day upon which the above contract was made a power of attorney was signed by Mrs. Less, and duly filed and recorded in the office of the circuit clerk and ex-officio recorder of Lawrence County, which is as follows:

"Know all men by these presents: That I, Ida Less, for and in consideration of the sum of one ($1) dollar, by cash in hand paid, and other considerations, do hereby appoint and constitute W. E. Beloate my agent and attorney-in-fact, subject to the conditions of a certain contract entered into this day between us, to represent me in the estate of my late husband, Isaac Less, and to collect all interest I have in said estate, and to collect all rents that may be due me for lands that may be set aside to me as dower.

"This power of attorney, subject to conditions of said contract, which is made a part hereof, as if set out in full, it being understood that each party has a copy of the same.

"Witness my hand and seal this 21st day of February, 1917.

"(Signed) Ida Less (Seal)"

The power of attorney was duly acknowledged before a notary public in the city of St. Louis, and recorded as aforesaid in Deed Record No. 27 at page 253.

It is the contention of the appellee that W. E. Beloate was the general agent of Ida Less Kory in the management of her real properties in Lawrence County, and that the execution of the note sued on was within both the real and apparent scope of Beloate's authority, and in addition, that the action of W. E. Beloate in signing the name of Mrs. Ida Less to the note was ratified by her for the reason that notice of the execution of the same was given her, and that she had received the benefit of the materials, purchase price of which was represented by the note in question, and that the appellee was look-

ing to her for payment of said note. In support of the first contention the appellee quotes from 21 R. C. L. 853, where a distinction is made between the power of a general and special agent to bind the principal, and that a general agent is usually authorized to do all acts in connection with the business and employment in which he is engaged, and "where it appears that an agent has done an act for the benefit of his principal, and that the latter has not questioned the authority of the agent to bind him, it will be presumed, until the contrary appears, that the agent was duly authorized. Though the agent exceeds his authority, the principal will be bound to the extent that he has acted within the powers conferred on him. * * * And this permits him to adopt any authorized usage or mode of dealing. An agency to manage property implies authority to do with the property what has previously been done with it by the owners or others with their express or implied consent or to do with it what is usual and customary to do with property of the same kind in the same locality."

The appellee further quotes from the same volume, *supra,* pages 854, 855 and 856, where the well recognized rule is stated that all acts of an agent within the apparent scope of the authority conferred are also binding upon the principal, and that where the principal knowingly permits the agent to exceed the powers actually granted and receives the benefit thereof, such acts will bind the principal because within the apparent scope of his agent's authority, and "whenever the principal has placed an agent in such a situation that a person of ordinary prudence conversant with business usage and the nature of the particular business is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it."

This rule has been recognized and followed by this court in a number of cases which have been cited by

counsel for the appellee and to which we give our full assent. However, they have no application to the facts in the instant case. While Beloate might be said to be the general agent of Mrs. Ida Less Kory, his agency was one of limited power not arising from implication but from the express language of the written contract, the source and limit of his authority, and any declaration that he might have made with reference to his agency or his power could not be binding upon the principal. *Patten* v. *Robbs,* 175 Ark. 784, 300 S. W. 388. It was the duty of the appellee, in dealing with Mr. Beloate, to ascertain the extent of his authority, and this it could readily have done by calling upon him to exhibit the contract which by the express terms of the power of attorney, was made a part of that instrument. The agency was created by a written contract, and the nature and extent of the agent's authority must be ascertained from it, and such authority cannot be extended by the declarations of the agent himself or his conduct while in the performance of his duties, except where such conduct is shown to be known to the principal who having received the benefits of such conduct, has acquiesced therein. *American Agricultural Chemical Co.* v. *Bond,* 177 Ark. 164, 6 S. W. (2d) 2. By necessary implication the contract under which Beloate acted precluded him from pledging the credit of his principal, for it was expressly stipulated that "he shall pay and advance all necessary repairs * * * out of the yearly rents hereinafter referred to and take credit therefor out of the annual return of said property." Therefore, when Beloate executed the note in controversy to the appellee in the name of Mrs. Ida Less, he exceeded the authority conferred by the contract and the note had no binding effect in so far as Mrs. Less was concerned. Before the appellant could be said to have ratified this unauthorized act of Beloate, it must first be shown that she derived some benefit from the transaction. As to this, the record is altogether silent. If, in fact, building material was purchased and a note

given for the purchase price thereof, there is no showing that the material so purchased was used in the repair or construction of buildings on Mrs. Kory's farm. The most that is shown is the hearsay statement of W. E. Beloate, Jr., who, in a letter to Mr. Robert C. Powell of St. Louis, used the following expression: "I am advised that this is an action of debt for material purchased and used in building a tenant house on the farm." Further, it would be necessary to show that Mrs. Kory knew and acquiesced in the action of Beloate in purchasing the material, if in fact he did purchase it, and in using it on her farm. She testified positively that she knew nothing of this until long after the suit had been filed on February 8, 1928, and that she did not authorize Beloate to make the purchase or to execute the note. There is nothing in the record to contradict this statement. At most, there is the testimony of Mr. Treischman as to what he believed was done by his employees in mailing out the notices. If he is correct in his assumption that the notices were mailed to Mrs. Kory, there is a total lack of evidence that the same were ever forwarded to her.

We think the evidence wholly insufficient to sustain the contention that Mrs. Kory received the benefit of the transaction, and knew of and assented to the same. In our view of the evidence, the trial court erred in its finding and judgment in favor of appellee.

On the question of limitation, it might be said that with the exception of the notations on the note in question there is nothing to show that any payment has been made thereon. There is no evidence showing by whom the notations were made, or, indeed, if any payment had been made at all. No witness testified that any payments had been made, and in view of the appellant's testimony, we do not think the indorsement alone would be sufficient to establish the alleged payments. *Slagle* v. *Box,* 124 Ark. 43, 186 S. W. 299; *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. (2d) 1089, 59 A. L. R. 899.

The decree of the trial court is reversed, and the case is dismissed.

MISSISSIPPI VALLEY POWER COMPANY *v.* HUBBARD.

Opinion delivered March 31, 1930.

Hill, Fitzhugh & Brizzolara, for appellants.

J. F. O'Melia and *G. L. Grant,* for appellee.

BUTLER, J. The appellants, Isaac Lewis and James A. Lewis, were a partnership owning and operating a coal mine near Alix in Crawford County, Arkansas, which they had purchased together with the equipment from Ben and Howell Douglass. Over the shaft leading to the interior of the mine was erected what the witnesses have designated as a "tipple." This appears to be a structure composed of four large uprights slightly inclined toward the center from the perpendicular, braced

at intervals and extending upward a considerable number of feet. The manner of construction is not disclosed by the evidence or the purpose for which it was to be used, but from the photographs and references made by the witnesses we presume that it was a derrick-like structure used for affording means by which things might be raised or lowered into the mine. Within the tipple and near the shaft on sills laid upon the ground were three electrical devices called transformers. The mine was electrified, the electricity coming over the wires of the appellant, Mississippi Valley Power Company, strung on poles to a large pole about eighteen feet away from the tipple. From this pole the wires were carried into the tipple at a certain distance from the ground—one of the witnesses stated at about twelve feet from the ground—and fastened to one of the up-rights and there brought down the side of the up-right and connected with the transformers. One of these wires was called a high-tension wire, carrying a charge of about forty-four hundred volts. The other wires were called secondary wires, all of which were plainly in view. An iron pipe about 1¼ inches in diameter led horizontally from a boiler at a point outside the tipple to within the enclosure made by the same where it was attached by an elbow to a pipe of like dimensions extending downward through the shaft into the mine and there connected with other equipment, the pipe being used for the transmission of steam. This pipe was leaking steam at a point below the entrance to the shaft, and on the morning of the 22d day of September, 1927, Isaac Lewis, who was the foreman in charge of the operations of the mine, caused to be detached the pipe within the mine at a point about seventy feet below where it entered the shaft for the purpose of raising the pipe in order that the leak might be stopped. When this was done, the pipe was detached from the connections leading from the tipple outside, leaving about four feet of the horizontal pipe still attached to the elbow. The foreman then called to his assistance two miners and

one Andy Hubbard, and the four raised the perpendicular pipe several feet upward—estimated from three to seven feet—where it was tied to prevent its slipping down. The purpose of this was to raise the pipe so the leak would be above the mouth of the shaft in order that it might be closed by a clamp. This work was to be done by Andy Hubbard who was a blacksmith, and the general repair man of the coal company.

The pipe was raised at about 7:30 or 8:00 o'clock in the forenoon. After it was raised and tied, the foreman, in the presence of the two miners who were helping him to raise the pipe, told Hubbard, who was to close the leak, to be careful with it and not to turn the pipe—that there was no danger if he did not turn the pipe. The elbow on the pipe at that time, and the piece of pipe about four feet long projecting therefrom were in an opposite direction and north from where the wires were installed on the south side of the tipple. After having raised the pipe and given the precaution to Hubbard, the foreman and his helpers descended into the mine where they remained. Hubbard also descended into the mine for some purpose and afterwards came back presumably to place the clamp on the pipe which was leaking. Later on, between 11:00 and 12:00 o'clock in the morning, the foreman, on coming to the bottom of the shaft, noticed a smoke and odor, and getting in the cage came up to the top where he discovered Hubbard lying dead, the pipe was turned with the projecting horizontal part against the wire and in an opposite direction from the point to which it extended when he had last seen it. An examination of the body of Hubbard disclosed the fact that the current of electricity had passed into his body at some place on his right shoulder or arm. Whether the point of contact was at the shoulder or below on the arm is not clearly shown by the testimony. The arm was burned to the bone, the current passing through the body and going out through his left foot, bursting the foot and burning off one of the toes. The wire with which the

pipe had come in contact was the high tension wire carrying about 4,400 volts of electricity, which was sufficient to, and doubtless did, cause instant death.

The testimony is in dispute regarding the manner in which the tipple was enclosed—whether it was boarded up or not. However, the evidence is clear that the wires, after they reached the inside of the tipple as they were brought down by the uprights, were not enclosed so as to prevent a contact with them and in this condition were dangerous. Hubbard was a man of mature years, having been in the employ of the appellants Lewis since 1924, and working in and around electrified mines since 1926. He was a blacksmith by trade, and, as before stated, he was the general repair man for the coal company. He had used electricity in connection with his work, and could not be said to be inexperienced with reference to the uses and the dangers attendant upon it.

It is insisted by the appellee, administratrix of the estate of Andy Hubbard, and the plaintiff in the action in the court below, that the defendant, Mississippi Valley Power Company, and the defendants Isaac and James A. Lewis, who were partners doing business under the name of Lewis Coal Company, were concurrently negligent in the installation and maintenance of the electric wires leading from the telephone post into the tipple and down one of its uprights, in that these wires were not properly insulated or guarded so as to prevent contact with them, and that this negligence was the proximate cause of the death of Andy Hubbard; and that the appellants were further negligent in not properly boarding up the tipple in order to prevent persons from coming in contact with the electric wires and devices installed within the same.

The defense of contributory negligence is interposed, and it is also contended by the appellant, Mississippi Valley Power Company, that whatever negligence might have existed with respect to the maintenance and placing of transformers and wires within the tipple, it is not responsible therefor, as its wires extended only to a pole

about 18 feet away from the place where the injury occurred.

It is not necessary for us to discuss or decide these questions, for the facts show that the injury and death of Hubbard was the result of a risk assumed by him. It is true employees do not ordinarily assume risks created by the negligent act of the master, and that he has a right to require of the master to provide suitable appliances and a safe place in which to do his work, and to do such is the clear duty of the master. *St. L. I. M. & S. R. Co.* v. *Touhey,* 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109; *Pettus & Buford* v. *Kerr,* 87 Ark. 396, 112 S. W. 886; *St. L. I. M. & S. R. Co.* v. *Holmes,* 88 Ark. 181, 114 S. W. 221. But it is equally true that where the danger arising from the negligent conduct of the master is so apparent and obvious in its nature as to be at once discoverable to one of ordinary intelligence, an employee, by voluntarily undertaking to perform his work in such a situation, assumes the hazards which exempts the employer from liability on account of injury to the employee. *Wisconsin & Ark. Lbr. Co.* v. *McCloud,* 168 Ark. 352, 270 S. W. 599; *C. R. I. & P. Ry. Co.* v. *Allison,* 171 Ark. 983, 287 S. W. 197; *Ward Furniture Co.* v. *Weigand,* 173 Ark. 762, 293 S. W. 1002. Especially is this true where, in addition to the information he may gain by the casual exercise of his senses, he is expressly warned of the dangers incident to his situation. We think, in view of the age, occupation, and experience of the deceased, the readily discoverable nature of the dangers incident to his work and the warning he had received, that Hubbard assumed the risk incident to his work. *Hunt* v. *Dell,* 147 Ark. 95, 226 S. W. 1055; *River, Rail & Harbor Co.* v. *Goodwin,* 105 Ark. 247, 151 S. W. 267; *Williams Cooperage Co.* v. *Kittrell,* 107 Ark. 341, 155 S. W. 119.

The judgment of the court below is reversed, and the cause remanded.

HICKS *v.* STATE.

Opinion delivered April 7, 1930.

Harney McGehee, for appellant.

Hal L. Norwood, Attorney General, for appellee.

PER CURIAM. Tom Hicks prosecutes this appeal to reverse a judgment of conviction for the crime of uttering a forged instrument. There is no bill of exceptions, and the sole reliance for a reversal of the judgment is that the court erred in overruling the defendant's motion in arrest of judgment. Under our statute, a judgment can only be arrested on the ground that the facts alleged in the indictment did not constitute a public offense within the jurisdiction of the court. *Dover* v. *State,* 165 Ark. 496, 265 S. W. 76; and *Lewis* v. *State,* 169 Ark. 340, 275 S. W. 663.

The indictment contains the essential elements of the crime charged as defined in *Ferrel* v. *State,* 165 Ark. 541, 265 S. W. 62. There is no error upon the face of the record, and the judgment will be affirmed.

CAMPBELL *v.* HARGRAVES.

Opinion delivered April 7, 1930.

[redacted]

Mann & Harrelson, for appellant.

HART, C. J., (after stating the facts). The receiver was appointed upon application of the mortgagee. After his appointment, the receiver gave bond as required by the court and duly qualified as such receiver. After this, the property which he was ordered to take charge of was deemed to be in custody of law. The court acquired jurisdiction over the property when the receiver was appointed, the judicial process served upon the mortgagor, and the receiver duly qualified as such, although he did not in fact take charge of the property. 23 R. C. L. par. 68; *Buchanan* v. *Hicks,* 98 Ark. 370, 136 S. W. 177, 34 L. R. A. (N. S.) 1200; and *Palmer* v. *Texas,* 212 U. S. 118, 29 S. Ct. 230.

It will be noted that the receiver was appointed and qualified on October 29, 1925, and that he did not report his proceedings to the court until March 28, 1927. It is true that he testified that he examined the live stock soon after his appointment and reported to the attorney for the mortgagee that the live stock was so old and worthless that it would not pay to keep them, and that he understood from the acquiescence of the attorney for the mortgagee that he accepted his report and did not wish him to take charge of the live stock. This, however, did not exempt him from liability to the mortgagor. He was appointed by the court, and the mortgagor would not have the right to interfere with his possession of the live stock without permission of the court. It was his duty to have reported the matter to the court and to have secured his discharge to the end that the mortgagor might have been notified that he might retake possession of the live stock. Not having done so, the receiver was guilty of negligence in the discharge of his

duty, and was liable to the mortgagor for any loss or damages occasioned thereby.

We are of the opinion, however, when the evidence is carefully considered, that the chancellor erred in finding the amount of damages in favor of the mortgagor in the sum of $920. It is true that he was justified in so finding under the evidence adduced in favor of the mortgagor; but we think that, when all the attendant circumstances are considered, this amount was too much. The mortgagor had not seen the live stock for some time prior to the appointment of the receiver. The testimony of the sheriff who was appointed receiver was that when he went to examine them they were poor and were not worth feeding. There was only one young horse in the number, and this one had the fistula, and soon died from that disease. The other four head of live stock were old, and either died from starvation or old age, or a combination of both. Hence the mortgagor could not recover any sum for their usable value. Two of the mortgaged animals were afterwards taken charge of and sold by him for what appears to have been their worth. This left only three animals to be accounted for; and, according to the testimony of the mortgagor, they were only worth $230.

We also think the preponderance of the evidence shows that the plow tools and farming implements were greatly overvalued by the mortgagor. The evidence is not very clear as to whether the amount of farming tools and farming implements testified to by the mortgagor were in use on the farm when the receiver was appointed. In any event, according to the testimony of the tenants on the farm they were very old and were practically worn out. Two of the tenants testified that they were not worth more than $50 or $60. Without any further discussion of the evidence or reviewing it in detail, we are satisfied, after a careful consideration of it as it appears in the transcript, that the live stock and farm implements were not worth in the aggregate more than

$500. Inasmuch as chancery cases are tried *de novo* in this court, the decree will be modified, and judgment will be rendered in favor of S. S. Hargraves against J. M. Campbell, receiver, and T. A. Burford, the surety on his bond, for the sum of $500, and this sum shall bear interest from this date at the rate of six per cent. per annum, if the same is not paid within thirty days.

It is so ordered.

ARKANSAS FOUNDRY COMPANY *v.* POE.

Opinion delivered April 7, 1930.

Buzbee, Pugh & Harrison, for appellant.

Sam T. Poe, Tom Poe and *McDonald Poe,* for appellee.

HART, C. J., (after stating the facts). It is first insisted that the judgment of the probate court removing B. C. Barnes as administrator of the estate of Orby King

and substituting in his place H. H. Morris, and abrogating the contract whereby B. C. Barnes, as administrator, had made a contract with Sam T. and Tom Poe to file and prosecute a damage suit against the Arkansas Foundry Company was correct, and that Sam T. and Tom Poe no longer had any right to represent the plaintiff in the damage suit.

We cannot agree with counsel in this contention. B. C. Barnes was duly appointed administrator of the estate of Orby King, and his contract with Sam T. and Tom Poe was approved by the probate court. Sam T. Poe then went to the State of Tennessee to see Jimmie King who was the father of Orby King, and his sole heir at law about the matter. They both testified in positive terms that Jimmie King ratified the appointment of Barnes and his contract with the appellees. Their testimony was corroborated by that of the attorney of Jimmie King in the State of Tennessee. He stated that Poe and Barnes came to his office with Jimmie King and told him all about the appointment of Barnes as administrator, and the suit which Poe had brought for damages. This attorney approved of the suit and advised Jimmie King and his brother to go to the State of Arkansas to see about the prosecution of the suit. According to the testimony of Tom Poe, after they arrived here, they ratified the appointment of Barnes as administrator and his contract with them to prosecute the damage suit.

It is true that this testimony is contradicted by that of Jimmie and Quinton King, his brother, who both testified that they did not know of the appointment of Barnes as administrator, and his contract employing Sam T. and Tom Poe to represent him in the damage suit. Their testimony, however, is inconsistent in itself. There could be no reasonable ground upon which to base the action of Barnes and Poe in going to the State of Tennessee and consulting him about the prosecution of the damage suit if they were not in some way interested in it. Jimmie King was the father of Orby King, and the sole

beneficiary of his estate. He was entitled to all of the proceeds of the suit, because there were no creditors of his son's estate. Then, too, the testimony of Jimmie King is weakened on cross-examination. He testified that he did not remember Barnes and Poe saying anything about the appointment of Barnes as administrator and Poe as his attorney when they came to Tennessee to see him. We think the evidence in the record clearly shows that Jimmie King ratified the appointment of Barnes as administrator of his son's estate and Barnes' employment of attorneys to prosecute the damage suit. Therefore, the decision of the circuit court on this branch of the case was correct. *St. Louis Southwestern Ry. Co.* v. *Terral,* 178 Ark. 475, 11 S. W. (2d) 763.

The undisputed evidence shows that Jimmie King was to recover the sum of $2,500 for signing a release of his claim for damages against the Arkansas Foundry Company, and that the company agreed to pay in addition whatever sum he would be required to pay Sam T. and Tom Poe or to Barnes. In other words, the effect of the evidence is that the defendant in the damage suit settled the case by paying Jimmie King the sum of $2,500, and also agreeing to pay his attorneys in the case.

This brings us to a consideration of the amount the attorneys were entitled to under their contract. We have copied that part of the contract in our statement of facts and need not repeat it here. B. C. Barnes, as administrator, agreed to pay Sam T. and Tom Poe fifty per cent. of all sums collected from the Arkansas Foundry Company or from any other person for it by reason of the claim for damages whether by suit, compromise, or otherwise.

In *Louisville, Evansville & St. Louis Rd. Co.* v. *Wilson,* 138 U. S. 501, 11 S. Ct. 405, the court quoted with approval the following: "The principle has long been established that a party should not run away with the fruits of a cause without satisfying the legal demands of his attor-

neys by whose industry and expense these fruits were obtained."

Counsel for appellant claim that the case falls within the rule announced in *St. L. I. M. & So. Ry. Co.* v. *Hays & Ward,* 128 Ark. 471, 195 S. W. 28, and cases cited. In that case it was held that a plaintiff has the right to settle a suit; but in making the settlement he must take into consideration that his attorney has a lien upon the cause of action, and under our statute may enforce it so that the plaintiff may not settle and deprive him of his rights under the contract with his client. In that case the client settled the suit without the consent of his attorneys, but there was no agreement upon the part of the railroad company to pay in addition the attorney's fee. Hence, the court held that the attorneys were only entitled to recover one-half of the amount that the client had received in the compromise settlement, because that was the amount of attorney's fee to which they were entitled under their contract.

Here the facts on this point are essentially different. We have a case where the defendant settled by paying the client a sum of money, and in addition agreeing with him that he would also pay his attorneys. On this question the cases are in conflict. All of them recognize the rule to be that the amount for which the parties agreed in good faith to settle is binding on the attorney, but they differ as to what this amount is. Case notes to 3 A. L. R. 481, and 40 A. L. R., p. 1533.

The leading case relied upon by appellant is *Proctor* v. *Louisville, Nashville Rd. Co.,* 156 Ky. 465, 161 S. W. 518, 3 A. L. R. 461. In that case, it was held that an amount which an attorney having a contract for a contingent fee on the percentage basis may recover in cases like this is to be computed as though the amount paid by way of compensation constituted the entire recovery. The court said that the amount the attorney was entitled to receive was absolutely fixed by the amount paid to the client. It was further said that, if the attorney

received one-half of the amount his client received, it does not concern him whether he was paid that amount by his client or by any other person.

The leading case on the other side of the question is *Johnson* v. *Great Northern Rd. Co.,* 128 Minn. 365, 151 N. W. 125, L. R. A. 1917B, 1140. It was there said that the agreement to pay the attorney was part of his settlement, and that the amount to be paid the client was not the whole of the settlement but only the client's part thereof. Therefore, it was held that the whole amount of the settlement on which the attorney's percentage is to be computed is that amount bearing such a proportion to the amount paid to the client as the whole bears to the portion representing the client's part. We think the rule there announced is in accord with the better reasoning.

In the case at bar, the defendant in the damage suit settled with the plaintiff for the sum of $2,500 with the agreement at the time that the company would pay B. C. Barnes, administrator, or Sam T. and Tom Poe, his attorneys, under the terms of their contract which had been approved by the probate court. The defendant had notice of this contract and the rights of the attorneys under it and expressly agreed to settle with the plaintiff and pay the attorneys whatever they were entitled to under the contract. Jimmie King, the beneficiary under the contract, did not attempt to settle the whole liability against the defendant. As we have already seen, the defendant knew that the attorneys were entitled to fifty per cent. of all sums collected from the defendant, and the release recites that it is executed in consideration of the payment of $2,500 to Jimmie King, and also releases all claims that he may have as the father and sole heir at law of the said Orby King, deceased, on account of the injuries which led to the death of Orby King, while he was working for the defendant. In addition, the defendant agreed to pay whatever amount was due the attorneys. The defendant knew that the client and the attorneys both had rights under their contract; and,

when it settled with the client for a stipulated sum to be paid him for his release, it also became liable for a like amount to the attorneys. Neither party was mistaken as to the facts of the case. The defendant knew the terms of the contract, and cannot be heard to interpose its erroneous interpretation of it as a defense to this action. The contract required that the fee should equal the amount of the client's share of the proceeds of any settlement, and it was evidently the intention of the parties that each receive an equal amount, so that when the defendant settled with the client for $2,500 and agreed to pay the attorneys' fees, it must be deemed to have agreed to pay them the same amount which it had paid the client. Therefore, the judgment will be affirmed.

BOONE *v.* TREZEVANT.

Opinion delivered April 7, 1930.

Ben F. Reinberger, for appellant.

Price Shofner, Ada Marett Carter and *Owens & Ehrman,* for appellee.

SMITH, J. On September 28, 1927, Henry Johnson obtained a loan from the Eagle Bond & Mortgage Company for $3,250 and executed a note therefor, and to secure the payment of the note he executed to Stanley H. Trezevant, as trustee for the mortgage company, a deed of trust on a certain lot which he owned in the city of

Little Rock. This note and the deed of trust securing it were acquired by Crump & Trezevant, who brought suit to foreclose the deed of trust when default was made in making payments as the note required.

The complaint in which foreclosure was prayed made W. H. Boone a party defendant, it being alleged that on January 3, 1928, Boone had entered into a contract with Johnson to purchase the mortgaged property, and had later done so, and had agreed to assume the payment of the note secured by the deed of trust.

There was a prayer for judgment against both Johnson and Boone, and that foreclosure of the lien be decreed. A receiver was appointed pending the foreclosure with directions to collect the rents on the house standing on the lot, and to hold these rents subject to the final decree.

Boone filed an answer, in which he admitted that on January 3, 1928, he had agreed with Johnson to purchase the property, the contract therefor contemplating the exchange of a quarter-section of land in Conway County for the said lot, but that he had rescinded the contract because of the failure of Johnson to comply with the terms of the contract for the exchange of the properties.

Boone filed a cross-complaint against his co-defendant Johnson, in which he alleged the following facts: His land was worth $2,000, and was assumed to be of that value in the trade. It was represented by the agent of Johnson that the city lot was worth $5,500, and that it could and would be sold by the agent representing Johnson for that amount, whereas the city lot was worth not exceeding $3,500, and when Boone became so advised he rescinded the contract on account of the false and fraudulent representation of value which had induced him to make the trade. He admitted that he had delivered a deed to his land to Johnson, but denied that he had received a deed to the city lot, and, after alleging that Johnson had sold the land, he prayed judgment against Johnson for $2,000, its alleged value.

Johnson filed an answer, in which he admitted all the allegations contained in the trustee's complaint. He filed an answer to Boone's cross-complaint, in which he denied that any false or fraudulent representations had been made to Boone; and also filed a cross-complaint against Boone, in which pleading the following allegations were made. That he had sold the city lot to Boone in consideration of a deed to Boone's land, and the assumption by Boone of the mortgage debt due the mortgage company, and the note of Boone in the sum of $250. That this contract had been fully carried out by the execution and delivery of deeds, and the execution and delivery of the $250 note. Johnson prayed that the court retain jurisdiction of the cause for the purpose of rendering judgment in his favor against Boone for any balance which might remain due upon the note to the mortgage company after the sale of the city property under the decree of foreclosure.

The testimony shows that the negotiations between Johnson and Boone were opened by the submission to Johnson of the following written offer:

"December 28, 1927.

"Real Estate Department,

"Central Bank,

"Gentlemen:

"I herewith submit to you the following offer of trade for the Henry Johnson place, at 219 North Monroe, on which there is a $3,250 loan, which I agree to assume, and for Mr. Johnson's equity in said place I will agree to give 160 acres, located in Conway County, Arkansas, within 3 miles of Martinsville, described as follows: NE¼ of Sec. 8, Twp. 8 N., R. 14 W., containing 160 acres, more or less. This 160 acres free and clear of all incumbrances. It is understood and agreed that Mr. Johnson will have electric light fixtures installed at 219 North Monroe and the gas line run to the house from the street. It is further agreed that each owner will furnish

an abstract showing good title to said properties mentioned herein.

"It is understood that Mr. Johnson is to pay Central Bank, Real Estate Department, $250 sales commission.

"Yours very truly,
(Signed) "W. H. Boone,
(Signed) "Addie L. Boone.

"Will trade and your $250 note due 90 days.
(Signed) "W. H. Boone."

Johnson had never had any communication with Boone prior to the submission of this offer, and it is very clearly the fact that the employee of the real estate department of the bank who submitted this offer was acting as the agent of Boone, who admitted that before authorizing this offer he had inspected the city property he was proposing to buy.

Indorsed upon this offer submitted to Johnson was an acceptance in the following terms:

"12-28-27. I will trade on a basis of $5,500 for the house, and $2,000 for land. This will leave a balance due me of $250. I agree to pay the commission. Allowance to be made of ($45) forty-five dollars for fixtures (Elec.).
(Signed) "Henry Johnson."

The explanation of the figures appearing in Johnson's acceptance of Boone's offer which the testimony clearly establishes is this. A valuation of $5,500 was placed on the city lot, against which there was a loan of $3,250, leaving a net value of $2,250. Boone's land was accepted at a valuation of $2,000, leaving still a balance in Johnson's favor of $250, for which sum a note was executed to Johnson's order, and which was indorsed by him to the bank in payment of its commission for negotiating the sale.

Deeds were executed but not immediately delivered; in fact, both deeds were left at the bank pending the examination and approval of the titles. The $250 note was executed by Boone to Johnson, and by him indorsed and delivered to the bank.

Boone now complains that no abstract of title to the city lot was ever submitted to him for his examination or approval. It does not appear, however, that he ever made any such demand. The abstract was in possession of the mortgage company, and Boone knew, of course, that the mortgage company had approved this title when it made the loan, and he appears to have waived his right to have an abstract of the title submitted to him.

Boone submitted an abstract of the title to his land, and objections to the title were made, which were later removed. This examination of Boone's title appears to have delayed the delivery of the deeds, but the deed from Boone was finally delivered by the bank when the title to the land had been approved. The bank retained possession of the deed to Boone until May 8, 1928, at which time it mailed him the deed, but he declined to receive it and returned it to the bank, and stated that he had been defrauded and would rescind the contract.

It appears, however, that prior to this incident possession of the house and lot had been delivered to Boone, who agreed that the bank might collect the rents thereon and apply them to the payment of his $250 note, and the rents were so collected and applied, so that on March 4, 1929, a balance of only $74.93 remained unpaid. Boone admitted that he did this because he knew he was obligated to pay the note. It further appears that on September 19, 1928, Boone made a payment of $50 to the mortgage company, and on October 18, 1928, made a second payment of the same amount, and the managing officer of the mortgage company who received these payments testified that when they were made Boone told him he had purchased the city lot, but when he later made demand upon Boone for additional payments Boone said he had rescinded the sale.

The chancery court rendered a decree foreclosing the mortgage, and found the fact to be that Boone had assumed the payment of the note which it secured. Judgment was rendered in Johnson's favor for the

$74.93 balance due on the $250 note, and it was adjudged that Johnson should have judgment against Boone for any deficiency remaining due on the mortgage note after the sale of the city lot.

The commissioner appointed in the decree of foreclosure to make the sale reported that the property had been sold to Crump & Trezevant for $2,800. A petition was filed by Boone protesting against the confirmation of this sale, but the testimony taken on the hearing of this protest does not appear in the record, and the report of sale was confirmed.

The testimony establishes the fact that both Johnson and Boone placed excessive valuations upon their property in making the exchange. Johnson testifies that he sold the land he had received from Boone for $850 in second mortgage paper, which he thought was worth something less than $600, and which he would be glad to sell for that amount.

The only real question in the case is one of fact whether Boone had the right to rescind, and he bases his right so to do upon the alleged false representations made to him by the employee of the real estate department of the bank that the city property could be sold for $5,500, and that a sale was about to be closed at that price, of which Boone would have the benefit, whereas the property was not worth $5,500, and no offer of that amount had been received for it.

It would unnecessarily extend this opinion to review all the testimony, and it will suffice to say that the court was warranted in finding, as it no doubt did find, that no fraud was practiced upon Boone, who inspected the property before buying it, and that it was substantially his own proposition, which Johnson accepted, as appears from the writings hereinabove set out.

Moreover, it appears that Boone brought suit against Johnson to cancel his deed to Johnson, but this suit was dismissed by Boone on his own motion. Boone testified that he dismissed the suit, because it was then

represented to him by the officers of the real estate department of the bank that a sale of the city lot could and would be made at $5,500; but this testimony was denied. On the contrary, the manager of the bank's real estate department testified that Johnson and Boone discussed their differences and shook hands, and it was agreed that the suit to cancel the deed should be dismissed upon Johnson doing certain work on the house, which appears not to have been quite completed when the exchange was made, and Johnson testified that he had done this work and had paid for it. It does not appear to be denied that Johnson did do this work and had paid for it, and, if so, this was a new consideration moving from him to Boone.

This testimony, which was evidently credited by the chancellor if he found there had been fraud, would be an affirmation of the contract. The chancellor made no findings of fact except that Boone had assumed the payment of the mortgage, but his decree must have been predicated upon the finding either that there had been no fraud, or, if so, that the sale had been ratified notwithstanding that fact, and either finding would not, in our opinion, be contrary to the preponderance of the evidence.

If the exchange of the property is not to be rescinded, and we affirm the chancellor's action in denying that relief, the liability of Boone subsists to discharge any deficiency judgment resulting upon the sale under the decree of foreclosure, for the law is as stated in a headnote to the case of *Wallace* v. *Hammonds,* 170 Ark. 952, 281 S. W. 902, that "where a purchaser of mortgaged lands from the mortgagor assumes and agrees to pay the mortgage debt, he becomes personally liable therefor, which liability inures to the benefit of the mortgagee, who may enforce it in an appropriate action." See, also, *Kirby* v. *Young,* 145 Ark. 507, 224 S. W. 970; *Walker* v. *Mathis,* 128 Ark. 317, 194 S. W. 702; *Felker* v. *Rice,* 110 Ark. 70, 161 S. W. 162.

As the finding of the chancellor does not appear to be against the preponderance of the evidence, the decree must be affirmed, and it is so ordered.

VAUGHAN *v.* SCREETON.

Opinion delivered April 7, 1930.

W. H. Gregory, Ross Mathis and *J. F. Holtzendorff*, for appellant.

W. A. Leach, for appellees.

HUMPHREYS, J. This suit was brought by appellees against appellant in the chancery court of Prairie County, Northern District, to recover a personal judgment against him on a note for $14,420 and interest; and to foreclose a deed of trust of even date therewith conveying certain real estate in said county, executed by him to appellee, George J. Screeton, trustee, to secure the payment thereof. In aid of the collection of the note separate allegations and interrogatories and bonds were filed to obtain writs of garnishment against a number of persons supposed to be indebted to appellant.

The garnishees filed separate answers, some admitting and others denying indebtedness to appellant.

Appellant filed an answer admitting the execution of the note and deed of trust, but as defenses thereto pleaded want of consideration; and that if a complaint which had been filed in said court by the People's Bank of Searcy against H. C. Brown, the beneficiary in said deed of trust, H. L. Brown, and appellant as garnishee, should be sustained, then said note and deed of trust was executed to defraud creditors of H. L. Brown, and on that account was void. The complaint of the People's Bank was made a part of appellant's answer, and is as follows:

"On July 20, 1916, the bank recovered judgment against H. L. Brown and J. S. Yarnell in the sum of $4,500, with interest at the rate of 8 per cent. per annum; that shortly thereafter the defendant Yarnell died insolvent and nothing was recoverable from his estate; that the sum of $6,638.45 is now due upon said judgment, and that the same was revived on the 9th day of August, 1922. That, since said judgment was rendered, the defendant, H. L. Brown, made a loan to Emmet Vaughan of $14,420; that for the purpose of placing said funds beyond the reach of his creditors and in fraud of plaintiff's rights herein, the said H. L. Brown caused the Vaughan note to be made in the name of his son, H. C. Brown; that said note was secured by deed in trust sued on by the said H. C. Brown; that said loan was not made by the said H. C. Brown, but that the money belonged to H. L. Brown; that foreclosure proceedings have been instituted by the said H. C. Brown, and that the suit is now pending in this court; that the note executed by the said Emmet Vaughan and the deed of trust to secure it was made for the deliberate purpose of covering up the property of defendant H. L. Brown and defrauding his creditors.

"Prays that the amount of its indebtedness be declared a valid and subsisting judgment against H. L.

Brown; that H. C. Brown be declared a trustee for his father, and that writ of garnishment be issued against the said Emmet Vaughan to answer what sum he has in his hands or under his control belonging to the defendant, H. L. Brown."

Appellant filed a motion to quash the writs of garnishment as well as a demurrer to them, each of which was overruled over his objection and exception.

The cause was submitted to the court upon the pleadings and testimony, resulting in a decree against appellant in the amount claimed, a foreclosure of the deed of trust, and judgment against Dr. J. H. Gipson as garnishee for $100 to be applied as a credit upon the judgment rendered against appellant, from which is this appeal.

Appellees introduced the note and deed of trust and in addition thereto the testimony of appellant, who testified in substance that in 1913 he entered into a contract with C. B. Brown through her husband H. L. Brown, to purchase and handle lands for them upon a basis of a division of the profits, they to advance the purchase money and he to render all services necessary in the purchase, handling and sale of the land; that in the progress of the business he became indebted to H. L. and C. B. Brown in proportions best known to them in the sum of $14,420; that on July 1, 1925, in payment thereof and at the direction of H. L. Brown, he executed the note and deed of trust in question to the son of H. L. Brown who was also the stepson of C. B. Brown, in order that, in the case of the death of H. L. Brown, the son would have something upon which to live; that as far as he knew C. B. Brown had no notice of this arrangement; that at the time he executed the note and deed of trust in question he owed H. C. Brown nothing, and that the whole amount constituted an indebtedness which he owed C. B. Brown and H. L. Brown growing out of the contract for the purchase, handling and sale of the lands aforesaid; that, after making the note and deed of trust

H. C. Brown at the instance of H. L. Brown, he loaned H. C. Brown $150; and that during all of the time, and at the present time he was and is solvent, owning much unencumbered property.

Appellant contends for a reversal of the decree upon the following grounds:

First: That the note and deed of trust is void for the want of consideration.

Second: That if the People's Bank should prevail in its action it must do so on proof that the deed of trust was given for the purpose of covering up the property of H. L. Brown, through his son H. C. Brown, so as to defraud the bank out of the value of its judgment and is, therefore, fraudulent and void.

Third: That the payment to H. C. Brown with the knowledge that the debt belonged to his father and stepmother would be no protection to appellant.

Fourth: That the garnishment proceedings were and are unlawful.

(1) There is no merit in the contention of appellant that the note and deed of trust are void for want of consideration. H. L. and C. B. Brown had a perfect right to give the indebtedness which appellant owed them to their son H. C. Brown, and in perfecting the gift to direct that appellant execute the note and deed of trust to their son. There is no principle better settled than that a maker's liability to a payee may be supported by a consideration coming from a third person who is not a party to the instrument. 8 C. J. 213, § 348; 7 Cyc. p. 691.

(2) The contention of appellant that the note and deed of trust were executed to defraud the creditors of H. L. Brown, and that same are void for that reason is not sound. The contention is not supported either by allegation or proof. Appellant did not allege in his answer that they were executed to defraud the creditors of H. L. Brown, but said that the People's Bank of Searcy had filed suit against H. L. and H. C. Brown and gar-

nished appellant, in which such an allegation was made by said bank. The allegation in appellant's answer was to the effect that, if the bank's suit was sustained, then and in that event the note and deed of trust in question would be void because executed for an immoral purpose and contrary to public policy. Appellant did not testify that the note and deed of trust were given for such purpose. We do not think, therefore, that the contention that the note and deed of trust were executed for an immoral purpose and contrary to public policy is supported by the contingent allegation in the answer, and certainly not supported by the proof when there was no proof introduced to sustain even the contingent allegation. The bank was not made a party to the instant suit, and, as far as this record reflects, there has never been any adjudication in favor of the bank to the effect that the note and deed of trust were executed for an immoral purpose.

The record is entirely silent relative to any fraud having been practiced upon Mrs. C. B. Brown by the execution of the note and deed of trust. According to the record, it seems that Mrs. C. B. Brown was perfectly willing for her stepson to have the note and deed of trust as she signed his bonds to procure writs of garnishment in the instant case.

(3) The record reflects that in the progress of the trial appellant suggested to the attorney for appellees that he make H. L. and C. B. Brown parties to the suit, because they were the real beneficiaries in the note and deed of trust instead of H. C. Brown. This would not be the case if it was the purpose of H. L. Brown and C. B. Brown to make a gift of the indebtedness to H. C. Brown. If, however, appellant was fearful, payment to the trustee for H. C. Brown would not protect him against a suit on the part of H. L. and C. B. Brown to recover the indebtedness from him, and to protect him against payments already made to them, he was at liberty to have made them parties himself, and to have

paid the money into the registry of the court to be paid to the true owners thereof. This he failed to do.

(4) We cannot agree with appellant that, because the complaint in the instant case did not allege the insolvency of appellant, or that the real estate described in the deed of trust was insufficient to pay the debt, the motion to quash the garnishment proceedings and the demurrer thereto were erroneously overruled. Such allegations in the complaint were not jurisdictional. *Bank of Eudora* v. *Ross,* 168 Ark. 754, 271 S. W. 703, is conclusive of this question. We find nothing in the law requiring a plaintiff to exhaust his security in the mortgage before resorting to other proceedings. A plaintiff creditor may prosecute all remedies against a debtor with the right, of course, to only one satisfaction of the debt. In pursuing the remedies by garnishment it was not necessary to make the garnishees parties in the complaint. The proceedings by garnishment are only ancillary or additional rights to remedies of a creditor against his debtor, and it is not necessary to make garnishees parties to the suit or to pray relief in the complaint against them. *Tiger* v. *Rogers Cotton Cleaner & Gin Co.*, 96 Ark. 1, 130 S. W. 585, 30 L. R. A. N. S. 694, Ann. Cas. 1912B, 488.

No error appearing, the decree is in all things affirmed.

Per Curiam. Counsel for appellant claims that we have ignored the provisions of § 1101 of the Digest relatting to bringing in new parties, as construed by this court in *C. O. & G. Rd. Co.* v. *McConnell,* 74 Ark. 54, 84 S. W. 1043; *Westmoreland* v. *Plant,* 89 Ark. 147, 116 S. W. 188; and *Thompson* v. *Grace,* 91 Ark. 52, 120 S. W. 397, to the effect that it was the duty of the court to have brought into the case any party who does not willingly come and whose presence is necessary in order to protect the rights of those then before the court. In each of these cases the trial court was asked to bring in the new parties and refused to do so. In the case at bar,

appellant only suggested that H. L. and C. B. Brown be made parties, but did not ask the court to make them parties, and did not even seek a ruling of the court on his suggestion to counsel for plaintiff H. C. Brown to have them made parties.

In *Paris Mercantile Company* v. *Hunter,* 74 Ark. 615, 86 S. W. 808, it was held that the objection for want of necessary parties can not be raised on appeal if not raised in the trial court. In *Peeples* v. *Hayley-Beine & Co.,* 89 Ark. 252, 116 S. W. 197, it was held that where the beneficiary in a crop mortgage sued in equity to enforce a lien upon the surplus of the crop in the hands of a prior lienor, without making the trustee in his mortgage a party, the defect was waived unless the objection was made in the trial court. Again, in *Chapman & Dewey Land Co.* v. *Wilson,* 91 Ark. 30, 120 S. W. 391, it was held that a defect of parties is waived by failure of the appellant to object thereto in the trial court. So if appellant had a counterclaim or setoff against H. L. and C. B. Brown, as now claimed by him, as to transactions involved in this suit with H. C. Brown, he should have made a motion to make them parties in the lower court, so that the interest of all parties in the subject-matter of the suit could be settled. This appellant did not do, and he cannot now complain that the court below erred in not making on its own motion H. L. and C. B. Brown parties because appellant had suggested to counsel for H. C. Brown that he should make them parties.

We adhere to the views expressed in the original opinion, and the petition for rehearing must be denied.

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

Opinion delivered April 7, 1930.

[redacted]

[redacted]

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

J. H. Townsend, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in allowing the introduction of testimony of witnesses stating their opinion of the amount of damage to the lands. These witnesses, however, stated their means and opportunity for knowing the value of the lands, and then their opinion of the value, and it was competent for them to do so. *St. L. I. M. & S. R. Co.* v. *Ayers,* 67 Ark. 31, 55 S. W. 159; *Railway Co.* v. *Morris,* 35 Ark. 622; *Standard Oil Co.* v. *Goodwin,* 174 Ark. 603, 299 S. W. 2.

The hypothetical question asked the witnesses was virtually the same as that approved in *St. Louis I. M. & S. Railway Co.* v. *Magness,* 93 Ark. 46, 123 S. W. 786, and the witnesses answering the question qualified themselves to do so by showing their familiarity with the lands and condition surrounding them before and after the waters of the river were diverted by the cut through the natural barrier allowing them to flow through and over appellee's land.

Appellant insists that it not only had the right to get rid of the surface water on its right-of-way, but was required to do so by statute (§ 8480, C. & M. Digest); that it caused no obstruction of any water course or diversion of any waters from a natural channel, and was not liable for any damages alleged to have been caused by waters flowing across appellee's lands. Although it is true appellant cut through the high bank of the ravine on its own right-of-way, which protected appellee's land on the west, and did not divert the water from any natural channel, nor change or disturb the natural flow of water in Spring River, the testimony tends to show that, before the cutting of the natural barrier protecting the west boundary of appellee's lands from the overflow waters of Spring River, her lands were not subject to overflows that were injurious because of the waters washing or cutting through, the overflows before being only back-water without current—still or dead water, and that her lands were not subject to overflow at all except during the extremely high water. Appellant's testimony on the other hand tended to show that the opening or cut through the natural barrier or embankment on the west of appellee's land could not have had effect to cause any damage to these lands in the years complained of, because it is undisputed that the water during these overflows was higher than the natural embankment and would have flooded in any event the lands north and south of it, the overflow water being high enough to cover the track of appellant which was 5 or 6 feet higher than any part of

the lands between it and the river. The jury found, however, that the lands of appellee would not have been injured by the current from the overflow but for the opening made in the bank or barrier on the west, and could have found that, because of it, they were now subject to be inundated by overflow from the river across the lower lands upstream at a stage of water from 5 to 6 feet lower than could have reached them before the opening was made. If appellant had diverted the waters of a stream or obstructed and collected surface water and turned it in injurious quantities through appellee's lands, he would have been liable to the payment of the resulting damages, and we can see no difference in principle between this case where its cutting or opening the natural barrier had the effect to release the waters in a swift current overflowing and injuring the lands below, and, the jury having found, under proper instructions and upon conflicting testimony that the lands were damaged thereby, its verdict will not be disturbed, and the judgment is accordingly affirmed.

JONES *v.* FERGUSON.

Opinion delivered April 7, 1930.

Edward Gordon, for appellant.

Bolon B. Turner and *Brooks Hays,* for appellee.

MEHAFFY, J. This action was begun by R. P. Ferguson, appellee, against A. Jones, appellant, to restrain Jones, his agents, servants and employees, from operating a motor transportation business for carrying freight for compensation between Little Rock and Morrilton. The facts necessary to be stated are as follows: The appellee, R. P. Ferguson, holds a license certificate to operate a freight transportation line between Morrilton and Little Rock, and it is agreed that said license certificate is valid and in full force and effect. The said license certificate was granted to Ferguson prior to the time that appellant made an application for a license certificate. The appellant bought a truck for the purpose of hauling freight between Little Rock and Morrilton for compensation and applied to the railroad commission for a permit or license, and his request was denied. He had paid $400 or $500 on the truck before his request was denied, concluded that, since his license was denied him, he could not pay for the truck and took it back to the seller expecting to lose what he had paid. Ten citizens of Morrilton paid for the truck and entered into a contract with Jones to haul freight for them between Morrilton and Little Rock, and they agreed to pay him the regular schedule rates being charged by truck lines so long as Jones would haul only and exclusively for them and not haul for the general public. Jones accepted these conditions and agreed to haul freight for the parties signing the contract and agreed that he

would not haul for the public. Several witnesses testified about the contract, and the evidence showed that Jones hauled freight for the persons with whom he contracted and refused to haul freight for any other persons and did not hold himself out to the public as a common carrier.

There is no dispute about the facts, and it is therefore unnecessary to set out the testimony in full.

The court entered a decree for a permanent injunction as prayed for in the petition, holding that the practice of Jones in securing from certain merchants and shippers in Morrilton contracts of employment to haul freight for said parties does not change the character of defendant's operations as a public carrier within the meaning of the provisions of act 99 of the General Assembly of Arkansas of 1927, and other legislative acts regulating cars for hire, using the highways of this State. To reverse this decree, appellant prosecutes this appeal.

Appellee makes the following statement in his brief: "We concede, of course, that the commission is without authority to require one who is truly a private carrier to become a public carrier, but it is clear from appellant's testimony in this case that the carrier has continuously acted as a public carrier and is attempting by his 'contract of employment,' to disguise his real operations."

The only question for our consideration is, whether Jones was a public carrier or a private carrier. The law recognizes two classes of carriers, viz: private carriers and common carriers. All persons who undertake for hire to carry the goods for another belong to one or the other of these classes. A private carrier is not bound to carry for any reason unless it enters into a special agreement to do so. A common carrier is bound to carry for all who offer such goods as it is accustomed to carry, and tender reasonable compensation for carrying them. 4 R. C. L. 549.

A common carrier is one that holds itself out as ready to engage in the transportation of goods for hire as a

public employment and not as a casual occupation. 10 C. J. 41.

A common carrier is not only one who holds itself out as engaged in the business for the public, but it is required to carry for all who offer their goods. It is a public service and is therefore subject to regulation; a private carrier is not. A private carrier does not hold itself out as engaged in the business for the public and is therefore not subject to regulation as a common carrier. The act relied on by appellee does not authorize the railroad commission to regulate private carriers, but only public carriers and the Railroad Commission would have no authority to regulate the business of a private carrier or the private business of any one. While they have jurisdiction over the highways, the act in question is not an act to regulate traffic or travel on the highways, but that part of the act relied on by appellee undertakes to regulate the business of the parties to whom it applies. We said in a recent case: "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 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, carried 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." *Merchants' Transfer & Warehouse Co.* v. *Gates,* 180 Ark. 96, 12 S. W. (2d) 406; *Arkadelphia Milling Co.* v. *Smoker Mdse. Co.,* 100 Ark. 37, 139 S. W. 680; *Lloyd* v. *Haugh & Keenan Trans-*

fer & Storage Co., 223 Pa. 148, 72 Atl. 516, 21 L. R. A. N. S. 188.

The undisputed evidence in the instant case shows that appellant did not hold himself out to the public as ready to undertake for hire the transportation of goods or passengers. His general business is not with the public; he does not solicit customers from the general public, and, therefore, under the case just cited, he does not come within the regulatory provisions of the statutes.

Appellee in discussing the case of *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570, 45 S. Ct. 191, says: "It is held by the Supreme Court in that case that it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public carrier," and concedes that the soundness of this position cannot be questioned; but appellee says that the carrier in the case referred to had contracts with only three shippers. That is true, he had contracts with but three persons, but he employed seventy-five men and operated forty-seven motor trucks and trailers upon the public highways of Michigan, which formed part of the route between Detroit and Toledo. In the instant case, appellant has but one truck, and although, in the Duke case above referred to, there were only three contracts, yet it appears that the business done by this carrier was many times greater than the business done by appellant. The Michigan act is substantially the same as our act. It provides that no person should engage or continue in the business of transporting persons or property by motor vehicle for hire upon the public highways of the State over fixed routes or between fixed termini, unless he shall have obtained from the Michigan Public Utilities Commission a permit so to do. The act then prescribes just how the permit shall be granted. In the Duke case, it is further said: "Moreover, it is beyond the power of the State by legislative fiat to convert property used exclusively in

the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the fourteenth amendment."

Appellee then discusses the case of *Marion L. Frost* v. *Railroad Commission of the State of California,* 271 U. S. 583, 46 S. Ct. 605, 70 Law. Ed. 701, and shows that there was a single contract, hauling only one commodity, and says that that case can hardly throw any light on the question before the court on this appeal. It is also argued that the court in that case specifically disclaimed passing upon the question here presented. In that case, the commission agreed that Frost was a private carrier, but held that he was subject to the provisions of the act. The commission's order was upheld by the Supreme Court of the State of California. The court said: "It is very clear that the act as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its principal purpose evidently is to protect the business of those who are common carriers, in fact, by controlling competitive conditions. Protection or conservation of the highways is not involved." The court further said: "That consistently with the due process clause of the fourteenth amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought in question here" The court continued: "We hold that the act under review as applied by the court below, violates the rights of the plaintiff in error, as guaranteed by the due process clause of the fourteenth amendment, and that the privilege of using the highways of California in the performance of their contract is not and cannot be affected by the unconstitutional condition imposed."

The act of the Legislature involved is valid but it has no application to private carriers. Since the appel-

lant in this case does not solicit business from the public, does not hold himself out as ready to serve the public, and refuses to accept freight, as the undisputed evidence shows, from the public, he is not a common carrier but a private carrier, and the chancery court erred in holding that the practice of defendant in securing from certain merchants and shippers of Morrilton contracts of employment to haul freight for said parties does not change the character of defendant's operations as a private carrier within the meaning of the act.

There is no evidence in this case of fraud, or any attempt to evade the law. The undisputed evidence showing that appellant does not hold himself out to serve the public, but has refused to take freight for anybody except those with whom he has the contract, and, as said in the case of *Frost* v. *The California Railroad Commission*, "It is enough to say that no such case is presented here, and we are not to be understood as challenging the power of the State or railroad commission under the present statute, whenever it shall appear that a carrier posing as a private carrier is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly."

The decree of the chancery court is reversed, and the case is dismissed.

BROWN *v.* BROWN.

Opinion delivered April 7, 1930.

[redacted]

Harry C. Steinberg and *G. E. Snuggs,* for appellant.

I. W. Stennett, for appellee.

MEHAFFY, J. This action was begun by appellant, who alleged that she and appellee were married on the 29th of September, 1928, and that they lived together as husband and wife until the 12th day of October, 1928, when appellee deserted her. She also alleged that appellee was guilty of such indignities as rendered her condition intolerable, and she charged appellee with improper relations with a certain woman, naming her. Appellee filed answer, denying the material allegations in the complaint, and filed cross-complaint, in which he alleged that they were married on the 29th day of September, 1928, and that after the marriage, on the same day, appellant told appellee that she had syphilis; that she concealed this from appellee until after the marriage ceremony, and that if he had known she had syphilis he would not have married her; that he never cohabited with her, but left her the day of the marriage, and never lived with her. He asked that the marriage be annulled. The chancery court entered a decree dismissing appellant's complaint for want of equity, and annulled the marriage as prayed in appellee's cross-complaint. This appeal is prosecuted to reverse said decree.

Appellant's first contention is that she should have been granted a divorce. A sufficient answer to this contention is that the evidence on this issue is conflicting, and the finding of the chancellor is not against the preponderance of the evidence. Appellant testified that they lived together nine days and that during that time appellee's conduct in cursing her, getting drunk, and his relations with another woman rendered her condition intoler-

able. There is practically no corroboration of her testimony, and it is denied by appellee. He testified that he did not live with her at all, and she admits that he left her the afternoon they were married, but says he went to work and worked that night, but that he lived with her after that a few days. The evidence introduced by appellant as to appellee's relations with another woman was contradicted by the evidence of appellee, and it would serve no purpose to set out the evidence here.

Appellant next contends that the case should be reversed because the court erred in granting a decree annulling the marriage. It is contended that some of the evidence introduced to corroborate appellee's testimony that appellant told him she had a contagious disease was incompetent. The testimony of the physician was inadmissible. However, appellee testified positively that she told him about this on the day of the marriage and after the marriage. He says he left her that afternoon and never lived with her. She admits that he left on the afternoon of the marriage and stayed away that night, but she says he went to work because he could not get any one to work in his place that night. She also denies that she told him she had syphilis and denies that she had any disease. Appellee's testimony is corroborated by the testimony of Mrs. Hattie McMillan, the executive secretary of the Welfare Bureau. This testimony of Mrs. McMillan was competent. This witness testified that some months before the marriage of the parties, she aided the appellant with food and medical aid. When asked if she recalled the nature of the illness of appellant and the treatment, she said: "Venereal trouble and treatment for that." There were other circumstances tending to corroborate appellee's testimony on this issue. The appellant denied that she had ever made any request to Mrs. McMillan for treatment. At appellant's request, the court made a special finding of fact that appellant was at the time of her contracting marriage with appellee, infected with a dangerous, loathsome, venereal disease,

viz: syphilis, which rendered her incapable of entering into the marriage state, and, as a matter of law, the court declared that her attempted marriage should be annulled and held for naught under section 7041, C. & M. Digest. The finding of fact by the chancellor is not against the preponderance of the evidence, and the decree is therefore affirmed.

[redacted]

McEuen *v.* Wakenight.

Opinion delivered April 7, 1930.

[redacted]

Brundidge & Neelly, for appellant.

Miller & Yingling, for appellee.

McHaney, J. Raymond McEuen, a minor son of appellant, purchased a used automobile from appellee, giving his note, with appellant as joint maker or surety, as part of the purchase price. In February, 1927, appellee secured a judgment by default on said note in the justice court of W. H. Bell for $76 and costs of $3.55. Thereafter Raymond McEuen paid appellee the amount of the judgment and costs, and satisfaction thereof was in-

dorsed on the docket entry of the judgment on March 20, 1927. In December following, Raymond McEuen, by his father and next friend, appellant, brought suit in the White Chancery Court against appellee, alleging his minority at the time the judgment aforesaid was obtained against him, and praying a recovery of the amount so paid by him in satisfaction thereof. He was successful in this suit and recovered a judgment against appellee for the amount of the judgment and costs paid him. Thereupon appellee filed a petition in the justice court to correct the judgment on his docket by cancelling or setting aside the entry of satisfaction, so as to leave an unsatisfied judgment against appellant as originally entered. The justice of the peace granted the petition and set aside the satisfaction. Appellant took an appeal to the circuit court, where the judgment of the justice court was affirmed.

We think the justice and the circuit court on appeal correctly held that appellee could cancel the satisfaction so as to leave the judgment stand as to appellant. While the judgment was paid by the minor with one hand, it was withdrawn by the other, and so the net result was that the judgment was never paid in fact. The contract so far as the minor was concerned was not void but only voidable. The contract, so far as appellant was concerned, was neither void nor voidable. No defense was made, and judgment was had in the justice court, and no appeal therefrom. When the minor recovered the amount paid in satisfaction of the judgment, appellee was entitled as a matter of simple justice to have the record of the judgment speak the truth. It showed "satisfied in full," when, as a matter of fact, it had not been satisfied. *Levy* v. *Ferguson Lumber Co.*, 51 Ark. 317, 11 S. W. 284, and cases there cited. "The satisfaction * * * was apparent, but not real," as said by this court in *DeLoach Mill Mfg. Co.* v. *L. R. Mill & Elevator Co.*, 65 Ark. 467, 47 S. W. 118. See also *Rutherford* v. *McDonnell*, 66 Ark. 448, 51 S. W. 1060; *Martin* v. *Bank of State*, 20 Ark. 636;

Stuart v. *Peay*, 21 Ark. 117. It has many times been held that the circuit court has the power, upon proper application and notice to the parties interested, to amend the record by vacating a satisfaction of a judgment. The cases cited above so hold. We see no good reason why the same rule should not apply to justice courts.

It is next urged that the amendment to the answer filed in the circuit court stated a defense, and that appellee's demurrer thereto should not have been sustained. The amendment was to the effect that at the time he signed the note of his minor son he had an agreement with appellee that he was not to be liable thereon personally. This defense is not tenable, and the court correctly sustained the demurrer thereto. The question of appellant's liability on the note was not before the circuit court, but only the right of appellee to have the satisfaction of the judgment vacated. If a defense at all, it was available in the justice court in the suit on the note, or on appeal to the circuit court from the judgment against him. It was not only a collateral attack on the judgment of the justice, but was an attempt to vary the terms of a written contract by parol testimony.

Judgment affirmed.

HUXTABLE *v.* STATE USE CRAWFORDSVILLE SPECIAL SCHOOL DISTRICT.

Opinion delivered April 7, 1930.

W. B. Scott, James G. Coston and *J. T. Coston,* for appellant.

Chas. D. Frierson, for appellee.

BUTLER, J. The only question in this case is whether the Legislature had the power to relieve the treasurer of Crittenden County from his liability to pay Crawfordsville Special School District five thousand dollars of its funds which he had deposited in a bank, and which was lost by reason of the bank's failure.

The appellant contends that the Legislature had the power to relieve the officer, and that the law enacted to that effect is not a special law within the meaning of the Constitution.

It is insisted by appellee that the act in question is a special act, and comes within the inhibition of Initiated Amendment No. 14 of the Constitution. The validity of such an act was upheld by this court in *Pearson* v. *State,* 56 Ark. 148, 19 S. W. 499, 35 Am. St. Rep. 91, where the General Assembly by its act had relieved the treasurer of Logan County from liability for sums due the county and various school districts where the loss was occasioned by a burglary, on the theory that as it was within the power of the Legislature to impose a debt upon a municipality, it had the power to release a debt due by such, provided the power was not exercised arbitrarily or capriciously. In that case it was contended that the act violated § 3 of article 14 of the State Constitution which ordained that no special taxes should be appropriated to any other purpose nor to any other district than that for which it was levied, and that it was also violative of the provisions of the State Constitution prohibiting legislation which would divest property rights or impair the obligation of contracts.

It will be observed that the act was not challenged on the ground that it was special in its nature. Since the decision in *Pearson* v. *State, supra,* numerous acts have been passed by the General Assembly relieving officials for loss of funds in their hands, which loss occurred through no fault on the part of the officer, which legislative practice continued until a recent date when Amendment No. 14 was initiated and adopted by the people. This amendment was very brief and very much to the point, and is as follows: "The General Assembly shall not pass any local or special acts. This amendment shall not prohibit the repeal of any local or special acts."

It is contended by the appellant in this case that, since the State was not expressly named in the amendment *supra,* the same would have no effect in so far as the rights of the Legislature to pass special laws concerning the business or the funds of the State, and therefore the act in question would not be a special act within the meaning of the amendment. It is our view that, although the State might not be expressly named, limitation might exist by implication, even though there might be no express language in the amendment to that effect. *Martin* v. *Roesch,* 57 Ark. 476, 21 S. W. 881.

In order to determine whether the State was intended to be included, we may look to the history of the times, the conditions existing at the time of the adoption of the amendment, in order to ascertain the mischief to be remedied and the remedy adopted, together with the general spirit of the times and the prevailing sentiment among the people. 6 R. C. L. § 46, p. 51, referred to and approved in *Lybrand* v. *Wafford,* 174 Ark. 304, 296 S. W. 729.

Beginning at an early date, the course of legislation tended to increase local and special acts in an increasing ratio. As stated in *Pearson* v. *State,* "As far back as 1840 and continuously since that time, acts have been passed in this State to release officers and their sureties from debts legally due by them to various counties where

the liability arose without fault of the officer and similar legislation abounds in other days. While such acts do not determine the question of constitutional law, they bear evidence of the public sense of justice and right. Whether the contentions that induce such acts are adequate, and whether public policy and interests are subserved by such legislation, are questions of grave doubt, but their solution is with the legislative and not with the judicial department of the government."

The policy on the part of the Legislature to pass local and special acts was a progressive one, and the number of such acts increased from session to session until in 1923, when by far a greater number of the acts of the General Assembly for that year and for several sessions preceding were of such character and became out of all proportion to the general laws enacted, so that there was a general sentiment engendered which condemned this policy and culminated in the initiation and passage by the people of Amendment No. 14, *supra,* and it is clear that one of the vices existing at the time of the adoption of the amendment was the frequency with which special laws were passed relieving officers from just liability, and therefore was one of the evils sought to be remedied by the adoption of the amendment. This conclusion seems to be irresistible when the emphatic and unambiguous language of the amendment is considered. Viewing such questions in the light of contemporaneous events, this court, in the recent case of *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617, has adopted the definition of the Alabama Court as to general, local and special laws: "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."

Under this definition, the act in question is undoubtedly a special law, and, since it did not undertake to set-

tle any controversy between the State and one of its citizens, nor refer to administration of justice, nor deal with some sovereign administrative power of the State, or by appropriation provide means to reimburse one to whom it was bound by a moral obligation, it could not come within the rule laid down in *State* v. *Crawford,* 35 Ark. 237; *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844; *Urquhart* v. *State,* 180 Ark. 937, 23 S. W. (2d) 963, the validity and force of which decisions are not intended to be impaired by our holding in this case.

Those cases recognize the principle that the State in its sovereign power 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 such acts would be general and not local or special laws.

From the foregoing observations it follows that the act involved in the instant case is a special act within the meaning of Amendment No. 14 to the Constitution, and is prohibited thereby. The decree of the trial court is therefore affirmed.

SMITH, J., disqualified and not participating.

HARGROVE *v.* ARNOLD.

Opinion delivered April 7, 1930.

Feazel & Steel, for appellant.

Abe Collins, Lake, Lake & Carlton and *Steel & Edwards,* for appellee.

BUTLER, J. The legality of an election held in Sevier County under the authority of an order of its county court submitting to the qualified electors of said county the question of the construction of a new court house and jail, and held at a special election ordered by the county judge, is challenged for the reason that the county court failed to prescribe the form of ballots, and failed to have said ballots show the amount of the proposed bond issue or its purpose, or the amount of taxes necessary to be levied in order to pay the bonds with interest as prescribed by § 4 of act 294 of the Acts of 1929, approved March 29, 1929.

The election was held under authority of Amendment No. 17, and the ballots were in the form prescribed by § 4 thereof, but not in form prescribed by § 4 of act 294, *supra.*

It is contended that, even though Amendment No. 17 is self-executing, the Legislature had authority to regulate the method by which elections should be conducted, and to alter or amend the form of the ballot prescribed by § 4 of the Amendment.

It is further contended that act No. 294, *supra,* did change the form of the ballot under which the election was held, and, the ballot voted on not conforming to the requirements of the act, the county court would be without authority to issue bonds under said election.

It is insisted, on the other hand, by appellee that act No. 294 dealt solely with an election by which power would be given the county court to take up any indebtedness existing at the time of the adoption of the amendment, incurred in the building, constructing or extending of any courthouse or jail, and had no reference to an election such as the one under consideration by which the construction of new county buildings and a tax to defray the expenses was authorized; also that, if said

act attempted to change the form of the ballot prescribed by the Constitution, such provision of the act would be null and void, because contravening the requirements of the Constitution itself, and, lastly, that said act No. 294 did not control or regulate the election for the reason that the same was not in effect at the time the election was held.

Our conclusion on the last point raised makes it unnecessary to discuss or decide the other questions presented, it being our opinion that appellee is correct in his last contention, namely; that act No. 294 was not in effect at the time of the election in Sevier County.

We take judicial notice of the records of both branches of the General Assembly from which we know that the Legislature of 1929 adjourned March 14, and that, while the act in question contained an emergency clause, no separate vote or roll call was had thereon, and therefore said emergency clause was never adopted, and the act did not go into effect until ninety days after the adjournment of the Legislature. *Road Imp. Dist. No. 16* v. *Sale,* 154 Ark. 551, 243 S. W. 825; *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653; *Crow* v. *Security Mortgage Co.,* 176 Ark. 1139, 5 S. W. (2d) 346; *Kendall* v. *Ramsey,* 179 Ark. 984, 19 S. W. (2d) 1020.

Since the election involved was held May 4, 1929, § 4 of the Constitutional Amendment prescribes the form of ballot which was used at the election, and, as the act was not then in effect, it would be immaterial what its provisions might be or what validity they might have. The judgment of the court below is therefore affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* DODGE.

Opinion delivered April 7, 1930.

Hal L. Norwood, Attorney General, *Claude Duty* and *Walter L. Pope,* Assistants, *Pace & Davis* and *Tom W. Campbell,* for appellant.

W. E. Spence, Dudley & Dudley and *Charles D. Frierson,* for appellee.

SMITH, J. E. L. and E. W. Lahar, partners doing business under the firm name of Lahar Brothers, brought this suit in the Pulaski Chancery Court against the chairman and members of the Arkansas State Highway Commission, and for their cause of action alleged the following facts:

That they had entered into a written contract with the State Highway Commission to construct certain portions of the State highway system, pursuant to which they had earned a large sum of money, which was payable to them under their contract, but the commission had refused to make proper estimates of the work and had declined to issue vouchers upon the State treasury, as they were in duty bound to do, whereby the plaintiffs were deprived of the compensation legally due them. Wherefore they prayed that a master be appointed to state the account between themselves and the highway commission, and that they have judgment for the amount alleged to be due them.

The commission filed a demurrer to the complaint upon the ground "that the plaintiffs are without right to file and maintain this suit, because it is in reality a suit against the State of Arkansas, and is prohibited by § 20, of article 5, of the Constitution of the State of Arkansas, and the court is therefore without jurisdic-

tion to hear and determine the complaint filed herein, because it is a suit against the State of Arkansas and prohibited by said section of the Constitution of the State of Arkansas."

The demurrer was overruled, whereupon the defendants filed in this court a petition for a writ of prohibition to prevent the chancery court from proceeding further with or exercising jurisdiction in said cause.

The practice is well settled that, when it appears that an inferior court is about to proceed in a matter over which it is entirely without jurisdiction under any state of facts which may be shown to exist, then the Supreme Court, exercising supervisory control over the inferior court, may prevent such unauthorized proceeding by the issuance of a writ of prohibition. *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 169, 222 S. W. 59.

Section 20 of article 5 of the Constitution reads as follows: "The State of Arkansas shall never be made defendant in any of her courts."

The argument is made that this provision of the Constitution is declaratory merely of what has always been the law, and that it means simply that the State may not be sued in her own courts without her consent. We think, however, that the purport of the language quoted is not to be thus limited. Numerous States have the provision in their Constitution that no suit shall be brought against the State except with its consent, and it is, of course, held in those States that suits may be brought when consent is given, but that such suits must be brought in the forum provided and be prosecuted in the manner authorized, and in no other forum or manner.

Our Constitution is not, however, merely declaratory of this attribute of sovereignty. It goes further and declares that the State shall never be made defendant in any of her courts, and nowhere is provision made under the Constitution whereby this immunity may be waived. *Pitcock* v. *State,* 91 Ark. 535, 121 S. W. 742, 134 Am. St. Rep. 88.

The Constitution of Alabama contains a provision almost identical with that of our own Constitution on this subject, and in the case of *Alabama Industrial School* v. *Addler,* 144 Ala. 555, 42 Sou. 116, 113 Am. St. Rep. 58, it was held (to quote a headnote): "If the Constitution contains a prohibition against the State being made a party defendant to any suit, and does not provide for any waiver of such exemption, the Legislature has no power to pass a law permitting such waiver, nor can the State or its agent waive such exemption by failure to plead to the jurisdiction or otherwise." We feel constrained to give the same construction to the same provision in our own Constitution.

The question for decision, therefore, is, whether the suit which we are asked to prohibit is, in fact, a suit against the State.

Any answer to this question requires a consideration of the statutes under which the contracts sued upon were executed. At its 1929 session the General Assembly passed an act entitled, "An Act to amend and codify the laws relating to State highways." 1, Acts 1929, p. 264. This act recreated the State Highway Commission, and the commission as recreated by the act of 1929 consists of five members, with a chairman, vice-chairman and a secretary. This act declared it to be the policy of the State "to take over, construct, repair, maintain and control all the public roads in the State comprising the State highways as defined hereinafter," and authority was given to make such contracts as were needful for these purposes. By act No. 18, passed at the 1929 session of the General Assembly (1, Acts 1929, p. 26), the sum of fifteen million dollars was appropriated for the construction of roads and bridges embraced in the State highway system for the fiscal year beginning March 1, 1929, and ending the last day of February, 1930, and a similar appropriation was made for the fiscal year beginning March 1, 1930, and ending the last day of February, 1931, and the act placed this money at the disposal of the

commission, to be disbursed in the manner therein provided. These acts were a continuation of the policy of road construction adopted by the State upon the passage of act No. 11 of the Acts of 1927 (Acts 1927, page 17), commonly known as the "Martineau Road Law," which act appropriated large sums of money to effect its purposes.

Upon the passage of the Martineau Road Law, and in the execution of its provisions, numerous suits arose, which hampered the work of the commission, and at the extra session of the General Assembly an act, No. 2, was passed and approved October 3, 1928, entitled, "An act to require bonds in certain suits affecting the administration of the State highway laws." Section 1 of this act reads as follows:

"Suits against the State Highway Commission, the State Highway Note Board, the members or any member of either, or against any State officer, involving any act done or proposed to be done in the administration of the State Highway Department, or of any law pertaining to the State highway system, shall be brought only at the seat of government in Pulaski County."

This act, passed at a special session called for the special purpose of considering the State's road-building program, recognized the existence of pending suits, and the probability of others being brought, and fixed the venue thereof at the seat of government, in Pulaski County, where the highway commission has its domicile and keeps its records.

While this special act did not designate the highway commission as a corporation, it was recognized as an entity, a juristic person, created for the purpose of making contracts for the distribution of the large sum of money which had been appropriated, and which it was anticipated would be later appropriated in constructing, maintaining, and repairing roads, and for other purposes. The highway commission was given no authority in the acts to which we have referred to make contracts in the name

of the State. Its authority was limited to the making of contracts relating to the specific appropriations which had been made to discharge the contracts which the commission was authorized to make. The special act of 1928 contemplated that differences might arise between the contracting parties, and to take care of such controversies a forum was provided wherein and whereby these differences might be settled.

In the proceedings there provided for a judgment might be rendered fixing a liability against the highway commission, but a judgment so rendered would not be a judgment against the State as such, and could not be enforced by the seizure or sale of the property of the State, as a judgment could be enforced against a private litigant. Satisfaction can be had only out of the fund specifically appropriated for the purpose in regard to which the highway commission was authorized to contract.

The appropriation for the use of the commission is a fund set aside for a specific purpose. The highway commission is an entity, or juristic person, created to disburse this money in payment of work which it is authorized to contract for, and, while the appropriation was not made specifically to satisfy judgments rendered against the commission, it was contemplated that judgments might be rendered, and the appropriation is the State's provision for their payment. It was not contemplated that the highway commission should accede to every demand of every contractor, yet it was contemplated that in the expenditure of a sum of money so large the highway commission, in its zeal to protect the fund, might take positions which, if persisted in, would work injustice to some contractor, who could not sue the State as such. Therefore, a forum was constituted where these differences might be adjusted according to applicable legal principles, this forum being the courts at the seat of government in Pulaski County.

A judgment rendered pursuant to this act would not be a "judgment against the State." It would be only an

adjudication that the sum adjudged was due on the contract out of which the litigation had arisen, to be paid out of the appropriation made for this and other purposes.

It may be said that § 20 of article 5 of the Constitution of the State gave the State no immunity which it would not otherwise have had, and that this immunity is absolute, with the exceptions named in the Federal Constitution, which are not applicable here. And it is also well settled that this immunity applies, not only where the State is actually named as a party defendant on the record, but to cases where the proceeding, though nominally against an officer of the State, is really against the State itself, or is one to which the State is an indispensable party. And, as was said by Mr. Justice Lamar, speaking for the Supreme Court of the United States in the case of *Hopkins* v. *Clemson College*, 221 U. S. 636, 31 S. Ct. 654, "No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights."

However, as we have attempted to show, the purpose and effect of this litigation is not to impose an obligation affecting the State's political or property rights. The obligation exists independently of the suit, and was incurred when the highway commission made the contract which the law authorized it to make, and the purpose of the suit is one to ascertain the extent of the obligation thus incurred. No one would question the power of the highway commissioners to adjust the differences out of which this litigation arose, and to draw warrants against the appropriation in settlement of the agreement reached without additional legislation authorizing them so to do, and this is true because the State has already, and in advance, appropriated money for this purpose. The State has conferred express authority upon the commis-

sion to make contracts, not in the name of the State, but in its own name, like the one here involved, and has appropriated money to discharge such contracts, and when the obligations of such contracts has been ascertained and discharged no burden is imposed upon the State which it had not previously assumed.

In the recent case of *State Highway Commission of Wyoming* v. *Utah Construction Co.*, 278 U. S. 194, 49 S. Ct. 104, it was held that a suit, based upon a contract made by the highway commission of the State of Wyoming was in effect and in fact a suit against that State, and that, as a State was not a citizen under the judiciary acts of the United States, there was no such diversity of citizenship as gave the plaintiff, a citizen of another State, the right to maintain the suit. But the contract there sued on was executed in the name of the State of Wyoming, whereas the contract here sued on was made by and in the name of the agency or entity designated by the General Assembly to expend the appropriation through contracts made for that purpose.

The instant case is somewhat similar to the recent case of *Urquhart* v. *State*, 180 Ark. 937, 23 S. W. (2d) 963. As appears from the facts stated in that case, the point really in issue was the extent of the liability of the State for interest upon a contract to purchase a State convict farm, and the sufficiency of the appropriation and the manner of its passage to discharge the obligation when its extent was adjudged by the courts of Pulaski County, the agency created for that purpose. Upon this feature of the case we there said: "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." It is true that suit was brought by the State, as the act

provided it should be, but the act also provided that the State's vendor might litigate his claim for interest, and that either party should have the right to appeal from an unfavorable decision.

The instant case is more like that of *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41. The facts in that case were that Grable brought suit in the Pulaski Chancery Court (and another claimant in the Pulaski Circuit Court) against the State Highway Commission and the individual members thereof to enforce the payment of an outstanding indebtedness incurred prior to January 1, 1927, against a road improvement district duly organized under the laws of the State of Arkansas. We there said that the right to recover depended upon the construction to be given act 153 passed by the Legislature of 1929 (1, Acts of 1929, p. 785). Section 1 of this act provided: "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, * * * 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 vouchers shall be delivered to the person authorized to receive the same, on proper satisfaction of such indebtedness * * *."

We there held that, while the provision for the payment of the claim involved in that case was a donation, we also held that a person holding a claim of the class described might maintain a suit against the highway commission to enforce it, although the funds out of which Grable and the other plaintiff demanded payment were derived from the identical source out of which the plaintiffs here ask payment, and all of it was the money of the State.

We did not treat the Grable case as a suit against the State, although its purpose was to compel the highway commission to pay out the State's money. But we treated the appropriation as being a legislative declaration that the merit of the claims had been passed upon and approved and the appropriation itself as the provision of the State for the discharge of the demand.

In that case the appropriation, so far as Grable and similar claimants were concerned, was a donation. Here the plaintiffs assert contractual obligation against the highway commission itself, and they seek to require the commission to devote a portion of the fifteen million dollar appropriation to the purpose for which it was all intended, to-wit, the payment of the obligations of the highway commission incurred in the construction of the State highway system. The appropriation for this purpose has already been made, and the plaintiffs here are not seeking to impose an obligation upon the State; they pray, rather, that the highway commission devote the fund for the purpose intended by discharging the obligation of the contract which the Legislature had previously authorized the highway commission to make. See, also, *Arkansas State Highway Commission* v. *Kerby,* 175 Ark. 652, 300 S. W. 377.

In this controlling respect the instant case is identical with the Grable case, and we can perceive no sound distinction between Grable's right to sue the highway commission, and thereby compel it to pay his claim, and the right of the plaintiffs here to sue. The object of both suits is identical, that is, to consummate the purpose of the appropriation, which, in one case, was to make a donation, and, in the other, to comply with contracts which the highway commission had been authorized to make and had made in its own name.

The case of *State ex rel. State Highway Commission of Missouri* v. *Bates, Circuit Judge,* 317 Mo. 696, 296 S. W. 418, involves a principle which the writer and Justice MCHAFFY think should be applied and is control-

ling here, and for that reason we quote somewhat extensively from the opinion in that case, which was a unanimous opinion of the Supreme Court of Missouri sitting in banc.

That case involved two suits against the State Highway Commission, damages being claimed in each arising out of contracts entered into by the plaintiffs with the State Highway Commission. One of these suits was brought in the county where the construction contract was performed; the other in the county where the highway commission had its domicile and kept its records—the county in which the State capitol was located.

The opinion begins with a quotation from a former opinion of the Supreme Court of that State, where Justice Lamm, speaking for the court, had said: "That the sovereign State may not be sued is a truism," and while it was added that the sovereign may, by law (under the Constitution of that State), give consent to the citizen to sue it, the point was expressly decided and made the basis of the decision that the suit was not in fact against the State. Immunity from the suit was claimed by the highway commission in that case upon the ground that, as it was an agency of the State, a suit against it was, in fact and in effect, a suit against the State, and could not be maintained for that reason.

In overruling the contention that a suit against the State Highway Commission was a suit against the State, Mr. Justice Graves, speaking for a unanimous court, said:

"It (State Highway Commission) is an entity, with powers of a corporation, established and controlled by the State for a specific public purpose, but that does not make this legal entity the sovereign State. No contract it is authorized to make is made in the name of this State, but in the name of the commission. The sovereign State could have contracted for the building of its public highways in its own name, but it chose to create a legal entity for this work. This act gave to this legal entity no part of the State's sovereignty, but authorized it to proceed

to do certain work which the State could have done by private contract made direct with the State. Thus it has been well said in 14 C. J., at page 75:

"'Although a corporation may be public, and not private, because established and controlled by the State for public purposes, it does not necessarily follow that such a corporation is in effect the State, and so not subject to the rules of law governing other corporations, for the State may, by engaging in a particular business through the instrumentality of a corporation, divest itself *pro hac vice* of its sovereign character, so as to render the corporation subject to the rules of law governing private corporations. Thus, although incorporated banks, established by the State for its own public purposes and owned and controlled entirely by the State, are undoubtedly public corporations, it has been held that they are not for that reason invested with the attributes of sovereignty, but are mere corporations, and subject generally to the rules of law governing other corporations.'"

After incorporating into the opinion the above quotation from 14 C. J., the learned judge proceeded to say:

"Such is the status of this commission. It is not the State, but a mere entity created by the State, for the specific purpose of contracting for the building of State highways and bridges, and the maintenance of the same, and doing all other things pertaining thereto. In the language of Walker, J., in *State* v. *Board of Regents,* 305 Mo. loc. cit. 68, 264 S. W. 701, it was constituted 'a legal entity, without in anywise lessening the State's sovereignty.' It is in no sense entitled to immunity from suit, as is the State. In fact, the State, which created the commission, subjected it to be sued by express statutory provisions. If, on the other hand, it is in fact and in law the State, or the State's *alter ego*, the State has consented to suit being brought. The commission is not the State, with the State's sovereignty (or any part thereof), but is a mere creature of the State, created for the express purpose of performing a specific work. A case fully

in point is the case of *Gross* v. *Kentucky Board of Managers of World's Columbian Exposition,* 105 Ky. 840, 49 S. W. 458, 43 L. R. A. 703.''

The learned jurist then cites and reviews a number of cases to the effect that the State is not the real party where it has created a legal entity to do the things to be done.

So here, the State of Arkansas has not contracted to build roads. It has created an entity for that purpose, and has made appropriations in advance to discharge the obligations incurred in that behalf. Building roads is, of course, a public purpose, for the accomplishment of which the public revenues may be expended, but it is not a work in which only the sovereign State may engage. Other agencies may build roads, and do build them, such as cities and towns and counties and road improvement districts. Here the State has created an entity and conferred upon it power to make contracts, not in the name of the State, but in its own name, and has appropriated the money with which the obligations of these contracts may be discharged.

After holding that suit, based upon a contract made by the State Highway Commission, might be maintained against the commission, it was said by the Supreme Court of Missouri in the case from which we have quoted that the highway commission as an entity was in a class different from pure corporations, and that, as it was created for a purely public purpose, the State could provide the place of a suit against it and the manner of service, and that this was done by making the permanent domicile of the commission in Jefferson City—the State capitol—and that suit could, therefore, be brought only in the county in which the capitol was located. Here, as we have said, the special act of 1928 makes the courts of Pulaski County —the domicile of our highway commission—the forum in which suits must be brought.

There is nothing unusual about these contracts, and there is nothing in the legislation authorizing them to

warn a prospective bidder for one of them that they do not have the usual attributes of contracts, and are not mutually binding and enforcible. On the contrary, the State has created an agency or entity to engage in a business not necessarily related to any sovereign function, and the controlling question in the case is whether this agency may be compelled to perform its contracts, as the General Assembly, acting for the State, intended it should do when the power to contract was given, and as the commission unquestionably has the power to do without being sued. If the commission saw proper to perform the contract sued on, it has the power so to do without obtaining further authority from the General Assembly for that purpose, and we conclude, therefore, that it may be compelled to exercise this power if the applicable principles of the law of contracts enjoin this duty.

The opinion in the case of *Maryland Casualty Co.* v. *Rainwater,* 173 Ark. 103, 291 S. W. 1003, is not inapplicable here. The facts in that case were that State funds had been deposited in a bank which became insolvent, and it was claimed that the State had the right to enforce its demand against the assets of the bank in preference to other creditors, but in holding against that contention we there said: "The State, in making such deposit, was not exercising a governmental function, but only engaged in ordinary business. Its attitude with regard to the transaction was just such as might have been assumed by any individual or private corporation, which might have chosen to lend its money to the bank; and, as said in *Callaway* v. *Cossart,* 45 Ark. 88: 'When a State steps down into the arena of common business in concert or in competition with her citizens she goes divested of her sovereignty.' The State cannot presume, under such conditions, to exercise the ancient prerogative of the king and claim a preference in the repayment of her moneys loaned to, or deposited in, the failed bank, as against all other depositors and creditors thereof, having made no intimation or declared no intention in her laws relating

thereto that such would be done. She will be held to have waived or abandoned such prerogative right, which cannot be exercised under existing laws."

It is therefore the opinion of the writer and of Justice MEHAFFY that, for the reasons herein stated, the writ of prohibition should be denied, and as the Chief Justice and Mr. Justice HUMPHREYS concur on another ground, it is ordered that the petition for the writ be denied.

HART, C. J., and HUMPHREYS, J., concur.

KIRBY, MCHANEY and BUTLER, JJ., dissent.

HART, C. J., (concurring). Judge Humphreys and myself concur in the judgment only.

The most difficult and perplexing question in the case is whether or not the present action is a suit against the State. On the one hand, it is claimed that the State Highway Commission is a legal entity with corporate powers and as such is subject to suit, as decided by the Supreme Court of Missouri in *State ex rel State Highway Commission* v. *Bates,* 317 S. W. 696, 296 S. W. 418. On the other hand, it is claimed that the Highway Commission is an agency of the State, and not a separate body politic or corporate, and that a suit against the Commission is a suit against the State itself. *Looney* v. *Stryker,* 31 N. M. 557, 249 Pac. 112, 50 A. L. R. 1404; and *State Highway Commission* v. *Utah Construction Co.,* 278 U. S. 194, 49 S. Ct. 104.

This is a question which each State must decide for itself, and the opinion of the Supreme Court of the United States is only persuasive. In *Palmer* v. *State of Ohio,* 248 U. S. 32, 39 S. Ct. 16, the court said that the right of individuals to sue a State in either Federal or State courts cannot be derived from the Constitution or laws of the United States. It can only come from the consent of the State. In *Duhne* v. *State of New Jersey,* 251 U. S. 311, 40 S. Ct. 154, it was held that Federal courts have no jurisdiction of a suit brought by a citizen against his

own State without its consent. In *Ex parte State of New York,* 256 U. S. 490, 41 S. Ct. 588, the court said:

"That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given; nor one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."

In that case the court also said that it is now thoroughly settled that what is to be deemed a suit against a State is a question to be determined, not by the mere name of the titular parties, but by the essential nature and effect of the proceeding as it appears from the entire record. The court quoted from *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 11 S. Ct. 699, to the effect that where the suit is brought against the officers of the State as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will operate, the suit is, within the meaning of the Eleventh Amendment, an action against the State. So, too, where the suit operates so as to require the State to make pecuniary satisfaction for any liability, it would be a suit against the State. *Smith* v. *Reeves,* 178 U. S. 436, 20 S. Ct. 619.

It will be noted that in the case of *State Highway Commission of Wyoming* v. *Utah,* 278 U. S. 194, 49 S. Ct. 104, the court expressly held that a State is not a citizen, and that a suit between the State and citizens or corporations of another State is not within the jurisdiction of Federal courts as involving diversity of citizenship.

While, as above stated, we must be controlled by our own decisions on this question, still the opinion of

the Supreme Court of the United States on the identical question is very persuasive, and is, we think, in line with our own decisions on the question, and should be followed. The obligation to build and maintain adequate public highways, including bridges across rivers, devolves primarily on the State; and we have recognized that the State itself may discharge the obligation or delegate the duty to an subordinate agency. *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.

In *Jobe* v. *Urquhart,* 98 Ark. 525, 136 S. W. 663, the court said that the penitentiary board was but an agency of the State, composed of certain officers thereof, for the conduct and maintenance of the State penitentiary, and that a suit against said board to reform a contract for the purchase of a State convict farm was in effect a suit against the State within the inhibition of the Constitution.

In the present suit a judgment against the Highway Commission would require the State to make pecuniary satisfaction for the liability, and we are of the opinion, that it is in effect a suit against the State. That this view is in accord with the principles declared by the Supreme Court of the United States will be further seen by a quotation from *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636, 55 L. Ed. 890, 31 Sup. Ct. Rep. 654, 35 L. R. A. (N. S.) 243, which reads as follows: "With the exception named in the Constitution, every State has absolute immunity from suit. Without its consent it cannot be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the Eleventh Amendment has been held to apply, not only where the State is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the State, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer, which seeks to compel him to exercise the State's power of taxation, or to pay out its money

in his possession on the State's obligations, or to execute a contract, or to do any affirmative act which affects the State's political or property rights."

This brings us to a consideration of whether article 5, § 19 of the Constitution providing that the State of Arkansas shall never be made a party defendant in any of her courts contains a prohibition, or is merely declaratory of the general rule that a State may not be sued without its consent. See case notes to 42 A. L. R. p. 1465 and, 50 A. L. R. at p. 1408. The State of Alabama contains a similar clause in her Constitution, and it was held that the section was prohibitory, and that the Legislature could not enact a statute allowing the State to consent to a suit against itself. *Alabama Girls' Industrial School* v. *Adler,* 42 So. 116.

We do not consider that case as controlling. The State of Alabama had a clause in its Constitution which provided that no local law shall be passed unless notice of the intention to apply therefor should be published in the county where the matter to be effected was situated, which notice should state the substance of the proposed law, and be published at least once a week for four consecutive weeks in some publication in such county or counties, and the court held that the prohibition was mandatory, and that noncompliance with it rendered the act void. *Kumpe* v. *Irwin,* 140 Ala. 460, 36 So. 1024. The court said: "The journals do not affirmatively show that the act was passed in accordance with the provision of said section (Constitution) in which case the courts are required, without any discretion, to pronounce the act to be void."

This court, in construing a similar provision which is contained in article 5, § 27, of our Constitution, held directly to the contrary. In a long line of cases, beginning with *Davies* v. *Gaines,* 48 Ark. 370, 3 S. W. 184, this court has held that whether the notice was given was merely a legislative question. Again, in construing article 5, § 25, of the Constitution, which provides that

in all cases where a general law can be made applicable, no special law shall be enacted, the court has uniformly held that the section was merely cautionary to the Legislature, and that the Legislature was the judge of the necessity of a special statute.

It has been held that article 19, § 9, which provides that the General Assembly shall have no power to create any permanent State office not expressly provided for by the Constitution, falls within the class of provisions like that which forbids the Legislature to enact a special law where a general law can be made applicable (Const. article 5, § 24) and the court has held that class of provisions to be directory and merely cautionary to the Legislature. *Greer* v. *Merchants' & Planters' Bank,* 114 Ark. 212, 169 S. W. 802, and *Ft. Smith Dist. of Sebastian County* v. *Eberle,* 125 Ark. 350, 188 S. W. 821. We do not regard *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742, as authoritative, because what was there said expressed the views of two of the judges only.

We are of the opinion that the better reasoning is to the effect that this section of the Constitution was not intended to be prohibitory, but that it was merely intended as a declaration that the State may not be sued without its consent. The reasoning for such a provision in a Constitution is well stated by Mr. Justice Holmes for the Supreme Court of the United States in *Kawanakoa* v. *Polyblank,* 205 U. S. 349, 27 S. Ct. 526, as follows:

"Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since the days before the days of Hobbes (Leviathan c. 26, 2). A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

A sovereign State which enacts its own laws and creates its own courts and defines their jurisdiction is

of necessity exempt from the jurisdiction of these courts except by its own consent. We can perceive no good reason why a State should not consent to being sued in her own courts upon such terms and conditions as her Legislature might prescribe. We do not think that the consent can be given except by the Legislature, which alone can declare the public policy of the State. If the State is to exercise its sovereign power in building roads, and in constructing bridges across navigable streams, it would seem that there should be a tribunal somewhere, which might pass upon the claims of those with whom the agency of the State had contracted with reference to the matter, and what tribunal could be a more appropriate and safe guaranty of the equal protection of the laws than the courts established by the State for the protection of its citizens, and for such citizens who might come within its borders for pleasure or gain.

The general rule is that a State which consents to be sued may prescribe such methods, terms, and conditions as it sees fit. Case Note to 42 A. L. R. p. 1477. Among the numerous cases cited in support of the doctrine is that of *Auditor* v. *Davies,* 2 Ark. 494.

It is settled beyond controversy that the State cannot be sued in its own courts without its consent. In this case, the State, through the Legislature, has granted the right or privilege to claimants to institute actions against the State Highway Commission upon certain terms and conditions; and all persons or corporations seeking to avail themselves of the right or privilege so granted must do so subject to the terms and conditions which form a part of the right as granted by the Legislature. In other words, the suits instituted must be limited to such claims as are contemplated by the act authorizing the State to be sued. *State of Indiana* v. *Mutual Life Ins. Co.,* 175 Ind. 59, 93 N. E. 213, 42 L. R. A. (N. S.) 256, and cases cited.

In short, a sovereign State can only be sued by its own consent; and, when a claimant avails himself of the

consent, he must pursue the remedy in the court prescribed by the statute granting the privilege, and upon the terms and conditions as it is provided by the statute.

It must be remembered that it is conceded by all that, without regard to the constitutional provision under consideration, the Legislature may recognize the validity of any claim against the State and appropriate money to pay it; and that it would have the right to designate a subordinate agency such as a court of claims or other board to pass upon the validity of the claims.

Then, too, it will be seen from the case notes above cited that it is a rule of universal application that, in the absence of a provision on the subject, it is an inherent attribute of sovereignty that a State may not be sued without its consent; and many of the States have express provisions in their Constitutions authorizing the Legislature to pass laws waiving the State's immunity from suit; and such provisions have been held to be declaratory of the principle that a sovereign State is incapable of being sued without some legislative provision authorizing such a proceeding; and that the statute must be strictly followed, as stated in *Auditor* v. *Davies*, 2 Ark. 494; and this, it may also be stated, is the general rule on the subject. All these matters may draw the sting out of the minds of those who fear that the sovereignty of the State may be diminished, or that the efficiency of the State government may be lessened by permitting the Legislature to pass acts permitting the State to be sued in its own courts upon such terms and conditions as it might prescribe. It would put form above substance to say that the Legislature might not permit such suits to be brought in the courts created by the State, but could create other tribunals before whom such claims could be established. At least judicial adjudication is a safe and reasonable way to guarantee that a person shall not be deprived of his property without due process of law.

To sum up, it may be said that when the State Highway Commission was created to construct State roads

and was selected to make contracts to expend the State's money therefor, it became the State's agent to do so. Whether it be called a corporate entity, commission or board, it is none the less an agency of the State; for the State may only construct and improve public highways in the discharge of a sovereign function, and it can only exercise that power by committing the discharge of it to agencies selected by its Legislature for that purpose. Therefore, the contracts which the State Highway Commission enter into obligates the State and not the Highway Commission or its members. Actions against it are to all intents and purposes suits against the State. It is the State's property rights that will be affected by the judgment, and the State will be required to make pecuniary satisfaction for any liability. It seems to us that the State's sovereignty will be better preserved and protected by holding that a State may through its Legislature waive its immunity from suit and select the forum and prescribe the terms and conditions upon which it may be sued than to allow the Legislature to parcel out the State's sovereign functions to various bodies, by whatever name called, and allow them to be sued, thereby accomplishing by indirection what they say the State may not do directly.

NORTON *v.* NO FENCE DISTRICT NO. 2.

Opinion delivered April 14, 1930.

Paul Miller, for appellant.

A. J. Johnson, for appellee.

HART, C. J., (after stating the facts). One petition for the annexation of territory was filed on April 29, 1929, with the clerk of the county court. Another one was filed on December 20, 1929. On the third day of February, 1930, the two petitions were consolidated and set for hearing by the county court on the fifth day of March,

1930, and the clerk was directed to give the statutory notice. In giving the notice, the clerk embraced the land in both petitions in the same notice, and the proof of the publication of the same was duly filed in the county court.

The judgment of the county court recites that the two petitions were consolidated, and notice by publication was given as required by the statute. The order further recites that the court found that the lands set out in the two petitions are adjoining, and that they also adjoin the lands in the original fence district; that each of said petitions is signed by more than two-thirds majority in acreage and value of the lands therein set out, and that it would be to the best advantage that said lands be incorporated and made a part of the original fence district. Judgment was entered in accordance with this finding upon the records of the county court.

We do not think there was any error in consolidating the two petitions for hearing and in giving the statutory notice by embracing the land described in the two petitions in the same notice. The Legislature of 1927 passed an act to authorize additions to fence districts. Acts of 1927, p. 225. Section 1 provides that when any number of landowners owning land near or adjacent to any fence district organized pursuant to law shall present to the county court a petition in writing, accompanied by a map giving the description of the land which they desire to have enclosed in the fence district, it shall be the duty of the county court to give the notice by publication in the time and in the manner prescribed by statute, calling upon all persons interested to appear and show cause why the prayer of the petitioners should not be granted.

An examination of the two petitions shows that this section of the statute was complied with, and no prejudice could have resulted to any one from hearing the two petitions at the same time. The publication of the land described in the two petitions in the same notice was a substantial compliance with the statute. The reason for giving the notice was to enable any one interested to ap-

pear and show cause why the prayer of the petitioners for the annexation of their lands to the fence district should not be granted. The lands described in the two petitions were adjacent lands as well as being adjacent to the original fence district. No one could have been misled by the publishing of one notice instead of two.

Section 2 of the act which requires the county court to act upon the finding that the owners of the majority in value or acreage of the land annexed was complied with. Indeed, the record of the county court, which is not disputed, recites that a majority of two-thirds both in value and in acreage signed each of the petitions. So it will be seen that the statute in this respect was complied with.

Section 3 of the act provides that from the date of such order all lands which shall become a part of the fencing district shall thereafter be liable for any charges, taxes and assessments that are levied against other lands within the same district; that said lands so enclosed in said order shall be liable for any special assessments made by the commissioners of the district to help defray the cost and expense of making the alteration necessary to enclose said additional land, and said assessment shall be paid by the owners thereof.

It is the contention of counsel of appellant that this section does not provide any means of assessing the lands in the territory annexed for the purpose of altering the fences. This act must be read in connection with § 4655, *et seq.* of the Digest, under which the original fence district was established. It was evidently the intention of the framers of the act of 1927, authorizing additions to fence districts, to provide that the assessments should be made in the method prescribed by the statute authorizing the organization of the original districts. It does not in any way violate the provisions of article 5, § 29, of the Constitution, which provides in effect that no act may be amended by reference to its title, but that the act as amended must be set forth at length. The later act simply confers the power upon the county court to

annex territory to a fencing district when the requirements of the statute are complied with, and that the assessments made under it should be made under the existing statute as to procedure. *Wilson* v. *Magnolia Petroleum Co., ante* p. 391, and cases cited.

The Legislature had the right to change the boundaries of the original fencing district by providing for the addition thereto of adjacent lands when the sections of the act were complied with. *Henderson* v. *Dearing,* 89 Ark. 598, 117 S. W. 1066.

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

HOGGE *v.* DRAINAGE DISTRICT NO. 7.

Opinion delivered April 14, 1930.

[redacted]

C. T. Carpenter, for appellants.

Chas. D. Frierson, for appellee.

HART, C., (after stating the facts). The demurrer admits that plaintiffs' lands have been damaged for a public use, and that the damage has not been ascertained or paid. This court has held that improvements for the protection of river valleys from overflow by building levees and draining them by constructing ditches may be united in one improvement district. The court has also held that a drainage and levee district, after building levees on each side of a river and constructing a reservoir thereby, has no right to build a dam at the outlet of the basin between the lower ends of the levees so as to cause flood waters to flow back and destroy the use of land for agricultural purposes; and that for injuries so caused, the landowners are entitled to compensation. *Sharp* v. *Drainage District No. 7,* 164 Ark. 306, 261 S. W. 923; and *Keith* v. *Drainage District No. 7 of Poinsett County, ante* p. 30.

In these cases the court had under consideration damage caused by this same levee and drainage district. A distinction is sought to be made between the principles of law as applicable to these cases and the present one

in that the lands in these cases were situated within the boundaries of the levee and drainage district, while in the present case they are situated in another county and without the limits of the drainage and levee district. This does not make any difference. There can be no doubt that obstructing a navigable or nonnavigable flowing stream and thereby flowing the water back upon the land of another is such a damage as entitles the owner to compensation.

While this court is thoroughly committed in numerous cases to the doctrine that reclaiming lands bordering upon flowing streams by levees and drainage districts is a work of great public importance and should be encouraged, whenever the courts can do so without violating legal principles, in order to develop our State, still there are settled principles of law which courts cannot ignore. The established rule is that the ordinary course of flowing water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another without compensation in damages. *Taylor* v. *Steadman,* 143 Ark. 486, 220 S. W. 821, and cases cited.

In *Ex parte* Martin, 13 Ark. 198, 59 Am. Dec. 321, the court held that, although the Constitution of the State contained no provision that private property shall not be taken for public use without just compensation, yet this prohibition upon the Legislature is implied from the nature and structure of our government, even if it were not embraced by necessary implication in other provisions of the Bill of Rights. The reason is that, while the right of eminent domain is inherent in the sovereign power, equally so is the vested right to hold property in its citizens, and the right of eminent domain means when the public necessity or common good requires it that the citizen may be forced to sell his property for its value.

Article 2, § 22, of our Constitution expressly provides that private property shall not be taken, appropriated, or damaged for public use without just compensation therefor. Numerous cases including levee and drainage

cases are cited in the footnote of the section to the effect that under this provision the inquiry is no longer confined to the question whether there has been a public invasion or appropriation of private property for public use, but that compensation may be recovered for any damage of a permanent nature done to the property.

If a drainage district actually takes land, compensation must be made or provided for before the land is appropriated; and if the district concedes that damage will result to lands by the construction of the improvement, such damages may be assessed under the law of eminent domain or by the common-law remedy of the owner in an action for trespass on the land. If the levee and drainage district does not concede that damages will result from the construction of the improvement, an action for damages may be brought by the landowner, when the improvement is constructed, to determine the question whether his lands will be permanently injured, and, if so, to recover the damages. This is in application of the provision of the Constitution above referred to that private property cannot be taken or damaged for a public use without just compensation. *Bradbury* v. *Vandalia Levee and Drainage District,* 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991; and *Fort Worth Improvement District No. 1* v. *Fort Worth,* 106 Texas 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

This principle has been recognized and applied by the Supreme Court of the United States in *Pumpelly* v. *Green Bay & M. Canal Co.,* 13 Wall. 166, 20 L. ed. 557, where the plaintiff's lands were overflowed by backwater from the construction of a dam, and the legislative authority for its construction was made the basis of the defense to an action for damages. There, as here, according to the allegations of the complaint, the nature of the injuries to the land worked an almost complete destruction of the value of the land and were permanent in their nature. Mr. Justice MILLER, speaking for the court, said:

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation. It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common-law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowed sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Again, in *United States* v. *Lynch,* 188 U. S. 455, 23 S. Ct. 349, a dam had been constructed by the United States in such manner as to hinder the natural flow of a stream, and, as a necessary result, to cause the level of its waters to rise and overflow the land of plaintiff to such an extent as to cause a total destruction of its value. In consequence thereof the land was rendered totally unfit for agricultural use and it was held liable for just compensation. It was held that when the United States Government by the construction of a dam or other public work so floods land belonging to an individual as to destroy its

value, there is a taking of private property within the meaning of the Fifth Amendment.

In *United States* v. *Cress,* 243 U. S. 316, 37 S. Ct. 380, the Government by means of a levee and a dam had caused the waters of the Cumberland River to rise above its natural level so that lands not nominally invaded were subjected permanently to frequent overflows impairing them to the extent of half of their value. A like improvement had caused the waters of the Kentucky River to be raised in the same manner so as to end the usefulness of a mill by destroying the head of water necessary to run it. The finding of the court was that it was not a case of temporary overflow but a condition of permanent injury from recurring overflows. Consequently, it was held that such overflowing was a direct invasion of the private property amounting to a taking of it. The court held that the right to have the water of a nonnavigable stream flow away from riparian land without artificial obstruction is not a mere easement, or appurtenance, but exists by the law of nature as an inseparable part of the land itself.

Again, in *Sanguinetti* v. *United States,* 264 U. S. 146, 44 S. Ct. 264, the principle was recognized that where the overflow was the direct result of the structure erected and its effect constituted an actual, permanent invasion of the land, this amounted to an appropriation of the land and not merely an injury to it.

In the present case, under the allegations of the complaint, the injury to the land was not temporary, but permanent. The customary use of the land was agricultural; and, under the allegations of the complaint, the overflow from the backwaters was the direct and immediate result of the construction of the levees and the dam across the St. Francis River. The demurrer admits these allegations to be true, and the action of the drainage and levee district constituted an actual, permanent injury to the land, and not merely a temporary injury to it. Hence there was a damage to the land within the meaning of

the section of the Constitution referred to, and the district was liable for the amount of damages suffered.

Some argument is made that the damage might have been caused by the construction of drainage improvements in Craighead County, but these matters cannot be considered in the present appeal. It was not incumbent on the landowner to show the particulars in which the construction of the levees and dam would cause the waters to flow back on his land. That would be to plead evidence. It was not necessary for him to negative the fact that the injury was not caused by the construction of other improvements. It was only necessary for him to allege that, by the construction of the levees and dam across St. Francis River, a reservoir was erected which collected vast quantities of water which heretofore had flowed in other directions, and thereby caused the waters to be collected in the reservoir and rise to an abnormal height, and to flow back upon the lands of the plaintiffs, causing permanent injury thereto and to their crops thereon.

Counsel for the defendant insist that the case falls within the rule announced in *City Oil Works* v. *Helena Improvement District No. 1,* 149 Ark. 285, 232 S. W. 28, 20 A. L. R. 296, where it was held that a landowner whose property is left outside of a levee is not entitled to damages because of the failure to protect his land or because the levee, as constructed, may prevent water from flowing off of his land as it otherwise would, or may deepen the water in an overflow of the land between the embankment and the river. We do not think the principles there announced have any application. When lands are left on the outside of a levee, they would be flooded from an overflow in the river whether a levee was constructed or not, and the construction of the levee would only serve to hold the water on the lands longer or to make it deeper, and this damage is not the direct but an indirect cause from the construction of the levee; and because levees are constructed to do the greatest good to the greatest number and because the damages are remote and consequential,

there can be no recovery. In such cases the courts hold that there is no invasion of the rights of property. In that case, however, the court recognized that damages produced by independent causes other than being left outside the levee may still be recovered.

Counsel also rely on the case of *McCoy* v. *Plum Bayou Levee District,* 95 Ark. 345, 129 S. W. 1097, to sustain their contention that there was no liability. In that case the landowners organized an improvement district to construct levees with the avowed purpose of confining the waters within the bed of the stream. The object was to prevent the water from overflowing the adjacent lands. The landowners did not obstruct the flow of the waters in the stream, but merely built a levee to protect their lands from overflow. In the present case the levee and drainage district included dams and levees which obstructed the natural flow of the water, and caused it to flow back upon the lands of the plaintiff to their permanent injury. *Taylor* v. *Steadman,* 143 Ark. 486, 220 S. W. 821.

Finally, it is insisted that the complaint shows on its face that the cause of action is barred by the statute of limitations. We do not agree with counsel in this contention. The complaint alleges that during the months of June and July, 1928, the defendant by the construction of said levees and their reservoir obstructed the flow of the waters, and impounded the same in said reservoir to so great an extent as to cause them to flow back and completely submerge the lands of the plaintiffs and to destroy the crops thereon. The original complaint was filed on July 16, 1928, and the amended complaint on December 17, 1928. Thus, it will be seen that the complaint does not show that the cause of action was barred.

Inasmuch as the judgment must be reversed and the cause remanded for further proceedings, we will decide what statute of limitations is applicable. Counsel for the plaintiffs claim that § 6950 of the Digest which provides that all actions for trespass on lands shall be

brought within three years after the cause of action shall accrue. On the other hand, counsel for the defendant claims that § 3942 of the Digest applies. This section provides that all actions for the recovery of damages against any levee or drainage district for the appropriation of land or the construction or maintenance of other levees or drains shall be instituted within one year after the construction of such levees or drains. This is a special statute limiting the time when such actions may be brought against levee and drainage districts, and, although it was passed before the enactment of the statute under which the present district was organized, yet it was in its terms very broad and comprehensive, and applies to all drainage districts which may hereafter be created whether under special or general acts, where no other statute of limitations is provided. See *Young v. Red Fork Levee Dist.*, 124 Ark. 61, 186 S. W. 604; and *Board of Directors of St. Francis Levee Dist.* v. *Home Life & Accident Co.*, 176 Ark. 558, 3 S. W. (2d) 967.

Therefore, the judgment will be reversed, and the cause will be remanded with directions to the circuit court to overrule the demurrer, and for further proceedings according to law. It is so ordered.

LUTESVILLE SAND & GRAVEL COMPANY *v.* MCLAUGHLIN.

Opinion delivered April 14, 1930.

[redacted]

J. H. Townsend and *C. D. Frierson,* for appellants.

Eugene Sloan, L. B. Poindexter and *David L. King,* for appellee.

SMITH, J. Margretta McLaughlin and her husband, T. F. McLaughlin, brought this suit against the appellant Gravel Company to recover the value of certain gravel alleged to have been taken from land owned by Mrs. McLaughlin, and judgment was rendered in her favor for the sum sued for.

The controlling question in the case is the one of fact whether Spring River, from which the gravel was removed, is a navigable stream. Mrs. McLaughlin amended her complaint to allege that the bar from which the gravel was removed was an accretion to her land, but the court held—and properly, we think—that under the undisputed testimony the bar was not an accretion to her land, and no complaint is made of that ruling.

Mrs. McLaughlin has title to a tract of land which is described in her deed and in the deeds to her predecessors in title as "All that part lying on the left or east bank of Spring River of east half of the northeast quarter of section 9, township 17 north, range 1 west." Therefore, if Spring River is a navigable stream, Mrs. McLaughlin takes only to the high water mark, whereas if the stream is not navigable, she has the right of a riparian owner to have her boundary extended in accordance with a rule well defined. The rule is as follows:

The riparian owner upon a navigable stream, deriving title from the United States, takes only to the high water mark, the title to the bed of the stream being in the State; but the riparian owner upon a non-navig-

able stream is entitled to the center of it, ratably with the other riparian proprietors, the extent of the interest depending upon the frontage upon the stream. *Barboro* v. *Boyle,* 119 Ark. 377, 178 S. W. 378; *St. L. I. M. & Sou. Ry. Co.* v. *Ramsey,* 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 359, 22 Am. St. Rep. 195; *Rhodes* v. *Cissel,* 82 Ark. 367, 101 S. W. 758; *Little* v. *Williams,* 88 Ark. 37, 113 S. W. 340; *Glasscock* v. *National Box Co.,* 104 Ark. 154, 148 S. W. 248.

It is conceded that under the rule for the apportionment of the beds of non-navigable waters Mrs. McLaughlin owns the bar from which the gravel was removed if Spring River is non-navigable.

Opposing counsel have cited and reviewed many cases upon this subject, but, as the law has long been at rest in this State, we will not review or discuss any cases from any other jurisdiction.

The case of *Little Rock, M. R. & T. R. R. Co.* v. *Brooks,* 39 Ark. 403, announced the test of navigability, and that case has been consistently followed. The question there involved was that of the navigability of Bayou Bartholomew, and the court there held that the burden of proving navigability, when that fact was in dispute, was upon the party asserting that fact. It was there said: "By the American doctrine, tide water, as a criterion of navigable character, has been discarded. Nor is it any objection to the public easement for navigation, that riparian proprietors of lands, along fresh waters, own to the thread of the stream. Nor is it necessary that the stream should be capable of floating boats or rafts the whole, or even the greater part of the year. Upon the other hand, it is not sufficient to impress navigable character that there may be extraordinary times of transient freshets, when boats might be floated out. For, if this were so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means

of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then, in the American sense, it is navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort and advance the prosperity of the community. But it is evident that sudden freshets at uncertain times cannot be made available for such purposes. No prudent man could afford the expense of preparation for such events, or could trust to such uncertainty in getting to market. The result of the authorities is this, that usefulness for purposes of transportation, for rafts, boats or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round (citing authorities)."

This statement of the law was quoted and approved in *Barboro* v. *Boyle, supra.*

The defendant admitted in its answer the removal of the gravel from the bar in question, but in paragraphs numbered 11, 12, 13 and 16 of its answer alleged certain facts by way of defense, which, on motion of the plaintiff, were stricken from the answer.

In paragraph 11 it was alleged that prior to the installation of defendant's plant for removing the gravel the War Department of the United States announced its decision that Spring River at the point in question was a navigable stream, and that the Department was exercising jurisdiction over it as such, and that a permit would be required before an overhead cableway across the river could be erected, and that this permit was obtained from the War Department, a copy of which was made an exhibit to the answer.

Paragraph 12 alleged that the point in controversy on Spring River is only two miles from Black River,

into which Spring River empties, and is only about a mile below the mouth of Eleven Points River, which is itself a navigable stream emptying into Spring River. That Black River connects with the White River, which empties into the Mississippi River, which, in turn, empties into the Gulf of Mexico, and that these streams, together, make a navigable waterway and channel for commerce, both interstate and foreign, and are therefore within the exclusive jurisdiction of the War Department of the United States.

In paragraph 13 it was alleged that two bridges across Spring River had been erected at points higher up the stream, and that the War Department had required that permission to erect them be first obtained, and that this permission had been obtained through special Acts of the Congress of the United States, copies of which were made exhibits to the answer.

Paragraph 16 denied that any sand or gravel had been removed from the banks of Spring River, but alleged that the sand and gravel had been taken from bars within the meandered lines and within the permanent bed of the river.

We think the court erred in striking out these paragraphs, and that the matters there alleged were and are evidentiary facts, to be considered in passing upon the ultimate question to be decided—that is, the navigability, in fact, of Spring River at the point where the gravel was removed.

In the case of *Little Rock, M. R. & T. R. R. Co.* v. *Brooks, supra,* it was insisted that the plaintiff, who there asserted the navigability of Bayou Bartholomew, "had failed to show *by any legal proof* that the bayou is a navigable stream by law," but the court said: "Parol proof was admissible. It is not necessary that the bayou should have been declared navigable by any statute of the State or Federal governments."

The authorities are also to the effect that, while the action of the War Department in assuming jurisdiction

over a stream as being navigable, and that of the Congress in passing legislation granting permits to build bridges, are not conclusive of the question of navigability where there is no express declaration of that fact, yet such action should be assigned weight in view of the power of legislative inquiry and judgment, although their effect is not to declare a river navigable in its natural state when the Acts of Congress do not purport to do so. *United States* v. *Brewer-Elliott Oil & Gas Co.,* 249 Fed. 609; *United States* v. *Cress,* 243 U. S. 316, 37 S. Ct. 380.

At § 14 of the chapter on Navigable Waters, 45 C. J. 416, it is said: "While the attitude of the Federal government, not amounting to a definite declaration, is to be considered upon the question of navigability, as is also the attitude of a State, navigability is not established by the fact that Congress has granted authority to construct a bridge in accordance with the general statute governing the bridging of navigable waters, nor by a precautionary proviso in such grant or permission that there shall be no interference with navigation, nor by congressional appropriations for the improvement of a river."

Here we have the action of the War Department in requiring and granting permission to extend cables across the river upon the theory that jurisdiction had been assumed over it as a navigable stream. We have also two special acts of Congress granting permission to build bridges across the stream at points above the gravel bar in question.

There was also offered in evidence an application made to the Commissioner of Insurance and Revenues of the State of Arkansas pursuant to the laws of this State (§ 6789 C. & M. Digest and Act 88 Acts of 1925, page 260) to remove the gravel. The permission required by the laws of this State to remove gravel from navigable streams was granted October 14, 1927, by the Commissioner of Insurance and Revenues of the State

for the agreed prices of two and one-half cents per cubic yard for sand and five cents per cubic yard for gravel, but upon the condition that the applicant "will not use this permit for the purpose of taking sand or gravel from said streams at any point where the same is not navigable, and * * * will not remove any sand or gravel from above mean high water mark."

There was also offered in evidence the official plat of the government survey of this stream, with the field notes of the survey, which show that the stream had been meandered in such survey.

Upon the subject of meandering streams in government surveys the following statement of the law appears at § 15 of the chapter on Navigable Waters, 45 C. J. page 416: "The running of a meander line along the bank of a stream does not establish its navigability, although it has been held that a body of water which has been meandered is *prima facie* navigable, but is not necessarily or conclusively so. Similarly the fact that a stream has not been meandered and returned as navigable does not show that it is non-navigable, but raises that presumption."

Among other cases cited in the note to this text is that of *Harrison* v. *Fite,* 78 C. C. A. 447. This case involved the navigability of Big Lake and Little River in this State, and affirmed the decree of the circuit court of the United States for the Eastern District of Arkansas (148 Fed. 781) holding that those waters were not navigable. Much that was said in the opinion in that case is relevant here, and upon the question of meandered streams it was there said: "The action of the government surveyors in meandering a body of water or in surveying its bed is to be considered as evidence upon the question of its navigability or unnavigability at the time; but it is not conclusive. The surveyors are invested with no power to foreclose inquiry into the true character of the water. If the United States has disposed of lands bordering upon a meandered unnavigable water

course or lake, by a patent containing no reservations, and there is nothing else indicating an intention to withhold title to the lands within the meander lines (*Niles* v. *Cedar Point Club,* 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171) it has nothing left to convey; and whether the title to the bed of the waters is in the State or passes to the grantee in the patent is determined by the local law. (*Lamprey* v. *Minnesota,* 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541). * * * Courts take judicial notice of the navigable character of our important rivers and inland lakes—those that are so within our common knowledge; but there are many of such insignificant capacity and doubtful utility that the question, being one of fact, is to be determined by the evidence produced, and in such case the burden of proof rests upon him who asserts the existence of the public servitude."

In addition to this evidence, all of which, except the permit from the State, was apparently treated by the trial court as being without evidentiary value, but which, as we have shown, does have evidentiary value, the following testimony was offered. W. E. Verkler testified that he was a boatman and timberman, with an experience of forty years on Spring River, and that he had license from the Federal government to operate boats on Spring River. Of this witness appellee says: "No one attempted to impeach his testimony or to question his sincerity." This witness testified that at different times he had operated on Spring River the Blue Goose, Ruby Pearl, the Quick Step, and the Boll Weevil, all of which were stern wheel steamboats, and that these boats had towed barges four feet deep, thirty feet wide, and sixty feet long, and upon these barges carried anything he pleased. That he made a number of trips up Spring River to defendant's plant, and delivered there railroad steel which was used in the construction of the plant, and that he had towed in barges to points higher up the stream material used in the construction of the

two bridges authorized by Acts of Congress which have been referred to. He also testified that when the toll bridges was built at Powhatan on Black River he brought out from Spring River on barges twenty feet wide and sixty-six feet long the gravel used in the construction of that bridge. He also testified that he had had a large number of logs, of all sizes, rafted down Eleven Points River to Spring River, and down Spring River to Black River, and that some of these logs would draw as much as forty-six inches of water, that is, the logs would sink that deep in the water in floating, and he further testified that if a few snags were taken out and some work done on the shallow places or "riffles" as he called them, boats could go up and down Spring River at any time of the year, and that you can go up and down the river with light craft now at any time.

Other testimony corroborative of this was offered, but after hearing six witnesses on the subject the court announced that only that number would be permitted to testify on either side.

The defendant offered—but the court excluded—testimony to the effect that other boats, the names of which were stated, had run to points higher up the stream carrying and delivering various articles of commerce.

There was offered in evidence photographs taken March 20, 1929, which showed the river at defendant's plant to be about five hundred feet wide, and soundings made on that day showed its depth to be ten feet in the shallowest water, and when the pictures were made the Boll Weevil, a steamer, a deck and a half high, was pushing a large barge. The pictures show the river to be well within its banks. It was admitted by the plaintiff and the witnesses who testified in her behalf that the river was in fact navigable, even for steamboats, at certain seasons of the year, but their testimony was to the effect that this navigable condition was intermittent and irregular, and did not exist except after rains, and did not occur at fixed periods of time or continue for any definite

duration, and that in low water the river was not navigable for rafts; that there were bars in the river over which the rafts could not be floated, and that the rafts would have to be broken up and the logs floated over, one at a time, and in some instances the logs had to be rolled over in the shallow water. Plaintiff also offered testimony to the effect that there were certain fords which could be crossed in low water, and that on one occasion an automobile had been driven over one of these fords, and one witness testified that he had on several occasions driven a reaper across the river at one of these fords. It was not contended, however, that this could be done or had been done except at low stages of the river, and, even then, only at the fords, but the testimony shows that even at those places and at the lowest stages of the river boats of light draft called "John Boats" could be propelled.

We have concluded that the undisputed testimony is to the effect that Spring River is a navigable stream under the tests of navigability laid down in the previous decisions of this court hereinabove referred to. Except at the shallows or bars there is, at all seasons of the year, enough water to carry rafts and similar commerce, and except during the periods of low water the river has a sufficient depth to accommodate substantial commerce, and, while this period of time varies somewhat, it does continue for a period of several months every year, and may be reasonably anticipated to exist except in the summer and fall when the river is at a low stage.

We conclude, therefore, that the court should have held, under the undisputed testimony, that Spring River is a navigable stream, and, being such, that the plaintiff had no cause of action to recover the value of the gravel taken from the stream opposite her land, and a verdict should, therefore, have been directed in defendant's favor, and for the error in not so doing the judgment is reversed, and the cause will be dismissed.

HUMPHREYS, J., disqualified and not participating.

BLEDSOE *v.* MCKEOWEN.

Opinion delivered April 14, 1930.

[redacted]

S. F. Morton and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Paul G. Matlock, for appellee.

HUMPHREYS, J. A petition to form a new Special School District out of Rural Special School Districts Numbers 30-31-6, three sections of Number 5 and Common School District Number 8 in Dallas County, duly signed by a majority of the electors residing therein, was filed with the county board of education of said county under the provisions of act 156 of the Legislature of 1927. A remonstrance against the formation of the district was filed before said board by electors residing in Special School District Number 6.

On a hearing of the petition and remonstrance, said board formed the territory described in the petition and shown by the plat accompanying same into a new special school district designated "Rural Special School District Number 42" of said county, from which order and con-

solidation electors in districts 5, 6 and 8 prosecuted an appeal to the circuit court of said county.

The cause was there tried by the court upon the petition, remonstrance and agreed statement of facts, together with the testimony of witnesses introduced by the respective parties upon the issue of whether or not it would be to the best interest of all parties affected to form the new district, resulting in a finding that it would be to the best interest of said districts numbers 30 and 31 for said territory embraced in said petition to be formed into a new rural special school district; that it would not be to the best interest of the other parties affected for said new district to be formed or created, and therefore it would not be for the best interest of all parties affected for the new district to be formed as proposed; and a rendition of a judgment vacating the order of said board and dismissing the petition, from which is this appeal.

It is apparent from the finding and judgment of the trial court that he gave no weight to the finding and order of said board. Section 1 of said act is, in part, as follows: "Upon a petition being filed with the county board of education signed by a majority of the qualified electors in the territory to be affected, said county board of education of any county within the State of Arkansas shall have the right to form new school districts, and to change the boundary lines between any school district heretofore formed, where, in the judgment of such board of education, it would be for the best interest of all parties affected."

The part of the section quoted clearly invested the board with a sound discretion in the formation of a new school district. Its orders forming new districts will not be disturbed on appeal unless it appears that such orders were arbitrary or unreasonable. No such finding was made in the instant case. Unless the testimony reflected that the order of said board was arbitrary and unreasonable, it was improper to vacate same and dismiss the petition. Discretion to form new districts is vested by the

act in the several boards of education and not in the circuit court.

It is also apparent that the trial court in his finding and conclusion of law treated the several districts involved as the parties in interest, rather than treating the parties residing in the whole territory involved as the interested parties to be affected. He based his finding that it would not be to the best interest of all parties affected to form the new district upon the fact that it would not be to the best interest of parties residing in Districts 5, 6 and 8 to consolidate said districts with Districts Numbers 30 and 31, although a large majority of the parties to be affected resided in the two latter districts. In our view this was not a correct interpretation of the act quoted. The language used clearly refers to parties residing in the territory to be incorporated in the new district as a whole, and not to parties residing in some particular part thereof. The proper interpretation of the language used in the act is that the board may consolidate the proposed territory into a new district if, in the judgment of the board, it would be to the best interest of all parties residing in the district as a whole, meaning, of course, a substantial majority of all the parties residing in the territory. The exercise of a sound discretion on the part of the board in the organization or formation of a new district upon proper petition does not mean that the board may greatly inconvenience, oppress or outrage any parties residing in any part of the territory. The true interpretation of the statute is that the wishes and convenience of a substantial majority in the whole territory should be respected if, in doing so, it would not greatly harm the other parties affected. Our interpretation of the statute finds support in the cases of *Stephens* v. *School District No. 85,* 104 Ark. 145, 148 S. W. 504; *Carpenter* v. *Leatherman,* 117 Ark. 531, 176 S. W. 113; *Irons* v. *Independent School District No. 2,* 119 Minn. 119, 137 N. W. 303; *School District No. 36* v. *School District No. 31,* 134 Minn. 82, 158 S. W. 729; and *Chicago B. & Q. R.*

Co. v. *Byron School Dist. No. 1,* 37 Wyo. 259, 260 Pac. 537, and cases cited therein.

On account of the errors indicated the judgment is reversed, and the cause is remanded with directions to retry the cause in accordance with the interpretation we have placed upon act 156 of the Legislature of 1927.

McHaney, J. Conceiving, as I do, that the effect of the evidence before the court wholly fails to show that the county board of education acted arbitrarily or in an unreasonable way, I am of the opinion that the judgment should be reversed and that the cause be dismissed. I agree with the majority that the cause should be reversed, and that the proper construction of the act has been made. I therefore concur in the judgment. Mr. Justice Kirby also concurs.

Brown-Hinton Wholesale Grocery Company *v.* Ware & Son.

Opinion delivered April 14, 1930.

Joseph R. Brown, for appellant.

George W. Johnson, for appellee.

Kirby, J. This suit was brought by appellant corporation against Ware & Son, a partnership, to recover a balance alleged to be due upon an account for goods and merchandise sold to appellee partnership, and is the second appeal herein, a full statement of which appears in

Brown-Hinton Wholesale Grocery Co. v. *Ware & Son,* 177 Ark. 1141, 9 S. W. (2d) 553.

The former judgment was reversed because of the giving of an erroneous instruction directing the jury, if it found that plaintiff participated in the assignment made for the benefit of the creditors by filing proof of its claim with the trustee and dealing with him, that it should find for the defendant. The court said therein: "Appellant would not be bound by merely filing its claim with the trustee, unless in so doing it thereby assented to accept its *pro rata* share of the proceeds of the trusteeship in full settlement of its claim, and the proof of the custom was competent as tending to show whether, in conforming thereto, appellant had agreed to cancel such portion of its debt as the receiver did not pay."

Appellant complains that instructions Nos. 2 and 3 given on this trial are erroneous in that they told the jury, if they found the custom existed and if plaintiff filed its claim with the trustee with the knowledge that by such usage and custom of trade its claim would be extinguished by the amount it would receive from said trustee, it could not recover and they will find for the defendants. Both of the instructions are erroneous in that they told the jury that, if there was a custom in the trade territory to wind up the estates of insolvent debtors by a trustee and an advisory committee of creditors, the creditors relinquished all claim to any further payment than realized from the dividends distributed by the trustee, and that the filing of a claim by any creditor with the trustee bound him by the custom to relinquish all further rights to the payment of any excess of his debt or claim over the amount of the dividends distributed in closing the insolvent's estate. It is the consent or agreement of the creditor to relinquish the balance of his claim and accept in settlement of it the amount of the dividend distributed by the trustee in winding up the insolvent debtor's estate in accordance with the trade custom which binds him to do so and not the custom itself, proof of which was competent as tending to show whether in con-

formity with it appellant had agreed to cancel or relinquish such portion of its debt as was not paid by the dividend.

In *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, 49 S. Ct. 108, the court reversing the decision of this court, held the plain purpose of the Bankruptcy Act to establish uniformity necessarily excludes State regulation of the subject-matter, whether interfering with the act or complementary, additional or auxiliary thereto. It said: "The enforcement of State insolvency systems, whether held to be in pursuance of statutory provisions or otherwise, would necessarily conflict with the national purpose to have uniform laws on the subject of bankruptcy throughout the United States." In that case the insolvent debtor was upon petition adjudged insolvent, and a receiver appointed with directions to take charge of his property, and liquidate it, directing the creditors to make proof of their claims "with the necessary stipulation that they will participate in the proceeds in full satisfaction of their demands." In pursuance of the statute, the court ordered a receiver after a fixed time to pay costs and salaries, and then the claims with stipulations, etc. One of the creditors, who had not agreed to be bound or stipulated for relinquishment of the balance of his claim after a *pro rata* division, brought suit and had a garnishment issued against the trustee who was compelled to pay the whole amount of his claim out of the proceeds on hand. Appellant denied that there was any such custom as attempted to be proved; denied having given its consent to any agreement to wind up the insolvency's estate by a trustee and an advisory committee, and, although it did file its account with the trustee showing the amount thereof, it refused to accept the dividend tendered it in payment of the whole amount of its claim, returning the check to the trustee. There could be no estoppel in its conduct since the trustee for liquidating the affairs of the insolvent partners had already been appointed and had taken charge of the assets before the filing of appel-

lant's claim, and it is conceded that no reply was made by appellant to the trustee's letter consenting to the arrangement for winding up the estate or anything else done indicating an agreement thereto.

Brown Shoe Co. v. *Stone,* 172 Ark. 1156, 292 S. W. 117, has no application here since the creditor there agreed to accept a *pro rata* dividend in full settlement of his claim against the insolvent's estate and accepted a check sent in full satisfaction of its account, reciting that such was the fact. Doubtless appellant could have agreed and bound itself to accept a less amount in full settlement of its entire claim against the insolvent debtor's estate, but appellees were bound to show that it had done so upon suit brought for payment of the account, which is undisputed, and proof of filing the claim with the trustee for the whole amount without any agreement at the time to accept a *pro rata* dividend in full settlement, and a refusal to do so upon tender of such dividend check is not sufficient to show a discharge of the debtors from further liability for the account sued upon.

The instructions objected to were erroneous, and the court erred in not directing a verdict for the appellant. For such error the judgment must be reversed, and the cause will be remanded with directions to enter judgment for appellant company for the amount due on its account. It is so ordered.

Justices HUMPHREYS and MCHANEY dissent.

ROGERS *v.* FARNSWORTH.

Opinion delivered April 14, 1930.

A. F. Smith, for appellant.

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

KIRBY, J. The question here presented for determination is whether an accommodation maker of a joint and several negotiable promissory note can escape liability thereon to one entitled to subrogation to the payee's right to payment having been compelled to pay the note to protect shares of stock owned by him wrongfully pledged by the payee as collateral without knowledge or consent of the owner to secure the payment of the note.

The agreed statement of facts shows and the court found that appellee, C. O. Farnsworth, was an accommodation maker of the note, and, having received no part of the consideration for which the note was given, was not liable to the payment thereof, having executed same on condition that the other joint maker pledge with the note as collateral the stock of the par value of $1,000, which was done, and that the withdrawal of the stock first pledged 8 months thereafter and the substitution of other certificates of the same kind of stock belonging to appellant, without her knowledge or consent, could make no difference as to his liability.

Appellee, though an accommodation maker, was liable primarily on the note, being by its terms absolutely required to pay it, and his rights and liabilities thereon as to third parties the same as those of the other joint maker who received a valuable consideration for its execution. Section 7762, C. & M. Digest; 3 R. C. L., § 336 and notes.

Appellant was not a party to the note sued on, had no knowledge or information of its execution and terms or that her stock had been wrongfully pledged as col-

lateral seven months after its execution, nor until she sought to pay her notes given for the purchase price of the stock in accordance with the contract of sale, and for which the stock was held as collateral.

The court erred in not holding appellee liable, and rendering judgment against him, for the same amount as recovered against the other maker of the note, and the decree will be reversed and the cause remanded with directions to enter such judgment. It is so ordered.

[redacted]

SMITH *v.* STATE.

Opinion delivered April 14, 1930.

[redacted]

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

McHANEY, J. Appellant was convicted of the crime of selling liquor, and sentenced to one year in the penitentiary. No brief has been filed in her behalf. The first three assignments of error in the motion for a new trial challenge the sufficiency of the evidence. We have read all the evidence given as abstracted by the Attorney General's Assistant, and find it ample to support the verdict. It appears that two indictments, one in August and one in November, were returned against appellant, both charging the crime of selling liquor, and that appellant objected to a trial on the November indictment. The court required the State to elect, and it elected to try on the August indictment, so she is in no position to com-

plain. She also moved for a continuance, because certain of her witnesses for whom attachments were issued could not be had. The motion did not comply with the requirements of the statute, § 1270, C. & M. Digest, and the court was therefore justified in overruling the motion.

Another assignment is that the court erred in permitting the State's witness, Gover, deputy sheriff, to testify that he had information that appellant had liquor at her home, and found a small quantity by a search; also similar testimony given by the sheriff. We think the testimony was competent as tending to show the nature of the business in which appellant was engaged. *Herren* v. *State,* 169 Ark. 636; *Lynn* v. *State,* 169 Ark. 880.

The last assignment relates to certain instructions, which we find unobjectionable. We do not set them out and comment on them separately, as it could serve no useful purpose. The court fully and fairly instructed the jury, and the evidence was amply sufficient to support the verdict. The judgment is accordingly affirmed.

FULTON COUNTY *v.* BARHAM.

Opinion delivered April 14, 1930.

Northcutt & Northcutt and *Shields M. Goodwin,* for appellant.

Oscar E. Ellis, for appellees.

McHANEY, J. In August, 1926, appellees, Barham, Martin and Worthington, filed separate claims against appellant for damages alleged to have been sustained by

them by reason of the construction of State Highway No. 11 through their respective farms. Barham's claim was for $659.17, Martin's for $435.97, and Worthington's for $1,229.06, and each claim was for all damage sustained including land taken, damage to land not taken, fencing, labor, fruit trees, crops, etc. In October, 1927, after the road was completed and fences constructed, the county court appointed viewers to view the premises, and assess such damages as appellees had sustained, which they did, and made report to the court that Barham was damaged $50, Martin $50 and Worthington $100. An order was then made directing the clerk to draw warrants on the treasurer in these amounts, payable to the respective parties. The warrants were so drawn, delivered to and cashed by the appellees. No formal order was at that time made disallowing the balance of the claims as filed, but on December 31, 1928, the claims were disallowed, and no order entered. On April 1, 1929, the county court entered an order *nunc pro tunc* as of December 31, 1928, disallowing each claim, from which appellees appealed to the circuit court. A trial there resulted in verdicts and judgments against the county as follows: Barham, $193.20; Martin, $130; Worthington, $380, which amounts included costs advanced by each. This appeal challenges the correctness of these judgments.

The county defended on the ground among others that the claims had been adjudicated by the county court in October, 1927, by an allowance and payment in the sums heretofore stated, from which there was no appeal, and that the claimants were then barred from prosecuting the appeals, and moved to dismiss the appeals for this reason. We think appellant county is correct in this contention. As before stated, the claims were filed in August, 1926, were allowed in part in October, 1927, and paid in the sums allowed. The allowance in the sums stated was tantamount to a disallowance or rejection of the balance of the claim, from which an appeal should have been taken if claimants were not satisfied. A simi-

lar situation existed in *Farmer* v. *Franklin County,* 179 Ark. 373, 16 S. W. (2d) 10. It was there stated that: "It is the settled rule in this State that county courts act judicially in the allowance or disallowance of claims against the county," and it was further held that where a claim is presented and allowed in a sum less than the claim, it is a final judgment, and operates as a disallowance or rejection of the balance claimed, from which an appeal lies to the circuit court. If no appeal is taken in the time prescribed by law, the claimant loses all rights to question the allowance thereafter. So here, when the county court allowed the claims in part, he disallowed and rejected the balance. No appeal having been taken from that order of allowance, appellees lost their rights in the premises.

The claims filed in August, 1926, were the only claims appellees had against the county, or ever filed against it, on this account. The appointment of viewers to assess the damages and the order of payment in the amounts stated necessarily referred to these claims, since there were no others. Appellees contend that the payments made to them covered additional dirt and additional right-of-way taken. But no additional claim was ever filed by either of them. It is difficult to perceive why the county court would appoint viewers to go out and assess damages to appellees for additional dirt and right-of-way taken, when no claim was filed for same, and when, at the same time, appellees had filed large claims for all kinds of damages growing out of the construction of said road. The conclusion is irresistible that the allowances made by the court had reference to the whole of appellees' claims as filed.

It necessarily follows that the court erred in entertaining these claims. The judgment in each case is therefore reversed, and the cause dismissed.

Justices HUMPHREYS and MEHAFFY think the judgment of the circuit court is correct, and that it should be affirmed.

KETCHUM *v.* JOHNSON.

Opinion delivered April 14, 1930.

[redacted]

Berry H. Randolph and *J. R. Long,* for appellant.

Witt & Witt, for appellee.

McHANEY, J. This is a replevin action, brought in the justice court by appellant against appellees for the possession of one sow and five pigs of the value of $30. The venue was changed to the court of common pleas, where, on a trial, judgment was entered for appellees, and an appeal was taken to the circuit court, where, on a trial *de novo,* judgment was again entered for appellees. The court instructed a verdict for appellees for the possession of the hogs, or their value, and submitted the question as to their value to the jury, and the jury found them to be of the value of $30, and judgment was entered accordingly.

For a reversal of the case, appellant contends that the court erred in refusing to submit the case to the jury as to appellant's right to the possession of the hogs. The undisputed proof in the case shows that appellee, Johnson, found the hogs in controversy running at large and in his inclosure, and that he impounded them under the act of March 20, 1923, p. 1130, Special Acts of 1923, gave the notices as required by that act five days before the date of sale, and, nobody appearing to claim the hogs, he offered them for sale as per the notices. There being no bidders, he bid them in himself for the amount due by the terms of said act at ten cents per day per hog. He thereafter sold the hogs to appellee, Suit. More than

one year after that time appellant brought this action to replevin the hogs, and made no tender of the amount the law provides shall be paid to one who takes up stock in a stock law district. The court therefore held that appellant was not entitled to replevin the hogs until he had tendered the amount provided by law for their keep. As stated, this evidence is undisputed, and the court was correct in so holding. It appeared that appellant had obtained possession of the hogs by reason of his replevin bond, given at the time the action was instituted. The court correctly ordered him to return the hogs to appellees or pay them their value, which the jury found to be $30. It will therefore be seen that there was no question to be submitted to the jury, as the undisputed evidence showed that no tender had been made.

Appellant says, however, that there is no sufficient proof of the notices as required by said act. Appellee, Johnson, testified that he posted two of them, and John Manser testified that he posted the other one. Manser says he put up one of the notices, although he did not read it. We think this fact was therefore established by the undisputed testimony.

No error appearing, the judgment is affirmed.

ARMSTRONG *v.* ARMSTRONG.

Opinion delivered April 14, 1930.

G. N. Cannon and *J. E. Hawkins,* for appellants.

Wade Kitchens, for appellees.

BUTLER, J. A negro family, brothers and sisters, were the joint owners by inheritance of one hundred and sixty acres of land, which, at the death of the ancestor, was burdened by a mortgage to secure a debt of five hundred and fourteen dollars ($514) due a firm of merchants. The mortgage debt was past due, and foreclosure proceedings were threatened, and on February 17, 1914, appellees conveyed the land to Monroe Armstrong, their elder brother.

Shortly after this conveyance Monroe Armstrong borrowed from appellant P. C. Grayson money with which he paid off and satisfied the mortgage then existing, and, to secure Grayson for the money borrowed of him, Monroe executed to Grayson a mortgage and went into the possession of the land, occupying and farming

it, Grayson advancing the necessary money for the farming operation. A number of renewal notes and mortgages were given to Grayson and finally, on the 26th day of April, 1922, Monroe executed a note for $1,800, due November 1st following, and bearing interest at ten per cent., and executed another mortgage which covered the lands, some livestock, a wagon and a crop of cotton to be grown on thirty-five acres of land and a crop of corn to be grown on twenty-five acres of land to secure the payment of said note.

This suit was filed by appellees, April 23, 1928, who allege that the deed was executed to Monroe for the purpose of enabling him to borrow money to pay on a mortgage due the mercantile company, with the understanding that they still owned the beneficial interest in the property conveyed, and that Monroe should manage the same and pay the indebtedness from the rents and profits of the land; that the money borrowed from Grayson and the mortgage executed to him were to carry out the agreement, of which Grayson had full knowledge at the time he loaned the money to Monroe and took the mortgage; that the money borrowed from Grayson had been paid, and that, although the purposes for which the deed to Monroe had been accomplished, Monroe was claiming to be the owner of the land by virtue of deed aforesaid.

Plaintiffs prayed for a decree cancelling the deed to Monroe, and the mortgages to Grayson. The court below found in favor of appellees cancelling the deeds and mortgages as prayed. To reverse the decree of the court below, this appeal is prosecuted.

Appellants insist: (1) That the decree of the court below was not supported by the evidence. (2) If the evidence established the agreement alleged, the same was void because of § 4867 of Crawford & Moses' Digest. (3) That the title was vested in appellant Monroe Armstrong by virtue of his adverse possession for the statutory period of limitation.

As to appellant, Grayson, the court held that the note and mortgage executed April 26, 1922, was inadmissible, because no marginal notation was made and attested on the record as prescribed by law showing any payment on said note or deed of trust within five years from the due date, and that a mortgage executed March 21, 1925, on the pine timber on said land to secure an indebtedness of one hundred fifty dollars ($150) from Monroe Armstrong to appellant Grayson, had been paid and decreed a cancellation of both of said mortgages.

It is the contention of Grayson that the evidence fails to show that he had any knowledge of the agreement between the Armstrongs; that, as to them, he was an innocent purchaser for value, and that appellees are not in position to complain of any failure to make a proper marginal notation on the mortgage record, as they are not "third parties" within the meaning of the statute. Section 7408, C. & M. Digest.

Monroe Armstrong testified that there was no agreement such as claimed by the appellees, but that, finding they would be unable to pay the $514 mortgage, they conveyed the land absolutely to him.

All the appellees, his brothers and sisters, testified in support of the allegations made by them, and their testimony was corroborated by that of disinterested witnesses, among whom was the justice of the peace who drew the deed from appellees to Monroe and took their acknowledgments. According to all this testimony, the deed was made to Monroe as the elder brother, so that he might secure money to pay the indebtedness then existing, and to manage the land and pay whatever indebtedness he might thus incur out of the rents and profits, and that, when this purpose was accomplished, he and his brothers and sisters would be the owners of the land, share and share alike. To our mind, this evidence is clear, satisfactory and convincing, and warranted the chancellor in the conclusion reached.

The contention of appellant, Monroe Armstrong, that this state of facts, if proved, would not entitle appellees to the relief prayed because of the statute of frauds cannot be sustained for the reason that the statute, § 4867, Crawford & Moses' Digest, refers to express trusts, and the facts established by the evidence in this case establish a contructive or a trust *ex maleficio,* to which the statute has no reference.

It is well settled that equity impresses a constructive trust in favor of those entitled to the beneficial interest against one who secures the legal title by means of an intentional false verbal promise, who held the same for a certain specified purpose, and having thus obtained title he retains and claims the property as absolutely his own. *Ammonette* v. *Black,* 73 Ark. 310, 183 S. W. 910; *Reeder* v. *Meredith,* 87 Ark. 111, 93 S. W. 558; *McDonald* v. *Tyner,* 84 Ark. 189, 105 S. W. 74; *Bragg* v. *Hartney,* 97 Ark. 55, 121 S. W. 1059.

The burden was upon appellant Monroe Armstrong to establish his title by adverse possession by a preponderance of the testimony. The trial court found against him on this question, and we do not think the court's finding should be disturbed because it has not been clearly shown that appellees had full knowledge of his intention to claim exclusive and sole ownership for a full seven years before the institution of their suit. The appellees are ignorant negroes, some of them almost imbeciles, and their testimony as to their knowledge of Monroe's intention is neither clear nor definite, but, as Monroe was the elder brother, apparently the most intelligent, and in whom they had trust and confidence, the chancellor might have reasonably concluded that they did not realize the intention of Monroe until he made a conveyance of the timber standing upon the land, which the evidence shows was within seven years before the filing of this suit.

While we think the decree of the trial court as to appellant Monroe Armstrong is supported by the testi-

mony, we fail to find that preponderance which would warrant the conclusion that appellant Grayson knew of any trust relationship existing between Monroe and his brothers and sisters. He testifies that he did not, and there is no competent testimony to the contrary, except the statement of Isaiah Armstrong, who testified as to a conversation with Mr. Grayson in which he stated that Grayson knew that the land was to go back to the heirs when the money was paid. We think the trial court also erred in its refusal to permit the introduction of the note and mortgage because of the failure to make the indorsement required by law upon the margin of the record.

It is unnecessary to decide whether the marginal notation of the record was a sufficient compliance with the law for the appellees were not "third parties" within the meaning of the statute. They were not strangers to the transaction. They knew that the money for which the first mortgage was given was to satisfy a mortgage then existing, and the loan from Grayson was procured and the mortgage to secure it was given with their knowledge and for their benefit. *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278, 134 Am. St. Rep. 78; *Clark* v. *Lesser,* 106 Ark. 207, 153 S. W. 112; *McKinley* v. *Black,* 157 Ark. 280, 247 S. W. 1046; *Tyson* v. *Mayweather,* 170 Ark. 660, 281 S. W. 1.

We are also of the opinion that the evidence did not justify the trial court in finding that the debt had been paid. Under the testimony, as set out in the record before us, we are unable to determine the extent, if any, of the indebtedness due by Monroe to Grayson; whether there is anything due, or, if any, how much. There is no testimony that anything has been paid on the note of April 26, 1922, except the notation, "Cash $192.38, date 9-23-1927." It seems that Grayson has received proceeds of the crops grown on this land for a number of years, and the proceeds of the pine timber sold, but there is no testimony as to how much this amounted to, nor is

there any testimony as to what went to make up the $1,800 for which the note of April 26, 1922, was given.

This case will therefore be affirmed as to Monroe Armstrong, and is reversed and remanded as to appellant Grayson for such further proceedings with reference to the indebtedness, if any, from Monroe Armstrong to Grayson secured by the mortgage as may be deemed advisable, consistent with the principles of equity and not inconsistent with the views herein expressed.

DUNCAN *v.* STATE.

Opinion deliverer April 21, 1930.

Cooley & Adams, for appellant.

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

HART, C. J. William Duncan prosecutes this appeal to reverse a judgment of conviction against him for the illegal sale of intoxicating liquors.

The evidence for the State warranted the jury in returning a verdict of guilty; and, inasmuch as counsel for appellant do not ask for a reversal of the judgment on the ground that the evidence is not legally sufficient to support the verdict, we do not abstract the testimony, and only state that it was conflicting.

The first ground relied upon for a reversal of the judgment is that the court erred in refusing to quash the indictment on the motion of appellant. The record shows that the indictment was returned on the 16th day of April, 1929, and that it charged William Duncan with unlawfully selling alcoholic, spirituous and intoxicating liquors on the 1st day of November, 1929. We do not think this assignment of error is well taken. This court has held that a late, impossible date after the indictment is an obvious error, which does not affect the validity of the indictment. *Kirkham* v. *State,* 158 Ark. 642, 237 S. W. 696. See also *Carothers* v. *State,* 75 Ark. 574, 88 S. W. 585; *Hunter* v. *State,* 93 Ark. 375, 124 S. W. 1028; and *Cooper* v. *State,* 145 Ark. 403, 224 S. W. 726.

The second assignment of error is that the court erred in allowing the sheriff to testify that he obtained a search warrant for the premises of appellant, and in the search thereunder found three gallons of whiskey, and that the appellant entered a plea of guilty to possessing the three gallons of whiskey without fixing any time or date. In the first place, the appellant took the witness stand in his own behalf, and, without objection, testified on cross-examination that he had pleaded guilty to possessing three gallons of whiskey on the occasion testified to by the sheriff. This fact being established by the appellant's own evidence, no prejudice could have resulted to him by permitting the sheriff to testify to it.

In the second place, the testimony was competent. The record shows that the indictment was returned into

court on the 16th day of April, 1929, and that the trial was had on the 21st of November, 1929. It is fairly inferable from the record that the sheriff made the search of the premises of the appellant a short time before or a short time after the return of the indictment. Hence the testimony was competent to show the nature of the business in which appellant was engaged, and the court at the time instructed the jury to consider the evidence for no other purpose. *Casteel* v. *State,* 151 Ark. 270, 235 S. W. 386; *Melton* v. *State,* 165 Ark. 448, 264 S. W. 965; and *Stephens* v. *State,* 171 Ark. 271, 284 S. W. 17.

Finally, it is insisted that the judgment should be reversed because the jury was improperly influenced by the court. We have examined the record on this point, and do not find that this assignment of error is well taken. We have carefully considered what occurred as shown by the record, and do not deem it necessary to set it out in full. It only shows that, after the petit jury had retired to consider the cause, the court entered into the trial of another case; and, after exhausting the balance of the regular panel, the court sent a deputy sheriff to inquire whether it would likely reach a verdict at an early date. The deputy sheriff did so and reported that the jury told him that they would arrive at a verdict in a short time. After perhaps thirty minutes, the court sent the sheriff to the jury room to make additional inquiry. After inquiring of the jury, the sheriff reported to the court. The court then proceeded with the trial of the other case without any further word to the jury. It was also shown that the sheriff told the jury that the court was inquiring about the matter because it would likely want them in another case. There was no attempt whatever on the part of the court to influence the jury in arriving at a verdict or to unduly hasten its proceedings. In the orderly discharge of the business of the court, the trial judge had the right to send an officer to inquire of the jury whether it would likely be detained for any considerable time in the discussion of

the case on trial. There was no intimation whatever on the part of the court that the jury should bring in a verdict because of the inquiry made, or that it should in any way hasten its consideration of the case to the end that a verdict might be reached. Hence we hold this assignment of error is not well taken. *Mahan* v. *State*, 179 Ark. 189, 14 S. W. (2d) 1113.

It follows that the judgment must be affirmed.

BROWN *v.* TURNAGE HARDWARE COMPANY, INC.

Opinion delivered April 21, 1930.

A. D. Pope, for appellants.

Ragsdale & Matheney, for appellee.

HART, C. J., (after stating the facts). No reversal of the decree can be had on account of vacating the first decree and setting aside the sale thereunder, for the reason that this was done on the motion of appellants, and they could not be prejudiced by the court acting in their favor thereunder.

It is earnestly insisted, however, that the decree should be reversed, because it is sought to foreclose a mechanics' lien on a tract of land comprising 360 acres. The verified account of the material furnished indicated that they all went into one building, and the description of the land shows that it all constituted one tract. We have frequently held that the statute should receive a liberal construction to effectuate its remedial purposes. All that is necessary is that a person of ordinary understanding should be able to find and recognize the premises intended by the description. The mere fact that more land was embraced in the claim filed by appellee under

the statute and in the decree rendered by the court will not of itself invalidate the lien; but it will be good to the extent recognized by the statute. It is sufficient that the description points out and indicates the premises so that, by applying it to the land, the structure into which the materials are placed can be found and identified. *Arkmo Lumber Co.* v. *Cantrell,* 159 Ark. 445, 252 S. W. 901; *Ferguson Lumber Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 353; and *Georgia State Savings Assn.* v. *Marrs,* 178 Ark. 18, 9 S. W. (2d) 785.

It is insisted, however, that this view is opposed to the holding in the case first cited. We do not think so. In that case the record shows that several buildings were erected on the tract of land comprising 1,380 acres, and there was nothing to identify which of the tenant houses were intended to be described. In the present case the verified account indicates that there was only one house into which the materials entered, and the decree shows that this was identified as the home of appellants. This view was recognized by the court in *Arkmo Lumber Co.* v. *Cantrell, supra,* where it was said:

"The majority does not mean to say that either the acre of land on which the lien is sought, or the building thereon, must necessarily be described in any particular form. All that is essential is that the acre of land or the building be designated in such language as will afford information concerning the situation of the property to be charged with the lien. Of course, if the building be described so as to properly designate its location, this is sufficient, for the statute itself fixes the quantity of land to be charged."

In the application of this principle the fact that the claim filed under the statute described more land than is subject to the lien does not defeat the lien as to the amount of land subject thereto under the statute where the claim and the account filed with it, duly verified as required by statute, indicate the improvement so that it can be identified by persons of ordinary intelligence.

To hold otherwise would subject substance to form, and deny the lien to persons clearly entitled thereto under the statute.

It follows that the decree must be affirmed.

COLLINS *v.* HUMPHREY.

Opinion delivered April 21, 1930.

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Trieber & Lasley and *Marsh, McKay & Marlin,* for appellant.

Hal L. Norwood, Attorney General, and *Walter L. Pope,* Assistant, *Thompson, Wood & Hoffman* and *R. E. Wiley, amici curiae,* for appellee.

HART, C. J., (after stating the facts). The constitutionality of the Severance Tax Law was sustained in *Floyd* v. *Miller Lumber Co.,* 160 Ark. 17, 254 S. W. 450, 32 A. L. R. 811, and that of the Income Tax Act of 1929 in *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000. It will be noted from our statement of the case that our Severance Tax Law of 1923 provides for a distribution of the proceeds derived from the collection of the tax by crediting two-thirds thereof to a special fund created to be known as the Severance Tax Fund of the State of Arkansas, and to be wholly dedicated to the common schools of the State; and that the remaining one-third be allocated to the county from which such taxes are collected; and that the proceeds of the Income Tax Act of 1929 are to be paid into the State Treasury, and are to be distributed to the Charities Fund, the Common School Equalization Fund and the remainder to a special fund to be used solely for the purpose of reducing the State tax on property. Each of the acts provides for a continuing levy and collection of the tax for the purpose named.

It will also be observed that act 180 of the Acts of 1929, which creates the Arkansas Construction Commission for the purpose of providing adequate buildings for the Hospital for Nervous Diseases and for the Tuberculosis Sanitorium, diverts a part of the proceeds derived from the collection of taxes under the Income Tax Act of 1929 to the payment of the "State Construction Bonds" authorized to be issued by the Arkansas Construction Commission for the purpose of providing adequate buildings for the State Hospital for Nervous Diseases, and for the Tuberculosis Sanitorium.

Likewise Acts 266, 267 and 364 of the Acts of 1929 appropriated a part of the fund collected under the Severance Tax Law, respectively, to the support and maintenance of the State School for the Blind, State School for the Deaf, and State Board of Education. It is earnestly insisted that each of the acts, in so diverting the funds and appropriating them to another purpose, is in violation of article 16, § 11, of the Constitution, which reads as follows:

"No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; and no moneys arising from a tax levied for one purpose shall be used for any other purpose."

It is first insisted that the constitutional provision applies to taxes collected from all sources, and not merely to property taxes, and in this contention we agree with counsel for the plaintiff. The whole of article 16 of the Constitution is devoted to finance and taxation. It is universally recognized that the power of a State to tax exists as a necessary attribute of sovereignty, except as regulated and limited by the Constitution. The reason is that the State government could not exist or perform its functions without it. The Legislature has all the power with reference to taxation that the State has, and consequently has the right to classify taxes. Therefore the Legislature must decide when and how and for what

public purpose a tax shall be levied, and must select the subjects of taxation. Cooley on Taxation, 3d ed., p. 255.

It is a fundamental rule of construction that the Constitution should be construed as a whole, and the various provisions on the same subject must be read in the light of each other. *Little Rock* v. *North Little Rock*, 72 Ark. 195, 79 S. W. 785. When this is done, we can perceive no good reason why the restrictions of the section under consideration should be held applicable to property taxes alone. Such limitation could certainly do no good, and might lead to much confusion, and would inevitably lead to great uncertainty in providing for adequate revenue with which to administer the various departments of the State government. This view is strengthened when § 12, article 16, provides that no money shall be paid out of the treasury until the same shall have been appropriated by law, and then only in accordance with said appropriation. There is nothing in either section to indicate that the framers of the Constitution intended to limit or restrict the provisions to property taxes. On the other hand, when read in connection with the other provisions on the subject, we think it plain that the restriction of the section should apply to all subjects of taxation, and that it was intended that no money arising from a tax levied for one purpose shall be used for any other purpose.

It by no means follows, however, that counsel for the plaintiff are correct in their contention that this section controls the present case. The governing rule in cases of this sort is plainly and clearly stated in 37 Cyc. 1550, as follows:

"Taxes which are set apart by the Constitution of the State for particular uses cannot be diverted by the Legislature to any other purpose. But, subject to this limitation, it is in the general power of the Legislature, not only by appropriation bills, but also by directions incorporated in the revenue laws, to regulate the disposition which shall be made of the taxes collected both by the State agencies and by the local authorities."

An examination of the various decisions cited will show that they support the text. A review of our decisions will show that the court has been in accord with the view there expressed.

In *Dickinson* v. *Edmonson,* 120 Ark. 80, 178 S. W. 930, Ann. Cas. 1917C, 913, the court held that the common school fund was appropriated by article 14 of the Constitution on the subject of education, which is self-executing, providing for its creation and collection, and that no appropriation thereof was required by the General Assembly. Section 3 of article 14, which is now Amendment 9, provides for the levy of a millage tax when voted, and the section contains a proviso that no such tax shall be appropriated for any other purpose nor to any other district than that for which it was levied. It was this tax that the court had under consideration in *Dickinson,* v. *Edmonson, supra.* The section of the Constitution expressly states that the millage tax is to be levied upon the taxable property of the State. Hence it cannot be levied upon other subjects of taxation.

As said by the Supreme Court of Florida in *J. F. McKinnon* v. *Florida, ex rel.,* 70 Fla. 561, 70 So. 557, L. R. A. 1916D, p. 90: "The school funds under our Constitution are to be regarded as a sacred trust; and the provisions of law safeguarding expenditures from such funds should be strictly construed, and the mandate of the Constitution enforced."

As we have already seen, the power of the Legislature over taxation is unlimited except as restricted by the Constitution. Hence it could supplement the school fund derived from property taxes under the Constitution by appropriating a part of the proceeds derived from the Severance Tax Law; and the part so appropriated could be raised, lowered, or altogether withdrawn at the will of the Legislature. In other words, our Constitution has set aside certain revenue raised from property taxes to be held sacred for the benefit of common

schools, and the Legislature is without power to divert it. The fund here sought to be diverted from the common schools is not set aside by the Constitution for that purpose. The application of the taxes raised under both the Severance Tax Law and the Income Tax Act of 1929 is left entirely to the control of the Legislature; there being no restriction of their application in the Constitution.

The power of taxation and the power of apportioning taxes are identical and inseparable unless there is some constitutional restriction. In *Moore* v. *Alexander,* 85 Ark. 171, 107 S. W. 305, the court held that the capital fund collected pursuant to a special tax levied for the purpose of building a State Capitol could not be paid out, unless there had been a biennial appropriation in compliance with article 16, § 12, of the Constitution, notwithstanding it was beyond the power of the General Assembly to divert the fund collected therefor to use for any other purpose under article 16, § 11 of the Constitution. In that case the levy here was a continuing one, but the tax had already been collected. Hence it was held that the Legislature could not divert it, because it was money arising from a tax levied for one purpose, and could not be used for another purpose. Of course, if there is a surplus left after the purpose is accomplished, and the money is no longer needed for the original purpose, the Legislature may appropriate it to another public purpose. If the framers of the Constitution had meant that a tax levied for one purpose could not be used for another purpose, they would have so provided, as they did in the case of school taxes under article 14. By the use of the phrase "arising from a tax levied for one purpose" it was evidently intended that, when the tax was collected, it automatically belonged to the purpose for which it was levied, and could not thereafter be diverted by the Legislature to another purpose.

In other words, the Legislature has no power to divert a fund after the tax has been levied and collected,

and transfer it to another and separate purpose. If it could transfer the funds thus levied and collected, it might seriously embarrass the administration of the State government.

Counsel for plaintiff to some extent rely upon *School District No. 14* v. *School District No. 4,* 64 Ark. 483, 43 S. W. 501, where the court said that, under article 16, § 4 of the Constitution "funds raised and set apart under the law for a specific purpose should not be used for any other." This is, as we have already seen, because of the provision of the Constitution relating to the millage tax for the common schools.

Again, they rely to some extent on *Gray* v. *Matheny,* 66 Ark. 36, 48 S. W. 678, and *Lee County* v. *Robertson,* 66 Ark. 82, 48 S. W. 901; but it will be noted in each of these cases the court was discussing a levy made by the county court under legislative authority for county and State purposes. The power of the county court was exhausted when the levy was made, and, on that account, it could not thereafter divert the funds. As we have seen, the power of the Legislature is unlimited except as restricted by the Constitution.

It is not even essential or vital to an appropriation, that it should be for an amount definitely ascertained prior to the appropriation, since there is no requirement of that kind in the Constitution. In *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000, the court reaffirmed the principle announced in earlier cases that, unless inhibited by some constitutional provision, the Legislature has full power over all matters of taxation and the collection and disbursement of taxes.

It is settled by the principles of law announced in *Grable* v. *Blackwood,* 180 Ark. 311, that the diversion of the funds from the purposes declared in the Severance Tax Law and the Income Tax Act of 1929, and the appropriation of them to a different purpose is not violative of the provisions of article 5, § 23 of the Constitu-

tion, as an appropriation by reference, which is prohibited by the section of the Constitution just referred to.

In *Skinner, Collector of Internal Revenue,* v. *Union Pacific Coal Co.,* 249 Fed. 152, the Court of Appeals of the Eighth Circuit had under consideration the construction of a section of the Federal Income Tax Act, which provides that the tax shall be levied "upon the entire net income arising or accruing from all sources during the preceding calendar year"; and it was held that the words "arising or accruing" meant the same as "received." Unless the word "arising" is used as the equivalent of "received or collected," it practically means nothing; and instead of providing that "no moneys arising from a tax levied for one purpose shall be used for any other purpose," the framers of the Constitution would have merely provided that no tax levied for one purpose shall be used for any other purpose. In short, there are "no moneys arising from a tax levied" until the tax is collected.

We have examined acts 180, 266, 267 and 364 of the Acts of 1929, and find each of them to be prospective in its operation. None of them attempt to divert funds or moneys which had already been collected from any subject of taxation to any other purpose than that for which it was levied and collected. The acts of the Legislature passing the Severance Tax Law and the Income Tax Act of 1929 levied the tax, but no moneys could arise or be in existence from the tax levy until the tax had been collected. It follows that the decree must be affirmed.

HUMPHREYS, J., (dissenting). I agree with the majority opinion in ruling that the restriction of § 11 of article 16 of the Constitution of Arkansas applies to all subjects of taxation, and that it was intended that no money arising from a tax levied for one purpose shall be used for any other purpose. This opinion is a result reached by giving the section in question a broad instead of a narrow construction. I think the same broad construction or interpretation given said section in order to

reach this conclusion should govern in ascertaining and determining what the makers of the Constitution meant or intended by using, in the latter clause of the section, the following language: "No moneys arising from a tax levied for one purpose shall be used for another purpose." In construing this language the majority opinion has departed from the rule of broad construction and adopted and applied a very narrow construction of the meaning of the words and the connection in which they are used in the sentence. The meaning attributed to this language by the majority opinion is that it only inhibits the diversion of money to another purpose than that for which it was levied, after the collection thereof. This is reading something into the section which is not expressed therein and which is not necessarily implied therefrom. The word "arising" in the sentence is a present participle and refers to money then collected or to be collected in the future as long, of course, as the purpose for which the levy was made exists. The broad, natural meaning of the language used in the sentence is that when a tax has been levied for a specific purpose the Legislature cannot thereafter (meaning after the passage of the bill in levying the same) divert the money arising therefrom to a different purpose. Any other construction would permit the Legislature to lay a tax upon the people for a certain purpose agreeable to them and provide for the collection thereof, but, before same had been collected, to divert it to some purpose not agreeable to them. This is the effect of the majority opinion. I cannot believe that it is a correct interpretation of the restriction. The construction is too narrow to give much effect to the language used, and wholly ignores the rules of grammar governing the sentence. I think the construction of the section contended for by appellant and adopted by me is fully sustained by reason in the cases of *Gray* v. *Matheny*, 66 Ark. 36, 48 S. W. 678, and *County Board of Education* v. *Austin*, 169 Ark. 430, 276 S. W. 2. For the reason stated I think act 189 of the Acts of 1929, in so far as it diverts

income taxes levied for one purpose to another purpose, and acts 266, 267 and 364 of the Acts of 1929 diverting the severance taxes to a different purpose from which it was levied are and were inhibited by article 16, § 11, of our Constitution and are void.

I am impelled therefore to dissent from the majority opinion to the effect that the acts in question are valid.

[redacted]

SCHAEFER *v.* BAKER.

Opinion delivered April 21, 1930.

[redacted]

Jonas F. Dyson, for appellant.

Ross Mathis, for appellee.

SMITH, J. Isaac J. Brittingham and Mary, his wife, executed a deed of trust on a tract of land in Woodruff County to secure the payment of the following note:

"$1,972 Hailey, Idaho, October 1, 1913.

"Five years after date we promise to pay to the order of W. W. Wallace nineteen hundred and seventy-two ($1,972) dollars, payable at Brinkley, Arkansas. Value received with interest at 6 per cent per annum. Interest payable semi-annually.

(Signed) "Isaac Brittingham
(Signed) "Mary I. Brittingham

"Due Oct. 1, 1918
"No. 46."

The following indorsements appear on the back of the note:

"Interest paid to April 1, 1914
"Interest paid to Oct. 1, 1914
"Interest paid to April 1, 1915
"Interest paid to Oct. 1, 1927
"Assigned to J. R. Baker
"Without recourse.
(Signed) "W. W. Wallace."

After the execution of the note and the deed of trust securing it, Mrs. Brittingham died, and on September 20, 1923, Mr. Brittingham also died. He was survived by Mrs. Della Brittingham Schaefer, his only child and sole heir at law, whose husband, William Schaefer, qualified as administrator of Mr. Brittingham's estate. There were only a few debts, and these were paid without having been probated; indeed, there appears to have been no necessity for the administration, and the first settlement was filed by the administrator about the time of the institution of this suit.

The note was purchased by J. R. Baker, who filed suit January 21, 1928, to foreclose the deed of trust securing it, and an answer was filed, in which it was alleged that the note was barred by both the statute of limitations and the statute of nonclaim. No attempt was made to enforce the payment of the note as a demand against Mr. Brittingham's estate, and the statute of nonclaim has therefore no relevancy. *Rhodes* v. *Cannon,* 112 Ark. 6, 164 S. W. 752; *England* v. *Spillers,* 128 Ark. 31, 193 S. W. 86; § 7408, C. & M. Digest. The question in the case is whether the note was barred by the statute of limitations at the time of the institution of the suit.

The deposition of Mr. Wallace, the payee in the note, was taken upon interrogatories, and the questions asked and the answers given do not fully develop the

facts in regard to the payments of interest. In direct interrogatory No. 4 he was asked this question: "It appears that various interest payments were credited on the note secured by the deed of trust, the last of these interest payments having been made in October, 1927. Was the interest in fact paid on the note up to October 1, 1927?" and the answer "Yes" was given to this question, and no other explanation was made. October 1, 1927, was apparently the approximate date of the assignment of the note to the plaintiff Baker, and it is insisted that, as the last preceding indorsement of the payment of interest was on April 1, 1915, the note was then barred by the statute of limitations.

The presence or absence of the indorsement of credits of interest or other payments on the back of the note is not conclusive of the fact that the payments were or were not made. As was said in the case of *McAbee* v. *Wiley,* 92 Ark. 247, 122 S. W. 623, "the proof of a payment on indebtedness, and of the indorsement of same upon the written evidence of that indebtedness may be made in the same manner as the proof of any other fact. It may be made directly, or by circumstances, or by the admissions of the defendant. It is actually the fact of the payment that tolls the statute, and not the indorsement; the indorsement is only a memorandum, or at most an evidence, of such payment * * *." The fact, therefore, that no payments of interest were indorsed between April 1, 1915, and October 1, 1927, is not conclusive of the fact that there were no intervening payments. The last indorsement is not merely that an interest payment was made on October 1, 1927, but is that the interest on the note was paid to that date, and the brief answer of Mr. Wallace to the interrogatory quoted above is to the effect that the interest was paid to that date.

The testimony taken at the trial from which this appeal comes, and which we shall briefly review, supports the finding that the note was not barred at the

time of Mr. Brittingham's death in 1923, and that, if so, his heir, Mrs. Schaefer, did not intend to interpose that defense, but, on the contrary, recognized the validity of the note and expressly assumed its payment.

The testimony shows the amount of interest paid after Mr. Brittingham's death, and that these payments were sufficient only to pay the current interest. If, therefore, the indorsement made by Mr. Wallace that the interest was paid to October 1, 1927, was true, payments must have been made by Mr. Brittingham in his lifetime, as the subsequent payments paid only the interest accruing after his death up to October 1, 1927.

It is not contended that any payments were made after Mr. Brittingham's death in excess of the current interest; in fact, it is denied that Mrs. Schaefer paid even this, and this question of fact is really the controlling question in the case.

The insistence is that the debt was barred when Mr. Brittingham died, and that the payments made by Mr. Schaefer, the husband of the sole heir, were made as administrator of the estate, and not for his wife as her agent, and that the administrator could not revive a note already barred by the statute of limitations.

There is certainly a question of fact as to whether the note was barred at the time of Mr. Brittingham's death, and we think the testimony supports the finding that Mrs. Schaefer agreed to pay the note, and the statute of limitations could not have run between the date of that agreement, and the date of the institution of this suit.

This suit was brought only for the purpose of foreclosing the deed of trust securing the note, and there is no attempt to enforce the demand against Mr. Brittingham's estate or against his heir personally.

Did Mrs. Schaefer agree to pay the note, thereby tolling the statute of limitations?

A few days after Mr. Brittingham's death Mrs. Schaefer wrote the following letter:

"Hunter, Arkansas, October 2, 1923.

"Mr. W. W. Wallace,

"Hailey, Idaho,

"Dear Sir: I am very sorry to have to write you the sad news that my father, Mr. Isaac J. Brittingham, passed away on September 23, 1923, his death was caused from cancer of the liver, his last hours were peaceful, am glad to say.

"I believe father's interest is due, but I am not in a position now to pay and won't be for about 30 days, please advise me what to do.

"From his daughter in sorrow,

(Signed) "Mrs. Wm. H. Schaefer,
"Hunter, Arkansas."

We think the purport of this letter is unmistakable, and is to the effect that Mrs. Schaefer recognized the binding obligation of her father's note to Mr. Wallace's order, and of her intention to pay it. The letter is, in fact, a plea for indulgence in this respect. Interest payments were later made by Mr. Schaefer, the administrator, but they were not made by him as administrator. The testimony is to the effect that Mr. Wallace always wrote to Mrs. Schaefer about the interest, and that he wrote her one or more letters in regard to each semi-annual payment, and, while these letters were answered by Mr. Schaefer, we think he was acting as agent of his wife, and not as administrator of the estate of her father. One of the letters written by Schaefer was signed both by himself and Mrs. Schaefer, and while he testified that she did not direct him to sign her name to this letter we think he was her agent in doing so.

We are of the opinion that the testimony warrants the finding that there was a promise to pay by Mrs. Schaefer, and that payments were made by her through her husband as her agent, and not by him as administrator of her father's estate. The note was never filed for probate, and none of the checks remitted in payment of interest was signed by Mr. Schaefer as administrator.

In fact, some of the checks used by him in paying interest were checks to his order, which were indorsed by him.

In the case of *McAbee* v. *Wiley, supra,* it was said that "a payment made by an agent is as effectual to suspend the statute as when made by the party himself," and 25 Cyc. 1384 is cited in support of the principle stated. The text cited reads as follows: "Payment is effectual to suspend the statute when made by an agent specially authorized to make it; or by a general agent and manager of the debtor's business, even where the payment is made on a debt owing by the principal to him. * * * Payment made by one acting as agent of an estate will not revive the debt of the ancestor against the heirs." As we have said, we find the facts to be that Mr. Schaefer made the payments as agent of the heir, and not as administrator of the estate.

In the case of *Morris* v. *Carr*, 77 Ark. 228, 91 S. W. 187, we quoted from the Supreme Court of the United States in *Shepard* v. *Thompson,* 122 U. S. 231, 7 S. Ct. 1229, as follows: "The statute of limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but, according to its intent and object, as a statute of repose. The original debt, indeed, is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. But, in order to continue or revive the cause of action after it would otherwise have been barred by the statute, there must be either an express promise of the debtor to pay the debt, or else an express acknowledgment of the debt, from which his promise to pay may be inferred. A mere acknowledgment, though in writing, of the debt as having once existed is not sufficient to raise an implication of such a new promise. To have this effect, there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor."

Here Mrs. Schaefer took title by inheritance to an incumbered piece of real estate, and she not only ac-

knowledged the validity of the lien against the land, but promised to discharge it, and, pursuant to this promise, made several payments, the last of which was much less than five years before the institution of this suit. The cause of action was therefore not barred by the statute of limitations. *A. R. Bowdre & Co.* v. *Pitts,* 94 Ark. 613, 128 S. W. 57; *Goodman* v. *Pareira,* 70 Ark. 49, 66 S. W. 147; *Tyson* v. *Mayweather,* 170 Ark. 660, 281 S. W. 1.

The decree of the court ordering the foreclosure of the deed of trust is therefore correct, and it is affirmed.

MALVERN & OUACHITA RIVER RAILROAD COMPANY *v.* SMITH.

Opinion delivered April 21, 1930.

H. B. Means and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

John L. McClellan and *Andrew I. Roland,* for appellee.

SMITH, J. The appellant railroad company, which is building a short line railroad for the purpose of haul-

ing gravel, sought to condemn a right-of-way through lands owned by appellee, and, the parties being unable to agree as to the amount of damages to be paid, a petition for condemnation was filed in the circuit court of the county in which the lands are located. In this petition it is alleged that the railroad company has laid out its line across the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 21, township 4 south, range 17 west, and a three and one-half acre tract joining it, and it is the right-of-way through these lands which the railroad seeks to condemn.

The testimony heard at the trial, from which this appeal comes, is to the effect that appellee owned, including the land above-described, about 100 acres of land in section 21, township 4 south, range 17 west, and that the line of the railroad ran for about half a mile through his property, leaving about the same number of acres on each side, and that the amount of land actually taken was about 3.6 acres.

There was a verdict and judgment in the sum of $3,000, and for the reversal of this judgment it is insisted that error was committed in permitting witnesses to "express an opinion as to what the damages were without stating the facts upon which the opinion was based," and that the verdict was excessive.

We think no error was committed in permitting the witnesses to express their opinion, where it was shown that they had some knowledge of the facts about which they testified. The measure of damages in such cases is, of course, the difference in value of the land before and after the construction of the railroad, excluding any enhancement of value by the building of the railroad, and in the very nature of the case this is largely a matter of opinion, and whether a witness has such knowledge of the facts as to make his opinion of any value is a question largely within the discretion of the trial judge, and the value of such testimony may be tested by a cross-

examination of the witness as to the facts upon which the opinion is based *St. Louis, A. & T. R. R. Co.* v. *Anderson,* 39 Ark. 167; *Texas & St. L. Ry.* v. *Kirby,* 44 Ark. 103, 106. We find no error in this respect.

We have concluded, however, that the verdict was excessive. The defendant himself testified that he had been damaged $5,000, while other witnesses estimated the damages at a less amount, it being placed by some of the witnesses as low as $350. The defendant testified that he paid $14,000 for 130 acres, of which the land in question is a part, and that the land is more valuable now than it was then. Other witnesses placed the value of the land at from $25 to $150 per acre.

Only 3.6 acres of the land were actually taken, but this, of course, is not the only element of damage. The land was divided into two parts, and the condition in which the land is left is always a proper matter to be considered. The line of the railroad ran within about 44 steps of defendant's barn, and it was shown that the railroad dump will be placed upon ballast about six inches deep and about four feet wide. Even this dump interfered to some extent with defendant crossing from one portion of the land to the other, and made it necessary for him to cross at a crossing provided for that purpose. This was, of course, an inconvenience which the jury had the right to consider in assessing the damages. These appear to have been all the elements of damage shown by the testimony except the loss of the use of some amount of land which would result from having to turn the tractors used in cultivating the land at the railroad right-of-way. There was no evidence of any obstruction of the drainage or increase in the cost of fencing.

In testing the sufficiency of the evidence to support the verdict we must view it in the light most favorable to appellee. In the case of *Railway* v. *Combs,* 51 Ark. 324, 11 S. W. 418, Chief Justice COCKRILL said: "The same principles obtain in these statutory proceedings as

in common law suits in regard to new trials. When the verdict is sustained by competent evidence, we do not interfere." But we have concluded that the competent testimony does not sustain the verdict. It is true that one or more witnesses for appellee placed the damage at a sum equaling the verdict returned by the jury, but the cross-examination of these witnesses fails to show any fair or reasonable basis for the opinion. This is not true, however, of T. A. Miller, who testified in appellee's behalf. This witness owned adjoining land, and had owned it for fifty-two years, and was acquainted with the condition of the land, and the effect on it of building the railroad across it. On his direct examination Mr. Miller placed the damage at from two to three thousand dollars, but on his cross-examination he placed the difference in value at two thousand dollars, and this, as we have said, is the true measure of damages.

We have concluded, therefore, that the judgment should be reduced to this sum, and, if appellee will, within fifteen days, remit the excess, the judgment will be affirmed for that amount; otherwise, it will be reversed and remanded for a new trial.

DROWN *v.* WHITE RIVER LEVEE DISTRICT.

Opinion delivered April 21, 1930.

Emmet Vaughan, for appellant.

Ross Mathis, for appellee.

HUMPHREYS, J. Appellant brought suit against appellee in the circuit court of Woodruff County, Southern District, to recover $5,802.12 for the alleged breach of a contract awarded to him by it for repairing two crevasses in a levee. The written contract was made the basis of the suit, and it was alleged that, after the execution thereof on the 29th day of March, 1927, and after filing a bond in the sum of $10,000 for the faithful performance thereof, and after equipping himself and making every preparation to perform same, appellee refused to allow him to do the work, although he was always able, ready and willing to comply with the contract.

Appellee filed an answer denying that appellant was ready, willing and able to comply with his contract, but, on the contrary, was unable to do so on account of the floods occurring in the spring following the date of the execution of the contract; and also denying that it breached the contract, or that appellant could have made any profit in the performance of same at the price he agreed to do the work, had he not been prevented from performing the contract by an act of God.

Appellant filed a demurrer to that part of the answer interposing the defense that he was prevented from carrying out the contract by an act of God, which was overruled by the court over his objection and exception.

When the cause was called for trial, appellee filed a motion for a continuance on the ground that one of its witnesses, R. A. Latimer, who was its engineer in charge of the work, was sick and temporarily absent from the State, setting out in the motion what he would swear if present. The record reflects that the trial court announced that he would grant the continuance unless ap-

pellant should agree that the absent witness would testify, if present, to the matters and facts set out in the motion. Without objecting and excepting to the action of the court, appellant then agreed that the absent witness would testify, if present, to the matters and facts set out in the motion, whereupon the cause proceeded to trial upon the pleadings, testimony and instructions of the court with the result that a verdict was returned for appellee, and a judgment rendered in accordance with the verdict, from which is this appeal.

Appellant contends for a reversal of the judgment because the trial court abused its discretion in ruling favorably upon the motion for a continuance, for the alleged reason that same did not comply with the requirements of § 1270 of Crawford & Moses' Digest relative to the continuance of causes. We deem it unnecessary to pass upon the alleged insufficiency of the motion, as appellant did not object or except to the ruling of the court, but, without doing so, agreed that if the absent witness were present he would testify to the matters and facts set forth in the motion. This estopped him from raising on appeal, for the first time, objections to the form and substance of the motion.

Appellant also contends for a reversal of the judgment because the trial court overruled his demurrer to that part of the answer interposing the defense that he was prevented from performing the contract on account of the spring floods. The demurrer was properly overruled. One who is prevented from performing a contract himself by an act of God cannot recover the loss of profits thereto, growing out of his failure to do so, from the other party upon the theory that the other party breached the contract by not allowing him to perform same.

Appellant also contends for a reversal of the judgment upon the ground that the undisputed testimony reflects that his failure to perform the contract was due to the refusal of appellee to set stakes and allow him

to perform same, and not to the spring floods; and that by reason of the breach he was damaged in the sum claimed. It is admitted that the jury was correctly instructed as to the law applicable to the facts, but the argument is made that the jury ignored the declarations of law, peremptory in their nature, and rendered a verdict contrary to the law and facts. This argument is based upon the erroneous theory that the undisputed testimony showed that appellant was prevented from performing his contract by the refusal of appellee to allow him to do the work, whereas there is substantial testimony in the record tending to show that destructive floods on White River occurred soon after the execution of the contract that produced nineteen crevasses in the levee in addition to the two that were to be repaired by appellant under the contract, and that the two were greatly enlarged; that the destruction to the levee by the floods was so great that it had to be relocated entirely at places, and that it was not possible to rebuild those portions of the levee that were to be repaired under the contract with appellant. This testimony is substantial in nature and sufficient to support the verdict and judgment. This court said in the case of *Arlington Hotel Co.* v. *Rector,* 124 Ark. 90, 186 S. W. 622, that: "It is a well settled principle in the interpretation of contracts that where parties contract for a service that is purely personal, or with reference to the continued existence of some particular thing constituting the subject-matter of the contract, if the person dies or the thing ceases to exist, then the performance of the contract will be excused because impossible."

Appellant also contends for a reversal of the judgment, because the court admitted incompetent testimony relative to the issue of whether he would have made any profit out of the contract if permitted to perform same. We deem it unnecessary to pass upon the admissibility of the evidence relative to this point, as there is substantial evidence in the record to support the verdict

and judgment upon the theory that appellant himself was prevented from performing the contract by an act of God. Every presumption must be indulged in favor of the verdict and judgment, and, as there is nothing in the record to show that the verdict and judgment were based upon the latter issue, we must presume that the jury based it upon the former issue.

No error appearing, the judgment is affirmed.

CROW *v.* ROGERS.

Opinion delivered April 21, 1930.

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Price Dickson, for appellant.
J. V. Walker, for appellee.

KIRBY, J., (after stating the facts). Appellant urges as the only question for determination that the court erred in holding the lien of his chattel mortgage on the undivided interest in the Williams-Rogers Agency inferior and subject to the equitable lien of the Motor Credit Company, a creditor of the old partnership. Appellee Rogers continued in the partnership business with Williams after he had purchased the McMichael interest, and mortgaged his undivided one-half interest therein to secure his individual debt to Homer Crow, appellant. The rule is announced in 47 C. J. 919, § 410, as follows:

"The rights of the creditor of an individual partner in the firm assets are confined to the share or interest of his debtor in such assets, and since a partner's share thereof can be ascertained only after the firm debts have been paid, an individual creditor is entitled to be paid only out of the debtor partner's share in the surplus which remains after the firm debts have been paid, and the equities between the partner and his copartners have been adjusted, and the partner's share has been ascertained and set apart." Our case, *Parker* v. *Wells,* 84 Ark. 172, 105 S. W. 75, is cited in support of this text. See also 47 C. J. 937, § 437.

The agreement between McMichael and Rogers with Roy Williams, purchaser of McMichael's interest in the agency, to which appellant Crow was not a party, to pay the debts of the old partnership could not have had effect to release the assets from the equitable lien of the Motor Company or estop it from asserting the superiority of its claim against such partnership assets over the mortgage of Rogers' interest to Crow. The mortgage was given by a partner of his interest in the firm property to secure an individual debt after the creation of the debt to the Motor Credit Company, a general creditor of the firm, and only covered the partner's interest in the assets after the payment of the firm creditors, the lien of same being subject and inferior to the rights of the creditor of the partnership in such assets. The decree is affirmed.

NATIONAL UNION FIRE INSURANCE COMPANY *v.* HENRY.

Opinion delivered April 21, 1930.

Dudley & Dudley, for appellant.

C. D. Frierson and *Cooley & Adams*, for appellees.

MEHAFFY, J. This action was brought to recover on an insurance policy issued by the National Union Fire Insurance Company to W. I. Henry. On October 8, 1926, W. I. Henry was the owner of a tract of land situated in Greene County, Arkansas, on which there was a dwelling house. The policy issued by appellant insured the building for $700, and the furnishings which were in the building for $300. Henry had given a mortgage on the real property to the American Trust Company for $500, and there was a clause in the policy which provided that the loss or damage, if any, should be payable to the American Trust Company as interest may appear. Henry and wife, on January 1, 1929, sold the real estate to E. N. Calhoun. Thereafter, on April 10, 1929, the house was struck by a tornado, and it was alleged that it was damaged in the sum of $830. The personal property was alleged to have been damaged in the sum of $100. After Henry sold the house, he retained one room for his use, and kept some of the property described in the insurance policy in this room, and it was in this room at the time of the tornado. The American Trust Company assigned and transferred to Mrs. Fannie Blum the notes and mortgage which had been executed by Henry to the American Trust Company, but it guaranteed the payment of the notes and mortgage to Mrs. Blum, and guaranteed that if foreclosure was necessary, it should be made without cost to her. This suit was brought by Henry, American Trust Company and Calhoun. Henry claimed that his personal property had been injured to the extent of $100, and asked judgment for that amount. He did not claim any interest in the building; he had already sold that to Calhoun. Calhoun claimed damage to the building, and the mortgage company sued for the amount due on the mortgage. The insurance company answered, admitting the issuance of the policy as stated by plaintiffs in their complaint, and that there was a mortgage clause in favor of the American Trust Company. It denied the extent of the damage, both to the building and the furniture, and denied the right of the plaintiffs, or either of them, to

recover any sum whatever. It alleged that in the policy special reference was made to the assured's application, and the agreements therein, which were made part of the policy. The facts are practically undisputed. There was a judgment in favor of the American Trust Company for the amount of its mortgage, with interest, 12 per cent. damages and $100 attorney's fee; there was also a judgment in favor of Henry for $100, 12 per cent. damages and attorney's fee of $50; and a judgment in favor of the insurance company as against Calhoun. The insurance company prosecutes this appeal to reverse said judgments.

Appellant does not controvert the fact that the policy when issued was valid, nor does it deny that there was a mortgage clause in favor of the American Trust Company. It is conceded that the premiums had been paid, and that proof of loss had been made. Appellant contends, however, that the case should be reversed because Henry, to whom the policy had been issued, had sold the real property prior to the damage done to it, and that he was for that reason not entitled to recover, and that no one else was entitled to recover. Appellant cites and relies on *Langford* v. *Searcy College,* 73 Ark. 211, 83 S. W. 944. This case, however, has no application. It is true that the contract of insurance was said in that case to be a personal contract, but in that case there was no clause in the policy for the benefit of any person other than the insured. A purchaser of property, which has been insured, acquires no interest under the insurance policy, because, as said in the above case, it was a personal contract, and it did not run with the title to the property.

Attention is next called to the case of *Lett* v. *Guardian Fire Ins. Co.,* 125 N. Y. 82, 25 N. E. 1088, which also holds that a policy of insurance is a personal contract, and that the obligation does not pass to the purchaser. Attention is also called to 14 R. C. L. 1114 and 1115. All of these authorities are to the same effect, and all hold that the obligation of the insurance company does not pass to

the purchaser of the insured property, but that is not the question here. Here the policy itself expressly provided that the loss or damage, if any, under this policy, shall be payable to the American Trust Company of Jonesboro, Arkansas, as first mortgagee, as its interest may appear. It therefore appears that the loss was made payable to the American Trust Company, made for its benefit, and it was the proper party to maintain the suit. Our statute provides "that every action must be prosecuted in the name of the real party in interest," etc. Section 1089, C. & M. Digest. *Burlington Ins. Co.* v. *Lowery,* 61 Ark. 108, 32 S. W. 383.

The policy also provides that the insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or negligence of the mortgagor or the owner of the within described property, nor by any foreclosure or other proceedings, or notice of sale relating to the property, nor by any change in the title or ownership in the property, etc. It will therefore be seen that the policy itself provides for a recovery or authorizes a recovery by the mortgagee, notwithstanding the mortgagor had sold the property. The fact that the mortgagor by selling the property or conveying it will make the policy void as to the mortgagor does not make the policy void as to the mortgagee, especially where the contract expressly provides that it shall not do so, as it does in this case. But the appellant contends that the mortgagee deprived itself of the right to maintain the suit by selling the note and mortgage to Mrs. Blum. In this case, however, it appears that, while the mortgagee had sold the notes and mortgage to Mrs. Blum, it had guaranteed the payment and was still liable to Mrs. Blum, and it was the only party which could have maintained the suit. Mrs. Blum had no interest in the policy, and its obligation did not run with the title to the property, and it was not insured for her benefit. This feature of the case is exactly similar to those cases relied on by appellant, beginning with the 73 Ark., *supra,* where it is held that the contract is a personal one

and does not run with the title to the property. Mrs. Blum acquired no interest in the policy by reason of purchasing the notes and mortgage, and the American Trust Company did not deprive itself of the rights under the policy by selling the notes and mortgage and guaranteeing to Mrs. Blum the payment. In other words, it was still liable, and there was nothing in the transaction that would deprive it of the right to maintain the suit. Mrs. Blum was not mentioned in the mortgage, it was not made for her benefit, and she was not a proper party and could not have maintained the suit. The mortgagee alone had the right under the policy to sue, and the transfer of the notes and mortgage under the circumstances in this case did not deprive it of that right. There was no change that was detrimental to the insurer, and this court has held that changes referred to in the policy mean changes detrimental to the insurer. *National Fire Ins. Co.* v. *Avant,* 167 Ark. 307, 268 S. W. 20.

"Under modern practice acts, however, requiring all actions to be brought in the name of the real party in interest, it is the general rule that, where the mortgage equals or exceeds the loss under a policy containing a loss payable clause, the mortgagee is the proper person to bring suit, even though he has assigned the mortgage, if he has guaranteed payment." 14 R. C. L. 1427. *Phenix Ins. Co. of Brooklyn* v. *Omaha Loan, etc., Co.,* 41 Neb. 834, 60 N. W. 133, 25 L. R. A. 679.

Appellant contends, however, that the mortgagee is not entitled to recover, because it did not notify the insurance company of the change in ownership. The mortgage clause in the policy contains the following provision: "The mortgagee shall notify the insurance company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of the mortgagee, and that fact shall be noted on the policy, and the mortgagee shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise, this policy shall be null and void. The mortgagee

did not notify the insurance company. The clause requiring notice of change clearly indicates that a change increasing the hazard was meant. It is not contended that the change increased the hazard. His failure to give such notice would have been material only where it would have caused prejudice or increased the risk to the insurance company, and there is no pretense of such a thing here." *Whitney* v. *American Ins. Co.*, 6 Cal. Unrep. 220, 56 Pac. 50; *Russell* v. *Cedar Rapids Ins. Co.*, 78 Iowa 216, 42 N. W. 654, 4 L. R. A. 538.

The property insured was sold by Henry to Calhoun. Calhoun also joined as plaintiff and sought to recover, but the court properly held that he was not entitled to recover. The company was under no obligation to him, and when he purchased the property he did not thereby acquire any rights in the insurance contract, and Henry by selling the property deprived himself of any right to maintain a suit for damage to the real property.

It is also contended by the appellant that Henry is not entitled to recover damage to personal property, because he had sold the real property. While the policy was written upon one paper and bore one number, it covered two separate pieces of property, insuring each in separate amounts against loss by fire or tornado. The building was insured for $700. The personal property in the house was insured for $300.

As said by this court: "In effect the policy constituted two contracts of insurance embraced in one paper. The cancellation and surrender of the one did not affect the other." *Globe & Rutgers Fire Ins. Co.* v. *Chisenhall,* 162 Ark. 231, 258 S. W. 135.

Sale of the real property therefore in this case did not avoid the policy as to the personal property. There was certainly nothing done which would in any way increase the risk. There might be some justification to argue that the sale of the dwelling would increase the risk as to the personal property against loss by fire, but it would certainly have nothing to do with increasing the risk as to a tornado.

Insurance contracts are to be construed like other contracts, and are construed most strongly against the insurance company which makes the contract. The purpose of providing in the policy against any change in interest or ownership of the property is for the benefit of the insurance company, and it is necessarily meant a change that will be detrimental to the insurance company.

The next contention is that the court erred in allowing damages and attorney's fees. The statute provides that: "In all cases where loss occurs and the fire, life, health or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, 12 per cent. damages upon the amount of such loss together with all reasonable attorneys' fees for the prosecution and collection of said loss," etc. Section 6155, C. & M. Digest. It will be observed that the statute does not mention tornado insurance.

This court said: "But the provisions of the act only apply in cases where the loss occurs and a fire, life, health or accident insurance company is liable therefor. It does not provide for the allowance of such damages and attorneys' fees in case where a loss is caused by a cyclone, and a cyclone insurance company is liable therefor. The act is highly penal, and it should not be held to apply to any loss or company that is not therein expressly named. It therefore should not be held to apply to cases where the loss is caused by cyclone and a cyclone insurance company is liable therefor." *Home Fire Ins Co. of Okla.* v. *Stancell,* 94 Ark. 578, 127 S. W. 966.

Since the loss in the instant case was caused by a tornado, and the statute does not provide for the allowance of such damages and attorney's fees in cases where the loss is caused by a tornado, it is not liable for such damages and attorney's fees. The court properly instructed the jury, and under the policy no act of Calhoun or Henry could affect the rights of the American Trust

Company. The policy itself provided that the American Trust Company's rights should not be affected by any act of the insured. There was nothing done in this case by any one in any way which increased the risk.

It follows that the judgment in favor of the American Trust Company and the judgment in favor of Henry must be affirmed, but the judgments for 12 per cent. damages and attorney's fees will be reversed, and the claim for such damages and attorney's fees be dismissed. It is so ordered.

FREE *v.* HARRIS.

Opinion delivered April 21, 1930.

E. W. Brockman, for appellant.

R. W. Wilson, for appellees.

McHaney, J. Appellees are the widow and heirs at law of W. H. Harris, now deceased. In January, 1927, W. H. Harris and Julia Harris, his wife, executed and delivered a note, secured by deed of trust on 220 acres of land, to O. P. Schnyder for an indebtedness amounting to $4,525.30 at the date of foreclosure, June 17, 1929. The deed of trust contained provisions by which dower and homestead were released, and waived the right of appraisement and redemption under the laws of this State. In December, 1927, Will Harris died intestate, leaving surviving him the appellees, the widow and five children, four of whom are minors. Julia was appointed administratrix of said estate.

The indebtedness represented by the note and deed of trust not having been paid, foreclosure proceedings were begun in November, 1928, in which the widow and all the heirs were made defendants. Guardian *ad litem* was appointed for the minor defendants, who filed answer for them in January, 1929. The widow made no defense. On June 17, 1929, the complaint was amended so as to make the administratrix a party, and on the same day she filed an answer admitting the plaintiff's lien, and that it was prior to her claim as administratrix, and consenting that decree might be taken at any time. On the same day, June 17, decree was entered giving judgment against Julia Harris in the sum of $4,525.30 and costs, which was declared a first lien on the 220 acres of land. A sale of the land was ordered, a commissioner being appointed for this purpose, if the judgment should not be paid in five days, after advertisement, and upon terms fixed by law. A sale was had pursuant to the terms of said decree on July 31, 1929, and appellant, Free, being the highest bidder, became the purchaser on a bid of $7,000. Several other bidders were present, including Mr. C. H. Holthoff, who bid up to $6,600 for the land. The concluding clause in the decree is, "That the court does retain jurisdiction of this cause for the purpose of mak-

ing such other and further orders as may be necessary for the protection of the rights of the parties hereto, and such others as may become proper parties."

Thereafter, on September 24, 1929, nearly two months after the sale to appellant, but before report of sale and confirmation, Julia Harris, as administratrix of said estate, filed "motion to set aside commissioner's sale and to permit redemption," in which it is alleged that the land was sold for an inadequate price, being worth $12,500; that only the homestead and dower interest of Julia Harris were sold; that she, as administratrix, was able, ready and willing to pay Schnyder his judgment, interest and all court costs, which amount she tendered in open court. She therefore prayed that the sale be set aside, confirmation be denied, and that she, as administratrix, be permitted to redeem. The court granted the prayer of this motion, and the purchaser at the sale has appealed from this latter decree.

It will be seen that the only ground alleged for setting aside the sale and refusing confirmation was the inadequacy of the price for which the sale was made. There is no allegation of fraud or other inequitable conduct attendant upon the sale, and the court specially found from the evidence adduced on the motion that "there was no fraud or unfairness in the conduct of the sale," which finding is supported by all the evidence. Mere inadequacy of consideration, however gross, unaccompanied by fraud, unfairness or other inequitable conduct in connection with the sale, is of itself insufficient to justify the court in setting the sale aside and refusing confirmation. *Marten* v. *Jirkovsky,* 174 Ark. 417, 295 S. W. 365; *Alexander* v. *American Bldg. & Loan Assn.,* 180 Ark. 251, 21 S. W. (2d) 156, and cases cited in both. In *Marten* v. *Jirkovsky, supra,* this court quoted from *George* v. *Norwood,* 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143, 7 Ann. Cas. 171, the following: "When a sale is made in all respects according to the terms of the decree, and neither fraud, mistake nor misrepresentation can be alleged against it, the faith of the

court is pledged to ratify and perfect it. * * * There is a uniform current of decisions settling that official sales will not be opened on mere representations that more may be obtained for the property. This well known practice is in accord with the policy of our law respecting such sales, which are required to be made after advertisement sufficient to give publicity, by public outcry, to the highest bidder. It is of the greatest importance to encourage bidding by giving to every bidder the benefit of bids made in good faith and without collusion or misconduct, and at least when the price offered is not unconscionably below the market value of the property. Nothing could more evidently tend to discourage and prevent bidding than a judicial determination that such a bidder may be deprived of the advantage of his accepted bid whenever any person is willing to give a larger price. The interest of owners in particular cases must give way to the maintenance of a practice which, in general, is in the highest degree beneficial."

While it is alleged that the sale price was inadequate, the preponderance of the evidence is that such is not the case. Mr. Holthoff and others testified that the land was worth $45 to $50 per acre, but on cross-examination admitted that $7,000 was a fair price. Appellant testified that his bid was all the land was worth, and the reason he wanted to buy was that it joined his land, and he would get the benefit of the trade from the tenants thereon. He also said that since $7,000 was the full value of the land, he would not lose anything if the sale were set aside. Whatever he may have meant by that remark, he is here insisting on his rights as purchaser. Therefore, we find and hold that the consideration was not only not grossly inadequate, but that it was fair and reasonable.

Counsel for appellees seek to uphold the decree on several grounds:

1st. That, under the decree of foreclosure, only the dower and homestead rights of Julia Harris were sold. The decree gave judgment against Julia Harris only,

and ordered a sale of the land in satisfaction thereof. No judgment was taken against the heirs, and properly so, as they did not execute the note. The amount of the judgment was declared to be a first lien on the land, for the satisfaction of which a sale was ordered. We are therefore of the opinion that the whole title passed by the sale, and not merely the dower and homestead rights of the widow, as the deed of trust conveyed the whole title as security for the debt.

2nd. That the foreclosure decree was premature by reason of the provisions of § 1288, C. & M. Digest. All the parties to the action were served, and had answered more than 90 days or were in default before the decree, except the administratrix. She answered that she had no claims prior to the lien of the plaintiff and consented of record that decree be taken at once. She cannot therefore complain now because she consented then for an immediate decree.

3rd. The inadequacy of the price bid has already been discussed. Julia testified that she thought the mortgage covered only a part of the land, and that 40 acres were left out. But she does not say that appellant or any one else connected with the sale so advised her. She knew of the suit, was served with summons, filed an answer as administratrix, knew the land covered by the deed of trust was to be sold, and herself signed the deed of trust.

4th. That the court had full control of the cause because of the concluding language of the decree above quoted. The court had full control to make all necessary or proper orders, but not to refuse to confirm a valid sale held pursuant to the decree, for a fair consideration, and without fraud or unfairness in the conduct of the sale. Judge Battle, in *Colonial & U. S. Mortgage Co.* v. *Jones,* 65 Ark. 152, 45 S. W. 60, announced the true rule, that confirmation will not be denied where "the property sold has brought its market value, and the purchaser and those conducting or controlling it have committed no

fraud, unfairness or other wrongful act injurious to the sale, and there is no occurrence, or special circumstance affording, as in other cases, a proper ground for equitable relief."

5th. Another ground relied on is that a portion of the property is the homestead of the widow and minors, and that this fact is sufficient to justify the court in refusing confirmation. We cannot agree. The mortgage or deed of trust was signed and acknowledged by the father and mother, which they had a lawful right to do without regard to the children. As heirs and as minors, they have no greater right than he would have if living. The homestead right was released, and the right to redeem waived.

6th. It is finally said appellant has suffered no loss, according to his own testimony. This may or may not be true if the decree appealed from is permitted to stand. Be that as it may, as we have already shown, appellees have shown no ground why confirmation should be denied.

The decree is therefore reversed, and the cause remanded with directions to overrule the motion, confirm the sale on the payment of the sum bid with interest. Costs will be adjudged against the appellees.

HUMPHREYS and MEHAFFY, JJ., dissent.

MCCASKEY REGISTER COMPANY *v.* MCCURRY.

Opinion delivered April 21, 1930.

V. D. Willis, for appellant.

Shouse & Rowland, for appellee.

BUTLER, J. Appellee executed a note to appellant payable in installments for the purchase price of an article referred to in the exhibits and testimony as a "register" and again as a "filing cabinet." Appellee defended in an action to enforce the payment of the note on the ground of failure of consideration. From an adverse verdict appellant has appealed, and assigns as error the action of the trial court in refusing to exclude from the jury a part of the opening statement of appellee's counsel.

1. In the bill of exceptions appears the following: "Plaintiff's objection to the opening statement of counsel for the defendant. The plaintiff desires to object to the statement of counsel for the defendant which he has just made to the effect that the McCaskey Register Company is one of the crookedest concerns operating in this

section of the State, and his statement to the effect that a number of witnesses will swear that they have been crooked out of money by the said McCaskey Register Company, and ask the court to exclude such statements upon the ground that if the said witnesses were to swear to the statement it would be incompetent and irrelevant and immaterial to the issues involved in this case." The motion was overruled by the court, and the appellant saved his exceptions.

This court has been called upon in many cases to determine whether remarks of counsel were improper, many of which have been reversed and others sustained as properly within the privilege of counsel.

Because of the infinite variety of the alleged improper remarks complained of in the adjudicated cases, no hard and fast rule can be laid down on the subject. The control of the conduct of the trial is within the sound judicial discretion of the trial judges, and a wide range of discretion must necessarily be allowed them in dealing with the subject, for they can best determine at the time the effect of any improper conduct or the alleged unwarranted language of counsel. This discretion, of course, is not an arbitrary one, but a judicial discretion, the exercise of which is a matter of review.

In determining whether the conduct or language permitted to be indulged in is ground for reversal, the true test appears to be whether an undue advantage has been secured which has worked a prejudice to the losing party not warranted by the law and evidence of the case.

This subject has been considered from time to time by this court, and a number of cases in which these questions were raised may be found cited by the court in the case of *Kansas City Sou. Ry. Co.* v. *Murphy,* 74 Ark. 256-8, 85 S. W. 428.

In view of the lack of conflict in the evidence and its nature, we are unable to see how the statement complained of could have been prejudicial.

It will be noticed in the instant case that the language complained of is not set out in the bill of excep-

tions, but only appellant's conception of its purport and meaning, which is not sufficient to call for a review of the trial judge's holding, because he might have concluded the language used not susceptible of interpretation placed upon it by appellant's counsel.

2. Appellee contended that the register purchased was worthless because it could not be opened. A deposition of a witness was taken in which there was testimony that the witness had examined the register in question, and had found that it could not be used for any purpose because the drawers could not be withdrawn. This testimony was relevant and competent.

The appellant filed a general objection to the admissibility of the deposition, and assigns as error action of the court in permitting the deposition to be offered in evidence over his objection. In this the court did not err. As said in *St. L. I. M. & S. R. Co.* v. *Taylor*, 87 Ark. 334, 112 S. W. 745: "If it be conceded that certain portions of it were hearsay and improper, the appellant did not object specifically to any parts of the evidence. Its motion to exclude was general, and, as the testimony was competent, and some portions at least were relevant to the issue, appellant's objection cannot avail." See also *St. L. I. M. & S. R. Co.* v. *Bryant,* 92 Ark. 425, 122 S. W. 996; *Clardy* v. *State,* 96 Ark. 57, 131 S. W. 46; *Martin* v. *Monger,* 112 Ark. 394, 166 S. W. 566.

3. In the deposition to which general objection was made the witness testified that he had examined other registers of the same make which had been purchased for use as that of appellee, and that neither of these could be used because of defects similar to that complained of by appellee. There was no objection made to the introduction of this testimony except the general objection to the entire deposition, so that there was no error on the part of the court in permitting this testimony to be read, besides, we think it was competent under the rule that other transactions may be testified to, if they are of the same nature and character, as tending to show a plan or gen-

eral conduct. *Meyers* v. *Martin,* 168 Ark. 1028, 272 S. W. 856, and cases therein cited.

4. The testimony in this case tends to show that the register or filing cabinet was purchased by appellee for use in his business; that it was purchased from a traveling salesman who exhibited a picture of the device, and the appellee purchased without having an opportunity of inspecting or trying out the article. When it reached him, he discovered that he could not open it and called in several to assist him. None were able to pull out the drawers, and the handles were broken in attempting to do so. Complaint was made to the seller, who promised to send some one to condition it, but this was never done. When the first installment fell due, appellee refused to pay, and this suit was brought to recover the face of the note. It provided that all of its installments should become due in default of the payment of any one of them.

It is well settled that where a chattel is sold to be used for a particular purpose, and vendee has not had the opportunity to inspect it, he must necessarily trust to the judgment and good faith of the vendor that the article purchased is reasonably fit for the purpose for which it is intended, and the law implies the warranty that it is of such character. In this case, if the register was for use in appellee's business and to aid him in keeping his accounts, and if it could not be opened, it was worthless for the only use to which any one could put it. This principle is announced in a number of our cases which are approved and cited in *Western Cabinet & Fixture Mfg. Co.* v. *Davis,* 131 Ark. 382, 181 S. W. 273; and in *Dike* v. *Magdalina,* 171 Ark. 225, 283 S. W. 374.

In the instant case the court charged the jury in accordance with the principles announced in the cases *supra,* and the verdict was in accord with the charge to the jury, and supported by the evidence. No error appearing, the judgment is therefore affirmed.

Opinion delivered April 21, 1930.

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[redacted]

Lake, Lake & Carlton, for appellant.

Abe Collins, for appellees.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not directing a verdict in its favor since there is no substantial conflict in the testimony, and we have concluded that the contention must be sustained. Appellees do not deny having discounted the Thomas note with appellant bank without disclosing to it any information of the contract binding them to the crediting of $1,000 on the note upon the furnishing of an abstract by the Thomases showing a clear title to the 40-acre tract of Missouri land during the life of the deed of trust securing the payment of the note, nor that appellant bank duly entered the credit of $1,000 claimed by the Thomases upon showing the clearing of the title to the 40-acre tract of land; their contention being that the crediting of such amount on the note was unwarranted, since the completed abstract did not show a clear title to the 40-acre tract of land within the meaning of their contract.

The abstract of title as first made was presented to appellees and their attorney, Mr. Jackson, who pointed out three alleged substantial defects in it, and refused to approve same. Other attorneys were employed by the Thomases to clear the defects in the title, one of which was done by a successful suit to quiet the title, the others were shown to be without merit because of curative statutes of the State of Missouri, and another by the execution of a deed from one of the parties grantor in one of the conveyances who lacked a few days of being of age when the first conveyance was made, which fact however did not appear in the abstract of title, there being nothing on the face of it indicating the minority of this grantor.

The Thomases were only bound under the contract to furnish an abstract showing a merchantable or marketable title to the 40-acre tract of land, the expression "clear title" in the contract meaning no more than that, one free from material defects. Since the abstract of title as corrected does not disclose any defect in the record title which could be cured only by parol proof or a title dependent upon parol proof, the question of whether the title is a marketable one was one of law for the court to determine—a question of legal construction. 27 R. C. L. 491; *Townsend* v. *Goodfellow,* 40 Minn. 312, 41 N. W. 1056, 3 L. R. A. 739; *Mead* v. *Altgeld,* 136 Ill. 298, 26 N. E. 388; note 52 A. L. R. 1462.

The court erroneously submitted the question to the jury. The record discloses that the objection (3d) made to the decree to quiet title did not arise out of the proceeding, but was attempted to be interposed by an affidavit disclosing that one of the heirs of the deceased grantor was a resident of the county where the suit was brought and constructive service duly had—an attempted collateral attack or showing that a judgment duly rendered upon constructive service was invalid. The question of this conveyance relative to its invalidity on account of the acknowledgment shown to have been taken

by a justice of the peace of the State of Arkansas, an officer not authorized to take acknowledgments under the statutes of Missouri, was probably cured any way by the curative statute of 1919.

The objection No. 1 to the abstract to entry No. 13 was that the conveyance from Ira Thomas and wife was not on a uniform blank as provided by the Missouri statute for a warranty deed. Appellee's attorney, however, stated in making this objection that he did not examine the opinions of the appellate court of Missouri to ascertain whether this was material or only a matter of form. The operative words in the deed are "do hereby grant and warrant to Clara R. Thomas, a widow, the real property described" and were sufficient to convey the title. 18 C. J. 178; *State* v. *Kelliher,* 49 Ore. 77, 88 Pac. 867; *Horton* v. *Murden,* 117 Ga. 72, 48 S. E. 786; *San Francisco, etc. R. Co.* v. *Oakland,* 43 Cal. 502; *McDill* v. *Meyer,* 94 Ark. 615, 128 S. W. 364.

The defects complained of in the other conveyances shown in the abstract were all cured by the statute of Missouri, § 368, Revised Statutes of Missouri, 1919, having been recorded more than a year prior to the commencement of the suit in the circuit court. 1 R. C. L. 292; 1 C. J. 877-78; note 19 A. L. R. 1080.

Appellee's attorney upon his last examination of the abstract abandoned his objection to entry No. 19, admitting it was sufficient.

Appellees contend that this suit was premature, having been brought before the corrected abstract was submitted to and passed upon by them, but they insist that the appellant's authority under the assignment of the note was broad enough to include the entering of the credit for the $1,000 in the event the Thomases furnished clear title to the land, and it is unquestioned that the corrected abstract was furnished to appellant bank with a demand made for the credit of the $1,000 on the note purchased by it from appellees, and that the credit was entered thereon by the bank before this suit was brought.

It could make no difference in appellee's liability under the circumstances of the case that suit was brought before presentation of the corrected abstract showing a clear title to the land in controversy since appellant was bound to enter the credit upon the making of such showing, and appellant could enter the credit on the note as appellees were bound to do, taking no risk in doing so, other than correctly deciding that the abstract presented showed the title clear in accordance with the contract.

The court having held that the abstract showed such title, appellees cannot escape their liability under the contract nor avoid the repayment of the amount credited on the note which was sold to or discounted with appellant bank without the disclosure of any right upon the part of the makers to a reduction of the amount of the note as made and paid for.

It follows that the court erred in not directing a verdict for said amount sued for, and the judgment is reversed, and the cause will be remanded with directions to enter a judgment in appellant's favor accordingly. It is so ordered.

AMERICAN DISINFECTING COMPANY, INC. *v.* FRANKLIN COUNTY.

Opinion delivered April 28, 1930.

J. C. Benson, for appellant.

R. S. Wilson, for appellee.

HART, C. J., (after stating the facts). Section 1976 of Crawford & Moses' Digest reads as follows:

"No county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended, and in no event shall any county court or agent of any county make any contract in excess of any such appropriation made, and the amount of such contract or contracts shall be limited to the amount of the appropriation made by the quorum court."

This section of the Digest applies to Franklin County, and the sheriff had no authority to purchase the disinfectant from appellant. There was no showing

made that an appropriation had been made which would warrant the purchase of the disinfectant; and, in the absence thereof, the purchase could not be made. *Madison County* v. *Simpson,* 173 Ark. 755, 293 S. W. 34.

In the absence of an appropriation for the purchase, the county judge could neither have made such a contract on his own motion, nor have ratified the contract made by the sheriff. In *Leatham & Co.* v. *Jackson County,* 122 Ark. 114, 182 S. W. 570, it was held that the county court might ratify an unauthorized contract made in behalf of the county, if the contract was one the county could have made in the first instance. The object of providing in advance for the appropriation was to prevent an expenditure for county purposes of an amount greater than the current income. Amendment No. 10, Constitution of Arkansas; *State use of Prairie County* v. *Leathem,* 170 Ark. 1004, 282 S. W. 367; *Dixie Culvert Co.* v. *Perry County,* 174 Ark. 107, 294 S. W. 381; and *Polk County* v. *Mena Star,* 175 Ark. 76, 298 S. W. 1002.

It follows that the judgment of the circuit court was correct, and it will be affirmed.

OSBURNE *v.* STATE.

Opinion delivered April 28, 1930.

Coleman & Reeder, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

SMITH, J. Appellant seeks by this appeal to reverse the judgment of the court below sentencing her to a term of nine years in the penitentiary upon the charge of murdering Maurice Osburne, her husband. The errors assigned are that the testimony is insufficient to support the verdict, and that error was committed in giving and in refusing to give certain instructions.

As to the sufficiency of the testimony, but little need be said. That the deceased was murdered—assassinated—is certain, and that his wife was present and participating in the atrocious crime appears equally so. She admitted that an illicit relation existed between herself and one J. P. Barber, and that her husband carried a $2,000 insurance policy on his life, with double liability in case of accidental death, of which she was the beneficiary.

Deceased and his brother, Charles, worked for their father in a store, and on the night of July 1, 1929, they closed the store and drove home in a car belonging to deceased. Charles jumped off the running board of the car at his own home, which was about 260 yards from that of his brother, who continued on to his home. Charles had been at home only a few minutes when he heard three shots fired, the second and third in rapid succession, following a short interval after the first. Charles left at once for the scene of the shooting, and overtook his mother, who was also on the way. They went into the house, and found Maurice lying on the kitchen floor dead. He had been shot in the face and twice in the back, and his murderer had beaten him over the head with a gun, the stock of which had been broken. There were powder burns in the back, which indicated that those shots had been fired at close range. Appellant was lying on the floor of a front room, and when deceased's mother asked, "My God, Norma, did you do this?" appellant answered, "No, he was cleaning his gun." Appellant made conflicting statements as to the manner in which her husband met his death, all of which were obviously false, and at the coroner's inquest admitted that Barber might have been at her home when the killing occurred, and that he

might have shot her husband. Barber, who was seen at the home at about sundown, fled the community, and had not been arrested at the time of the trial from which this appeal comes. The testimony was also to the effect that the furniture in the house had been rearranged to afford the assassin an unobstructed shot at deceased as he came into his home, and it was only poor markmanship which made more than one shot necessary. Had the first shot been fatal, as was, no doubt, intended, the story that deceased had shot himself while cleaning his gun would have been more plausible. This was, no doubt, the story appellant had planned to tell to explain the death of her husband, but the deceased's brother and mother arrived on the scene before time was afforded to adjust the story to the unexpected circumstances. Appellant did not testify in her own behalf at the trial from which this appeal comes, and the implication is that she fainted when her husband was shot, and was still unconscious when the deceased's brother and mother arrived; but, even so, this does not explain the conflicting and untrue statements made by appellant as to the circumstances attending the killing of her husband.

Appellant requested, but the court refused to give, an instruction numbered 4, which was to the effect that "where circumstantial evidence alone is relied upon to establish the guilt of one charged with crime, such evidence must exclude every other reasonable hypothesis except that of the guilt of the accused."

This statement of the law has been approved by this and many other courts, and it would be well to give such an instruction in a proper case. But it may be doubted whether the State relied upon circumstantial evidence alone in the instant case. It is true that no witness who testified in the case saw the killing, but numerous statements of appellant herself relating thereto were offered in evidence, and the inferences deducible therefrom were of an incriminating character. The inference is fair and reasonable from appellant's own admissions that she must have known how her husband met his death, and her

improbable and untrue statements in regard thereto support the conclusion that she was a party to his murder. There was therefore no error in refusing the instruction.

Moreover, we have held that, while an instruction of the character of the one requested should properly be given in a case where the State relies entirely on circumstantial evidence, yet the failure so to instruct the jury was not error where the jury had been instructed fully and fairly on the question of reasonable doubt and the presumption of innocence which accompanies the defendant throughout the trial, and that a conviction could not be had unless the jury found beyond a reasonable doubt that the defendant was guilty as charged. *Payne* v. *State,* 177 Ark. 413, 6 S. W. (2d) 832; *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d) 946; *Conley* v. *State,* 176 Ark. 654, 3 S. W. (2d) 980; *Whitney* v. *State,* 176 Ark. 771, 4 S. W. (2d) 9; *Barton* v. *State,* 175 Ark. 120, 298 S. W. 867; *Bost* v. *State,* 140 Ark. 254, 215 S. W. 615; *Thompson* v. *State,* 130 Ark. 217, 197 S. W. 21; *Jones* v. *State,* 61 Ark. 88, 32 S. W. 81; *Reed* v. *State,* 54 Ark. 621, 16 S. W. 819; *Green* v. *State,* 38 Ark. 304. Instructions to this effect were given in the instant case, and we conclude therefore that no error was committed in refusing to give instruction numbered 4.

Exceptions were saved to the giving of instructions numbered 6, 7 and 9. Instruction numbered 6 declared the law if appellant herself fired the fatal shots, while instructions numbered 7 and 9 declared the law if it were found that Barber fired them. The objection to these instructions is that they are abstract. We do not think so. The instructions go to the very heart of the case. No one could know whether appellant herself fired the fatal shots, or stood by and aided Barber to do so, but she was equally guilty in either event, and it was proper for the court to so declare the law, and this the instructions did. The instructions were not abstract, as we think it sufficiently appears, from the facts already stated, that, if appellant did not kill her husband—and she may not have done so—

she was nevertheless present, aiding and abetting the person who did.

No error appears, and the judgment must be affirmed, and it is so ordered.

CARTER, BLEVINS AND BURKS *v.* STATE.

Opinion delivered April 28, 1930.

W. R. Donham, for appellants.

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

HUMPHREYS, J. The appellants were separately indicted in the circuit court of Saline County for perjury, and the cases were consolidated for trial, which resulted in verdicts and judgments of conviction of each, imposing a penalty of one year in the State penitentiary upon them, from which is this appeal.

A reversal of the judgments is first sought upon the grounds that the indictments contained no negation of the truth of the alleged false testimony, and no facts showing the materiality of the alleged false testimony.

The alleged false evidence of each appellant set out in the respective indictments is, with slight variances, the same. Copying from the Blevins' indictment the alleged false testimony is as follows: * * * "did then and there unlawfully, willfully, feloniously, falsely and corruptly swear and testify that he, the said Troy Blevins, on a Sunday around the first of August, 1929, saw Ira Buckalew and Mart Ogle firing the woods; that Mart Ogle had a fire built up around a pine stump; that Ira Buckalew did not have anything in his hands at first, but he took up a pine torch, and, when he, the said Ira Buckalew, saw him, the said Troy Blevins, the said Ira Buckalew dropped the torch and left; that he, the said Troy Blevins, positively identified the said Ira Buckalew and Mart Ogle, and knows they were setting the woods on fire, and that the fire was on the Burks property."

The rule is that it is not necessary to negative the truth of the alleged false testimony in an indictment if the alleged false testimony itself necessarily implies that its converse is true, and what the converse is. In that event the implication is equivalent to such an allegation. *Loudermilk* v. *State,* 110 Ark. 549, 162 S. W. 569. The necessary implication from the allegation in the instant case is that appellant did not see Ira Buckalew and Mart Ogle fire the woods back of Billy Burk's property in Saline County, and that said parties did not fire the woods. The averment in the indictment was sufficient without an express negation therein as to the truth of the alleged false testimony.

The contention that the indictment is fatally defective for failure to set out facts showing the materiality of the alleged false testimony is based upon the failure to set out therein the crime with which Ira Buckalew and Mart Ogle were charged before E. T. Holliman, a justice

of the peace in and for Saline township, Saline County, in which appellants testified, and the alleged false testimony concerning an offense committed in Saline County. The indictment alleged false testimony in a certain criminal case in the justice court of E. T. Holliman in Saline township, Saline County, who had jurisdiction to try said case, wherein the State of Arkansas was plaintiff and Ira Buckalew and Mart Ogle were defendants, and also alleged that the false testimony given by them was to the effect that they saw said defendants, Ira Buckalew and Mart Ogle, firing the woods back of Billy Burks' place. The necessary inference from these allegations was that the defendants were charged with firing the woods within Saline township, Saline County. The justice of the peace would not have had jurisdiction to try the case, had the offense charged been committed outside his territorial jurisdiction. There was an affirmative allegation in the complaint that the alleged false testimony was material in the case, so, when each indictment is read as a whole, it is apparent that appellants were charged with falsely swearing in the case in which Ira Buckalew and Mart Ogle were charged with the crime of setting fire to the woods back of Billy Burks' place in Saline County. The crime charged against Ira Buckalew and Mart Ogle was inferentially set out in the indictments, and the venue was sufficiently alleged.

Appellants also contend for a reversal of the judgments on the ground that the evidence was insufficient to show that the crime charged against Ira Buckalew and Mart Ogle, in which it was alleged appellants testified falsely, occurred in Saline County. The record reflects that the affidavit in the case of State v. Ira Buckalew and Mart Ogle alleged they committed the offense of firing the woods back of Billy Burks' property in Saline County, and all of the testimony was to the effect that the offense was committed back of Burks' property. This testimony was sufficient to establish the venue of the crime in which Ira Buckalew and Mart Ogle were tried in Saline County.

It is also contended that the judgments should be reversed because the court allowed T. E. Holliman and Elizabeth Canaday to testify concerning the nature of the offense for which Ira Buckalew and Mart Ogle were tried, but this contention is based upon the erroneous assumption that there was no allegation in the indictments as to the offense against them having been committed in Saline County.

Appellants also contend that the trial court erred in giving instructions numbered 2, 3 and 4 submitting the question of the materiality of the alleged false testimony to the jury. This contention is based upon the erroneous assumption that there was no allegation of fact in the indictments to show that the alleged false testimony was material, and no evidence in the record to show what the defendants testified to seeing occurred in Saline County. As there was no dispute about the facts sworn to, the court should have told the jury that the testimony was material. *Foster* v. *State,* 179 Ark. 1084, 20 S. W. (2d) 118. In submitting the question of materiality to the jury, no prejudice therefore resulted to appellants.

Appellants also contend for a reversal of the judgments because the court refused to give instruction No. 6 requested by appellants, which is as follows: "The mere fact that the prosecuting attorney may have inserted in the information filed in the justice of the peace court that the offense of firing the woods happened on the fourth day of August cannot be considered by you as evidence in this case for any purpose whatever."

This instruction was not requested until after the jury had retired to deliberate upon the case, and it was in the discretion of the court at that time to refuse to give the instruction. Without deciding the correctness of the instruction as a matter of law applicable to the facts, appellants should have requested it before the cause was submitted, and cannot complain because the court refused to give it after the cause was submitted to the jury.

No error appearing, the judgment is affirmed.

Mr. Justice BUTLER dissents.

WINTON *v.* BARTLETT.

Opinion delivered April 28, 1930.

W. E. Spence, for appellants.

Holifield & Upton and *Harrison, Smith & Taylor,* for appellees.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Clay County, Eastern District, First Division, sustaining a demurrer to a complaint filed therein by appellants and, upon their failure to plead further, dismissing same. It was alleged in their complaint that they were duly appointed and qualified commissioners of Central Clay Drainage District in said county, which was organized by special act 317 of the Acts of 1911, having been appointed thereto by orders of the county court of Clay County on April 21, 1929, and June 15, 1929, which appointments were authorized under the provisions of acts 227 of the Acts of 1927 and 256 of the Acts of 1929; and it was further alleged that appellees had usurped the offices of directors of said district and excluded appellants therefrom, and, without authority of law, were withholding from appellants the books, papers and other things pertaining to said district and wrongfully and without right or authority were excluding appellants from the office of directors of said Central Clay Drainage District and precluding each of them from performing his duties—with a prayer for judgment against appellees for the possession of said office and all books, papers and effects pertaining thereto.

Appellees, claiming to be directors of said district under the provisions of the act creating same and amendments thereto, passed by the General Assembly prior to said acts 227 of 1927 and 256 of 1929, filed a general demurrer to the complaint of appellant attacking the constitutionality of said acts 227 of 1927 and 256 of 1929.

The ground upon which appellees attack act 227 of the Acts of 1927 is that the act offends against article 5, § 23, of the Constitution of 1874, which provides that "No law shall be revived, amended, or provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended or conferred shall be re-enacted and published at length." Said act is not in conflict with said section of the Constitution, as same did not attempt to revive, amend or extend the provisions of the special act creating said drainage district, nor any other special act creating drainage districts in the State. The title thereof shows that it was intended to be and was an act in aid of drainage districts formed under special law and not an effort to amend or extend the provisions of any of them. The preamble thereto recites in so many words that under the restrictions of the Constitution it was impossible to amend special laws theretofore enacted by the Legislature. The act in question is a general law placing drainage districts, created by special acts with reference to procedure therein and thereafter under the terms of the general law as provided in act No. 279 of the Acts of 1909, as incorporated in Crawford & Moses' Digest in §§ 3607-56, inclusive. The act within itself was an independent complete act, and adopted by reference to the procedure outlined in general act number 279 of the Acts of 1909, among other things, empowered the county court or the county judge in vacation to appoint commissioners of any drainage district. The act comes within the class of statutes, known as reference statutes, which do not impinge upon the constitutional limitations contained in article 5, § 23, of the Constitution of 1874. *State* v. *McKinley*, 120 Ark. 165, 179 S. W. 181; *House* v. *Road District*, 154 Ark. 218, 242 S. W. 68.

Our attention is called to the latter clause in the proviso of § 1 of act 227 of the Acts of 1927 to the effect that commissioners and directors of special drainage districts in office at the time of the passage of the act should not be displaced. This, of course, could only mean that their offices could not be filled by an order of the county court until the expiration of their respective terms or until a vacancy occurred. The complaint in the instant case alleged that the appellees were usurpers of the district, and were acting without authority of law.

For the purpose of the instant case, it is unnecessary to pass upon the validity or invalidity of act 256 of the Acts of 1929 as the procedure for the appointment of commissioners in special drainage districts is the same under that act as under the provisions of act 227 of 1927, which we have ruled is not unconstitutional.

On account of the error indicated, the judgment is reversed, and the cause remanded with directions to overrule the demurrer to the complaint.

MORRIS *v.* MULLINS.

Opinion delivered April 28, 1930.

Williamson & Williamson, for appellant.

George W. Parks, for appellee.

KIRBY, J. This suit was brought by appellant to recover the value of a $2.50 hog, costs and expenses, sold to him by appellee.

Appellee sold and delivered to appellant 3 hogs for $2.50 each, and Dave Nichols replevied one of the hogs after appellant had kept it and fed it for about 60 days. Appellant herein notified appellee Mullins of the suit, and was told by him to hold the hog and defend the suit. Appellant insisted that the hog was not worth a lawsuit, and appellee assured him that his title had been good, and that he would defend the lawsuit, and if appellant lost he would pay the costs. Appellant insisted that Mullins would better hire a lawyer, and that he did not do so and attempted to defend the suit himself. Mullins did not ask to be made a party to the suit, and appellant, not knowing that it could be done, did not ask to have him made a party. Upon losing the suit appellee insisted that appellant should appeal the case to the circuit court assuring him that he would sell some cotton, and repay the costs. Appellant replied that he would take the appeal if appellee would pay the costs and make an appeal bond, as he did not care to assume the liability. Appellee did not make the appeal bond or pay the costs, but did leave one dollar with the justice of the peace to pay for the transcript when the affidavit for appeal was made. No appeal was taken, and appellant paid the costs in that suit, and brought this suit in the justice court against Mullins for the price of the hog, and costs, etc., and recovered judgment there, from which an appeal was taken to the circuit court, and from the judgment against him there appellant prosecutes this appeal.

The facts are virtually undisputed, and appellant insists that the court erred in giving over his objections for appellee instructions Nos. 2, 3 and 4. By these instructions the court told the jury that defendant in this case had a right to have the replevin suit for the possession of the hog prosecuted in the circuit court, and it was his duty after being notified of the suit to appear and defend it; that if Mullins had agreed to pay the costs of the replevin suit, and the suit went against Morris, appellant here, "and if there was no demand or request

made on him that the case be appealed to the circuit court," then Morris would be entitled to recover. In instruction No. 4, the jury were told that if they found that Mullins had agreed with Morris that he would pay the value of the hog and the expenses of the replevin suit if he lost it, and that Mullins, after the suit went against Morris in the justice court, had assisted in the trial "and demanded that Morris take an appeal to the circuit court" and paid the dollar for the transcript, and agreed to execute an appeal bond, and Morris failed to make the affidavit and take the appeal, the jury should find for defendant, appellee here.

The court erred in giving these instructions, which were peremptory in effect. Appellee was liable to repay to appellant the price of the hog sold him to which he had no title, recognized this liability, and insisted upon appellant resisting the replevin suit for its possession, agreeing to pay the costs of the suit if the judgment was against him. The judgment was rendered against him, and he had to pay the costs. Appellee could have made himself a party to this suit if he had desired to do so, and appellant could have had it done upon proper motion made, but he was not made a party.

Appellant was not bound to prosecute the replevin suit further than the justice court to determine his right to the ownership or possession of the property sold to him by appellee here, who was adjudged in that suit to have no title thereto, nor could appellee avoid his liability to repayment of the price of the hog, to which he had no title, sold by him to appellant, and the costs of the suit for determination of the title, which he agreed to and failed to pay, because appellant refused to prosecute an appeal in that case to the circuit court.

The court erred in instructing the jury otherwise, and for this error the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

LOUISIANA & ARKANSAS RAILWAY COMPANY *v.* MULDROW.

Opinion delivered April 28, 1930.

[redacted]

Steve Carrigan and *B. E. Carter,* for appellant.

John P. Vesey, for appellee.

KIRBY, J., (after stating the facts). Appellant first contends that the evidence disclosed that appellee had assumed the risk, and that the court erred in not directing a verdict in its favor. It is conceded that the action was brought under the Federal Employers' Liability Act, which it is correctly claimed did not abolish the defense of assumed risk. The evidence shows that, while the men were engaged in loading the rails, four at each end thereof, the three men carrying the end of the rail with appellee turned loose without direction of the "caller" allowing all the weight of it to fall on appellee, resulting in or causing his injury. Certainly he had no means of knowing or any intimation that they were going to turn

the rail loose, leaving the weight of it on him, in time to have protected himself against the negligence, this notwithstanding they were laughing and talking while doing the work, and might not have heard or heeded the direction of the "caller." This could have constituted no notice to him nor caused him to realize that they might negligently turn the rail loose before time or without throwing it on the car, leaving the whole weight to fall upon and be supported by him, and he could not, as a matter of law, be held to have assumed the risk of such negligence.

The court told the jury that one of the defenses was assumption of risk, and that, if it should be found that appellee was injured because of the negligence of some agent or employee of appellant which contributed to or caused the injury, such negligence was one of the ordinary and usual risks of plaintiff's employment, and was assumed by him. In the latter part of instruction No. 2, the court told the jury that appellee assumed the ordinary risks incident to his employment, but not the negligence, if any, of appellant or its employees, "unless he knew of such negligence before he was injured, if he was." He also told the jury that, if they found he was injured in the manner alleged or claimed in the complaint, etc., they could find for him damages, "provided you do not find that his injuries, if any, arose from his having assumed the risks incident to his employment." The court did not take from the jury, as contended, consideration of the defense of assumption of risk, and the authorities relied upon have no application here.

Neither was error committed in giving appellee's requested instruction No. 1, complained of, which told the jury that where the term "preponderance of evidence" and "greater weight of evidence" was used in the instruction, it did not mean a greater number of witnesses on one side or the other. These terms were defined properly in instruction No. 2, complained of, by

saying "Does not mean necessarily the greater number of witnesses, but means evidence which in your judgment is entitled to greater weight in respect to its credibility."

It is next insisted that the verdict is contrary to the weight of the testimony, and, conceding this to be true, it was a matter to be addressed to the trial court and furnishes no grounds for reversal here, there being substantial testimony in support of it. *Newhouse Mill & Lumber Co.* v. *Keller,* 103 Ark. 538, 146 S. W. 855; *St. L. Sw. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768.

No error was committed in refusing to allow the witness Greene to state the full conversation that occurred in appellee's attorney's office in his presence relative to the cause of the accident. Appellant attempted to show indirectly that appellee had made a different statement as to the cause of his injury in stating the case to his attorney by showing that his attorney stated that if such was the case there was no liability. This was not a contradictory statement of the witness, nor a statement of his at all. Neither was it competent, since there was no relation of the entire statement of the facts by appellee to his attorney, nor an attempt to show any contradictory statement made by him there. His attorney might have been mistaken as to the law and liability in making any such statement, if he did make it, and it cannot be presumed that, because witness made a statement of the facts of the jury to his attorney, who expressed the opinion that there was no liability, that the witness had made a different statement to the one related on the stand.

It may be that appellee did not suffer the particular technically alleged injury as a result of the negligence of his fellow workmen in releasing the end of the steel rail and letting the entire weight fall or rest on him, but there was substantial testimony from which the jury could have found that he had suffered an injury to his back therefrom that caused the pain and physical dis-

ability complained of, and it was sufficient to show the injury and support the verdict. We find no error in the record, and the judgment is affirmed.

MERCHANTS' & PLANTERS' BANK *v.* EWAN.

Opinion delivered April 28, 1930.

Bogle & Sharp, for appellant.

June P. Wooten and *Lee & Moore,* for appellees.

BUTLER, J. On the 6th day of March, 1922, appellee, Parker C. Ewan executed a note to the Merchants' & Planters' Bank, appellant, in the sum of $15,000, due December 15, 1922, with eight per cent. per annum interest from date until paid, and to secure the payment of same, executed and delivered his mortgage of even date with the note to the bank covering certain real property in Monroe County, Arkansas. The mortgage was duly recorded in said county on March 8, 1922. Payments beginning in 1923 were made and credited on the note each year down to and including the year 1928. None of these payments were indorsed or noted on the margin of the record of the mortgage. There appeared, however, on the margin of the record of the mortgage this endorsement:

"For value received, we hereby release all of Block PP, Parker Ewan's Subdivision, Clarendon, Arkansas.

Signed, Merchants' & Planters' Bank, by W. H. Brown, Cashier. 1-3-25. Attest John W. Hooker, Clerk."

The appellees, Keesee, Moore and Murphey, hold judgments against Ewan, and were proceeding to enforce the same by levying executions on the lands contained in the mortgage aforesaid when this suit was instituted by the appellant bank to foreclose its mortgage, and to enjoin the judgment creditors from further proceeding against said lands. The appellee judgment creditors defended on the ground, that the mortgage which appellant sought to foreclose and the lien thereof were barred by statutes of limitation.

The trial court found that the indorsement upon the margin of the record was not sufficient to toll the statute, and that the mortgage, so far as the same affected the rights of the judgment creditors, was barred by limitation. The court also by its decree settled the priorities of liens of the appellees, and that part of the decree is before us for review. The principal question to be decided is, "Was the indorsement made on the margin of the record a compliance with the statute authorizing the extension of maturity of a mortgage debt."

The suit of appellant bank was instituted on the 28th day of June, 1929, more than five years after the due date of the note secured by the mortgage, so that, as to appellees, the judgment creditors, the lien would be barred unless the notation on the margin of the record was made within five years of the due date, and which would be a sufficient compliance with § 7408, Crawford & Moses' Digest. This section is as follows: "In suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given, provided, when any payment is made on any such existing indebtedness, before the same is barred by the statute of limitation, such payment shall not operate

to revive said debts, or to extend the operations of the statute of limitation, with reference thereto, so far as the same affects the rights of third parties, unless the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with the date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk."

The appellee contended, which contention was upheld by the court below, that the indorsement *supra* did not comply with the statute just quoted, in that it failed to show a payment on the mortgage debt, and if a payment was shown it fails to state the date such payment was made, both of which are required by the statute. This court has had occasion to construe this statute a number of times, and has held that when a debt secured by a mortgage is apparently barred by limitation, and no payment which would stay the limitation is indorsed on the margin of the record, it becomes as to third parties an unrecorded mortgage, and constitutes no lien upon the mortgaged property as against them, notwithstanding they have actual knowledge of the execution of the mortgage, and notwithstanding the fact that payments might have been made on the note which it secured.

In *Clark* v. *Lesser,* 106 Ark. 207, 153 S. W. 112, cited by appellee, the following indorsement on the margin of the record was held not to be sufficient compliance with the statute, the indorsement being, "There being a balance due on the within D/T of $118 this November 4, 1902. M. Lesser & Co., Attest: F. H. Govan, Clerk." The court in that case used this language: "It will be observed that the statute requires that the date of the payment shall be indorsed on the margin of the record. The indorsement above set out does not show the date on which the payment was made. Conceding that the indorsement shows that a payment had been made, it falls far short of showing that such payment was made

within five years before the beginning of the suit to foreclose. It is not the fact of payment, but the date on which payment is made, that tolls the statute. The indorsement only shows that there was a balance of $118 on November 4, 1902, but it does not show that the payment which left such a balance was made on November 4, 1902. For aught that the indorsement shows to the contrary, such payment might have been made even before the note became due on October 15, 1899, or so soon thereafter as not to bring the date of the payment within the period of five years before the institution of the suit to foreclose. The date of the payment must be indorsed on the margin of the record in order that third persons examining the same may know whether or not the mortgage or deed of trust is barred by the statute of limitations."

The testimony of the cashier who made the indorsement is to the effect, and it is undisputed, that there were $420 paid the bank on January 3, 1925, from the sale of the property named in the indorsement, which had been sold by Ewan to the School Board, and the release was executed in order that the School Board, the purchaser, could receive clear title to the lot.

It is the opinion of the majority that the expression, "for value received," is equivalent to the statement that a sum of money had been received by the mortgagee on the debt secured by the mortgage, and that the date affixed to the signature of the cashier refers to and is the date of the transaction which the memorandum records, and of its indorsement, and is therefore a compliance with the requirement of the statute, and was sufficient to apprise any one that examined it that a portion of the indebtedness had been paid on the mortgage debt sufficient to warrant the bank in releasing a part of its security, and that it is distinguished from the case of *Clark* v. *Lesser, supra,* for the reason that the indorsement in that case was not sufficient to indicate a payment had been made on any definite date, so that third

persons examining the record could have no information as to whether any payment had been made within the time that would prevent the mortgage from being barred by limitation, while in the instant case the date affixed to the signature of the mortgagee would reasonably refer to the date when the consideration for the release was received by it, and was within five years from the due date of the note.

The majority are strengthened in the conclusion reached by the fact that all of the transactions by which Ewan became indebted to the appellees, his judgment creditors, were had at a time when the mortgage was in full force and virtue, of which mortgage they were presumed to have knowledge, and the indorsement was sufficient to put them on inquiry as to the continued existence of the mortgage lien.

We think the judgment and decree of the court in adjudging the priorities of the judgment creditors with respect to each other is correct, and they would be entitled to share in any residue remaining from a sale of the land after the mortgage debt has been satisfied in amount, and to the extent found by the court below. In view of the conclusion reached, the decree of the chancery court is reversed, and the case remanded for further proceedings consistent with the principles of equity, and in conformity with the views hereinbefore expressed.

(1) STATE EX REL. ATTORNEY GENERAL *v.* WILSON.

(2) STATE EX REL. ATTORNEY GENERAL *v.* KENT.

Opinion delivered April 28, 1930.

Hal L. Norwood, Attorney General, and *Coleman & Riddick,* for appellant.

Lemley & Lemley, O. A. Graves and *L. F. Monroe,* for appellees.

BUTLER, J. As the two cases depend upon the same state of facts, they have been consolidated, the question in both cases being the validity of a sale of a sixteenth section school in Hempstead County, Arkansas. The sale was ordered and made pursuant to authority contained in §§ 2, 3, 4 and 5 of act No. 344 of the Acts of the General Assembly of 1919, the provisions of which that are material to issues involved are as follows:

"Section 2. It shall be lawful for the county court of any county in which any permanent school lands and lots, as defined in the preceding section, are situated to order the same sold at public auction by the sheriff in legal subdivisions upon the application of any person who may desire to purchase the same, and who will deposit with the clerk of said court a sum sufficient to pay the costs of the appraisement, the estimate of the timber thereof, if any of commercial value, the survey thereof if one is necessary, and the advertisement and other cost of sale. Such applicant shall also file a written guarantee that he will bid at said sale at least two and 50/100 ($2.50) dollars per acre, if it is land, the full appraised value if it is lots; * * *

"Section 3. The county court shall appoint three disinterested householders of said county who are familiar with real estate value to view and appraise said lands and lots, and cause the timber, if any, on said land to be estimated. Each of said appraisers shall take an oath which shall be filed in said court, that he does not desire or intend to buy said land or lots or any part thereof, and that he will not directly or indirectly be or

become interested in the purchase thereof, at the sale to be made by the sheriff. Said appraisers shall each receive for his services the sum of one dollar and fifty cents ($1.50) per day for each day they are engaged in such services.

"Section 4. The sheriff shall give notice by publication in some newspaper published in the county where the land is situated at least four weeks before the day of sale, that he will sell said land or lots at the courthouse door. Upon the day of the sale the sheriff shall offer the lands or lots at public auction in separate legal subdivisions, if land, and by separate lots, if town lots. * * *

"Section 5. The sheriff shall without delay report all sales to the county court, which may reject or confirm the same. * * * If any sale be rejected the county court may direct the sheriff to again advertise, and offer the land or lots for sale. If the sale be confirmed by the court, the sheriff shall execute and deliver to the purchaser a certificate showing that he has purchased the land, * * *. Upon the presentation of the certificate of purchase to the Commissioner of State Lands, Highways and Improvements, the purchaser of the lands or lots as the case may be, his heirs or assigns shall be entitled to a deed from the said commissioner for the land or lots described in said certificate, and the said commissioner is hereby authorized to make conveyance of any lands or lots sold under and by virtue of this act."

As provided by said act the Arkadelphia Milling Company filed a petition in the Hempstead County Court asking for the sale of section 16, township 13 south, range 25 west, making the deposit and bond required. Pursuant to the petition, the court made an order on the 7th of June, 1920, directing the sale of the land, and appointing appraisers as required, and on the 14th day of July following the sheriff filed his report of the sale with the county court which on September 6, 1920, made

an order approving and confirming the sale which is as follows:

"IN THE COUNTY COURT OF HEMPSTEAD COUNTY, STATE OF ARKANSAS.

"Instrument, report of sale. Date, September 6, 1920. Record Book, County Record Z, at page 37.

"In the matter of the sale of lands in section 16, township 13 south, range 25 west.

"Now on this day is presented to the court the report of R. L. Keel, sheriff of Hempstead County, Arkansas, of his sale of lands located in section 16, township 13 south, range 25 west, in Hempstead County, Arkansas, together with the petition, the report of the appraisers, and the proof of publication filed herein, from which the court finds that a petition in due form of law was presented and approved by the court; that the court appointed three disinterested householders of said county to appraise said lands, who were familiar with real estate values, and to cause the timber on said lands to be estimated, and after subscribing the oath as prescribed by law, said appraisers did view and appraise said lands and estimate the timber thereon as prescribed by law, and afterwards caused their said appraisements to be filed with this court. And the court further finds that the sheriff of Hempstead County did give notice of said intended sale by publication in the manner prescribed by law, at least four weeks before the day of sale, and that upon the day advertised for said sale at the courthouse door of said county in separate tracts of 40 acres each between the hours of ten o'clock in the forenoon and three o'clock in the afternoon, and at said sale so had and made by said sheriff, the following parties became the purchasers of said lands at the prices set opposite their respective names, to-wit: * * * and it further appearing to the court that the price received for said land was adequate and not less than the market value thereof and more than two dollars and fifty cents per acre, and that said sale should be in all things confirmed and approved by the court.

"It is therefore ordered, considered, and adjudged by the court that said sale so made by the sheriff be and the same is hereby in all things approved by the court, and the sheriff of Hempstead County is hereby ordered to issue to each purchaser of said lands a certificate of purchase, to the end that they may receive a deed for same as in such cases provided by law."

On the 18th day of April, 1929, the appellant filed this complaint in the Hempstead Chancery Court against J. H. Kent, the original purchaser of four of the 40's of the said sixteenth section, and by amendment later the subsequent purchasers of land from Kent were made parties to the suit. In this complaint it was alleged that the sale of the land to Kent and the order of the court confirming the sale were void, and it prayed for cancellation of the deed from the Commissioner of State Lands to Kent, and for cancellation of deeds from Kent to those holding under him, and for judgment for the value of timber cut and removed from the land.

The defendants (appellees) interposed a demurrer, which demurrer was sustained, and from the order sustaining same plaintiff (appellant) appealed to this court. Subsequently plaintiffs filed a petition for a writ of certiorari in the Hempstead Circuit Court in which it prayed that the judgment of the county court confirming the sale to defendant Kent be declared to be void. To this petition the subsequent purchasers were made parties defendant on their petition, and the purchasers of the remaining eight 40-acre tracts were also made parties defendant on that petition. Thereupon, all of the parties defendant demurred to the petition for certiorari, which demurrers were sustained by the court. An appeal was prosecuted therefrom, which, as before set out, has been consolidated in this court with the chancery court proceedings.

The contention of plaintiff in the court below and here is that the sale and judgment of the county court is void, (1) because the appraisers did not take the oath

of office required by law; (2) the appraisers did not file the oath in the county court as required by law; (3) the appraisers did not file the appraisement in the county court as required by law; (4) each tract of land and the timber thereon were sold for less than one-fourth of the market value thereof as ascertained by the appraisers; and (5) the county court in its confirmation order did not find that the market price received for the land sold was the market value as shown by appraisement.

A county court acting within the powers conferred by the Constitution and statutes is a court of superior jurisdiction, and, where by statute special powers have been conferred and such special powers exercised judicially, its judgment cannot be impeached collaterally except for want of jurisdiction or errors apparent on its face. *Stumpff* v. *Louann Prov. Co.,* 173 Ark. 192, 292 S. W. 106; *Bragg* v. *Thompson,* 177 Ark. 870, 9 S. W. (2d) 24. But when the act under such powers is ministerial only and not judicial, its decision must be regarded as that of a court of limited and special jurisdiction, and in such cases all of the facts essential to the exercise of the special jurisdiction must appear upon the face of the record. *Morris* v. *Dooley,* 59 Ark. 483, 28 S. W. 30, 430.

Under the statute quoted *supra,* it will be noted that the sale is one made when ordered by the court, and is not consummated until the proceedings have been reviewed and confirmed by it. It will, therefore, be seen that the court in ordering and confirming the sale was acting judicially and not ministerially, and therefore the effect of its judgment is that of a court of superior jurisdiction, and where it has acquired the jurisdiction all who may claim an interest in the land are concluded by the judgment, valid on its face, unless they have assailed it by a direct proceeding in the action or by appeal. *Reeves* v. *Conger,* 103 Ark. 446, 147 S. W. 438.

This court has often held that where jurisdiction is conferred on a court by special statute which is to be

exercised in a special manner therein prescribed, the record of such court must show the facts essential to give the court jurisdiction, otherwise no presumption as to its jurisdiction will be indulged. The statute in such cases must be strictly pursued, and the jurisdiction must be made to appear in the mode pointed out by the statute. But such cases have no application here.

The essential fact to give the court jurisdiction in the instant case was the filing of the petition asking for sale, which fact is shown by the recitals in the judgment, and is conclusive of the jurisdiction. As this was a judicial sale, it was not essential that all of the facts necessary to the validity of the sale be shown of record, but the court had jurisdiction to inquire concerning these matters. Upon the presentation of the report of sale, the county court was empowered to inquire into the proceedings in order to determine whether the statutory requirements had been observed, and the confirmation is conclusive as to all such matters upon collateral attack unless the contrary affirmatively appears in the judgment itself. *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390, 142 S. W. 836; *Clay* v. *Barnes,* 121 Ark. 474, 181 S. W. 303; *Jones* v. *Ainell,* 123 Ark. 532, 186 S. W. 65.

Except in those cases where an attack upon the judgment is authorized by statute, it is necessary, in order to constitute a direct attack upon a judgment, that some step be taken to impeach its validity in the action itself, such as by appeal taken from it or by motion to vacate or modify on account of some irregularity; any other is a collateral attack. This action is a collateral attack.

The first three reasons assigned by appellant for contending that the sale and judgment of the court was void was that the appraisers did not take the oath required by law, and did not file the oath in the county court as required by law, and did not file their appraisement. These were irregularities which were cured by the confirmation of the sale, for the doing of none of these acts was necessary to give the court jurisdiction,

but were incident only to the conduct of the proceeding which the court must be presumed to have inquired into, and determined that they were done in compliance with the statute.

In § 1 of the act there is a provision that no State school land shall be sold for less than two dollars and fifty cents ($2.50) per acre, nor for less than the market value, which value shall be ascertained by appraisement. It is insisted, as the fourth reason given why the sale is void, that this provision of the statute was not complied with, as the land was not sold for its market value as shown by the appraisers, and, lastly, that the judgment is void because the court did not find that the price received for the land sold was the market value "as shown by appraisement."

We think the recital in the judgment, "And it further appearing to the court that the price received for said land was adequate and not less than the market value thereof, and more than two dollars and fifty cents ($2.50) per acre," in the judgment was sufficient. The market value was the essential fact, the appraisement merely being the evidence by which that fact was established, and we must presume on collateral attack that the finding was based on proper evidence. Appellant insists that the requirement of a sale for the appraised value is jurisdictional, and cites a number of cases to the effect that the sale of land and the order confirming the sale is void where the land does not bring the amount required by the statute. In those cases, however, the statute expressly made such sales void, which the statute under consideration does not do, and, also, there is nothing in the judgment of the court in the instant case to indicate that the value named was not received. As we have seen, granting that a sale for the appraised value was necessary, unless the fact was not shown by the judgment itself, no advantage could be taken of it in this action. The proceeding for the sale of the school land was an action *in rem,* jurisdiction of the subject-

matter having been obtained by the filing of the petition, and the finding of the court, acting in a judicial capacity, that the land was sold for its market value was tantamount to a finding that the requirements of the statute had been met. *Reeves* v. *Conger, supra.*

Where a judgment is sought to be impeached upon collateral attack, the only question that can be inquired into on which an examination of matter extraneous to the judgment itself can be made is to determine whether the court had jurisdiction of the person or subject-matter of the suit, and where this is found, other questions affecting the validity of the judgment must be determined from it alone. The appellant takes the position that the court is not limited to an examination of the judgment record alone in determining whether the judgment is void, but may look to other parts of the record which may contradict the recitals of the judgment. To sustain this view, appellant cites *Gregory* v. *Bartlett,* 55 Ark. 30, 17 S. W. 344; *McClain* v. *Duncan,* 57 Ark. 49, 20 S. W. 597; *Champion* v. *Williams,* 165 Ark. 328, 264 S. W. 972; *Quertermous* v. *Bilby,* 144 Ark. 101, 221 S. W. 856; *Van Etten* v. *Daugherty,* 83 Ark. 534, 103 S. W. 837; but all those were cases where such an examination was permitted for the purpose of determining the jurisdiction of the court with respect to the person or the subject-matter.

We have found no declaration of this court that would warrant the conclusion that on collateral attack, where the court is shown to have had jurisdiction, its judgment can be impeached by controverting its recitals by evidence *aliunde.*

It follows that the chancery court properly sustained the demurrer to the appellant's complaint, and that the action of the circuit court in sustaining the demurrer to the petition for writ of certiorari was also correct. We have uniformly held that the writ of certiorari (in cases where an appeal might have been prosecuted) will lie only where the examination of the judgment itself

shows it void on its face. *Cazort* v. *Road Imp. Dist.* 175 Ark. 570, 299 S. W. 1014; *McCrory Special Sch. Dist.* v. *Curtis,* 174 Ark. 343, 295 S. W. 971; *Kenyon, Excr.,* v. *Gregory,* 127 Ark. 525, 192 S. W. 887.

As appellant has shown no reason for his failure to appeal, and, as we have seen, the judgment of the court is regular on its face, and not void, it follows that in case No. 1524 the decree of the chancery court and in No. 1525, the judgment of the circuit court, must be affirmed, and it is so ordered.

WILLIAMSON *v.* MITCHELL AUTO COMPANY.

Opinion delivered April 28, 1930.

J. P. Machen, for appellant.

McKay & Smith, for appellee.

PER CURIAM. Without determining whether or not the circuit court exceeded its jurisdiction in the respect complained of, the court will deny the writ of certiorari. The writ is not one of right, but will be granted or denied in the discretion of the court, according to the circumstances of each case as justice may require. The court has held that an appeal will lie from a void judg-

ment. *Taylor* v. *Bay St. Francis Drainage Dist.,* 171 Ark. 285, 284 S. W. 770.

It is also well settled in this State that error apparent on the face of the record may be reviewed on appeal without any bill of exceptions or motion for new trial. *Miller* v. *Tatum,* 170 Ark. 152, 279 S. W. 1002.

Under the authority of the case last cited, when the time for appeal, as is the case here, has not expired, we will treat the proceedings as an appeal from the judgment of the lower court; and it is ordered that the case take its place on the calendar.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION *v.* HUNNICUTT.

Robinson, House & Moses and *Chas. Q. Kelley,* for appellant.

H. G. Wade, for appellee.

PER CURIAM. Mutual Benefit Health and Accident Association has been granted an appeal on January 16, 1930, from a judgment rendered against it in the circuit court on the 22d day of July, 1929, in favor of James E. Hunnicutt for $2,740. On August 6, 1929, James E. Hunnicutt transferred said judgment to H. G. Wade for value received. The transfer or sale was duly signed by said James E. Hunnicutt, and acknowledged by him before a justice of the peace on the same day. The said

written assignment of the judgment was filed for record in the circuit clerk's office on the 18th day of January, 1930, and duly recorded. The original assignment was placed in the files of the case in the circuit court which rendered the judgment.

James E. Hunnicutt died intestate on October 15, 1929. Letters of administration were duly granted by the clerk of the probate court upon his estate on the 8th day of April, 1930.

Upon motion of appellant to revive the case in the name of the proper party succeeding to the interest of James E. Hunnicutt in the judgment, each of these parties claimed to be the successor in interest. Said administratrix denies the validity of the assignment to Wade. The latter alleges that the administratrix has no interest in the matter, and that she was divorced from Hunnicutt when the assignment was made.

We cannot try this disputed question of fact. Section 6303 of the Digest provides for the transfer or sale of judgments. Its provisions were complied with, and Wade thereby became the real party in interest in the action before the death of Hunnicutt, and before the appeal was taken; and thereby became the successor in interest to James E. Hunnicutt.

Where the interests of a party to an appeal devolve upon another, whether by operation of law or by act of the parties, a person acquiring such interests will usually be allowed to be substituted, and to prosecute or defend the appeal in place of the original party, if the proper steps are taken in accordance with the practice in the particular jurisdiction. 3 C. J. p. 1031.

Under our Code, actions must be prosecuted in the name of the real party in interest. Crawford & Moses' Digest, § 1089. Here Wade succeeded to the rights of Hunnicutt before his death, and is entitled to defend on the appeal. Of course, the administratrix may proceed by action in a court of competent jurisdiction to have the assignment to Wade set aside on the ground of fraud;

but, until that is done, Wade has the right to be substituted as a party to the appeal. It is so ordered.

DUNN *v.* FORRESTER.

Opinion delivered May 5, 1930.

[redacted]

Duke Frederick, for appellant.

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

HART, C. J., (after stating the facts). The rights of the parties under the timber deeds depends upon the construction to be placed upon that clause which provides for the trees and timber "to be cut and paid for within two years after the completion of a railroad down Mill Creek."

The timber deeds were executed on the 7th day of January, 1907. It is well settled in this State that in a sale of standing timber, when there is no time fixed in the contract within which the purchaser is to remove the timber, the purchaser shall have a reasonable time, considering all the facts and circumstances surrounding the transaction, within which to remove the timber. *Liston* v. *Chapman & Dewey Land Co.,* 77 Ark. 116, 91 S. W. 27; *Hall* v. *Wellman Lumber Co.,* 78 Ark. 408, 94 S. W. 43; *Garden City Stave & Heading Co.* v. *Sims,* 84 Ark. 603, 106 S. W. 959; *Fletcher* v. *Lyon,* 93 Ark. 5, 123 S. W. 801; *Smith* v. *Dierks Lumber & Coal Co.,* 130 Ark. 9, 196 S. W. 481; *Young* v. *Cowan,* 134 Ark. 539, 204 S. W. 304; *Fulcher* v. *Dierks Lumber & Coal Co.,* 164 Ark. 261, 261 S. W. 645; and *Ozan-Graysonia Lumber Co.* v. *Swearingen,* 168 Ark. 595, 271 S. W. 6.

This is in application of the fundamental principle that where a time is not specified for the performance of a contract, it should be performed within a reasonable time. In the present case, the expression in the timber deeds or contracts that the trees and timber were

to be cut and paid for within two years after the completion of a railroad down Mill Creek near which the land was situated indicates that the contracting parties did not intend that the right to cut and remove the timber should continue in perpetuity, but rather that it was to come to an end sometime in the future. What that time was cannot be declared to be other than would be a reasonable time for the removal of the timber according to the circumstances of the case. The parties thought a railroad would be constructed in the near future which would afford a suitable means of marketing the timber after it was cut. Only two years were given for cutting and removing the timber after the cutting began, and payments were to be made monthly. The railroad had already obtained a number of right-of-way deeds in that locality. This fact not only indicated the direction of the railroad, but pointed to the fact that construction work would begin in the near future.

All these facts and circumstances negative an intention on the part of the grantors to convey to the grantee a perpetual right to enter upon the land and cut and remove the trees growing thereon, but clearly manifests an intention to limit the right to cut and remove the trees to two years after a railroad is completed down Mill Creek, provided that should be done within a reasonable time. The grantee waited over 20 years before beginning to cut and remove the timber. Such a length of time was unreasonable. It does not make any difference that it would not have been profitable to have begun operations sooner. While no hard and fast rule should be laid down, and each case must depend upon its own particular facts, we are of the opinion that 20 years were too long to wait in the present case. The record shows that one tract comprised 80 acres, and the other 159.49 acres. The parties lived on their respective tracts of land, and a part of them was cleared. It is unreasonable to presume that the parties intended that the clearing and putting in cultivation the lands should be delayed

for such a length of time. To hold otherwise would enable the grantee to cut and remove the timber when his convenience or market conditions required it, without regard to the interest and convenience of the owner of the land, or any injury that might result to him by reason of delay in cutting and removing the trees.

We are of the opinion that the grantee waited too long in the present case, and the title to the timber was thereby forfeited. Therefore, the chancery court erred in giving the grantee further time within which to cut and remove the timber; and the decree will be reversed and the cause remanded with directions to the chancery court to grant the prayer of the complaint in each case, and for such further proceedings as may be necessary according to the principles of equity. It is so ordered.

SEBASTIAN BUILDING & LOAN ASSOCIATION *v.* MINTEN.

Opinion delivered May 5, 1930.

George W. Dodd, and *Geo. F. Youmans,* for appellants.

A. M. Dobbs and *J. B. McDonough,* for appellees.

HART, J., (after stating the facts). At the time that the Ferguson Lumber Company made the contract with T. B. Westmoreland to furnish him the materials to be used in the construction of the two houses, the latter could not be said to be the owner within the meaning of § 6933 of the Digest. The contract was made prior to the 14th day of February, 1927, to supply the materials, and according to the evidence for the Ferguson Lumber Company, a part of the materials for the houses was delivered on the lots on that day. At this time the title to the lots was in J. C. Pierce. Westmoreland had only an oral contract to purchase the lots, which was not enforceable in any court. It is true that he took possession of the lots, and dug trenches or ditches to be used in the foundations of the houses. Westmoreland's oral contract only fixed the price at which he could purchase the lots, and it contemplated that there should be a future conveyance to him of the lots upon payment of the purchase price, before the sale was consummated. Until then,

he could not charge the lots with the statutory lien, because he was not the holder of any interest in the lots; and because he was not the owner in contemplation of our mechanics' lien statute. Such a lien is an interest in the land, and attaches to the legal or equitable title. It can be established only in the manner provided by statute, which requires the agreement or assent, express or implied, on the part of the owner, whose interest in the land is sought to be charged with the lien. Westmoreland cannot be regarded as the owner within the meaning of the statute before the time of the conveyance to him by Pierce. His subsequent acquisition of the title could not relate back to the date of his parol contract. It was a new title, and there is nothing to show that Pierce gave his consent to Westmoreland agreeing to a lien to be charged against his interest in the land. *Hayes* v. *Fessenden,* 106 Mass. 228; *Saunders* v. *Bennett,* 160 Mass. 48, 35 N. E. 111, 39 A. S. R. 456; and *Courtemanche* v. *Blackstone Valley Street R. Co.,* 170 Mass. 50, 48 N. E. 937, 64 A. S. R. 275. We are of the opinion that Westmoreland, having only an oral contract to purchase, was not the owner within the meaning of our mechanics' lien statute. The conclusion we have reached is supported by our own decisions bearing on the question.

In the construction of an earlier mechanics' lien statute, the court held that a contract for labor and materials, made by a vendee under an oral contract or privilege to purchase, would not subject the legal owner's interest to a lien, even if the latter had knowledge that the labor and materials were being furnished. *Thomas* v. *Ellison,* 57 Ark. 481, 22 S. W. 95. While this court is committed to the rule that the vendee under a valid and enforceable executory contract of sale has an interest on which he could create a lien in favor of mechanics and materialmen under our statute, it is equally positive in holding that in such cases no element of estoppel arises against the vendor by mere knowledge or even his consent that the labor and material were furnished for the

construction of the building, in the absence of some affirmative act which showed that he had consented to subordinate his claim to that of the laborers and materialmen. *Gunter* v. *Ludlam*, 155 Ark. 201, 244 S. W. 348, and *Fine* v. *Dyke Bros.*, 175 Ark. 672, 300 S. W. 375, 58 A. L. R. 907.

In *Mansfield Lumber Co.* v. *Gravette*, 177 Ark. 31, 5 S. W. (2d) 726, the court said that something more than mere possession was necessary, and that there must be some sort of present interest to enable one claiming as vendee to support an agreement for a mechanics' lien under our statute. In short, in order to charge the land with a mechanics' or materialman's lien under our statute, mere possession of the land is not sufficient; but the person seeking to charge the land with a lien under the statute must have some interest either legal or equitable which may be enforced in the courts.

This brings us to a consideration of the construction to be placed upon § 6909 of the Digest, which reads as follows: "The lien for the things aforesaid, or work, shall attach to the buildings, erections, or other improvements for which they were furnished or work was done, in preference to any prior lien or incumbrance or mortgage existing upon said land before said buildings, erections, improvements, or machinery were erected or put thereon, and any person enforcing such lien may have such building, erection, or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter; provided, however, that, in all cases where said prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements or buildings, then said lien shall be prior to the lien given by this act."

Counsel for the claimants of liens for materials and labor contend that the Legislature did not intend to prefer the lien of the mortgagee over that of a laborer or materialman, where the former loans his money on

the representation that it is borrowed for the purpose of improving the mortgaged property, unless it is in fact expended for that purpose, and that it is incumbent upon the mortgagee to establish this fact, as held in the majority opinion delivered by Judge Thayer in *Chauncey v. Dyke Bros.*, 119 Fed. 1. On the other hand, counsel for the mortgagees insist that the dissenting opinion in that case by Judge Sanborn, to the effect that the purpose of the loan should determine its superiority over the claims of laborers and materialmen, carried out the declared intent of the Legislature. The majority opinion in that case expressed the view that this was an unreasonable interpretation of the statute, and one that would enable a mortgagee to defeat an equity, which the statute clearly recognizes as superior, and an equity which it was designed to protect. It is said that the Legislature knew that the lender usually sees to it that the money is used as the borrower promised to use it, and that the lien statute was framed with reference to this well known habit of men who loan money on the security of real estate. We do not think so. The binding force of a mortgage results from the contract between the parties as expressed in the mortgage, and becomes a lien on the real property from the time it is filed for record. The money borrowed pursuant to the terms of the mortgage is turned over to the mortgagor, and the mortgagee no longer has any control over it, unless there should be a special clause in the mortgage looking to that end. As said by Judge Sanborn, this would require the substitution of the word "use" instead of "purpose" in the statute; and the courts have no warrant to do this. There is nothing in the language used in the statute to indicate that the Legislature intended that the mortgagee must see to the use, or the application of the money raised by such mortgages. The legislative declarations was that the purpose of the loan should determine its superiority. The provision of § 6909 expressly declares that the purpose for which the mortgage is given determines its

superiority over subsequent mechanics' liens. The lien in favor of mechanics and materialmen is wholly statutory, and the lien claimant must bring himself within the provisions of the statute in order to be entitled to a lien. If the Legislature had intended the use to which the money borrowed was the test of the superiority of the liens, it doubtless would have so declared, instead of making the purpose for which the money was borrowed the test. After a review of the authorities on statutory interpretation, Judge Sanborn, said: "Apply the rule which these authorities announce to the statute in hand. It declares without uncertainty or doubt that the liens of prior mortgages whose proceeds were raised for the purpose of making improvements upon the mortgaged property are superior to subsequent mechanics' liens. It says: 'that in all cases where said prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements or buildings, then said lien shall be prior to the lien given by this act.' The contention is that it intended to except from that declaration the liens of all such prior mortgages the proceeds of which were not actually used to make the improvements. In other words, the argument is that the Legislature enacted that the purpose of the loan should be the test of its superiority when it intended to provide that the use of the loan should constitute that test. But the difference between purpose and use is patent in common parlance, in legislation, and in the law. Statutes which authorize the issue of municipal bonds invariably specify the purpose for which they may be issued and sold. If issued for that purpose, they are valid; if for any other purpose, they are void. But it is a well-established principle, which has been uniformly and repeatedly sustained by the decisions of this court, that the fact that the proceeds of such bonds have not been used for the purpose for which they have been raised constitutes no defense to the bonds. The test of their validity is the purpose for which the proceeds were

obtained, not the use to which they were applied. (Citing authorities). The Legislature of Arkansas could not have been ignorant of the difference between purpose and use when it enacted this statute. It had undoubted power to choose whether the purpose of raising the proceeds of the mortgage loans or their use should determine the superiority of the liens of the mortgages. It chose and clearly provided that the purpose should constitute the test. This was a positive declaration that the use should not constitute it, for the expression of one alternative is the exclusion of the other, and it seems to me that it left no tenable ground for the position that the Legislature intended that any other test than that which it plainly expressed should determine the superiority of the liens of such mortgages. The legal presumption becomes conclusive that the Legislature meant what it so clearly expressed, and that it meant nothing else."

Under the test prescribed by the statute, laborers and materialmen can learn the purpose for which the money was raised by examining the clerk's records, and, if they do not believe the borrower will use it for that purpose, they may refuse to perform labor or furnish material towards the construction of the contemplated improvement. In any event, the statute should be construed as it was enacted by the Legislature, with its plain declaration that the sole test of the superiority of liens upon lands before improvements are made is the purpose for which the money is raised or borrowed, and not the use made of it. The result of our views on this branch of the case is that the Sebastian Building & Loan Association has a prior lien under § 6909 to the mechanics' and materialmen's liens claimed herein, but that the mortgage of Dr. C. S. Means has no such priority, because it was not recorded.

Section 7381 of the Digest provides that every mortgage shall be a lien on the mortgaged property from the time it is filed for record, and not before. This view is in accord with our own previous expressions on the ques-

tion. In *Shaw* v. *Rackensack Apartment Corp.*, 174 Ark. 492, 295 S. W. 966, it was held that a mortgage for the purpose of raising money to erect a building which was filed prior to the commencement of work by a lien claimant, was superior to a lien for labor and material furnished, notwithstanding that some of the loan, for which the mortgage was given, was used for clearing the title. Again in *Duncan* v. *Travellers Bldg. & Loan Assn.*, 178 Ark. 17, 9 S. W. (2d) 773, it was held that the lien of a mortgage upon land securing a loan for the payment of the purchase price was superior to a materialman's lien, where the materials were furnished two days after the mortgage was recorded.

It is contended by the attorney for Dr. C. S. Means that it would be inequitable to allow, as against him, a single mechanic's lien in favor of the Ferguson Lumber Company for the total amount of the materials furnished for both buildings, and in this contention we think counsel is correct, under the particular facts of the present case. In reaching this conclusion, we are not unmindful of our previous decisions to the effect that where labor is performed, or materials furnished under one contract and for one owner, for two or more buildings on contiguous lots, a single mechanics' lien may be filed against all the buildings. *Tenny* v. *Sly*, 54 Ark. 93, 14 S. W. 1091; *Meek* v. *Parker*, 63 Ark. 67, 38 S. W. 900; *Central Lumber Co.* v. *Braddock Land & Granite Co.*, 84 Ark. 560, 105 S. W. 583; *Burel* v. *East Ark. Lumber Co.*, 129 Ark. 58, 195 S. W. 378; *Hill* v. *Imboden*, 146 Ark. 99, 225 S. W. 330; *Ferguson Lumber Co.* v. *Scriber*, 162 Ark. 349, 258 S. W. 353, and *Crown Central Petroleum Co.* v. *Frick-Reid Supply Co.*, 173 Ark. 983, 293 S. W. 1012. That such holding is in accord with the trend of authority, see case note to 11 A. L. R. at p. 1026.

In all the cases, the houses were built pursuant to one contract, and it might not have been practical for the contractor to have kept a separate account for the materials furnished for each house. There was nothing to

make it inequitable for the contractor or materialman to file a single lien on all the houses. Hence the court in each case properly held that they were not bound to apportion the amount of their lien between the several houses. At the time the work was done and the lien was filed, all the houses were owned by the same party, and there could be no valid objection to treating them all as practically one building and permitting the lien claimant to embrace them all in a single proceeding, and allowing one lien to be filed covering all. In the present case, the two houses were constructed on contiguous lots, of the same materials, size, style and price, both to be erected and completed within the same time. The Ferguson Lumber Company was to furnish all the material for each house. Dr. Means, before the house on lot 2 was commenced, agreed verbally to purchase it when completed for $5,000. He advanced Westmoreland $3,100 of the consideration, $1,150 of which was used in paying the purchase price of the lot. To secure the payment of the $3,100, Westmoreland gave Dr. Means a mortgage on the lot dated February 16, 1927, but this mortgage was never filed for record. On June 29, 1927, Dr. Means filed for record his deed from Westmoreland to the lot, and Westmoreland represented to him all persons who might assert liens for labor or materials had been paid, and that there was nothing against the lot. Westmoreland died after the institution of the present suit without giving his testimony in it. While we are of the opinion that under the authorities above cited one notice or claim for lien was all that was required of the Ferguson Lumber Company, where other rights are to be affected as here, the amount of the lien of the Ferguson Lumber Company should be apportioned, and that a lien should be asserted and enforced against lot 2 for half the amount of the materials furnished, that being the particular amount of material which was furnished for the house on said lot 2. It will be remembered that the buildings are separate and apart, and that the one on lot 2 now belongs to Dr. Means, and that the house

on lot 3 still belongs to the estate of T. B. Westmoreland, deceased. We think this result was recognized in *Tenney* v. *Sly,* 54 Ark. 93, 14 S. W. 1091, although the particular facts of that case did not call for its application.

The claim of the Ferguson Lumber Company for the paint and oil furnished by it for both houses will be disallowed on the ground that it was not used on the houses. The evidence shows that it was delivered on the two lots to be used in painting the two houses to be erected thereon. The Ferguson Lumber Company was furnishing Westmoreland, who was a house builder, similar materials to be used elsewhere. The person who actually painted the two houses testified that he did so under contract with Westmoreland, and furnished his own paint and oil. Other witnesses testified that the amount of paint and oil furnished by the Ferguson Lumber Company to be used in painting the two houses was largely in excess of the amount necessary for that purpose. A delivery of the material upon the ground where the building is to be constructed is furnishing material within the meaning of the statute, and proof of such fact by the materialman makes a *prima facie* case in his favor. The owner or other party interested may show that the material was not used in the construction of the building, in order to defeat the lien for the material thus furnished. *Van Houten Lumber Co.* v. *Planters' National Bank,* 159 Ark. 535, 252 S. W. 614, and *Standard Lumber Co.* v. *Wilson,* 173 Ark. 1024, 296 S. W. 27.

L. S. Minten filed a claim in the sum of $175 each for painting the houses and furnishing the paint and oil therefor on both houses. The lien therefor is acquired by filing a verified account within 90 days from the date the last item was furnished or the last labor performed. *Ferguson Lbr. Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 353; *Planters Cotton Oil Co.* v. *Galloway,* 170 Ark. 712, 280 S. W. 999, and *Standard Lumber Co.* v. *Wilson,* 173 Ark. 1024, 296 S. W. 27. Minten filed his claim for a lien under the statute on February 6, 1928. The proof

shows that the last work done on the house on lot 3 was sometime in the month of November, 1927, but it is not shown that it was within 90 days. Therefore we find that he has no lien against the house on lot 3, because his claim therefor was not filed within 90 days after the last work was done, as required by statute.

As to lot 2, the last work done under the original contract was in the month of November, 1927, but Minten in January, 1928, painted a cabinet which had been torn out after the work was finished. Minten did this of his own volition, and not under his original contract. The work done was small and inconsequential. It was to compensate the deficiency in the work done under the original contract, and ought not to preserve the lien. It is the continuity of the claim which gives it effect under the statute. The work under the original contract had already been completed and accepted more than 90 days before the lien claim was filed, and the claim for the work of painting the substituted cabinet by Minten on his own motion did not extend the time for filing his lien for painting the house under his original contract. In a case note to 54 A. L. R., at p. 984, it is said that the rule seems to be well settled that, where a contract to furnish material is to be regarded as completed, a subsequent gratuitous furnishing of material in the nature of a substitution or replacement to remedy a defect in the material originally delivered will not operate to extend the time within which to claim a mechanics' lien. Numerous cases from the courts of last resort of various States are cited which support the text.

The claim of G. W. Shirley for a lien for work done as a plumber will likewise be disallowed, because it was not filed until March 1, 1928, which was more than 90 days after the last material was installed under the original contract. It is sought to bring this claim within the 90-day period by showing that Shirley put in a new sink on December 15, 1927. This work was done as a substitution or replacement of work under the original

contract. Shirley filed a lien for $332.50 on lot 2. Shirley tore out the sink he put in under his original contract, and put in a new one without additional cost because he thought his work was defective. His work had been accepted under his original contract. The lien claim was not filed within the statutory time. The voluntary furnishing a new sink to replace the one installed under the original contract because it was thought by him to be defective did not, under the rule above announced, extend the time for filing his lien. His conduct under the circumstances was not the performance of labor or the furnishing material under his original contract. The substitution was for defective work done under the original contract, and took its place as of that date, and was not in continuation of the original contract.

The Mansfield Lumber Company filed a claim for $417.65 for material furnished to build the house on lot 3. The proof showed that the material was delivered on lot 2, and used in building the house on it. The claimant sought to amend its account after 90 days had expired so as to make its claim for material apply to lot 2. This it could not do. It was required to comply with the statute in order to acquire a lien; and a failure to do so on the ground of mistake could not supply the omission. The lien is created by statute, and the statute must be complied with. The lien is founded on a contract between the owner and the materialman. Hence the account filed must correspond with the contract, and it cannot be amended, after the statutory time has expired, so as to include a different and separate lot or parcel of ground than that embraced in the claim filed within the time prescribed by statute.

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

It is so ordered.

McHaney, J. I dissent from that part of the opinion herein holding that Westmoreland was not the owner of lot 3 at the time he made the contract with Ferguson Lumber Company to furnish the material for the house on lot 3. He was either the owner or the agent of the owner. He was placed in possession of the lot, and the work was started and material furnished prior to the recording of appellant's mortgage. The material lien was therefore prior to the mortgage under many decisions of this court. I am also of the opinion that the rule announced by Judge Thayer in the case mentioned by the majority opinion is the correct rule, and that the appellant was bound to see that the money loaned on the mortgage was actually used in the construction of the building. While we are not bound by the decision of the Circuit Court of Appeals construing our statute, still the courts generally, I believe, have followed same until the decision ought to be held to be a rule of property, and at least it ought to be highly persuasive.

I agree with the majority in other respects.

Madison-Smith Cadillac Company *v.* Wallace.

Opinion delivered May 5, 1930.

James B. McDonough, for appellant.

Partain & Agee, for appellee.

Smith, J. Appellee alleged as his cause of action that Roy Franklin, a sales agent of the Madison-Smith

Cadillac Company, negligently ran a car he was demonstrating into appellee's car and demolished it, and upon the trial from which this appeal comes he recovered judgment against both Franklin and the automobile company. The principal question of fact in the case was that of Franklin's agency, but this issue was submitted under correct instructions and is concluded by the verdict of the jury, as the testimony is legally sufficient to support the finding that Franklin was the agent of his co-defendant, and was employed in that capacity at the time of the collision.

Appellee testified that his car was a new Ford sedan, for which he had paid, including certain accessories and a license plate, $668.50, and that the car had been driven only about 1,300 miles, and had been demolished in the collision.

S. E. Langford, called as a witness by appellee, testified that he was the manager of the Sheridan Ford agency, which had sold the car to appellee; that the Sheridan wrecker went out and got the car and brought it to the garage, where it had since been; that the value of the car new, exclusive of certain extras which appellee had purchased, was $655, and this value had been depreciated $50 by the use of the car up to the time of the collision, and that the present value of the car was $100, as it had been practically ruined. Appellee did not order the car brought to the garage, and had not called for it.

Appellee's testimony in regard to value is substantially identical with that of Langford. He also testified that a member of the Cadillac Company ordered the car taken to the Sheridan garage, and that he had not since had the car in his possession, and no tender of it to him had been made; that he had had no other car since "and it has cost me about a hundred dollars too." It was not made clear just what items comprised this hundred dollars, but the loss of the use of the car was probably intended.

The car has not been repaired, and Langford estimated the repairs at $255.55, but admitted that while these repairs would, in a way, make the car as good as new, it would not be as valuable as it was before the collision. No one has used the car since the collision, but no one appears to question appellee's right to its possession.

Upon the question of the measure of damages the court gave over appellant's objection, an instruction numbered 4, which reads as follows: "You are instructed that, if you find for the plaintiff, you may fix his damages at such a sum as will fairly compensate him for the damages sustained to his automobile, if any, and in that connection you are instructed that the plaintiff, if you find for him, will be entitled to recover the difference between the value of his automobile before the injury and the value of his automobile after the injury *and damages to it, if any.*"

The jury returned the following verdict: "We, the jury, find for the plaintiff against both defendants the sum of $518, his car, and $100 for the non-use of his car," and judgment was rendered accordingly, from which is this appeal.

As the testimony shows that the car had some value after the collision, the correct measure of damages was the difference between the value of the car before the collision and its value after that event, and instruction numbered 4, set out above, so declared the law, but the jury was further told in the instruction to fix the "damages to it, if any," and the addition of this phrase must necessarily mean that the difference in value was not the only item of damage to be considered. The verdict for the hundred dollars for the non-use of the car must have been in response to this phrase. This is error.

The suit was not one in replevin. The right to the possession of the car is not involved. The car had no usable value until repaired, and the repairs were not made. The jury should, therefore, have been told to find only

the difference in value of the car before and after the collision.

In the case of *General Fire Extinguisher Co.* v. *Beal-Doyle Dry Goods Co.,* 110 Ark. 49, 160 S. W. 889 Ann. Cas. 1915D, 791, an instruction to that effect was approved, and in that connection we said: "And in *C. B. & Q. Ry. Co.* v. *Metcalf,* 63 N. W. 51, it is held: 'Where chattels are injured by the negligence of another, but not wholly destroyed, the measure of damages is the difference between the value of the chattels immediately before and immediately after the injury.' See, also 13 Cyc. 148."

It was there pointed out that the rule is different where property has been lost or destroyed through the negligence of another, as in such cases the measure of damages is the value of the property at the time and place of the conversion or total destruction thereof, with interest thereon from that time. Here the car was not lost or destroyed, but has yet substantial value, and damages should, therefore, have been assessed only to compensate the difference or loss in value resulting from the collision.

The verdict of the jury makes it possible to correct the error without reversing the judgment, and this may be done by striking out the item of $100 for the non-use of the car, and, as thus modified, the judgment will be affirmed, as no other error appears.

Counsel for appellants has discussed assignments of error relating to the admission and exclusion of testimony, and to the giving and refusing to give certain instructions, and, while we have considered these assignments of error, we do not think they are of sufficient importance to require discussion.

The judgment will be modified by striking out the item of $100 for the nonuse of the car, and, as thus modified, will be affirmed.

HILL *v.* SCHULTZ.

Opinion delivered May 5, 1930.

[redacted]

Eugene Sloan, for appellant.

O. H. Hurst and *Dudley & Dudley,* for appellee.

SMITH, J. J. H. Jones owned a forty-acre tract of land, which was his homestead at the time of his death, which occurred in 1908. He was survived by his widow, Mrs. Luna Jones, and four children. Mrs. Jones continued to reside on the land, and in October, 1923, she married E. P. Schultz, and she and her second husband have since resided on the land. She and Mr. Schultz executed several mortgages on the land, which instruments purport to convey a fee simple title. The last of these mortgages was executed June 30, 1927, and on June 7, 1928, three of Mrs. Schultz's children brought this suit, alleging the abandonment of the homestead as the result of these mortgages. Later the complaint was amended to allege that Mrs. Schultz had forfeited her life estate in the land by failing to pay the taxes due thereon over a period of several years. The land was redeemed from the tax sales by Mrs. Schultz before the complaint was amended to raise this question.

The chancellor found that there had been no abandonment of the homestead on account of the mortgages, and that the life estate had not forfeited on account of the nonpayment of the taxes, and this appeal is from that decree.

It is settled that the widow may abandon her homestead; whether she has done so or not is a question of intention. *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. (2d) 63. If she sells and conveys the homestead, the presumption of abandonment is conclusive, but a mortgage is not a sale.

It was held in the case of *Moore* v. *Tillman,* 170 Ark. 895, 282 S. W. 9, that a mortgage of land, entered for homestead purposes, by the entryman, prior to obtaining his patent or making final proof entitling him to a patent, was not an alienation of the land within the prohibition of Revised Statutes United States, § 2291, which section requires the entryman to make affidavit, before obtaining his patent, to the effect that no part of the land entered has been alienated. The entryman in that case had given a mortgage, and in holding that this was not an alienation it was there said: "But an analysis of these very cases will discover that a mortgage of lands is not a conveyance thereof carrying the absolute and unrestricted title thereto. On the contrary, while a mortgage at law does carry the legal title, it is not, either at law or in equity, an absolute unconditional and indefeasible title. It becomes such only after the mortgagor has breached the condition of the mortgage and his equity of redemption has been foreclosed. In other words, while the legal title under the law does vest in the mortgagee, still this is only for the purpose of enabling him to obtain security for the satisfaction of the debt or obligation due him by the mortgagor; and, when that satisfaction is obtained, the legal title vests and remains in the mortgagor without the necessity of a reconveyance from the mortgagee. Thus, after all is said and done, a mortgage, in common parlance as well as legal acceptation, is an instrument evidencing a security for debt—the conveyance or instrument to be void upon the discharge of the debt or obligation. As is well said in 19 R. C. L. page 242, § 2, 'harmony and consistency have been achieved only by the complete adoption, by judicial decision or statute, of the

original equitable conception that a mortgage is in fact a security—nothing more, nothing less!' "

There has been no foreclosure of the mortgages executed by Mr. and Mrs. Schultz, and her possession has not been disturbed by reason thereof, and we, therefore, hold that the execution of the mortgages was not an abandonment of the homestead.

We are also of the opinion that the chancellor was correct in holding that there had been no forfeiture of the life estate under § 10054, C. & M. Digest, through failure to pay taxes. Redemptions were perfected before the question was raised. The case of *Galloway* v. *Battaglia*, 133 Ark. 441, 202 S. W. 836, is conclusive of this question. It was there said: "In the case of *Magness* v. *Harris*, 80 Ark. 583, [98 S. W. 362], we said that the manifest purpose of this statute is to afford the remainderman an opportunity to redeem during the last of the two years allowed by law for redemption 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. It was the duty of Martha Mitchell, as the widow of Morris, to pay the taxes on the portion of this lot which she was occupying as her homestead, and, when she failed to do so, and the land had been unredeemed from the sale for a period of one year, intervener, and the other heirs of Morris, had the right to declare the life estate forfeited, and to take possession of the land. But they did not do so. Upon the contrary, they permitted the life tenant to redeem the land by purchasing it from the State, and, not having asserted the forfeiture while the land was unredeemed and this could have been done, they waived their rights to assert this forfeiture by permitting the widow, who had continued to remain in possession of the lot, to redeem it as aforesaid. (Citing authorities)."

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

ARKANSAS MINERAL PRODUCTS COMPANY *v.* CREEL.

Opinion delivered May 5, 1930.

[redacted]

June P. Wooten, for appellant.

Taylor Roberts and *Carmichael & Hendricks,* for appellees.

SMITH, J. Appellee—the plaintiff below—alleged, and offered testimony tending to establish, the following facts. She is the widow and sole devisee under the will of her husband, S. H. Creel, who, prior to July 22, 1924, owned an eighty-acre tract of land in Saline County, upon which he thought there was a valuable clay deposit. He and J. M. Ensor organized a corporation known as the Arkansas Mineral Products Company, each taking 799 shares of the capital stock of the face value of $5 each. Two shares were issued to A. W. Hall. The corporation took over the tract of land owned by Creel, which was the only asset it ever had, and agreed to assume the payment of a note for $500 held by the People's Trust Company, of Little Rock, which was secured by a deed of trust on the land, which the incorporators estimated was worth $8,000. The principal place of business of the corporation was Little Rock.

Ensor paid nothing for his stock, but was made president of the corporation. The note to the bank was not paid by the corporation, but was purchased by Ensor for his wife, who brought suit to foreclose, and took a foreclosure decree. To save the land from sale Creel and his wife paid the judgment.

After the organization of the corporation it was planned to sell additional stock, and B. F. Reinberger was employed to obtain this authority so to do from the

State Blue Sky Department under a contract with him which provided that he should receive $500 of the stock of said corporation for his services. The permit was obtained from the Blue Sky Department, but no stock was sold, and none was issued to Reinberger, who brought suit for $500 as the value of his services. It was alleged that he conspired with Ensor to obtain this judgment, and that Ensor, as president of the corporation, entered its appearance and filed an answer admitting the justice of Reinberger's claim, when he was fully advised that Reinberger's contract entitled him only to have stock of the corporation issued in the sum of $500.

A judgment was rendered in the suit of Reinberger against the corporation, and a certified copy thereof was filed with the circuit clerk of Saline County, upon which an execution was issued against the land owned by the corporation in that county, and Reinberger became the purchaser at the execution sale. He assigned an undivided half interest in the certificate of purchase to Mrs. Ensor, the wife of the president of the corporation, and assigned the other undivided half to his own wife. It was alleged that all this was done pursuant to a conspiracy to acquire the title to the land.

Mrs. Creel further alleged that, as sole devisee of her husband, she was entitled to a judgment of $558.55 as of January 22, 1927, the date on which the land was redeemed from the foreclosure decree, which indebtedness the corporation had assumed and agreed to pay. It was alleged that the corporation was insolvent, and had no assets except the land in Saline County, and there was a prayer that a receiver be appointed to take charge of the land, and to wind up the corporation's affairs. It was further prayed that the defendants, Mrs. Reinberger and Mrs. Ensor, be required, as constructive trustees, to reconvey the land to the receiver, and that Mrs. Creel have judgment against the corporation for $558.55 and interest, and that the receiver be directed to sell the land and to apply the proceeds of the sale to the costs of the ac-

tion, and to satisfaction of plaintiff's judgment and to disburse the balance, if any, to the parties as their respective interests are made to appear.

The answer alleged the good faith of all the transactions herein referred to, and denied specifically that fraud of any kind had been practiced, and the question of jurisdiction was raised both by the answer and by demurrer.

After hearing testimony the court entered a decree, which contained a finding of facts conforming substantially to the allegations of the complaint. It was adjudged and decreed that the plaintiff, Mrs. Creel, have judgment against the corporation in the sum of $558.55, and that the lands (which were described) "be and are hereby divested out of defendants, Mrs. L. P. Ensor and Mrs. Emma Reinberger, and vested in the said H. S. Nixon, receiver." The receiver was directed to give notice to all creditors of the corporation to exhibit their demands, and jurisdiction of the case was retained to enforce the rights of the parties as therein adjudged. This appeal has been duly prosecuted from that decree.

We think the demurrer, which raised the question of jurisdiction to grant the relief prayed should have been sustained, for the reason that the action is local, and not transitory. By § 1164, C. & M. Digest, it is provided that "Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated: First. For the recovery of real property, or of an estate or interest therein."

Appellee insists, however, that this statute does not defeat the jurisdiction of the court, for the reason that the purpose of the suit is to have a trust declared and established, and that, as the suit was brought in the county in which the corporation is domiciled, equity may grant relief, upon declaring the existence of a trust, by directions to the receiver.

In the chapter on equity in 10 R. C. L., § 115, page 365, it is said: "It is, however, undoubtedly a recognized doctrine that in cases of contract, trust, or fraud, a court

of equity, sitting in a State and having jurisdiction of the parties, is competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust, or fraudulent title pertains to lands in another State or country, and such lands are necessarily affected by the court's decree. But this jurisdiction is strictly limited to those cases in which the relief decreed can be obtained through the party's personal obedience, and the decree in such suit imposes a mere personal obligation, enforceable by injunction, attachment, or like process against the person, and cannot operate *ex proprio vigore* on lands in another jurisdiction, to create, transfer, or vest a title."

The decree here appealed from transfers and vests the title. Its effect is to cancel the execution deed, although it does not do so expressly, and it transfers the title conveyed in the execution deed to the receiver, and vests his title in the receiver for the benefit of appellee or any other creditors of the corporation.

Very similar relief was sought in the case of *Harris v. Smith,* 133 Ark. 250, 202 S. W. 244. It was there said: "It is insisted by appellants that the court, sitting in Sebastian County, had no jurisdiction to cancel deeds to lands in Polk County, and subject them to the payment of appellees' claims. The first and third subdivisions of § 6060 of Kirby's Digest provide that suits 'for the recovery of real property or an interest therein, or for the sale of real property under a mortgage, lien or other incumbrance,' must be brought in the county where the subject matter of the action, or some part thereof, is situated. Appellees insist that because the suit was brought in Sebastian County, where part of the lands were situated, under the plain language of § 6060 of Kirby's Digest, the Sebastian County Chancery Court acquired jurisdiction over the Polk County lands. The construction placed upon the statute by appellees would be forceful if applied to a case where all the lands, though lying in different counties, were involved in litigation between the

same parties, but certainly cannot be true when applied to a case where the lands not only lie in different counties, but also involved different parties defendant."

Further construing § 6060, Kirby's Digest (which now appears as § 1164, C. & M. Digest), it was there said: "It seems to be well settled that if the purpose of the bill and the effect of the decree are to reach and operate upon the land itself, then it is regarded as a proceeding *in rem,* and, under the statute in question, is a local action, and must be brought in the county where the land is situated. *Jones & McDowell & Co.* v. *Fletcher,* 42 Ark. 422; *McLaughlin* v. *McCrory,* 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56."

The decree of the Sebastian Chancery Court in that case, which canceled conveyances of real estate in Polk County, was reversed, and the cause remanded with directions to dismiss as to the Polk County lands for the want of jurisdiction, for the reason that the action was local, and not transitory.

For the same reason the decree in this case must be reversed, except that the money judgment against the corporation the right to which appears to be clear, will be affirmed. It is so ordered.

Mr. Justice McHaney dissents.

BLACKWELL OIL & GAS CO. *v.* MADDUX.

Opinion delivered May 5, 1930.

Jesse Reynolds, for appellant.

Morrow & Williams and *Hugh Basham,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment overruling a motion to set aside a judgment and grant appellant a new trial in the case of Geo. M. Maddux v. T. W. Flake and Mable Flake, in the circuit court of Johnson County, in which appellant was a garnishee. The Flakes, being non-residents of Arkansas, were constructively served in the original suit by publication in the Herald-Democrat, a newspaper printed and published in said county, for more than thirty days before the May, 1929, term of said court, the warning order appearing in the issues of said paper on the 21st and 28th days of March and the 4th and 11th days of April, 1929, although the proof of publication, through error, failed to show that the warning order appeared in the issue of April 11, 1929. Appellant was duly and personally served as a garnishee therein, and filed an answer admitting a contingent indebtedness of $7,400 to T. W. Flake, the contingency being that it would owe him said amount out of the proceeds of the sales of leases or of oil and gas upon certain acreage in said county when same should be sold. Relying upon the sufficiency of its answer and the deposition of Mr. Imel, its secretary, it did not again appear in the case. Appellee here—plaintiff in the original suit—filed a denial of appellant's answer in the garnishment, alleging that the contingent indebtedness had been reduced to a certainty by the production of gas in a large daily output on said lands, and that at the time it filed its answer it was indebted to T. W. Flake in the sum of $7,400. The judgment in the

original suit was rendered on May 8, 1929, and it was recited therein that the cause was heard upon the issues joined by the pleadings and oral and documentary evidence, from which the court found that T. W. Flake owed appellee herein $8,394.35, and that appellant herein owed T. W. Flake $7,400, for which amount judgment was rendered against appellant in favor of appellee. After the adjournment of the May, 1929, term of said court appellant filed the motion in the instant case to set aside said judgment and grant it a new trial, the grounds alleged being that the court acquired no jurisdiction over the Flakes because the proof of publication of the warning order failed to show that it was published on April 11, 1929, and that for that reason the court was without authority to render judgment against appellant as a garnishee, and that no triable issue was made upon the answer filed by appellant, the garnishee, which would warrant the rendition of a judgment in the original case. After the motion was filed and prior to the regular November, 1929, term of said court, appellee herein filed an amended and substituted proof of publication showing that the warning order against the Flakes was published four consecutive weeks in the Herald-Democrat on the 21st and 28th days of March and the 4th and 11th days of April.

The instant suit, although styled a motion for a new trial in the original action, is, in fact, an independent proceeding collaterally attacking the validity of a judgment after the adjournment of the court at which same was rendered on account of a clerical omission in the proof of publication, and because no triable issue was made upon the answer of appellant, the garnishee in the original suit.

Appellant's first contention for a reversal is that the court did not acquire jurisdiction of the parties defendant in the original suit until the proof of publication showed that the warning order appeared in four consecutive weekly publications of the Herald-Democrat.

Jurisdiction of the parties was acquired by proper publication of the duly issued warning order, and not by the proof thereof. The warning order was actually published as required by law, so the defect in the proof of publication thereof was subject to amendment so as to speak the truth, under our liberal statute allowing amendments. This court said in the case of *Johnson* v. *Lesser*, 76 Ark. 465, (quoting syllabus 1): "Where, in a suit to foreclose a mortgage, a warning order against a non-resident mortgagor was duly published, the failure to make proof of such publication in the manner required by statute is an irregularity that does not affect the jurisdiction, and cannot be considered in a collateral proceeding."

We can see no good reason why the amendment correcting the proof of publication cannot be filed after, as well as before, the rendition of a judgment. In the case of *Smith* v. *Bank of Higden,* 115 Ark. 216, this court reversed the judgment of the circuit court, and remanded the cause with directions to remand the case to the justice of the peace with directions to set aside the judgment in the original case unless it should be shown by sufficient proof that the warning order had been published the requisite number of times. We think this case is authority for the proper practice in case of a defect in a warning order which can be cured by amendment.

Appellant's second contention for reversal of the judgment, for the reason that the answer of the garnishee was not sufficiently controverted, is without merit. Appellee herein, who was plaintiff in that case, denied the allegations of the answer of the appellant herein, who was garnishee in the original case, sufficiently to present an issue for determination by the court. The issue was tried with the result that a judgment was rendered against the garnishee, the appellant herein. As appellant had been personally served, and did not lose its right of appeal except through its own neglect, we do not think it can now successfully attack the judgment

by independent suit. Its proper and only remedy was by appeal.

No error appearing, the judgment is affirmed.

McLain *v.* State.

Opinion delivered May 5, 1930.

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Cochran & Arnett, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court should have directed a verdict in his favor on the charge of obtaining "a thing of value"—medical services—under false pretenses, and we have concluded that the contention must be sustained. There is no testimony showing any representations whatever made, false or otherwise, to either of the physicians by appellant upon his pledging with their bookkeeper the alleged forged note as collateral to secure the payment of his notes to the firm and the individual member thereon given for closing his account due them for more than the sum of the collateral note; nor any testimony whatever indicating an intention upon the part of appellant to procure the professional services of either of the physicians because of the pledging of the collateral note. It is no violation of the statute against obtaining personal property by false pretenses (§ 2449, C. & M. Digest) to obtain credit or settlement of an existing account or indebtedness by such pretenses. *Jamison* v. *State,* 37 Ark. 445; *Shelton* v. *State,* 96 Ark. 237, 131 S. W. 871.

Even if it be conceded that obtaining the services of a physician by false pretenses would come within the provisions of the said statute within the meaning of the

term "or other valuable thing," and we are cited to only one authority, a case from the Supreme Court of Mississippi construing a like statute to that effect, there is no evidence showing that it was the intention of appellant to procure any such services in the future upon the pledging of the collateral note, which was for a less amount in fact than the amount of the notes it was given as collateral to secure. There was testimony showing that appellant had come to one of the physicians and procured the collateral note for collection, stating to him at the time that the makers were ready to pay it, and that he neither collected the note nor returned it, and one of the instructions of the eight first given and withdrawn was on that point allowing the jury to convict appellant if it found such to be the case, as though he had procured the note "a thing of value" by the false representation that the makers were ready to pay it. There should, of course, have been no such instruction given, and, conceding that it was sufficiently withdrawn by the statement to the jury that such instructions were not to be considered, it may nevertheless have influenced the jury's verdict. In any event there is no sufficient testimony in this case to support the verdict of the jury, and the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

HUGHES COMPANY *v.* CALLAHAN.

Opinion delivered May 5, 1930.

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Feazel & Steel, for appellant.

McConnell & Jackson, for appellee.

KIRBY, J., (after stating the facts). Appellants contend that the court erred in subrogating appellee to the rights of the holder of the mortgage upon its payment by him at the request of the mortgagor, because of his accepting a release of the mortgage instead of taking an assignment thereof.

The undisputed testimony shows that he furnished the money to pay off the mortgage at the request and for the benefit of the mortgagor upon his assurance that there were no other liens or incumbrances against the land, and that his advances and payment should be secured by a first lien thereon. He was not merely a volunteer therefore in the payment of the mortgage debt, the loan having been negotiated by the mortgage debtor for

the express purpose of paying it. *So. Cot. Oil Co.* v. *Hill Cot. Co.,* 108 Ark. 555; *Stephenson* v. *Grant,* 168 Ark. 927; *Rodman* v. *Sanders,* 44 Ark. 514; and 37 Cyc. p. 365, note p. 473.

It is true that he might have discovered appellant's execution deed by examination of the record, but he was not culpably negligent in failing to do so on account of the assurances given by the mortgagor; and if it had been discovered, his rights could have been protected as completely in making the loan as was intended should be done by requiring the transfer or assignment of the mortgage to him upon his payment of the mortgage debt upon the request of the mortgagor. The rights of the purchaser under the execution deed are not prejudiced by the decree allowing a subrogation of appellee to the rights of Schobacker, the holder of the mortgage, since as against the lien of such mortgage appellant's claim was without merit and subject thereto.

The court did not err therefore in decreeing a subrogation of appellee to the lien and rights of the holder of the mortgage, and a foreclosure thereof for satisfaction for the money advanced to pay off the mortgage indebtedness and the decree must be affirmed. It is so ordered.

WARD *v.* PIPKIN.

Opinion delivered May 5, 1930.

S. S. Hargraves, for appellant.

Mann & Harrelson, for appellee.

McHaney, J. This is an appeal from a decree of partition, ordering a sale of certain real property in Forrest City, the property not being susceptible of division in kind. Appellee and his stepmother, Fannie Pipkin Ward, were the owners thereof as tenants in common, each owning a half interest. Mrs. Ward and her husband, appellant, resided on the property, and appellant made certain improvements and paid certain taxes thereon during the lifetime of his wife and at her request. After her death, appellant continued to reside on the property, and this suit was brought to partition the property, all parties having any interest therein being made parties. Appellant filed a cross-complaint, claiming that the amount spent for improvements and taxes should be a charge against the property. The court dismissed the cross-complaint, decreed a sale of the property, and that the proceeds of the sale should be distributed, first, to the payment of costs; second, one half the remainder to appellee; and, third, the other half to be deposited in the registry of the court, "pending the appeal of H. W. Ward from the finding of the circuit court, and then paid to the parties entitled thereto, holding under Mrs. Fannie Ward, deceased." The case referred to in the above order is *Ward* v. *Pipkin,* 180 Ark. 855, 22 S. W. (2d) 1011. Appellant attempted to stop the sale by filing a supersedeas bond with the clerk, but the clerk refused to accept the bond and stop the sale. The property sold for $1,400.

Appellant first says his improvements and taxes paid should be a first charge against the whole property.

We do not think so. These improvements were made and taxes paid without authority from appellee, and at a time when appellant and his wife were enjoying the use of the property rent free, although she owned only a half interest. In *Lemly* v. *Works,* 138 Ark. 426, 211 S. W. 362, this court quoted with approval from a note to the case of *Ward* v. *Ward,* (W. Va.) 52 Am. St. Rep. 935, the following: "That, for improvements made or services rendered by a co-tenant, he cannot maintain any action which will result in a personal judgment against any of his fellow tenants unless he can prove an express promise to pay or such a state of circumstances that a promise should be implied, and it will not be implied either from the making of improvements or from their utility or necessity." There was no express promise to pay by appellee, and none can be implied. Neither does the fact that the expenditures were incurred at Mrs. Ward's request alter the situation in so far as appellee is concerned. As to what effect it may have on his right to reimbursement from Mrs. Ward's estate, we do not decide, as that question is not before us. It is sufficient to say that appellee's one-half interest was not burdened thereby, even though the value of the property may have been enhanced by reason thereof. Neither can there be a recovery for the taxes paid at the request of his wife. He paid certain paving taxes and the general taxes for two years. They occupied the premises for about five years. It is not shown what the rental value is, but in *Patterson* v. *Miller,* 154 Ark. 124, 241 S. W. 875, it was held that a tenant in common in possession, who has received rents enough to keep the taxes paid, is required to pay the taxes for the benefit of himself and co-tenants. In the absence of a showing to the contrary, it will be presumed that the rental value was sufficient to pay the taxes.

It is finally urged that the case should be reversed, because appellant attempted to supersede the judgment and stop the sale pending an appeal. We do not think

so. Appellant conceded that appellee owned a half interest in the property. There was no dispute that it could not be divided in kind. Therefore appellee had an absolute right to a decree partitioning the property and ordering it sold. And, as we have already shown, appellant's claims cannot be a lien or charge on appellee's interest. So he was in no position to complain of a sale being had. The decree fully protected his interest, if any, in the proceeds, and his rights have not been prejudiced in any way. No claim is made that the property sold for an inadequate price.

The decree is accordingly affirmed.

AMERICAN INVESTMENT COMPANY *v.* GLEASON.

Opinion delivered April 28, 1930.

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Rose, Hemingway, Cantrell & Loughborough, for appellant.

M. F. Elms and *Joseph Morrison,* for appellees.

HART, C. J., (after stating the facts). The practice in this State is that, where a defendant has been constructively summoned seeks a new trial under § 6266 of Crawford & Moses' Digest, he cannot have the judgment or decree vacated on motion, but it will remain until the case is retried, to be then confirmed, modified, or set aside as the evidence introduced may warrant. *Gleason* v. *Boone,* 123 Ark. 523, 185 S. W. 1093; *Moreland* v. *Youngblood,* 157 Ark. 86, 247 S. W. 385; and *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905.

This brings us to a consideration of whether the evidence introduced in support of the motion was sufficient to set aside the original decree in favor of appellee. This question largely depends upon whether the description in the original mortgage given by the Prange Brothers to John C. Gleason was so vague and indefinite as to be held void for uncertainty.

The general rule in this State is that the description in a deed or mortgage is not to be held void for uncertainty if, by any reasonable construction, it can be made available. When a description of the land as given in the instrument is doubtful, the courts in their endeavor to arrive at its meaning should assume the position of the parties. The circumstances of the trans-

action should be carefully considered, and in the light of these circumstances the mortgage should be read and interpreted. *Walker* v. *David,* 68 Ark. 544, 60 S. W. 418; and *Scott* v. *Dunkel Box & Lumber Co.,* 106 Ark. 83, 152 S. W. 1025.

In *Wells* v. *Moore,* 163 Ark. 542, 260 S. W. 411, the courts said that all the law requires is that the general description of the land contained in the instrument should furnish the means of its definite location and identification. Again, in *Snyder* v. *Bridewell,* 167 Ark. 8, 267 S. W. 561, the court said that the general rule is that the sufficiency of a description to pass title to land under a deed or mortgage is that it shall be described with sufficient certainty to identify it. The court said further that the description in the deed must refer to something tangible by which the land can be located.

This is in application of the maxim that that is certain which can be made certain. In the application of the rule, it is settled in this State that a deed or mortgage cannot be declared void for uncertainty if it is possible, by any reasonable rule of construction, to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. In short, the office of the description in a deed or mortgage is not to identify the land, but to furnish the means of identification.

The description in the mortgage to Gleason is set out in our statement of facts, and need not be repeated here. It is the contention of counsel for appellant that it plainly conveys the west half of section 21 and the northeast quarter of section 29, and an undivided one-half interest in the Prange and Tindall Pumping Plant and Canal with all lands, machinery, and fixtures belonging thereto. In other words, they contend that the description itself shows that the mortgagors intended to convey certain lands in sections 21 and 29, and their one-half interest in a pumping plant and canal located in section 15. On the other hand, it is the contention of

counsel for appellee, and the chancery court so found, that the description in the mortgage, when read in the light of the circumstances surrounding the parties at the time the conveyance was made, shows that the mortgagors intended to convey to the mortgagee certain lands in sections 21, 29 and 15, and also their undivided one-half interest in a pumping and canal plant located thereon.

We think the construction placed upon the mortgage by the chancery court more naturally follows the description contained in the mortgage itself, when read in the light of the attendant circumstances. It will be remembered that according to the testimony of the engineer the pumping plant is situated in section 15, and the canal extends down through section 15 into section 21, which is also conceded to be embraced in the mortgage. It will be noticed, that the mortgage describes an undivided one-half interest in the Prange and Tindall Pumping Plant and Canal. This would indicate a reason for describing the pumping plant and canal. If the mortgagors had owned the whole of the pumping plant and canal, this would pass with the description of the lands themselves. But, inasmuch as they only owned an undivided one-half interest, it was necessary to describe the pumping plant and canal. Then in addition "all lands (about 200 acres in section 15-3-2)" are embraced in the mortgage. The evidence shows that all the lands owned by the mortgagors in section 15 was 200 acres, and it naturally follows that the describing of the lands by quantity conveyed the whole of the tract owned by the mortgagors to the mortgagee. Otherwise, no useful purpose would have been served by describing the quantity of the lands. Of course, quantity does not control when it is contradicted by the particular description. But, in the present case, it is not contradictory, but is rather explanatory of the property intended to be embraced in the mortgage.

In *Wilson* v. *Boyce,* 92 U. S. 320, there was a statutory mortgage securing bonds issued by the State of

Missouri to a railroad company, which bonds, it was enacted, "shall constitute a first lien and mortgage upon the railroad and property of the several companies so receiving them," etc. The question was whether certain lands which did not constitute the railroad or any part thereof, but which were owned by the railroad company, should be considered to be embraced in the mortgage. The tracks of the railroad were not located upon the lands in question, nor were they used in connection with the railroad. The court said that the description, "the railroad and property of the several companies so receiving them," embraced the lands, and the word "property," as used in the statute, created a valid lien on the lands belonging to the railroad, but which were not used in connection with it. The court said: "The generality of its language forms no objection to the validity of the mortgage. A deed 'of all my estate' is sufficient. So a deed 'of all my lands wherever situated' is good to pass title. *Johnson* v. *DeLancy*, 4 Cow. 427; *Pond* v. *Berg*, 10 Paige, 140; 1 Atk. on Conv. 2. A mortgage 'of all my property' like the one we are considering, is sufficient to transfer title."

In the present case, we are of the opinion that the chancery court rightly held that, when the description in the mortgage was read in the light of the circumstances surrounding the contracting parties, it was the intention to include in the mortgage the undivided one-half interest of the mortgagors in the pumping plant and canal, and, in addition, all the lands owned by them in section 15. If they had intended merely to mortgage their undivided one-half interest in the pumping plant and canal, they would likely have so stated, and would not have described all of the land owned by them in section 15. Therefore the decree will be affirmed.

HART, C. J., (on rehearing). Counsel for appellant earnestly insist that a rehearing should be granted because the description in the mortgage brings this case within the principles of law decided in *Freed* v. *Brown*,

41 Ark. 495, and other decisions of this court, to the effect that a description in a conveyance of a part of a particular tract of land of a larger tract, containing a designated quantity of acres, is void for uncertainty. The reason is that in such cases the calls in the deed do not refer to anything by which the land could be located, and parol evidence cannot import terms into an instrument. It can only be used to explain or show the things to which the instrument refers by the terms it uses so as to make the terms certain when understood. For that reason, all instruments of that character are void upon their face for uncertainty.

We have set forth the description of the mortgaged lands in our former opinion as contained in the mortgage to Gleason, and do not deem it necessary to set them out again in this opinion. Reference to the description will show that it does not fall within the class of cases just referred to, but rather comes within *Little Rock and Ft. Smith Ry. Co.* v. *Evins,* 76 Ark. 261, 88 S. W. 992, and *Walker* v. *David,* 68 Ark. 544, 60 S. W. 418.

In the case first cited, it was admitted by the parties that the tract in controversy contained 7-19/100 acres. Hence there was a call within the deed by means of which by the aid of parol evidence the land could be identified or located. In the latter case, there was also a call within the deed showing the quantity of lands conveyed, and the proof was that the grantor owned only that amount of land in the section under consideration and owned no other land in that section. Hence the calls in the deed, aided by parol evidence, were sufficient to identify and locate the land.

So here it was admitted by the parties that 200 acres were, at the time of the execution and delivery of the mortgage to Gleason, all the lands in section 15, township 3, south of range 2 west, Arkansas County, which were owned by the mortgagors. Hence, under the cases above cited, the description was sufficient. If the mortgagors had owned a greater quantity of land than that

described in the mortgage in section 15, the cases cited by appellant would control.

The most serious contention in our mind is whether or not we were correct in holding that the description of the 200 acres in section 15-3-2 referred to the 200 acres of land owned by the mortgagors in that section or was merely intended to convey the right-of-way for the canal owned by the Prang and Tindall Pumping Plant and Canal. After a careful consideration of the matter, we adhere to our original view on this point. There is a plat of the pumping plant and canal in the transcript. The map shows that the pumping plant is located in the northwest corner of said section 15 on White River. It extends in a southwesterly direction through the northwest quarter of section 15 into section 16. Thence, it runs in a southwesterly direction to the center of section 16. The canal then extends southward through the eastern half of section 21 but close to the western boundary thereof. It enters section 28 near the western boundary of the east half of section 21 and extends through section 28 in a southwesterly direction.

Now, it will be noted that the description in the mortgage is the northwest quarter of section 29 which is the 160 acres west of the north half of section 28. Then the mortgage contains a description as follows: "West half of section 21. This is the 320 acres west of the canal which runs through the east half of section 21." It will be noted that the description is of a one-half interest in the Prang and Tindall Pumping Plant and Canal, with all lands, (about 200 acres, in section 15-3-2), machinery and fixtures thereto belonging.

Now the evidence shows that nothing like this amount of land would have been required as a right-of-way for the canal. It is conceded that 8 or 9 acres would have been sufficient for that purpose. Therefore, we think that the expression "all lands, about 200 acres," in connection with the agreement that 200 acres was all the land owned by the mortgagors in section 15, shows that

the mortgagors intended to convey the 200 acres of land and in addition thereto their one-half interest in the pumping plant and canal. If, as contended by counsel for appellant, they had merely intended to convey the right-of-way for the canal, it would have been just as necessary to have done this by proper description through the other lands as it would have been through the lands in section 15. It is shown that most of the 200 acres owned by the mortgagors in section 15 were not adjacent to the canal, and were not used as a part of its right-of-way, and the use of the phrase "all lands," etc., indicates that it was intended to embrace in the mortgage all the lands owned by the mortgagors in section 15, instead of merely those necessary for a right-of-way for the canal. Therefore the motion for rehearing will be denied.

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THOMAS *v.* ARKANSAS STATE FAIR ASSOCIATION.

Opinion delivered May 5, 1930.

[redacted]

Philip McNemer, for appellant.

A. L. Rotenberry, for appellee.

McHANEY, J. In 1924, appellant signed a subscription agreement for the purchase of $250 of the capital stock of appellee. The subscription agreement provided that the amount might be paid in installments, and that upon full payment of the purchase price, "the Fair Association will issue and deliver to the undersigned the number of shares hereby subscribed for, which shall be fully paid and nonassessable." Appellant, either at that

time or later paid $50 which was credited thereon leaving a balance of $200. On February 14, 1925, he executed and delivered to appellee his promissory note for such balance, payable October 1, 1925, with interest from date at 8 per cent. to maturity and thereafter at 10 per cent. No part of this note has ever been paid, and forms the basis for this litigation. Judgment was rendered against appellant in the municipal court and in the circuit court on appeal.

The contention relied upon here, as also in the circuit court, is that the note is void because given in payment for stock in a corporation, as being in violation of § 8, art. 12, Const. 1874, which provides: "No private corporation shall issue stocks or bonds, except for money or property actually received or labor done," etc. Our cases, *Bank of Commerce* v. *Goolsby,* 129 Ark. 146, 196 S. W. 803; *Bank of Dermott* v. *Measel,* 172 Ark. 193, 287 S. W. 1017; *Bank of Manila* v. *Wallace,* 177 Ark. 190, 5 S. W. (2d) 937; *Park* v. *Bank of Locksburg,* 178 Ark. 669, 11 S. W. (2d) 483; *Ellis* v. *Jonesboro Trust Co.,* 179 Ark. 615, 17 S. W. (2d) 324; and *Taylor* v. *Gordon,* 180 Ark. 753, 22 S. W. (2d) 561, are cited to sustain the contention. The gist of the rule as stated in all these cases is that a note given to a corporation in payment of its capital stock is void, except in the hands of an innocent purchaser. However, we are of the opinion that neither the section of the Constitution above quoted, nor the rule announced by this court in the cases above cited have any application to the facts in this case. The note sued on here was given, not in payment of stock of appellee, but, as evidence of the balance due on the subscription agreement. It was specifically agreed that the stock would be issued and delivered only upon full payment of the amount subscribed. Appellant did not purchase stock, and appellee did not sell him stock. He signed an agreement which bound him to pay certain moneys at a certain time, compliance with which entitled him to a certain amount of appellee's stock. Such subscription agree-

ments have been held valid by this court. *Snodgrass* v. *Zander & Co.*, 106 Ark. 462, 154 S. W. 212; *Nowlin* v. *Memphis Packing Corp.*, 161 Ark. 294, 255 S. W. 1092; *Harrington* v. *Citizens' Inv. & Sec. Co.*, 160 Ark. 320, 254 S. W. 831. In the Nowlin case *supra*, the court said: "It is true, as contended by counsel for the plaintiff, that parties may make a valid preliminary stock subscription contract which will be enforced according to its terms, just as other contracts are enforced. * * * It is also true that, like other contracts, an agreement to take shares in the capital stock of a corporation may depend upon a condition precedent or subsequent, just as the parties may agree upon, and that they are bound to perform their contract according to their intention as it may appear from the language of the contract," citing cases.

The prohibition of the Constitution is directed against the issuance of stocks or bonds by private corporations except for money, etc. "No private corporation shall *issue* stocks or bonds except for money," etc. The corporation here has not *issued* appellant any stock, and is not going to do so except for money. This is the only question presented by the briefs.

The judgment of the circuit court is correct, and must be affirmed.

SAXON *v.* ARKANSAS STATE FAIR ASSOCIATION.

Opinion delivered May 5, 1930.

Barber & Henry and *Troy W. Lewis,* for appellant.

Dillon & Robinson, for appellee.

BUTLER, J. Appellee brought suit in the Pulaski Circuit Court against appellant, its cause of action being based upon the following instrument.

"$300,000 ARKANSAS STATE FAIR ASSOCIATION $300,000

"The undersigned hereby subscribes for 500 shares of the capital stock of the Arkansas State Fair Association of Arkansas, of a total par value of $1,000. He will pay this amount to the Fair Association in the amounts and on the dates following:

One-half in 1924	One-fourth in 1925	One-fourth in 1926
$..... is herewith;	$..... by May 15;	$..... by May 15;
$..... by June 15;	$1,000 by June 15;	$..... by June 15;
$..... by July 15;	$..... by July 15;	$..... by July 15;

"Immediately upon the full payment of the purchase price, the Fair Association will issue and deliver to the undersigned the number of shares hereby subscribed for, which shall be fully paid and non-assessable. NO PROMISES, REPRESENTATIONS, AGREEMENTS OR CONDITIONS HAVE BEEN MADE OR AGREED TO WHICH ARE NOT FULLY STATED HEREIN.

"Little Rock, Arkansas, 5-12-1924.
"Dr. R. L. Saxon."

In the court below it was agreed that appellant, defendant there, signed the above instrument, and that the appellee is a corporation organized under § 1796, C. & M. Digest, as a fair association with an authorized capital stock of $300,000, divided into 15,000 shares of $2 each par value. The incorporators made application to the Blue Sky Department of the Arkansas Railroad Commission for a permit to sell its stock before offering the same for sale to the public, and was informed by the Commission that no permit was necessary, and none was issued. Each year since the organization of the corporation, Arkansas Fair Association, it has conducted a fair at Little Rock where livestock and farm products, agricultural and other machinery, and merchandise of merchants and dealers in other commodities have been shown,

and the usual amusements, such as horse races, automobile races, Ferris wheels, etc., are conducted as a part of the fair. Entrance fees were charged to the public for admission, and space fees to those who desired to exhibit their goods, wares and merchandise and concession fees charged those who exhibited and disposed of goods, wares and merchandise to the assembled public who had paid to enter the fair grounds as spectators. From the money derived in this manner the association pays its current expenses, the excess cash, if any, to be expended by the board of directors of the association, but that no such excess cash had ever accumulated.

The articles of incorporation was introduced in evidence which declared the general nature of the business proposed to be transacted by the corporation was the holding of a periodical State fair in or near Little Rock, at which was to be shown the natural agricultural, mechanical and other products of the State, together with all such other exhibits of whatever kind or character as would tend to aid the advancement, progress and prosperity of the State. As incident to this purpose, the charter empowered the corporation to acquire collections of the products shown for the purchase or sale of real estate and personal property, for the erection of such buildings as would be necessary for the conduct of its operations, for making contracts, borrowing or lending money, etc., and further provided, "no dividend shall ever be declared or paid by the corporation, but all profits accruing and resulting from the conduct of its business or affairs shall be retained by the corporation, and be permanently employed in the enlargement or development of the enterprise."

First. It is the contention of appellant that the contract sued on is void under § 8, article 12, of the Constitution of this State which provided that no private corporation shall issue stocks or bonds except for money or property actually received or labor done and, second, that the transaction involved was in violation of § 8, of

act 242 of the Acts of 1915, (§ 757, C. & M. Digest), known as the "Blue Sky Law."

1. The answer to the first contention is that the instrument sued on is not a promissory note for the purchase of stock issued, but is a contract for the purchase of stock, payment to be made in the amount designated, and when such payment has been made the stock subscribed was to be issued and delivered. As this is the nature of the contract involved in this suit, it should be enforced according to its terms. This feature of this case is ruled by the opinion in *Thomas* v. *Ark. State Fair Assn., ante* p. 748, to which we refer for further discussion of the question here presented, and for the authorities to support our view.

2. Sections 1796 and 1797, under which appellee was organized, provides: "That agricultural and mechanical fair associations and other associations of a public nature and designed to promote the public good, may be constituted bodies politic and corporate in the manner now provided by law for 'corporations for manufacturing and other lawful business,' and the capital stock may be divided and held in shares of two dollars each; no profits or dividends shall ever be declared or paid under this act; provided, dividends may be paid to the amount of money paid in by the stockholders on their respective shares.

"This act shall not be construed to prohibit such associations from being chartered and incorporated with the powers and privileges, and in the manner now provided by law."

The main idea in the formation of agricultural and mechanical fairs is to give object lessons to the people of new methods in the preparation of the soil, fertilization, cultivation of crops, and the use of modern machinery by which interest might be stimulated in agricultural pursuits and means and methods inculcated so that the toil of the farm might be lessened, and the rewards of labor increased. It is recognized that agriculture is be-

coming unremunerative, and, even with an adequate return on his investment and for his labor, the farmer is beset by many difficulties. When to these are added the small returns received by him, the agricultural situation is rendered most acute, and produces a threat which gives great uneasiness and the exodus from the farm has been notable within the last decade, so much so as to give general concern.

Associations, such as that in the instant case, have been organized from purely patriotic motives for the purpose of educating the farmer to the point where he may appreciate the dignity and beauty of his calling, and also encourage the use of modern methods in the operation of his farm and the application of business principles, by which his home may be beautified and his business rendered profitable and his labor lessened; the hope being that, when these ends are accomplished, the rural life and activities which have meant so much in the past and, in the opinion of many, are the nation's hope for the future, may be preserved.

The appellee association was not used for pecuniary gain, but exclusively for the purpose above stated, and, therefore, is both educational and benevolent, and as such is not within the purview of § 757, C. & M. Digest, by which a permit or certificate to sell its stock is required and must be obtained, but comes under clause E of § 752 of said Digest, which exempts from the requirements of § 757 "securities of any domestic corporation organized without capital stock and not for pecuniary gain, but exclusively for educational, benevolent, charitable or reformatory purposes."

While conceding that appellee association "is *quasi* educational in nature," appellant insists, because of the use of the words "exclusively educational" in paragraph E of § 752 *supra,* appellee association does not come within the exception, for, in addition to the exhibits, horse racing and harmless amusements are engaged in as a part of the fair. These amusements no more detract

from the exclusively educational nature of the association than do the swings and playgrounds in the school yard for the use of the children at stated intervals render a public school not "exclusively educational." These are but incidents to the main purpose, and in aid of it, and it might be said that a certain amount of amusements are necessary in any educational enterprise. Since fairs are created to bring together those engaged in agricultural pursuits, stock raising, manufacturing farm implements, etc., so they may better discuss conditions and improve themselves in matters of farming and stock raising, and the amusement features are but to afford periods of relaxation. It is our opinion that the appellee association falls within the exemption of the statute, and may be said to be exclusively educational within its meaning, and therefore no permit was needed for the sale of its stock.

We think the holding of the court below was correct, and its judgment is affirmed.

BAILEY *v.* RUNYAN.

Opinion delivered May 12, 1930.

McConnell & Jackson, for appellant.

Feazel & Steel, for appellee.

HART, C. J. (After stating the facts). It is first sought to reverse the judgment on the ground that the circuit court did not have jurisdiction to try the case. This court has held that an infant's contract for the purchase of an automobile is void and unenforceable, but that relief may be had at law as well as in equity. *Commercial Credit Co.* v. *Blanks Motor Co.,* 174 Ark. 274, 294 S. W. 999.

In the second place, the plaintiff consented to the circuit court trying the case by not moving to retransfer it to the chancery court. *Gilbert* v. *Shaver,* 91 Ark. 231, 120 S. W. 833.

The circuit court recognized that the contract of a minor for the purchase of an automobile was void and unenforceable, and so instructed the jury. The right of the defendant to a verdict was predicated upon a finding by the jury that the contract of purchase and sale of the automobile was made by the defendant with the mother of Chester Bailey. The jury was expressly instructed that, if it should find that the contract of sale for the car was made by the defendant with Chester Bailey, it should find for the plaintiff. The evidence in behalf of the defendant warranted the jury in finding that the contract was made by Runyan with the mother of Chester Bailey, and not with him. Hence the evidence was legally sufficient to support the verdict.

It is next insisted that the judgment should be reversed because the court erred in not allowing Mrs. Sallie Young, the sister and guardian of Chester Bailey, to testify that the money with which he paid for the automobile came from their father's estate. The court held that this evidence was immaterial. We think the court was right in its ruling for two reasons. In the first place, according to the testimony of Mrs. Young, her mother had received a part of the money left by their father, and it may be that the money with which she furnished her son to purchase the automobile was her part of the estate. In any event, she was liable to her son for any misappropriation of the funds belonging to her husband's estate by herself. It was not attempted to show that Runyan knew that the money used in paying for the automobile did not belong to Mrs. Bailey. According to his testimony, he made the contract with Mrs. Bailey, and his agent testified that Mrs. Bailey told him when she bought the car from him that she would send her son with the money to pay the balance of the purchase price the next morning. The right of the defendant to a verdict was predicated solely upon a finding by the jury that Runyan had sold the automobile to Mrs. Bailey, and not to her minor son. In this view

of the matter, the court correctly held that it is immaterial where Mrs. Bailey got the money with which she paid for the automobile.

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

TURK *v.* SWEETEN.

Opinion delivered May 12, 1930.

Sidney L. Graham and *Hardin & Barton,* for appellant.

D. W. Bryan and *A. N. Hill,* for appellee.

HART, C. J. Appellant prosecutes this appeal to reverse a judgment against him for damages for negligently injuring appellee while in his employment.

T. W. Sweeten was the principal witness for himself. According to his testimony, at the time he was injured, he was working for the Turk Construction Company, and his occupation was cleaning up the machinery

at night for the next day's work. Appellant was engaged in road construction work, and appellee was employed to clean and grease the machinery, and act as watchman for it during the night. On the night in question, appellee had brought his young son with him to help clean the machinery, and finished his work about 11 o'clock. He went to a place on the premises where there was a ten-gallon can of gasoline and told his boy to hold the lantern while he poured some out for the purpose of washing the grease off his hands. Appellee opened up the ten-gallon can, and was pouring gasoline into another can when the gasoline caught on fire and severely burned him before it could be put out. Appellee had been told to bring his coal oil lantern which he used in his work because one of the electric lanterns owned by appellant was out of fix. The lighted kerosene lantern was three or four feet from the can of gasoline when appellee was pouring it out. Appellee was a farmer, and had seen other employees of the company wash the grease off of their hands with gasoline. He had to use a hammer to knock the top off of the can of gasoline so that he could pour it out. Appellee knew that the ten-gallon can of gasoline was for emergency use in running the engines belonging to the appellant. No one had told him to use the gasoline to wash his hands. Appellee had been accustomed to driving an automobile for four or five years. He was thirty-nine years of age at the time of the accident.

The court erred in not directing a verdict for the appellant. In the first place, it may be said that the appellee's own testimony shows that there was no negligence on the part of appellant. The injury complained of was the result of appellee's own act for his own benefit or convenience, and not in the line of his duty as an employee of appellant. Appellee was employed to clean the machinery at night and to guard it. It was not necessary for him to use gasoline in his work. As a master, the appellant owed no duty to the appellee as a servant while acting outside of the scope of his

employment to instruct and warn him of the dangers incident to the use of gasoline but which were not incident to the work of the appellee. This rule is so well established, and of such universal application, that no citation of authority is necessary to support it. It will be remembered that the gasoline was not escaping, and there was no need for appellee to have opened the can at all. Hence there was no duty on the part of appellant to warn or instruct.

In the second place, the court should have directed a verdict in favor of appellant on the ground that appellee, as a matter of law, was guilty of contributory negligence. Appellee was a man of mature years, and had been driving an automobile for four or five years. It is a matter of common knowledge that gasoline becomes volatile when exposed to the air and is easily ignited when it comes into contact with a flame. *Gibson Oil Co.* v. *Sherry,* 172 Ark. 947. Appellee was using a kerosene lantern in the discharge of his duties, and when he knocked the top off of the gasoline can and started to pour the gasoline out into another can within three or four feet of the lighted lantern, he is charged with knowledge that an explosion would likely occur which would burn him. He is lucky that his burns were only temporary.

It follows that the judgment must be reversed; and inasmuch as the cause of action has been fully developed, it will be dismissed.

MARYLAND CASUALTY COMPANY *v.* PEOPLE'S LUMBER & SUPPLY COMPANY.

Opinion delivered May 12, 1930.

Cockrill & Armistead and *Harry T. Wooldridge,* for appellant.

Poff & Smith, for appellee.

SMITH, J. Appellee brought this suit to recover from J. T. Carr and the Maryland Casualty Company, hereinafter referred to as the company, the sum of $307.90, and interest, and for its cause of action alleged that Carr entered into a contract with the Arkansas Highway Commission to construct a certain road, and that the company signed the contractor's bond as surety, guaranteeing, among other things, that the said contractor would pay all bills for material and labor entering into the construction of the road.

It was alleged that Carr, the principal contractor, sublet to J. J. Harrison a portion of the work, and that pursuant to his subcontract Harrison hauled gravel, and that for each load of the gravel he was given, by a representative of the Highway Commission, a ticket evidencing the fact that a load of gravel had been placed in the road and the price payable therefor. To secure the money necessary to complete his subcontract, Harrison sold and delivered these tickets to appellee, whose representative presented them to Carr for payment, and when payment was refused this suit was brought. Harrison was made a party defendant, and he filed a separate answer and cross-complaint against Carr and the surety company, in which he admitted the allegations of appellee's complaint, and alleged that Carr had refused to make settlement and payments to him as his subcontract required, and that he had obtained advances from appellee. That Carr had instructed him to borrow money to continue the work and to pledge and assign his claim for labor done, and he transferred and assigned his claim to appellee in the sum sued for, which was due for hauling gravel and placing same upon the road, and, evidencing this intention, he delivered to appellee the tickets of the

checker showing the number of loads of gravel hauled with the price therefor, and he alleged that, "I authorize the said People's Lumber & Supply Company, in my name or its name, to sue for and collect and obtain payment of said claim."

A demurrer was filed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action for the following reasons: "(1) The assignment alleged to have been made by the defendant, J. J. Harrison, to the plaintiff herein, if any so made, was oral, and not evidenced by any writing. (2) The gravel tickets mentioned in said amended and substituted complaint are mere evidences of the amount of gravel hauled by the defendant, J. T. Carr, and represent neither money nor property, and are therefore not assignable, under § 475 of Crawford & Moses' Digest of the Statutes of Arkansas."

The demurrer was overruled, and, Carr and the company declining to plead further, a judgment was rendered against them, from which the company only has appealed.

It is insisted, for the reversal of the judgment appealed from, that the instant case is similar to and is controlled by the opinion in the case of *Goode* v. *Ætna Casualty & Surety Co.*, 178 Ark. 451, 13 S. W. (2d) 6, but we do not think so.

We do not consider or decide whether the gravel tickets were assignable instruments or not. They at least evidenced the quantity of gravel hauled, and the sum due on that account, and it was this sum—the total thereof—which Harrison assigned to appellee, and both the assignor and the assignee have sued. This is the controlling distinction between the instant case and the Goode case, which was a suit upon an oral assignment of an open account, which we said could not be maintained without making the assignor a party. Here the assignor is a party.

It is not questioned that Harrison's claim is covered by the bond of the surety company, and both the assignor and the assignee unite in the suit to enforce this claim against the bond. The case of *American Bank & Trust Co.* v. *Langston,* 180 Ark. 643, 22 S. W. (2d) 381, cited by appellant, has therefore no application.

The demurrer was properly overruled, and the judgment must be affirmed, and it is so ordered.

GALLOWAY *v.* HOOD.

Opinion delivered May 12, 1930.

Longstreth & Longstreth, for appellant.

Robert Bailey, for appellee.

HUMPHREYS, J. Appellant brought suit against appellee for $463.71, the balance due on a Lipman Ice Machine he sold appellee on the installment payment plan, and to enforce a lien on said machine for said amount. It was alleged that he sold the machine for $1,022.50, received $102 cash, and eighteen notes for the balance of the purchase price, all of which were paid except the notes covering the amount sued for; also that pursuant

to the contract, made the basis of the suit, he properly installed the machine by attaching same to an American fountain which appellee purchased elsewhere, and regulated the operation thereof with a thermostat; that after installing the same the contract provided for a twenty-four hours' test to ascertain whether satisfactory, which test was made to the satisfaction of appellee, who then accepted same; that the written contract provided that after the twenty-four hour test guaranteeing satisfaction "seller's liability is limited to replacement of such parts as may prove defective in one year," provided seller be notified of defect in writing; and "seller does not guarantee and will not be responsible for spoilage or other damage which may occur after installation and satisfactory test."

Appellee filed an answer admitting the contract, and that there was a balance of $466.71 due on the notes, but filed a cross-complaint claiming damages in the sum of $1,000 on account of the failure of the Lipman Ice Machine to satisfactorily do the work for which it was sold.

Appellant filed a reply denying the allegations of the cross-complaint.

The cause was submitted upon the pleadings and testimony, at the conclusion of which, appellant requested a dismissal of the cross-complaint which was refused, over his objection and exception.

The court then sent the case to the jury upon the sole issue of whether appellee sustained damages, not to exceed $1,000, on account of defects in the Lipman Ice Machine, which prevented it from satisfactorily doing the work for which it was sold, over the objection and exception of appellant.

The court correctly stated to the jury that appellee admitted the execution of the contract and the balance due thereon; but we think erroneously told them that appellee was entitled to recover on his counterclaim for any damage resulting to him on account of defects in the Lipman Ice Machine. The only proof tending to show

damage was for spoilage and loss of profits in appellee's business because the thermostat, which automatically regulated the temperature in the different compartments of the soda fountain to which the Lipman Ice Machine was attached, did not correctly function. The testimony did not show what a new one would have cost, or that the installation of a new one would not have caused the machine to do the work satisfactorily for which it was sold. The undisputed testimony reflects that the twenty-four hour test provided for in the contract was made with the result that the Lipman Ice Machine correctly functioned. According to the terms of the contract appellant was exempted from liability for spoilage or other damages after the installation of the Lipman Ice Machine and a satisfactory test thereof, the only reservation being that appellant should supply or pay for defective parts within a year upon written notification. The testimony does not reflect that such an application was made for any part of the Lipman Ice Machine after the test on account of same being defective.

Again, long after the installation of the Lipman Ice Machine and the twenty-four hour test had proved satisfactory, and after appellant admits that he knew he was sustaining damages on account of defects in said machine, he wrote the following letters to appellant which, in our opinion, clearly estopped him from claiming damages on account of spoilage, or the loss of profits in his business:

"11-8-26.

"Just received your letter. Am very sorry you had to pay those notes. Owing to the crop conditions which you are aware of we just can't make collections, and business is very quiet. Too, we have been handicapped in many ways. Our plumbing bills were big and our power bill is more than we anticipated, and we have other unforseen expenses. It is impossible for us to pay all the notes off now, but we will pay the past due notes one at a time, and then pay the others as they fall

due. Let us hear from you. The company is still holding one note which we paid but failed to include interest. We will send this when we hear where the note is. We can pay at least two of the past due notes this month. Maybe all of them.

"Respectfully, Louis Hood."

"11-30-26.

"Galloway Woodward.

"Gents: We expected to send you some money before now. We have some notes which parties promised to pay, but to date we haven't collected. We will send you check to pay one by Monday, and will take up another one soon. We cannot pay them all at once, but will get them paid before long. We have been handicapped in many ways. Our fountain has not been fixed right yet. Our electric bill is more than we anticipated, and owing to condition of fountain we have had some big plumbing bills which we shouldn't of had. Of course you are aware of the slump in business which we didn't anticipate. We will get it all adjusted soon. Thanking you,

"Respectfully, Louis Hood."

"1-6-27.

"Galloway Woodward.

"Gents: We don't owe you 5 notes. Just 4. We are sending check to cover No. 88, and will pay another one soon. Will send check for the extra interest due you, too.

"Respectfully, Louis Hood."

According to a proper interpretation of the contract, and the undisputed evidence relating to the installation and twenty-four hour test that was made, and the letters quoted above, the trial court should have dismissed the cross-complaint, when requested to do so by a peremptory instruction.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

HART, C. J., dissents.

FRAME *v.* WHITTAM.

Opinion delivered May 12, 1930.

[redacted]

John P. Roberts, for appellant.

Evans & Evans, for appellee.

HUMPHREYS, J. This is an appeal from a judgment in the sum of $225 principal, and $52.45 accrued interest, rendered in the circuit court of Logan County, Southern District, on appeal from the court of a justice of the peace, in favor of appellee against appellant.

The cause proceeded to a hearing in both courts upon a statement of a cause of action filed before the justice of the peace to the effect that appellant was indebted to appellee in said sum for a Ford car sold by appellee to J. R. Frame and R. R. Pearson and later sold to L. L. Frame, appellant, by J. R. Frame and R. R. Pearson.

According to the undisputed testimony, J. R. Frame, the son of appellant, and R. R. Pearson purchased a new Ford runabout from appellee on May 31, 1926, for $475, paid in cash therefor $245, and gave their promissory note for $225, payable on November 1, 1926, bearing 10 per cent. interest per annum from date until paid, in which title to the car was retained in appellee until the note should be paid, but that on the same date, May 31, 1926, R. R. Pearson, representing that the car was the property of Henderson Motor Company of Paris, Arkansas, sold it to appellee for $375, $50 cash and a

note due in thirty days for $325; that appellee paid the note when due, and subsequently sold said car to a man by the name of Montrey; that when appellee attempted to collect the note executed by J. R. Frame and R. R. Pearson he learned that R. R. Pearson had sold the car to appellant, and that appellant in turn had sold it to Montrey.

The record reflects a dispute in the testimony as to what then occurred.

The testimony introduced by appellee tended to show that he threatened, through employees, to retake the car, whereupon appellant prevailed upon him not to do so, promising that he would pay the note.

The testimony introduced by appellant tended to show that when appellee's representatives demanded payment for the car from him, and said that they would retake same unless he paid the note, he refused to pay the amount, and told them to repossess it, as he could get his money back from the Henderson Motor Company.

The issue of disputed fact was submitted to the jury for determination under the following instruction requested by appellee:

"If you find from the preponderance of the testimony that the defendant, Frame, promised the plaintiff, Whittam, to pay the purchase price of the automobile remaining unpaid in consideration, that plaintiff would not take the automobile from Montrey and plaintiff, by reason of such promise, refrained from taking the automobile from Montrey, your verdict will be for the plaintiff, against the defendant for the balance due on the automobile with interest."

Appellant contends that the court erred in giving the instruction quoted because the promise of appellant to pay for the car was not in writing, and the oral contract was within the statute of frauds, Crawford & Moses' Digest, 4862, which provides that no action shall be brought to charge any person upon any special promise to answer for debt, default or miscarriage of another,

unless the contract is in writing. A contract to pay the debt of another need not be in writing if supported by a new or independent consideration. Such a contract is not within, or governed by, the statute of frauds. *Zimmerman* v. *Holt,* 102 Ark. 407, 144 S. W. 222; *Brinkley Car Works & Manufacturing Co.* v. *Cook,* 110 Ark. 325, 161 S. W. 1065; *Hunt* v. *Taggett,* 160 Ark. 617, 255 S. W. 873; *Burkhart Manufacturing Co.* v. *Berry,* 162 Ark. 123, 257 S. W. 723. Under the conflicting evidence in the instant case, the jury could have found and did find that appellant promised to pay the note executed by J. R. Frame and R. R. Pearson to appellee in consideration that he would not take the automobile from Montrey, to whom he had sold it.

Appellant also contends that the court erred in giving the instruction lettered A on his own motion, because it omitted the issue of whether appellee failed to retake the car by reason of the promise of appellant to pay the debt. The instruction undertook to state what the issues were, and it failed to state the question of a new consideration. It could hardly be regarded as an instruction to the jury, as it did not declare any principle of law applicable to the facts in the case. It simply attempted to state the issues involved. The omission complained of was included in instruction No. 1, given by the court at the request of appellee, which was a correct instruction. It is apparent that the question omitted in instruction A was an inadvertent omission, and might be regarded as a clerical error which could only be reached by specific objection. No specific objection was made to it, and we are unable to see that any prejudice resulted to appellant on account of the omission. Had appellant thought so, he could have called the attention of the court to the failure to include the question, and the court would have readily included it.

No error appearing, the judgment is affirmed.

GENERAL MOTORS ACCEPTANCE CORPORATION *v.* JERRY.

Opinion delivered May 12, 1930.

[redacted]

Linwood Brickhouse and *Ben D. Brickhouse,* for appellant.

Powell, Smead & Knox, for appellee.

KIRBY, J., (after stating the facts). It is first insisted for reversal that the court erred in allowing testimony introduced tending to show that the plant installed was not fit for the service for which it was purchased, and intended to be used, and especially in permitting the hearsay testimony of the witness that an agent of the seller, long after the plant was sold appellee and installed and the contract assigned to appellant, told him in trying to sell him a like plant, "I guess the reason you don't want a plant is because Mr. Jerry has a bum outfit. * * * We let Mr. Jerry have a second-hand outfit for the price we let him have it at." The witness relating this conversation did not know the man with whom he talked, nor that he was an agent of the company which sold the light plant to appellee. Said he would not recognize him if he saw him again, and, certainly, he was not in the performance of any duty so far as the trans-

action in controversy is concerned at the time of this statement. He did say that the man was riding in a car belonging to the Electric Refrigerating Company, and was talking to him as a prospect for a sale of a light plant machine, which he had in the car at the time. He certainly had no authority to make an admission, as against the interest of said company about a sale, a transaction long since completed, out of the presence of his principal, and the testimony was nothing but hearsay at best, was inadmissible and highly prejudicial. The court erred in not excluding it. *Lovell* v. *Sneed,* 79 Ark. 204, 95 S. W. 157; *Forrester* v. *Lockett,* 149 Ark. 225, 231 S. W. 897; *Galloway* v. *Russ,* 175 Ark. 665, 300 S. W. 390.

It is undisputed that the Delco light plant was purchased under the written contract, which contained no warranty; that the machinery for its construction and operation is a well known and definite article of commerce in general use for the construction of such plants, and there was therefore no warranty as to the fitness of it for the purpose for which it was purchased implied, and the court erred in modifying the said instructions, and in failing to give the one asked, telling the jury, under the terms of the contract, there was no warranty except against defects in the machine, etc. *Western Cabinet & Fix. Mfg. Co.* v. *Davis,* 121 Ark. 370, 181 S. W. 273; *Kull* v. *Noble,* 178 Ark. 496, 10 S. W. (2d) 902; *Crow* v. *Fones Bros. Hardware Co.,* 176 Ark. 993, 4 S. W. (2d) 904.

For the errors designated, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

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

Opinion delivered May 12, 1930.

Thos. S. Buzbee and *George B. Pugh,* for appellant.

W. L. Kincannon and *Evans & Evans,* for appellee.

KIRBY, J. (After stating the facts). Appellant insists that the court erred in not directing a verdict in its favor, contending that there was no negligence shown on its part approximately contributing to the injury, or, if so, that the contributory negligence of appellee was greater in degree than its negligence, preventing a recovery in the case. The testimony was in conflict as to whether the signals were given, and the proper lookout kept by the trainmen in approaching the crossing, and, there being substantial testimony that such was not the case, the question of appellant's negligence was one for the jury. Neither do we agree with appellant's contention that the undisputed testimony shows that appellee's contributory negligence was greater in degree than the negligence of appellant, and should have been declared so by the court, and a verdict directed against him. The facts of the case bring it within the provisions of the statute, § 8575, C. & M. Digest, commonly known as the comparative negligence statute, there being substantial evidence in the record tending to show negligence on the part of appellant and its employees, as well as contributory negligence on the part of appellee. Under that statute an injured party guilty of contributory negligence cannot recover damages for an injury, unless his negligence is of a less degree than the negligence of the railroad company. The facts in this case present this issue of whether the negligence of the injured person was of a less degree than that of the railroad company, and, since it cannot be said that the undisputed testimony shows such to have been the case, it was a question properly determinable by the jury. *Jemell* v. *St. L. Sw. Railway Co.,* 178 Ark. 578, 11 S. W. (2d) 449; *Chicago, R. I. & P. Ry. Co.* v. *McKamy,* 180 Ark. 1095, 25 S. W. (2d) 5.

Appellant argues that, since appellee had time to stop his slow-moving car after passing the sign board, which obstructed his view of the oncoming train, and did not look again and discover his danger and stop the car, it should be said as a matter of law that his contributory negligence was not of less degree than that of appellant company; but he was only about twenty feet from the crossing, when he leaned out and looked down the track and did not see the train, and, not being aware that his vision was obstructed by the sign board which prevented his seeing it, and not hearing the signals he was expecting to be given, he continued driving on toward the tracks, and it cannot be said as a matter of law under the circumstances that his negligence in not stopping was not of a less degree than the negligence of the railroad company causing the accident in approaching the crossing without a proper lookout, and the giving of the statutory signals as the jury found was the case. Since no complaint is made of the amount of the recovery, which was much less than the amount sued for, it will be assumed it was diminished in proportion to the contributory negligence of the appellee.

We find no error in the record, and the judgment must be affirmed. It is so ordered.

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

Opinion delivered May 12, 1930.

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

Cunningham & Cunningham, for appellee.

MEHAFFY, J. Joe B. Cole, the appellee, was the owner of a team of mules, wagon and harness. The mules were hitched to the wagon in front of the house of Mr. Jones, but were not hitched to anything to prevent them moving. The lines were tied to the wagon standard, and the team was left standing, no one about them. Mr. Jones had hitched them to the wagon and left them standing in front of the house, and they walked off, went to the railroad crossing, and were struck by a train, and the mules were killed, the wagon and harness damaged. After Jones had tied the lines in front of the wagon and left the mules unhitched, he walked towards the railroad track, and was on the track when the mules started towards the track. The railroad crossing where the mules were killed was about 170 steps from the front door of Mr. Jones' house, in front of which the mules were left.

There is some conflict in the testimony as to whether the mules in going from Jones' house to the railroad crossing were walking fast or slow, but all of the witnesses agree that they were walking. Some of appellant's witnesses say they were walking at a good fast walk, and appellee's witnesses testify that they were walking slow. The track was straight and unobstructed for more than a quarter of a mile from the crossing where the mules were killed, in the direction from which the train came.

The engineer, King, testified that he was the engineer on a passenger train of six steel coaches and locomotive, going south towards Memphis. That he struck the team of mules a short distance west of Hoxie, was running about sixty miles an hour. He also testified that he sounded the whistle at the whistling post for the crossing, following that with the station whistle, and that the whistle was sounded all the way until they were over the crossing. He said he turned on the bell ringer and the bell was ringing. That the fireman hollered at him, and he slipped the brakes over to the emergency, and then saw the heads of the mules as he struck them. The mules came on to the track from the left side and had never been in the view of the engineer. He testified that he had been an engineer since May 12, 1905; that he was looking ahead all the time. The front of the engine and boiler obstructed his view of the mules, and when the fireman hollered at him he put the brake into emergency. They were a short distance from the crossing, probably 100 feet when the fireman gave him notice. The brake valve is right at the engineer, and he struck the brake valve back into emergency, and about that time they hit the mules.

The fireman testified that he had had experience of 11 years, and, when they approached the crossing about 700 feet away, he saw a team coming on the side of the right-of-way line. They walked on, and he saw there was no driver in the wagon. When he discovered that

there was no driver, he hollered to the engineer, and the engineer applied the brakes in full force, but they struck the mules. The fireman testified that the engineer was blowing the whistle for the crossing, that the mules were getting into the inside of the right-of-way line fence before the fireman discovered them. He did not have any sight of them while they were off the right-of-way until they reached the fence; saw the first glimpse of their heads when they were coming into the right-of-way fence. From the right-of-way line to the center of the track is 50 feet.

Ernest Jones testified that there was nothing to obstruct the view of one on a locomotive approaching the crossing in the direction the train was going, from seeing a team when it comes into the right-of-way a quarter of a mile, but he said when the train was a quarter of a mile away the mules were not there. He did not think the train whistled, but would not be positive about it.

Bessie Holder testified that she was between the house and the railroad, and saw the train strike the mules, and did not hear any alarm. She said she did not know how many times she heard the train whistle, but she heard it after it hit the mules.

Nina Jones testified that she heard the whistle north of the trestle, but not south of it.

Ruby Cole, daughter of appellee, testified that the whistle blew before the train got to the trestle, but never before it got to the crossing, and the train did not whistle any more after the first time. She admitted, however, that she signed a statement, and that she herself wrote at the bottom of the statement, "I have read this, and it is true," and in that statement she admitted that she had said she heard the whistle sounded. It was the musical sounding whistle, and she did not know how many times it sounded.

Claudia Cole, another daughter of appellee, saw the train and said it did not whistle. She had also signed

a statement and had written at the bottom of it before she signed it, "I have read this, and it is true," and in that statement she said she did not think the whistle was sounded, but could not be positive; if it sounded, she did not hear it.

The only question for our consideration is whether the evidence is legally sufficient to sustain the verdict. There was a verdict for $250 in favor of appellee. It is the established doctrine of this State, under § 8562, 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. When the evidence shows that an injury was caused by the operation of a train, the presumption is that the company operating the train is guilty of negligence, and the burden is upon such company to prove that it was not guilty of negligence. *St. L. S. W. Ry. Co.* v. *Vaughan,* 180 Ark. 559, 21 S. W. (2d) 971.

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 railway company the duty of producing some evidence to the contrary. When this is done, the inference is at an end, and the question of negligence is one for the jury upon all the evidence." *Western & A. R. R. Co.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445.

After the introduction of evidence by the railroad company, as we have already said, the inference is at an end. It cannot be considered by the jury as evidence.

In construing the Mississippi statute, the Supreme Court of the United States said: "It did not * * * fail of due process of law because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. * * * That of Georgia, as considered in this case, creates an inference

that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate. The presumption raised by § 2780 is unreasonable and arbitrary, and violates the due process clause in the 14th Amendment." *Western & A. R. R. Co.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445.

Under the construction placed upon statutes like ours, the presumption of negligence is at an end when the railroad company introduces evidence to contradict it, and the presumption cannot be considered with the other evidence, because to do this would, as stated by the Supreme Court of the United States, be unreasonable and arbitrary, and would violate the due process clause of the 14th Amendment. Therefore, in determining whether the evidence in this case is legally sufficient to support the verdict, we cannot consider the presumption created by the statute, but must determine the question from the evidence introduced. The train was running about 60 miles an hour, the engineer and fireman were both keeping a lookout. It was impossible for the engineer to see the mules as they approached the track because they were on the left hand side of the track, and the engineer on the right-hand side. The fireman, however, was keeping a look-out, and saw the mules about the time they came on to the right-of-way, but at first there was nothing to indicate that there was any danger. The mules were walking, and, according to the testimony, the whistle was being sounded. The engineer and fireman testified that it was, and the witnesses for appellee did not say that it was not, but some of them say they did not hear it, but the engineer and fireman both testified that the bell was ringing at the time, and this is not disputed by any witness. The statute does not require that both the whistle and the bell shall be sounded, but it does require that one of them must be, and the undisputed proof shows that this statute was complied with. Section 8568A, C. & M. Digest.

When the fireman saw the team, as we have said, there was nothing to indicate that there was any danger. Persons operating passenger trains are not required to stop when they see teams near the right-of-way unless there is something to indicate that they are going on to the track. They have a right to assume of course that persons driving on the highway will exercise ordinary care, and the persons operating the trains are required to exercise just such care as persons of ordinary prudence would exercise under the circumstances. Whenever persons operating a train see persons or stock near the track, and there is anything to indicate that they did not know of the approaching train or that they are in a situation of peril or danger, it is then the duty of the persons operating the train to exercise care to avoid injury.

"The statute referred to imposes upon the railroad the duty to maintain a constant lookout, and charges it with the responsibility of having seen what would have been seen, had this lookout been kept, and imposes upon the carrier the degree of care it should have exercised had the lookout been kept and the traveler's peril thereby observed; and if, by keeping this lookout, the railroad company could and would have discovered the traveler's peril in time to avert the injury, it is liable if it fails to do so, nothwithstanding the fact that the traveler's contributory negligence placed him in peril. But it does no more than this. The duty of the railroad to take precautions begins when it discovers, or should have discovered, the peril of the traveler. So here the railroad company should have kept the lookout, and is chargeable with such knowledge as it would have had, had the lookout been kept; but if the lookout had in fact been kept and appellee's presence near the track discovered, this would have imposed no duty on the railroad to stop the engine or to take other precautions until the peril of the traveler was discovered." *B., L. & A. S. R. Co.* v. *Gessell,* 158 Ark. 569, 250 S. W. 881; *Lane* v. *K. C. S. R. Co.,* 78 Ark. 236, 95 S. W. 460.

The jury could not arbitrarily disregard the testimony of the engineer and fireman. *St. L. I. M. & S. R. Co.* v. *Landers,* 67 Ark. 514, 55 S. W. 940.

"The public interest requires that trains be run on time and that railroads dispatch their business promptly." *Davis* v. *Porter,* 153 Ark. 375, 240 S. W. 1077.

In this case the evidence shows that both engineer and fireman were keeping a lookout, and that, as soon as the fireman discovered there was no driver, he notified the engineer, the engineer then did all he could to avoid striking the mules. The fact that the fireman saw the mules near the track imposed no duty on the railroad to stop the engine, or to take other precautions until the peril was discovered. Until the fireman discovered that there was no driver, he had a right to believe that the person in charge of the mules would act in response to the dictates of ordinary prudence. It appears from the evidence that there was a fence, and that the fireman did not see the mules until they passed this fence. Appellee contends that because the fireman said it was several seconds before the engineer understood him, that this was evidence of negligence, but we do not think this evidence indicates or tends to prove negligence. The trainmen did all they could after they discovered the peril, and they were not required to take any precautions until the peril was discovered, if they were keeping an efficient lookout, and the undisputed evidence shows that both the engineer and fireman were keeping a lookout. The evidence in this case is not legally sufficient to support the verdict. The judgment is therefore reversed, and the case dismissed.

BANK OF EL PASO *v.* NEAL.

Opinion delivered May 12, 1930.

[redacted]

Brundidge & Neelly and *H. A. Midyett,* for appellant.

Miller & Yingling, for appellee.

MEHAFFY, J. This action was begun by appellant in the justice of the peace court in White County, where the case was decided against it, and appeal was taken to the circuit court. A trial was had in the circuit court, where there was a verdict and judgment against appellant. This appeal is prosecuted to reverse said judgment.

The appellee contends that the appeal was not taken within six months. Section 2140 of C. & M. Digest is as follows: "An appeal or writ of error shall not be granted, except within six months next after the rendition of the judgment, order or decree sought to be reviewed, unless the party applying therefor was an infant, or of unsound mind at the time of its rendition, in which case an appeal or writ of error may be granted to such parties, or their legal representatives, within six months after the removal of their disabilities or death."

Judgment was rendered in the White Circuit Court July 15, 1929, and the appeal was granted by the clerk of this court January 16, 1930.

"It is a general rule, not only in jurisdictions where the computation of time is regulated by statute, but in other jurisdictions, where it is not so regulated, that, in computing the time given or allowed by statute or order of court for taking of an appeal or writ of error, and

all the proceedings necessary to perfect the same, there should be excluded the date of rendition of the judgment, order, or decree or other day from which the time commences to run, and that the last day, or the day on which the appeal is taken, should be included." 38 Cyc. 326. *Early & Co.* v. *Maxwell & Co.,* 103 Ark. 569, 148 S. W. 496; *Peay* v. *Pulaski County,* 103 Ark. 601, 148 S. W. 491; *Shinn* v. *Tucker,* 33 Ark. 421; *Connerly* v. *Dickinson,* 81 Ark. 258, 99 S. W. 82; *Pearce* v. *Peoples Savings Bank & Trust Co.,* 152 Ark. 581, 238 S. W. 1063; *Field* v. *Waters,* 148 Ark. 325, 229 S. W. 735; 3 C. J. 1047.

"The rule of reckoning from a given day to a day of the corresponding number is one so easily understood and applied that we do not think that we should be justified in adopting any other. The rule seems to be that of Commercial Law." *Parkhill* v. *Brighton,* 61 Iowa 103, 15 N. W. 853.

"On what day, therefore, did six calendar months from November 30, 1894, expire? Under all of the authorities, without exception, which we have been able to find, the period would expire on May 30, 1895. * * * In *Glore* v. *Hare,* 4 Neb. 132, it was held that an appeal taken on the 22nd day of August from a judgment rendered February 21st was not within six months from the rendition of the judgment. We have been cited to no authority laying down a different rule or method for the computation of time, and this seems to be in complete accord with common usage and with common understanding. This being true, we are constrained to hold that this suit was barred by the limitation imposed by the contract. It was begun one day too late. The bar was complete with the expiration of the day of May 30th." *Daly* v. *Concordia Fire Ins. Co.,* 16 Col. App. 349, 65 Pac. 416.

Applying the above rule appellant's time expired on January 15th. The appeal was not taken within six months.

"The time within which an appeal must be taken being fixed by statute, it must be taken within the time designated. The provision which limits the time is jurisdictional in its nature." *Sample* v. *Manning*, 168 Ark. 122, 269 S. W. 55.

Since the appeal in this case was not taken within six months, it must be dismissed. It is so ordered.

ARKANSAS POWER & LIGHT COMPANY *v.* TOLLIVER.

Opinion delivered May 12, 1930.

Rose, Hemingway, Cantrell & Loughborough and *Elmer Schoggen,* for appellant.

Sam T. Poe, Tom Poe and *McDonald Poe,* for appellee.

BUTLER, J. The appellee, Pearl Tolliver, was injured in a collision between a Ford sedan, in which she was driving, and a street car operated by the appellant, near Thirteenth and Rice streets in the city of Little Rock on September 2, 1927. The street car was headed west, the automobile being in front of it. It is the contention of the appellee that she was driving on the track in front of the street car, and that it ran into and struck the rear of her automobile, inflicting upon her personal injuries. The appellant contends that the appellee's sedan was parked in a place of safety on the side of the street, and, just as the street car approached, she backed her automobile suddenly and without warning toward the track, thereby bringing about the collision, which could not have been averted by the motorman.

The testimony in the case was in direct conflict. A group of workmen who were engaged in repairing the street testified that the collision occurred at about the noon hour, at which time they were on the curb near the scene of the accident, taking their noon-day meal; that at that place the street on either side of the car track was being repaired and was so obstructed that it was necessary for those traveling along it to travel partly on the tracks of the appellant company. These witnesses observed the appellee driving in a westerly direction partly on the car track. She was proceeding at a moderate rate of speed when a street car approached from her rear and traveling at a more rapid rate of speed than the appellee, rapidly lessening the distance

between them, and, without any warning being given, ran into the Ford sedan, violently knocking it from the street toward the curb and severely injuring the appellee. The motorman and a number of passengers on the street car, as well as other witnesses, testified that just before the street car reached the point of the accident the appellee's car was parked on the edge of the street, and that she suddenly and without warning backed her car on the track in front of the approaching street car, and as she did this the motorman sounded his signal and applied the brakes, but was unable to stop or check the street car in time to avoid striking appellee.

There were several witnesses, including physicians, who testified as to the appellee's injuries. The jury found the issues in favor of the appellee, and assessed her damages at $3,000. The court rendered a judgment in accordance with the verdict, from which the appellant has appealed.

The first ground of error assigned and argued in plaintiff's brief is that instruction No. 1A given for the plaintiff was erroneous and prejudicial in that it incorrectly stated the law of discovered peril. The specific vice of the instruction urged upon our attention is that the instruction told the jury that if the motorman *could have discovered* appellee's peril in time to have stopped his car and avoided the injury to the appellee, had he used ordinary care with the means at his command, and did not do so, appellant was liable, and it is argued that the court should have limited the degree of care required of the defendant's motorman to ordinary care in stopping the car after he actually discovered the plaintiff in a perilous position upon the track, and also that there was no testimony to show that the motorman failed to keep the lookout required by the exercise of ordinary care, and that therefore the instruction was abstract in this regard.

We do not think the instruction inherently wrong or prejudicial. Unlike railroads, a street railway com-

pany has no exclusive right to occupy its own tracks, but has only the preferential rights to that part actually being used at any given point of time, and every one has the right to use the entire street, including the tracks of the street railway company, whenever reasonably necessary or convenient. Therefore, we think that the operator in charge of a street car is under the duty to keep a constant lookout to avoid injuring those who may chance to be in a dangerous position by reason of its operation, and, because of the fact that the street railway uses the streets in common with others, such duty would only be the exercise of ordinary care. The principle, as stated, is not in conflict with the case of *Johnson* v. *Stewart*, 62 Ark. 164, 34 S. W. 889, for the effect of that decision was merely to hold that the duty to keep a lookout did not abrogate the doctrine of contributory negligence. Before the passage of our "lookout statute," it was not the duty of the railroad operatives to keep a constant lookout for persons upon the track for the reason that the railroads had the exclusive occupancy of their tracks, and had the right to assume that the way would be clear. This, however, has never been the rule as to street railways, for, as we have seen, they have not the right to the exclusive use of their tracks. *Bain* v. *Fort Smith L. & T. Co.*, 116 Ark. 125, 172 S. W. 843 L. R. A. 1915D, 1021; *Pankey* v. *Little Rock Ry. & Elec. Co.*, 117 Ark. 337, 174 S. W. 1170.

It is contended that incompetent testimony was admitted on the part of the appellee in permitting her to testify as to what she earned before and after the accident. The true test as to the measure of damages, as suggested by the appellant, is "what she was able to earn since the accident as compared with what she was able to earn before the accident," but the testimony admitted was competent for the purpose of tending to establish that fact. Further objection was made to the testimony of the appellee to the effect that she had no other source of livelihood than that of cleaning and

pressing. We have frequently held that where one had fitted himself for the prosecution of any profession or trade, and by reason of an injury was no longer able to follow such occupation, this might be considered, in measuring the damages sustained, as tending to show the loss of earning power.

It is also contended that the verdict is excessive. This question we need not consider as the case must be reversed and remanded for a new trial for the reasons hereinafter stated.

In the complaint, after the allegation of the injury occasioned by the street car running into the automobile of the appellee, and after the allegations as to negligence, the specific results of the negligence charged were set out in the following language: "As a result of the negligence and carelessness of the defendant, its servants and employees, complained of herein, the plaintiff received severe, painful and permanent injuries to her person, and has suffered great, severe and excruciating bodily pain and mental anguish. The injuries complained of herein consisted of a fractured rib, a contusion on the back of head, sprained and strained muscles in back and neck, and internal and outer injuries to body and limbs, which are permanent and have greatly impaired the health of plaintiff, and caused her continual and painful suffering to mind and body." A number of witnesses testified in support of these allegations, including the appellee's physician, after which Dr. E. F. Ponder was called as a witness, and, after qualifying as an expert in the diagnosis and treatment of mental and nervous disorders, was permitted to testify over the objection of the appellant as to an examination made by him, and his conclusions based thereon regarding certain injuries to the appellee's nervous system. His conclusion was that the appellee was suffering from a specific organic disease of the brain known as "Friedman's complex," and that, in his opinion, this condition was permanent. The specific objection made to

this testimony was that there was no allegation in the complaint of any nervous injury or injury to the nervous system. It will be noted that Dr. Ponder did not testify, nor is it anywhere shown, that the mental disease mentioned was a necessary or even probable result of the injuries sustained by the appellee as described to the witness. The most that can be inferred from his testimony is that the condition described by him could be caused by jars that produce a disturbance. The exact testimony of the witness on this question, after stating the information he received from the appellee as to her condition at, and subsequent to, the accident and after defining "concussion of the brain," is as follows:

"Just how much trouble will be manifested in a concussion depends on the jar, and will leave a more or less permanent condition in the brain. There are two kinds, immediate and more remote. The immediate effect of concussion in trauma is manifested by the evidence I described; and more remote—if it is sufficient to cause vasomotor—it will be manifested in symptoms such as she complained of, such as mental fatigue, inability to be as they formerly were." When asked whether in his opinion the nervous trouble of the appellee was permanent, the witness answered: "Well, that is problematical; the best way to judge the future is by the past. This has been going on for two years; we have claimants at the bureau (interrupted by the court) —that condition can be caused by jars that produce a disturbance. Yes, I believe it is permanent from the history and the present condition. It is known as Friedman's complex. It is an organic trouble, because that affects the circulation of the brain. The only difference between that and an injury that would produce paralysis is that it would have been large hemorrhages and caused paralysis—is the only difference."

The specific injuries alleged in the complaint were a fractured rib, a contusion on the back of head, sprained and strained muscles, internal and outer injuries to the

body and limbs. Any conditions which were symptomatic of the injuries alleged, and by which the existence of those injuries might be established, would be relevant and competent—such as loss of sleep, pain suffered in various parts of the body, lassitude, general debility, and many other things. But the evidence elicited tended to establish the existence of an injury independent and distinct from any of the injuries alleged in the complaint, *i. e.*, that the appellee was suffering from an organic disease of the brain known as "Friedman's Complex," and, as there is no evidence that such disease is the necessary or even probable result of any of the injuries pleaded, the testimony was therefore incompetent, and its admission was error.

The general rule as stated in 17 C. J. 1021, cited by the appellant, is as follows: "In an action for damages the pleadings and proof must correspond. The damages recovered must be warranted by the pleadings, and a defendant is entitled to know from the declarations the character of the injury for which he must answer. Evidence of damages for an injury not mentioned therein, or for which no claim for damages as alleged or for which the claim has been abandoned, cannot be admitted. So in an action for personal injury, where plaintiff describes in his petition the different parts of his body injured, it is presumed that this specification covers the whole cause of action, and that proof of an injury to a wholly different part of the body cannot be shown." This rule is supported by the weight of authority and it seems to be generally held that evidence of an injury or disease not specifically alleged is incompetent, unless such are the necessary results of injuries that are specifically pleaded. *Chesapeake & N. Ry. Co.* v. *Hammer,* (Ky.), 66 S. W. 375; *Wilkins* v. *Nassau Newspaper Del. Exp. Co.,* 98 App. Div. 130, 90 N. Y. Supp. 678; *Fort Worth, etc., Co.* v. *Rogers,* 21 Tex. Civ. App. 605, 53 S. W. 366; *Atchison, etc., Co.* v. *Willey,* 57 (Kan.) 764, 48 Pac. 25; *Howard* v. *Washington Water Power Co.,* 75

Wash. 255, 134 Pac. 927; *Lane* v. *Kansas City Rys. Co.* (Mo. App.) 228 S. W. 870; *Pugmire* v. *Oregon Short Line R. R. Co.*, 33 Utah 27, 92 Pac. 762; *Gordon* v. *Northern, etc., Co.*, 39 Montana 571, 104 N. W. 679; *Martin* v. *Pac., etc., Co.* (Cal. App.) 255 Pac. 284; *Mobile, etc., Co.* v. *Therrell,* 205 Ala. 553, 88 So. 677; *Ry. Co.* v. *State,* 59 Ark. 165, 26 S. W. 824.

As opposed to this rule, the appellee cites 17 C. J. 1013, where it is said: "As the mind and nervous system are so intimately connected with the body, and so likely to be affected by physical injuries, proof of impairments of these faculties is usually held admissible under allegations in substance of grievous or permanent physical injury. Also, evidence of nervousness is not objectionable on the ground that it is not pleaded specially, where it is offered, *not for the purpose of proving damages for an injury to the nervous system, but merely as proof of one of the manifestations of the physical injury complained of.* A general allegation of injury to the mind or nervous system is sufficient without setting out details." The appellee also cites a number of cases from Kentucky, and other respectable courts, which we have examined with care, and find they merely support the text cited by appellee, and are not in conflict with the rule first stated *supra.*

The appellee argues that, although this testimony was incompetent for the purpose of proving an independent element of damage, it was admissible under the general allegation of injury as showing the extent of the physical injury for which the appellee claimed compensation. This contention is not tenable for the reason that the specific objection was made, that the complaint did not allege any such injury as Dr. Ponder testified to, and at the conclusion of his testimony the appellant moved to exclude same for the reasons stated in its objection. For that reason, the authorities cited by the appellee are not in point.

There is no merit in appellee's contention that the appellant failed to plead surprise and meet the issue by the introduction of controverting testimony. When the appellant specifically objected to the testimony of Dr. Ponder, and afterward at the close of his testimony moved to exclude the same for the reasons stated, and these motions were overruled, the appellant saving its exceptions, it did all that it could to preserve its rights. The court should have sustained the objection and motion, and then the appellee, had she so desired, might have asked for leave to amend her complaint, which the court could have permitted, giving the appellant sufficient time to meet by answer and proof the new issue raised. *Bryant* v. *Swifton,* 85 Ark. 322, 108 S. W. 216.

For the error in the admission of the testimony of Dr. Ponder, the judgment is reversed, and the case is remanded for a new trial.

FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* RIEFF.

Opinion delivered May 19, 1930.

Horace Chamberlin, for appellant.

Carmichael & Hendricks, for appellee.

HART, C. J., (after stating the facts). No contention is made about the validity of the indebtedness of D. C. Horton, Inc., to H. F. Rieff, and no objection is made to the form of the mortgage to him. The mortgage to Reiff by D. C. Horton, Inc., was also prior in point of time to that executed on the same lots in favor of the Fidelity & Deposit Company of Maryland.

It is earnestly insisted, however, by the Fidelity & Deposit Company that the acknowledgment of the mortgage by D. C. Horton, Inc., to Rieff was not in conformity

with the statute, and for that reason the mortgage to Rieff was not entitled to record, and under our statute did not constitute a lien on the lots as against the mortgage executed to it. Section 7380 of Crawford & Moses' Digest provides that mortgages shall be acknowledged in the same manner that deeds for the conveyance of real estate are now required to be acknowledged, and, when so acknowledged, shall be recorded in the county in which the real property is situated. Section 7381 provides that every mortgage for real property shall be a lien on the mortgaged property from the time it is filed for record and not before. It is conceded that these provisions of the statute were complied with, but it is insisted that the acknowledgment was defective.

In ordinary forms of acknowledgments, this court has held that a substantial compliance with what the statute requires to be done ought affirmatively to appear from the certificate. While a literal compliance is not required and while words of similar import to those used in the statute may be employed, yet there must be a substantial compliance with the statute. Courts cannot suggest by intendment important words omitted in the certificate of acknowledgment. *Jacoway* v. *Gault, Admr.*, 20 Ark. 194; and *Little* v. *Dodge,* 32 Ark. 453.

Section 1526 of the Digest relating to the acknowledgment of mortgages by corporations reads as follows:

"All deeds, conveyances, deeds of trust, mortgages and other instruments in writing affecting or purporting to affect the title to any real estate situated in this State and executed by corporations, the form of acknowledgment shall be as follows:

" 'On this.....day of....., 19....., before me, a notary public, duly commissioned, qualified and acting, within and for said county and State, appeared in person the within named.....and....., (being the person or persons authorized by said corporation to execute such instrument, stating their respective capacities in that behalf), to me personally well known,

who stated that they were the.....and..... of the.....a corporation, and were duly authorized in their respective capacities to execute the foregoing instrument for and in the name and behalf of said corporation, and further stated and acknowledged that they had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.' "

At the outset, it may be stated that the seal of the corporation, accompanied with the signature or signatures of the appropriate officer or officers of the corporation becomes *prima facie* evidence that such officer or officers had due authority from the corporation to execute the instrument, so as to cast the burden of proof upon one who challenges its validity. 10 Cyc., page 1018. This court has recognized the rule, and has held that a deed executed by the president of a corporation and bearing its seal raises the presumption that he was authorized to execute the instrument. *Sibly* v. *England*, 90 Ark. 420, 119 S. W. 820; and *Cotton* v. *White*, 131 Ark. 275, 199 S. W. 116.

An examination of the certificate of acknowledgment of the mortgage from D. C. Horton, Inc., to H. F. Rieff made before a notary public, when read in connection with the mortgage itself, shows that the mortgage was executed by a corporation. In the body of the mortgage it is recited that the mortgagor is D. C. Horton, Inc. The mortgage is signed D. C. Horton, Inc., by D. C. Horton, president. To the left is the seal of the corporation, and under it appears the following: "Attest: E. F. Horton, secretary." It is conceded that the word "seal" indicates the seal of the corporation.

So it will be seen that the mortgage itself purports to be the act of the corporation executed by its president and attested by its secretary with the corporate seal affixed. No effort was made to show that the president was not authorized to execute the mortgage, and it was not necessary that the mortgage should recite the vote

of the corporation that the president was authorized to execute the mortgage. This was not essential to the validity of the mortgage, and the statute did not require it to be done. The acknowledgment recites that D. C. Horton, president, and E. F. Horton, secretary, of D. C. Horton, Inc., well known to the notary as the grantors in the body of the deed, appeared and stated that they had executed the same for the consideration and purposes therein mentioned and set forth. In the absence of proof to the contrary, the recitals of the certificate of acknowledgment, taken in connection with the recitals in the mortgage itself, show that it was executed by a corporation, and that the president and secretary acted for the corporation affixing the corporate seal, and acknowledging that they had done so as officers of the corporation. This was equivalent to a recital that they were duly authorized in their respective capacities to execute the mortgage for the corporation, and that they were the persons authorized by the corporation to execute it.

As we have already seen, all that has ever been required with reference to the ordinary acknowledgment of a deed or mortgage is a substantial compliance with the statute. While the certifying officer does not declare in express terms that the president and secretary were authorized to execute the instrument, still that was the effect of the acknowledgment when read in connection with the recitals of the mortgage itself. The mortgage purports to be the act of the corporation executed by D. C. Horton, president and attested by E. F. Horton, secretary, with the corporate seal affixed. It is recited in the acknowledgment that these persons were known to the certifying officer as the president and secretary of the corporation, and this is a substantial compliance with the statute, and was sufficient to admit the mortgage to be filed for record. It constituted a prior and paramount lien to the mortgage given by the same corporation at a later date to the appellant. As we have already seen, the authority of the president and secretary to exe-

cute the mortgage will be assumed under the doctrine of our own cases above cited; and the affixing by the secretary of the corporate seal determines the sufficiency of the acknowledgment as to the corporate intent. Authorities on both sides of the question may be found in case notes to 29 A. L. R. at page 989 and 108 A. S. R. at page 573.

Therefore the decree will be affirmed.

[redacted]

USREY *v.* YARNELL.

Opinion delivered May 19, 1930.

[redacted]

Cooley & Adams, for appellant.

Miller & Yingling, for appellee.

SMITH, J. This appeal is prosecuted from a judgment of the circuit court sustaining a demurrer to that portion of appellant's complaint which made J. Pitts Yarnell, as sheriff of White County, a party defendant. The suit was against both Yarnell, as sheriff, and H. P. Pollett, and the complaint alleged the following facts as constituting a cause of action. Pollett, while specially deputized and acting as the agent and deputy of Yarnell, as sheriff of White County, and while armed with process for the arrest of prisoners who had escaped from White County, was en route, by the shortest and most direct route, to Leachville, Mississippi County, where said escaped prisoners were supposed to be, for the purpose of arresting them, and, while so engaged, he negligently ran

his automobile into that of the plaintiff. Judgment was prayed to compensate the damages resulting from the collision.

The statute (§ 9152, C. & M. Digest) provides that "Each sheriff may appoint one or more deputies, for whose official conduct he shall be responsible," and in the case of *Edgin* v. *Talley,* 169 Ark. 667, 276 S. W. 591, we said: "The general rule is that for all civil purposes the acts of a deputy sheriff or constable are those of his principal. Hence, a sheriff or constable is liable for the act, default, tort, or other misconduct done or committed by his deputy *colore officii.*"

The question for decision is, therefore, whether the negligence of Pollett, in colliding with plaintiff's car, under the circumstances alleged, was done *colore officii,* or was official conduct for the consequences of which his chief should be held liable.

There is here no relation of master and servant, and the complaint alleges only that Pollett was traveling to a place where, upon his arrival, he was to perform an official act, that is, arrest prisoners who had escaped. He was not acting under color of his office while driving his automobile, and he was not engaged in any official conduct at the time he collided with plaintiff's automobile. He was driving at his own volition to a place where, upon his arrival, he expected to perform an official act, but the collision occurred before his arrival there.

The note to the annotated case of *Alabama* v. *Kolb,* 1 A. L. R. 218, 218 Ala. 439, 78 So. 817, contains an extended review of cases dealing with the liability of officers for the acts of deputies and assistants; but we do not review any of these cases for the reason that, in our opinion, there is no allegation in the complaint that Pollett was acting officially, or by virtue of his deputyship, when he collided with the plaintiff's car. Therefore no cause of action was alleged against Yarnell, as sheriff, and the demurrer was properly sustained as to him. The judgment is therefore affirmed.

HOLTON *v.* COOK.

Opinion delivered May 19, 1930.

[redacted]

McAdoo, Neblett, O'Connor & Cladgett and *J. A. Tellier,* for appellant.

Donham & Fulk, for appellee.

MEHAFFY, J. This suit was begun by appellant against appellee to collect $900 balance due on a contract alleged to have been made for tuition and board of appellee's minor daughter for the school year 1927-1928. The appellee lives at Malvern, Arkansas, and his sixteen-year-old daughter was attending school in Little Rock, and, while attending school in Little Rock, she wrote to a number of schools for catalogues. After receiving a number of catalogues, she decided she wanted to attend the Holton-Arms School, and she so informed her parents, and they agreed that she might attend this school. She took the catalogue home, but her father never examined it, and neither the girl nor her parents had ever noticed what is called "the agreement" in the catalogue. The catalogue contained the following: "The school reserves the privilege of asking pupils to withdraw for infraction of the honor rules of student government. Pupils are entered for the entire year, and no reduction is made for either absence or withdrawal. Tuition is payable half yearly in advance on the opening day of school and on the first day of February." In addition to this, the daughter signed an application which contained a number of blanks to be filled, and, among other things in the application, it was

stated that the price varied from $1,400 to $1,800, according to the size and location of the room, and the daughter selected a room, the price of which was $1,800. This catalogue received by the daughter was for 1926-1927, and she attended the Holton-Arms School that year, and, before leaving in June, 1927, she notified the plaintiff verbally that she was coming back for the school year 1927-1928. No contract was signed, and no additional catalogue furnished at that time. She went back to school in the fall of 1927, and remained at the school until December 14, 1927, when she went home. On December 31, 1927, Mrs. Holton received the following telegram from Mrs. Cook: "Regret that Verna is not returning to school. Letter following." She also received the following letter, written January 4: "I regret very much to say that Verna will be unable to return to school. I have been considering the matter; therefore I delayed writing you."

The evidence tends to show that she did not go back to school because she became wholly incapacitated from pursuing her studies at the school by reason of defective eyesight, and for that reason alone did not return to school at the close of the Christmas vacation of 1927. It is unnecessary to set out the evidence in full. The court found in favor of the defendant.

The only question for our consideration is, whether the fact that the appellee's daughter becoming incapacitated relieved him from liability for tuition and board for the balance of the year.

It is earnestly contended by the appellant that the facts show that the parties entered into an entire and indivisible contract, and that the appellee is liable for the board and tuition for the entire year whether the absence or withdrawal of appellee's daughter was voluntary, or whether it was caused by illness or incapacity to pursue her studies. There is some conflict in the authorities, and appellant calls attention to a number of authorities relied on to sustain her contention.

The first authority to which attention is called by appellant, and which is relied on, is a statement of the law in 24 R. C. L. p. 630. It is stated in that paragraph: "A parent is bound by a provision in a school catalogue that pupils may be entered only for the entire year, and that no money will be refunded if the pupil is withdrawn or expelled, if such provision was known to him when he entered his child. In such case the contract is entire. The fact that a pupil is incapacitated by illness does not relieve the parent from liability for tuition during that time." It will be observed, however, that this statement of the law is based on the fact that the provision was known to the parent when he entered his child. The section quoted from and relied upon by appellant contains the following, after the statement quoted by appellant: "It has been held that there can be no recovery of tuition if the pupil is prevented by illness from attending school at all. This is on the ground that the parties must have acted on the assumption of the continued ability of the promisee to give, and the promisor to receive the proposed instruction." There is cited under this section, *Stewart* v. *Loring,* 5 Allen (Mass.) 306, 81 Am. Dec. 747. The court in that case said: "But if we may suppose the real purpose of the writing to have been to insure the plaintiff in advance that his school should be patronized, and that the defendant would be a pupil, then the answer, as it seems to us, might be reasonably made that the party, without any fault of his own, was from subsequent ill health rendered physically incapable of attending the gymnasium as a pupil. The parties must have acted upon the assumption of the continued ability of the promisee to give, and the promisor to receive, the proposed instruction."

The next case to which attention is called by appellant, is *Hall* v. *Mount Ida School for Girls,* 258 Mass. 464, 155 N. E. 418. The school was a school for girls, and appellant's granddaughter was discharged because she secretly married while attending school. One difference

between that case and the instant case, is that in the Hall case the pupil was expelled because of her misconduct; in the instant case the withdrawal was because of incapacity of the pupil. In the Hall case it was agreed: "That contracts for board, lodging and instruction at a private school for a specified time have always been held to be entire contracts and not divisible; and as a practical consequence further agree that the plaintiff is entitled to recover in the action $900 or nothing." The question involved in that case was very different from the question we have here.

The next case relied upon by appellant, is *Pierce* v. *Peacock Military College* (Tex.) 220 S. W. 191. The contract made in the Peacock case expressly referred to the catalogue, and made it a part of the contract. The applicant, Mrs. Pierce, stated in her letter that she had examined the catalogue, and accepted the rules and regulations as published both in the catalogue and the literature of the college. This case does not discuss the question which is before us. That was a written contract and a voluntary withdrawal of the pupil, and not a question of incapacity of the pupil to receive instruction.

The next authority referred to, is Sedgwick on Damages, which cites the *International Text Book Co.* v. *Martin,* 92 Neb. 430, 138 N. W. 582. The opinion in the International Text Book Company case quotes from Sedgwick on Damages as follows: "In some cases the plaintiff may recover the whole contract price. A common case is that of a school master. If a scholar is removed from the school during the year, the school master may recover the tuition fee for the whole quarter." The case does not discuss the question involved here, and in fact does not state the facts in that case but refers to the same case in 82 Neb. 403, 117 N. W. 994. The facts in that case as stated by the court in 117 N. W., shows that a contract was entered into, and that the defendant notified the plaintiff that he did not intend to perform the contract. This was a voluntary withdrawal or breach

of the contract, and there was no question of illness or incapacity or other excuse for not performing the contract.

The next case to which attention is called by appellant, is *Vidor* v. *Peacock* (Tex.) 145 S. W. 672. It was held in that case: "That Vidor agreed to the catalogue provision on the subject, which was that money advanced on account is never refunded except in cases of severe illness whereby a pupil withdraws from school by the advice of a San Antonio doctor and then the loss is shared equally by the parent and the school. No rebate under any circumstances is allowed for withdrawals during the last month of the school year. Pupils entered are obligated to remain to the end of the year. The court held that this was defendant's contract, and that he was obligated to pay for the whole year, except, and as a condition precedent to the exception, the boy withdrew on account of severe illness and then upon the advice of a San Antonio physician." The parties had a right to contract as to the manner in which the illness would be determined, and they did contract that it should be determined by a San Antonio physician, and this contract was violated, and the court held that a recovery could be had.

The case of *William* v. *Stein,* 100 Misc. Rep. 677, 166 N. Y. S. 836, relied on by defendant, merely holds that under the contract in that case the school was entitled to recover. In that case, however, the application for admission expressly stated that it was made for the school year, according to the terms, rules and regulations in the catalogue, to all of which the applicant agreed. In the catalogue special attention was drawn to the notice that pupils were entered for the entire year, and that no reduction would be made for absence or withdrawal, except in cases of protracted illness. In that case the pupil voluntarily withdrew, and there was no question of illness involved.

The next case relied upon by appellant is *Kentucky Military Institute* v. *Cohen,* 131 Ark. 121, 198 S. W. 874, L. R. A. 1918B, 709, but that does not discuss the question involved here. There was no question of illness or incapacity, but was simply a question of breach of contract on the part of the school, and withdrawal of the pupil because of said breach.

There are one or two other cases referred to by appellant, but the cases involving simply a breach of contract, or voluntary withdrawal or expulsion, have no application here. The question here is, whether the incapacity of the pupil to receive instruction discharges the parent from liability.

"In all contracts in which the performance depended on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance. In none of the cases are the terms in words other than positive, nor is there any express stipulation that the destruction of the person, or thing, shall excuse the performance, but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel." 6 R. C. L. 1005.

Contracts to perform personal acts are considered as made on the implied condition that the party shall be alive, and shall be capable of performing the contract, so that death or disability will operate as a discharge when a contract is made like the one involved here. The parties must have acted on the assumption of continued ability for the school to give, and the pupil to receive instruction. This is implied in contracts of this character, unless this implied condition is plainly negatived by the contract itself. See *Arlington Hotel Co.* v. *Rector,* 124 Ark. 90, 186 S. W. 622; 24 R. C. L. 630; 6 R. C. L. 1012. In other words, the parties to the contract necessarily understand that it is on condition that the pupil shall be able to receive instruction, and that the school

shall be able to give it, and either death or disability which renders the performance impossible discharges the contract. Contracts of this character must be construed as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible without fault of the contractor. In contracts of this character there is an implied exception in case of incapacity to receive instruction.

We do not mean to say that parties could not contract so that there would be no condition implied, but in this case they have not done so. If for any reason, not the fault of appellant, the school had been destroyed, or it became impossible to give the instruction, this would excuse the appellant from complying with the contract. If a pupil without fault becomes incapacitated from receiving instruction, the parent is excused from performing the contract. The evidence in this case shows, and the trial court found, that the physical disability of defendant's daughter to further pursue her studies or to attend appellant's school rendered the performance of the contract impossible, and absolved appellee from all liability thereunder.

In the instant case, appellee's attention was never called to the provision in the contract, but Mrs. Cook testifies that when she wrote to appellant, and when she took her daughter to Washington, the appellant did not mention anything about the tuition to her, did not mention anything about the time she should leave her daughter, or about any contract. When she got ready to leave, she mentioned tuition to appellant, and appellant said there was no hurry about it, and she would send bill later. In the cases relied upon by appellant, the written contract itself in most of them called attention especially to provision in the catalogue, and made it part of the contract, and in other cases relied on there was no question of the incapacity of either party, and where it is shown that a pupil has withdrawn because of incapacity to pursue her studies, and there is nothing in the contract to the con-

trary, it will be implied that the total incapacity of either party excuses the performance. Finding no error, the judgment of the Pulaski Circuit Court is affirmed.

Justices SMITH, HUMPHREYS and BUTLER dissent.

REEDER *v.* STATE.

Opinion delivered May 19, 1930.

Pryor, Miles & Pryor, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

MEHAFFY, J. The grand jury of Sebastian County returned four indictments against appellant, charging him with, (1), unlawfully and feloniously setting up a distillery for the purpose of manufacturing distilled spirits for beverage purposes; (2), keeping in his possession a still; (3), making mash; and (4), manufacturing and being interested in the manufacture of liquor. Each of the indictments contained all the necessary allegations required by statute to charge the crime mentioned. The indictments also charged Earnest Reeder, son of appellant, with the same offenses. Appellant entered a plea of not guilty in each case, the cases were consolidated by

agreement, a trial was had resulting in a conviction in each case. The punishment was fixed at imprisonment in the penitentiary for one year in each case, the sentences to run concurrently. This appeal is prosecuted to reverse the judgments of conviction.

Appellant contends that the evidence was not sufficient to justify the jury in finding him guilty. He admits, however, that the evidence of two witnesses introduced by the State connected appellant with the crimes charged, but he argues that their testimony is highly unsatisfactory, unreasonable and contradictory. These were questions, however, for the jury, and not for this court. The credibility of the witnesses, and the weight to be given their testimony, are for the jury, and there was substantial evidence to support the verdict. If the jury believed the two witnesses whose testimony connected the appellant with the crimes charged, they were justified in finding him guilty. Appellant earnestly insists that his motion for a new trial should have been granted on the ground of newly discovered evidence, and that the case should be reversed because the trial court refused to grant his motion on this ground. Mr. Houck and Mrs. Finley both testified, in substance, that the appellant who lived about one-half a mile from Houck's home, rented a stone potato house from Houck in which the still, equipment, etc., was found. The potato house was about sixty yards from Houck's dwelling house, and fifty or sixty yards from the hog pen. That appellant agreed to pay the rent of $10 a month in groceries, and that he did deliver the groceries. That appellant put two hogs in the pen on Houck's place, and that he brought feed for the hogs each day. After the time when witnesses say appellant rented the potato house, it was kept locked. Appellant denies renting the potato house, but admits that he put his son's hogs in the pen and fed them, and admits that he delivered groceries to Houck, but says the groceries were delivered for his son Earnest Reeder. In appellant's motion for new trial, he says that he dis-

covered after the trial that his son, Earnest Reeder, who was at that time confined in the county jail at Muskogee, Oklahoma, had stated in an affidavit that appellant had nothing to do, and knew nothing about the still and equipment for which he was convicted; that the still and equipment belonged to J. H. Houck and Earnest Reeder; that he had talked with his son about the case, and asked his son if he knew anything about the facts, and his son refused before the trial to disclose the facts which were in his knowledge; that appellant knew of no other witness by which he could establish his innocence; that these facts were only obtained from the son after his conviction; that he used all diligence in preparing his defense; that he did not know his son would testify to any of these facts until after his conviction, and that, if a new trial is granted, he will have his son present to testify. The affidavit of his son, Earnest Reeder, was attached to his motion for new trial.

Evidence to be newly discovered must be found out since the trial, and it must appear that it could not have been known at the time of the trial by the exercise of reasonable diligence. *Johnson* v. *Johnson,* 169 Ark. 1151, 277 S. W. 535. Appellant in this case knew that his son was charged jointly with him. He knew that his son knew all the facts about the hogs, the feed and the delivery of the groceries, and he knew his son was an important witness to establish the facts about whose hogs were in the pen, and who sent the groceries to Houck, if appellant delivered them for his son as he testified. Appellant cites and relies on *Huckabee* v. *State,* 174 Ark. 859, 296 S. W. 716. The facts in this case do not bring it within the rule announced in that case. The court in that case, however, said: "And it is also true that this court has held in numerous cases that a motion for a new trial for newly discovered evidence should show diligence in getting such evidence on the trial of the case, and must ordinarily show an excuse why such evidence was not produced at the trial." It is within the discre-

tion of the trial court to grant a new trial or not. *Carter* v. *State,* 174 Ark. 871, 298 S. W. 7; *Jewel Coal Mining Company* v. *Whitner,* 170 Ark. 393, 279 S. W. 1031; *Houston* v. *State,* 130 Ark. 591, 197 S. W. 576; *Brown* v. *State,* 143 Ark. 523, 222 S. W. 377.

In criminal, as in civil cases, the grant or refusal of a new trial is generally said to rest in the sound discretion of the trial court, and the appellate court has no right to review the exercise of such discretion, unless it appears that it has been abused to the prejudice of the defendant. 16 C. J. 1119.

Of course, this discretion is founded on established legal principles, and is to be exercised for the promotion of justice and the protection of the innocent. We do not think the trial court abused its discretion in refusing to grant a new trial in this case, and the judgment is therefore affirmed.

STEVENS *v.* ADAMS.

Opinion delivered May 19, 1930.

Northcutt & Northcutt, for appellant.

McHANEY, J. Appellant, the town marshal of the town of Calico Rock, was sued by appellee for damages for personal injuries received by him as the result of a shot fired by appellant at the car in which appellee and others were driving in said town. Appellant attempted to stop the car and arrest appellee and the others for a misdemeanor committed in his presence and hearing, that of disturbing the peace, and for publicly using vile and profane language. When the parties in the car did not stop

on his order, appellant fired two shots at the tires of the car. One of the bullets struck appellee in the back of the head, inflicting a severe and painful injury. He did not shoot at either of the parties in the car, and did not intend to hit any one. The case was tried to a jury, resulting in a verdict and judgment against appellant for $150.

For a reversal appellant argues that the court erred in giving, and in refusing to give, certain instructions. Three of the instructions given were peremptory in effect, as they told the jury that, if they found appellant fired the shot that struck appellee, they should return a verdict in his favor for some amount. Since we are of the opinion that the court should have instructed a verdict for appellee, the amount of damages to be determined by the jury, on the undisputed evidence, no prejudice could have resulted to appellant by the giving or refusing to give, the instructions complained of.

In the recent case of *Edgin* v. *Talley,* 169 Ark. 662, 276 S. W. 591, 42 A. L. R. 1194, this court reaffirmed the rule of law regarding the force an officer may use in making arrests, and preventing escapes after arrest in misdemeanor cases, as stated by the court in the earlier case of *Thomas* v. *Kinkead,* 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68. In the latter case, Judge MANSFIELD, speaking for the court, said: "In making the arrest or preventing the escape, the officer may exert such physical force as is necessary on the one hand to effect the arrest by overcoming the resistance he encounters, or on the other to subdue the efforts of the prisoner to escape; but he cannot in either case take the life of the accused, or even inflict upon him a great bodily harm, except to save his own life or to prevent a like harm to himself."

The same principle applies here. Appellant had no right to kill the appellee, or to inflict a great bodily injury upon him, in order to effect his arrest for a misdemeanor, and it can make no difference, in a civil action, that appellant did not fire the shot at appellee or intend

to hit him. It is not disputed that one of the shots fired at the tires struck appellee, and it must have been the result of negligence or carelessness, since the specific injury was not intended.

A correct instruction was given on the measure of damages, and again repeated in another instruction. Complaint is made of this repetition, but no specific objection was made thereto on this account.

The court correctly refused to give the instructions requested by appellant, about which complaint is now made. It is argued that certain language used in *Edgin* v. *Talley, supra,* supports him. But not so. The language relied upon refers to the suit of Edgin, which was affirmed because he received no injury, but it was reversed as to Goldia Floyd, who was riding in the car with him, and who was injured by the shot fired by the constable.

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

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* BIGGS.

Opinion delivered May 26, 1930.

Joseph R. Brown and *James B. McDonough,* for appellant.

Roy Gean, for appellee.

HART, C. J. Appellant prosecutes this appeal to reverse a judgment against it in favor of appellee for injuries to person and property, alleged to have been caused by one of appellant's trains negligently running into her automobile at a railroad crossing in the city of Fort Smith.

According to the evidence adduced in favor of appellee, she had just purchased a new Ford sedan, and was driving in it with her husband across the railroad tracks of appellant sometime after dark in the latter part of January, 1929, when one of appellant's trains negligently ran into her automobile and severely injured her and badly damaged her automobile. Appellee was sitting by the side of her husband who was driving the car at the time the accident occurred. The automobile was going west; and, as they were going across the railroad crossing, something dark struck the automobile and turned it around. The train went on by the crossing and then stopped. There was no headlight burning on the engine of the train, and there were no lights in the coaches of the train. The bell was not sounded nor was the whistle blown for the crossing. The headlights were burning on the automobile at the time of the accident. There was no light ahead of the automobile which looked like that of a train or automobile. The train ran about a block after it had run across the crossing before it was stopped. The crossing where the accident occurred was about four blocks from the railroad station.

According to the evidence adduced in favor of the appellant, the operatives of the train began to ring the bell after the train left the station, and it was kept ringing by an automatic ringer until after the accident occurred. The statutory whistle was also blown for the

crossing. The engineer and fireman were both keeping a lookout. The engine had a standard headlight, and there were lights in the coaches at the time the accident occurred. The engineer and fireman were at their usual places on the engine, and both were keeping a lookout. The engineer did not see the automobile until it came right out in front of the engine on his side of the train. No automobile appeared in range of the headlight of the engine when it was a block or a half a block away from the crossing. The headlight was burning at the time the engine approached the crossing, and there was nothing wrong with it. Other witnesses for the appellant testified that the headlight of the engine was burning, and that there were lights in the coaches at the time the train approached the crossing. They also testified that the bell was ringing, and that the whistle was blown for the crossing. The track was straight from the crossing in the direction from which the train was approaching.

It is first earnestly insisted by counsel for appellant that the evidence is not legally sufficient to warrant the verdict. They contend that, inasmuch as the track was straight, and as both the engineer and fireman testified that the headlight was burning and that the statutory signals were given, appellee should be held, as a matter of law, to have seen the approaching train. It cannot be said, however, that the evidence in favor of appellant on this point is uncontradicted. According to the evidence for appellee, the statutory signals for the crossing were not given. The witnesses for appellee testified that they were listening for such signals as the automobile approached the crossing, and that none were given. They testified that they would have heard the bell ringing or the whistle blowing if such had been the case. They also testified that they were looking in the direction from which the train approached, and that there was no light in the headlight of the engine. They testified that the train approached silently, and that they did not see it until the engine struck the automobile of appellee. This was tes-

timony of a substantive nature, and this court has uniformly held that where the trial court has overruled a motion for a new trial based upon the legal insufficiency of the evidence and there is any substantial evidence to support the verdict of the jury, it will not be disturbed upon appeal. The duty rests upon the trial court to grant a new trial if it is of the opinion that the verdict is contrary to the weight of the evidence. This court has no such power. *St. L. S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768.

This case was brought under what is commonly called our look-out statute, and the instructions given by the court were predicated upon our decisions construing that statute. We do not mean to say that we approved the instructions as to form; but in substance they conform to the rules of law laid down in the following cases: *Ft. Smith & Western Ry. Co.* v. *Messek,* 96 Ark. 243, 131 S. W. 686; *Louisiana & Arkansas Ry. Co.* v. *Woodson,* 127 Ark. 323, 192 S. W. 174; *Mo. Pac. Rd. Co.* v. *Mitchell,* 170 Ark. 689, 280 S. W. 627; *Dickerson* v. *St. Louis-San Francisco Ry. Co.,* 177 Ark. 136, 5 S. W. (2d) 943.

The rule laid down in *Jemell* v. *St. Louis S. W. Ry. Co.,* 178 Ark. 578, 11 S. W. (2d) 449, to the effect that a driver of an automobile is guilty of negligence as a matter of law in driving upon a public crossing without looking when he could have seen an approaching train if he had looked for it, is not applicable under the evidence adduced by the appellee in the present case. The accident there occurred in the daytime; and, according to the testimony of the plaintiff himself, he could have seen the approaching train if he had looked. In the case at bar, the witness for appellee testified that they did look for an approaching train, and neither saw nor heard one. The accident occurred in the night, and they testified that the headlight of the engine was not burning, and there were no lights in the coaches of the train which would indicate that a train was approaching the crossing.

It is next contended that the court erred in allowing the husband of appellee to testify in her behalf as to the facts relative to the accident. He was permitted to testify that the headlight on the automobile was burning, and that the headlight on the engine was not burning at the time of the accident. He also testified that there were no lights in the coaches, and that the statutory warnings for the crossing were not given. The husband was driving the car at the time the accident occurred, and his testimony was admitted on the theory of his agency in the transaction. According to the third subdivision of § 4146 of the Digest, husband and wife may not testify for or against each other, except that either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent. This court has frequently said that the design of the statute was to enable the husband or wife who had transacted business with some third party, through the other as agent, to prove such business by the agent who transacted it, the principal not having first knowledge thereof. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; *Miles* v. *St. L. I. M. & So. Ry. Co.,* 90 Ark. 485, 119 S. W. 837, and cases cited; and *Miller* v. *Hammock,* 97 Ark. 11, 132 S. W. 1000.

In *Mississippi River, Hamburg & Western Ry. Co.* v. *Ford,* 71 Ark. 192, 71 S. W. 947, in applying the rule, the court held that the fact that a husband had authority to treat with a railroad company as to the terms upon which the right-of-way might be secured through his wife's land, did not qualify him, after a failure to agree upon such terms, to testify as her agent as to the damages she sustained by reason of the construction of the railway through her land.

Again, in *St. L. I. M. & Sou. Ry. Co.* v. *Courtney,* 77 Ark. 431, 92 S. W. 251, the court said that the statute under consideration is violated by permitting the husband to testify as to the value of the wife's stock in a suit by her against a railroad company for stock killed by the

train. The court said that the testimony of the husband in such a case was not testimony in reference to any business transaction done by him as her agent, and was not therefore competent testimony.

The result of the holding in all these cases and other decisions of this court is that the husband is only allowed to testify for the wife in regard to business transactions by him with third persons for her in the capacity of agent. To illustrate, in the present case, the husband was driving the automobile of his wife, and his testimony as to the manner in which the accident occurred did not involve any transaction by him with the railroad company in which he acted as agent for his wife. On the other hand, if, after the accident had happened, his wife had authorized him to settle the damages sustained by her, he might have testified as to any agreement which he had reached with the proper agents of the railroad company, since this would have been the transaction of business by him with the railroad company in the capacity of agent for his wife.

This is not a case where part of the testimony might have been admitted and part of it was not competent. In such cases, the objection must relate solely to the testimony which was incompetent. Here a proper objection was made to the competency of the witness. The testimony was all relevant to the matter under consideration, and all would have been competent testimony if it had been given by a competent witness. The court erred, however, in holding that the husband was a competent witness for his wife under the provisions of the statute above referred to. *Mosley* v. *Mohawk Lbr. Co.,* 122 Ark. 227, 183 S. W. 187.

It is next insisted that the court erred in giving instruction No. 7, which reads as follows:

"If you find for the plaintiff you will fix the amount of her recovery at whatever sum you find from the testimony will fairly and reasonably compensate her for damages to her automobile, if any, and suffering endured by

her, if any, all of which must appear from the proof in the case."

It is contended that the instruction is too indefinite and uncertain to furnish a correct guide to the jury as to the measure of damages to appellee for injury to her automobile. In this connection, we also think counsel is correct. The instruction is inherently wrong in that it fails to furnish to the jury any certain guide in fixing appellee's compensation for the automobile except what it might believe from the evidence would be fair and reasonable. The jury would thus be left to their own individual ideas as to how much was a reasonable compensation. The measure of damages was the difference between the market value of the property immediately before the injury, and its market value immediately after the injury. *Southern Ry. in Kentucky* v. *Kentucky Grocery Co.*, 166 Ky. 94, 178 S. W. 1162; *General Fire Extinguisher Co.* v. *Beal-Doyle Dry Goods Co.*, 110 Ark. 49, 160 S. W. 889, Ann. Cas. 1915D, 791.

For the errors in giving instruction No. 7 and in allowing the husband of appellee to testify, as indicated in the opinion, the judgment must be reversed, and the cause will be remanded for a new trial.

Justices SMITH and HUMPHREYS concur.

NATIONAL UNION FIRE INSURANCE COMPANY *v.* WANT.

Opinion delivered May 26, 1930.

McCormick & Graves, for appellant.

D. F. Taylor, Jr., D. F. Taylor, Sr., James G. Coston and *J. T. Coston,* for appellee.

SMITH, J. On March 8, 1926, the appellant fire insurance company, hereinafter referred to as the company, issued to appellee a policy of fire insurance in the sum of $3,000, for a period of three years, covering his residence and household goods. The policy was issued in consideration of a premium of $131.25, of which $43.75 was paid in cash and the balance evidenced by "an installment note of $87.50, due and payable as follows: $43.75 on the 1st days of March, 1927-1928." The policy was introduced in evidence, but the note was not, and it does not appear of record whether the note bore interest, and, if so, at what rate. The policy contained the following provision:

"PAYMENT OF NOTES OR INSTALLMENT FOR PREMIUM.

"It is understood and expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any installment of the installment note given for premium upon the policy remains past due and unpaid or while any single payment, promissory note (acknowledged as cash or otherwise), given for the whole or any portion of the premium remains past due and unpaid."

The premium installment due March 1, 1927, was paid by a check for $46.33, which included the annual installment of $43.75 and $2.58, the interest thereon for one year.

The company sent the insured a notice on February 1, 1928, calling attention to the fact that the third and

final annual premium would become due March 1, 1928. This notice contained the following language:

"This note, by its terms and conditions, is due and payable at the Southwest Service Office of this company in Memphis, Tenn. Please remit by postal money order or bank draft payable to the order of the company."

The insured did not remit as directed, but on March 2, 1928, handed to D. A. Fisher, Incorporated, of Memphis, Tenn., the agent of the insurance company in that city, his personal check, on the Bank of Tyronza, for $43.75. This check was indorsed by the agent and sent to the home office of the company in Pittsburgh, Pennsylvania, and, on March 8, 1928, the home office wrote to insured the following letter:

"We have received your check in the amount of $43.75, paying your installment on policy No. 5159. However we note that you have overlooked the $5.25 interest, and we ask that you allow this amount to come forward by return mail."

At the time the check was delivered to the Memphis office of the insurance company the insured had to his credit in the Bank of Tyronza a sum sufficient to pay the check, and if it had been deposited that day or within the next few days thereafter by the Memphis office for collection, instead of being sent to Pittsburgh, Pennsylvania, it would, in due course, have been presented to the Tyronza bank while the insured had on deposit sufficient funds to pay it, and it would have been paid. The ledger sheet of the insured's account at the Bank of Tyronza for the month of March and a part of April was introduced in evidence, and it appeared therefrom that the account fluctuated, there being days when the account exceeded the check and other days when it did not.

The insurance company deposited the check with its bank in Pittsburgh on March 9, and in due course it was presented to the Bank of Tyronza for payment, but payment was refused for want of sufficient funds.

On March 21 the company wrote and mailed from Pittsburgh the following letter:

"Your check in the amount of $43.75 payable to D. A. Fisher, and in turn indorsed to us, has been returned by the bank marked 'not sufficient funds.' In order to reinstate your policy, it will be necessary for you to forward to us cashier's check or a post office money order in the amount of $43.75. We attach an envelope for your convenience."

On March 24 the insured answered this letter as follows:

"In regard to your letter of March 21, 1928, which I have in hand, would like to say that the check that was tendered to D. A. Fisher, Inc., was perfectly good, and that it was returned for reasons unknown to me. I wish that you would kindly present same again for payment, and I am sure that it will be honored upon presentation. I also have your letter of March 8, 1928, in regard to interest on my note. This is covered by the enclosed check."

Upon receipt of this letter last quoted the check for $43.75 and the one for $5.25 were deposited in Pittsburgh, and the larger check was again returned unpaid by the bank upon which it was drawn on account of insufficient funds, while the smaller check was paid.

The insured property was destroyed by a fire on April 18, 1928, and the insured immediately demanded payment from the insurance company. Without offering to return the check which had been twice dishonored or the $5.25 check which had been collected, the insurance company, on June 11, 1928, wrote the insured the following letter:

"We are interested to know if you have been successful in establishing the fact that an error was made by the bank or the National Union Fire Insurance Company in not clearing your check which was given for the installment premium. We have not heard from you in sometime, and, if we can assist you in any way, please call on us."

Upon this testimony there was a verdict by a jury and a judgment for the face of the policy, with interest, penalty, costs and attorney's fees, from which is this appeal.

The provision of the policy suspending liability thereunder, set out above, while the premium remained unpaid, is valid and must be given effect. Such provisions have been upheld by this court in a number of cases, three of which are very recent. *Yarnell* v. *Mechanics' Ins. Co.,* 178 Ark. 1106, 13 S. W. (2) 303; *American Ins. Co.* v. *Austin,* 178 Ark. 566, 11 S. W. (2d) 475.

It is insisted, however, that the premium has been paid, and that, if there was a forfeiture, there has also been a waiver thereof. Appellee insists that the check for $43.75 was accepted by the insurance company in payment of the premium, and not merely for collection, and that such is the effect of the letter set out above acknowledging its receipt.

We think the correspondence between the parties, set out above, shows clearly that such was not the case. It is admitted that the check has never been paid, although twice presented for payment, and upon its first dishonor the company notified the insured that his check had been dishonored by the bank, and that his policy stood suspended and could only be reinstated by sending a cashier's check or money order. Certainly, the insured had no right to assume, in view of this letter and the additional fact that the same check was dishonored a second time, that the company was holding the check as payment of the premium.

Dealing with a very similar question the Court of Appeals of Kentucky in the case of *Ratliff* v. *St. Paul Fire & Marine Ins. Co.,* 207 Ky. 492, 269 S. W. 546, said: "We cannot see how the case is any different than it would have been if appellant had paid the amount of the premium in counterfeit bills."

The case of *Veal* v. *Security Mutual Life Ins. Co.*, 6 Ga. App. 721, 65 S. E. 714, is one upon which appellee relies for the affirmance of the judgment upon another ground. In that case the insurance company had issued a premium receipt upon receiving a check, and it was contended that the acceptance of the check and the issuance of the receipt constituted payment, but the Court of Appeals of Georgia said: "* * * For in the case of an existing indebtedness checks are not payment until they themselves are paid, unless there is an agreement otherwise. * * * We would not be understood as saying that, if a policyholder sends a check in payment of his premium, and the company merely sends the check for collection, a payment of the premium results from this alone if the check is dishonored. Commercial usage is to the contrary." This is stated, in the chapter on Payment in 21 R. C. L. page 60, to be the general rule, and the numerous annotated cases cited in the note to that text fully sustain that statement of the law.

The chief insistence for the affirmance of the judgment of the court below is that, if there was a forfeiture, there was also a waiver resulting from "the demand of the defendant, two or three weeks after the premium was due on Want, the insured, for $5.25 interest, and the retention of the check for $43.75, without offering to return it or letting him know that payment was refused the second time, or declaring a forfeiture, constituted a course of conduct amounting to a waiver of the forfeiture."

We think there is no evidence in the record to support the finding that the insurance company had accepted this twice dishonored check as payment of the note or in satisfaction of the insurance premium. It was run through the clearing house the second time, because the insured requested that this be done and represented that an error had been made by the bank upon which it was drawn, and that otherwise the check would have been paid upon its first presentation. This representation

proved to be false upon the second presentation of the check. It does not appear when the check was deposited in Pittsburgh the second time, but it could not have been done until after the receipt of the insured's letter dated March 24 asking that this be done. It appears, from the testimony, that about eleven days was required for the check to clear on its first remittance and deposit, and no doubt the same length of time was required on its second remittance and deposit, and the fire occurred on the 18th of April.

The insurance company has done nothing since the fire to mislead the insured or to waive the suspension, and it has made no effort to collect the check since the fire, and its only action has been to write the letter of June 11, 1928, set out above, after notice of the loss had been received, in which it inquired whether the insured had "been successful in establishing the fact that an error was made by the bank or the National Union Fire Insurance Company in not clearing your check which was given for the installment premium," and it is not contended even yet that such an error was made.

Appellee very strongly relies upon the case of *Veal v. Security Mut. Life Ins. Co., supra,* as sustaining his contention that the retention of the check was a waiver of the right to declare the policy forfeited.

The point decided in that case is indicated by the first headnote, which reads as follows: "If the holder of a policy of life insurance sends to the company on the day the premium is due a check in payment thereof, and, when the check is presented at bank, payment is refused because of lack of funds to the credit of the drawer, the company, although it has delivered the premium receipt to the insured, may, by taking the proper steps, repudiate the transaction for the legal fraud resulting from the insured's having sent a check without having in bank the funds to meet it, and may enforce a lapse of the policy for nonpayment of premium. But if the company, in such a case, after notice that the check has been dishonored,

retains it, and, instead of repudiating the transaction by returning the check and demanding back its receipt, insisted upon the insured's paying it after the date on which the policy would otherwise have lapsed, a waiver of the punctual payment of the premium in cash results. If the insurance company accepts and retains a note, check or other interest-bearing obligation for the premium, the policy shall not be held to be lapsed or forfeited for nonpayment of premium, even though the note or other obligation is not paid at maturity, unless there is an express provision in the policy providing that a failure to pay any such obligation at maturity shall result in a lapsing or a forfeiture of the insurance. *Prima facie* the liability to pay interest is regarded as the only penalty for failure to meet at maturity an ordinary indebtedness."

It is obvious that there are two very material distinctions between that case and this. The first is that the insurance company in the instant case deposited the check the second time only because of the representation that an error had been made which had prevented its payment, when such was not the fact, and the company has since made no further effort to collect the check, and has done nothing to lead the insured to believe that it was holding the check in satisfaction of the premium. The second distinction between the cases is that the policy here sued on, unlike the one in the Veal case, contained the express provision that a failure to pay at maturity should result in a lapsing or a forfeiture of the insurance.

As to the item of $5.25 paid as interest it may be said that this was paid to and has been retained by the company. The annual installments of the premium were payable in advance, but it does not appear whether the note evidencing the annual installments bore interest or not. Such evidence as there is on the subject indicates that it did. When the insured paid the second installment of the premium he paid a year's interest. If the note bore interest, then interest for two years was due

when the third installment of the premium fell due, and the $5.25 check paid only this interest and paid no part of the third year's premium. But appellee insists that the note did not bear interest, and that the $5.25 must therefore be credited on the third year's premium, as nothing else was due the company, and that when so credited it suffices to pay the proportionate part of the premium to a time two days later than the date of the fire.

We think appellee is correct in this contention if the note did not bear interest, for it is the law that, where a part payment is made and accepted on a premium which amounts to more than the premium then earned, and a loss occurs before the whole of the premium paid has been earned, there is a waiver of any forfeiture on account of a failure to pay the whole premium. This is an application of the simple principle that it would be inequitable to permit the insurer to receive and retain the insured's money without giving him credit for it, and if credit is given it must be applied to extend the insurance for such proportionate time as the money received and held would pay. Such is the effect of the following cases: *Continental Casualty Co.* v. *Baker, ante* p. 156; *Security Life Ins. Co.* v. *Matthews,* 178 Ark. 775, 12 S. W. (2d) 865; *Missouri State Life Ins. Co.* v. *Miller,* 163 Ark. 480, 260 S. W. 705; *Mutual Life Ins. Co.* v. *Henley,* 125 Ark. 372, 188 S. W. 829; *American Nat. Ins. Co.* v. *Mooney,* 111 Ark. 514, 164 S. W. 276.

We conclude, therefore, that the judgment of the court below must be reversed, and upon the trial anew the cause will be dismissed for failure to pay the premium, unless it be made to appear that the premium note did not bear interest, in which event the verdict will be directed in favor of the insured, as the undisputed testimony would show in that event that the insurance company had received a sufficient portion of the premium to carry the insurance to a day beyond the date of the fire.

HUMPHREYS and MEHAFFY, JJ., dissent.

CONNERLY *v.* STEPHENSON.

Opinion delivered May 26, 1930.

William West, for appellant.

W. W. Grubbs, for appellee.

HUMPHREYS, J. The sole issue presented by this appeal for determination is whether the notice given by the mayor, pursuant to an ordinance of the city of Eudora calling a special election on April 8, 1930, to vote on an $8,000 bond issue for the purpose of constructing a public hall in said town, meets the requirement for such notices provided in Amendment number 16 to the Constitution of the State.

No newspaper was printed within the corporate limits of Eudora, so the notice in question was inserted in the Chicot Spectator, a weekly newspaper printed in Lake Village, Arkansas, which had a general and *bona fide* circulation in Eudora, and about one-half of which was devoted to the news of Eudora, being edited by a local reporter or editor.

The form or subject-matter of the notice is not attacked or questioned, but appellant contends that it is void and of no effect because the newspaper in which same was inserted for the required time was not printed in the corporate limits of Eudora. The provision in Amendment number 16 to the Constitution relative to the notice is as follows:

"Notice of said election shall be given by the mayor by advertisement weekly for at least four times, in some newspaper published in said municipality, and having a *bona fide* circulation therein; the last publication to be not less than ten days prior to the date of said election."

We do not think the word "published" as used in the amendment is altogether synonymous with the word "printed." If that meaning alone should be attributed to the word "published," in the connection in which used, it follows that the people intended by the passage of the amendment to deny cities in which a weekly newspaper is not printed the privilege of voting bonds to build a public hall. Certainly it was not the intention of the people to penalize a city simply because a weekly newspaper was not printed therein. The intention was to accord to all cities the privilege, by a majority vote of the electors, of issuing bonds to build a public hall. As there is nothing in the amendment to indicate that the people intended to discriminate between cities of the State relative to voting bonds to construct a public hall, the word "published" should not be restricted in meaning so as to result in such a discrimination. The common and ordinary meaning of the word "published," according to Webster's New International Dictionary, is "to make public, to make known to the people in general." The newspapers might be printed but never published. It is only published when put in general circulation. The proper and correct meaning of the word "published," as used in the amendment, is that the notice must be inserted for the required time in a newspaper that will make the special election and the date thereof a public matter or known to the people in the city affected. In the instant case the notice was promulgated or proclaimed in a newspaper that had five hundred subscribers in the corporate limits of Eudora, and about one-half of which was devoted to the news of said town, being edited by a local reporter or editor.

This court has adopted a liberal rule governing the sufficiency of notices of special elections. *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161; *Hogins* v. *Bullock,* 92 Ark. 67, 121 S. W. 1064, 19 Ann. Cas. 822. We think the liberal rule announced in the cases cited should be applied to the instant case, because in doing so the true

intent of the people in the adoption of the amendment will be reflected in the construction of the word "published" in the connection used without doing violence to the language and context. If the word "published" should be restricted in its meaning to the meaning of its synonym "printed" then the intent of the people would not be reflected in the construction.

No error appearing, the judgment is affirmed.

Mr. Justices SMITH and MEHAFFY dissent.

SMITH, J., (dissenting). The majority say that the sole question presented by this appeal is whether the notice given by the mayor of the special election meets the requirement for such notice provided in the Amendment to the Constitution of the State referred to as Amendment No. 16. They also say that "Certainly it was not the intention of the people to penalize a city simply because a weekly newspaper was not printed therein. The intention was to accord to all cities the privilege, by a majority vote of the electors, of issuing bonds to build a public hall."

With the greatest deference to the majority, I dissent.

The amendment was not proposed and adopted to regulate the manner of the exercise of a power. Its purpose was to confer a power which did not previously exist, and, therefore, only such power exists in the matter of issuing bonds as the amendment confers. A proposition as elementary as this requires no citation of authority to support it.

It does not "penalize" a municipality to say that it may not issue bonds for municipal purposes. Indeed, it is not contended that all municipalities may do so. On the contrary, only cities of the first and second class may do so. The incorporated towns, which comprise a large majority of the municipalities, may not do so, and there is a wise reason for this "penalty," if it may be called such.

It was no doubt thought by the proponents of this amendment and by the people in adopting it that the cities of the first and second class would have newspapers published in their limits, through which publicity of a proposed bond issue might be given, which would not exist in the case of the smaller municipalities. But, whatever the reason for the discrimination, if such it be, between the municipalities of the State, the fact remains that the amendment itself provides that the power there conferred, and which does not otherwise exist, may be exercised only after the publication of notice of the election by advertisement in some newspaper "published in said municipality and having a *bona fide* circulation therein." There can be no question but that this power cannot be exercised until the precedent condition of publication has been performed, and the majority opinion recognizes that fact. They say, however, that there was publication as required by the amendment, and this is the point of difference.

In this connection, it will be observed that there must not only be publication in a newspaper published in the municipality proposing to issue bonds, but the newspaper must be one having a *bona fide* circulation therein. This last is an additional requirement, and means that the publication must be in an established paper, one of whose existence the citizens are advised, and to which they are accustomed to look for important news, especially of a local character, and not in some publication which might be established in the community overnight for the purpose of apparently complying with the Constitution, of which the people were not advised and to which they were not accustomed to look for information concerning their local affairs.

It occurs to me that the case of *Gibson* v. *Incorporated Town of Hoxie,* 110 Ark. 544, applies with peculiar force just here. In that case an ordinance was passed by the town of Hoxie creating an improvement district, and providing for the assessment of benefits to

pay for its construction. The ordinance of the town was passed pursuant to the authority conferred by §§ 5666 and 5685, Kirby's Digest, which later became §§ 5650 and 5668, C. & M. Digest, respectively. These sections required publication of notice of the passage of the ordinances establishing improvement districts in some newspaper published in the city or town in which the district was established.

The notices required by these sections of the statute were published in Walnut Ridge, an adjoining but separate municipality, there being no newspaper published in Hoxie.

In holding that this publication did not comply with the statutes cited, it was there said: "The Legislature had the right to prescribe the terms upon which an improvement district might be created, and it made the publication of these ordinances in some newspaper published in the town a prerequisite. Doubtless, the Legislature thought it unwise to permit the establishment of these districts in towns which were too small to have, or which did not have, a newspaper therein. But we need not seek the legislative reason; it is sufficient if we know the legislative will. And publication in a newspaper published in another town did not meet the requirements of the law. *Jackson* v. *Beatty,* 68 Ark. 273."

So here the people, in adopting the amendment designated as No. 16, may have thought it unwise to confer the authority to issue bonds upon a municipality which did not have a newspaper published in its confines and having a *bona fide* circulation therein, to give publicity to the proposed bond issue. But, as was said in the Hoxie case, *supra,* we need not seek the legislative reason, it is sufficient to know the legislative will. So, here, we need not inquire why certain cities have been "penalized," it suffices to know what limitations have been imposed by the Constitution, and we should therefore deny the right to issue bonds to any city upon which the Constitution has not conferred that power, even though,

in doing so, an apparent discrimination is made between the cities of the State.

No doubt the paper published in Walnut Ridge was largely circulated in the adjoining—but separate—municipality of Hoxie. But circulation did not suffice. The holding in that case was that circulation was not sufficient, as the statute required publication in a newspaper published in Hoxie, and the ordinance was held invalid, because this requirement of the statute had not been complied with, although it was one which could not have been complied with for the reason that there was no newspaper published in Hoxie.

It is true that § 5650, C. & M. Digest, was repealed by § 1 of act 64 of the Acts of 1929 (Volume 1 Acts 1929, page 24), and that § 5668, C. & M. Digest, was amended by § 13 of the above mentioned Act of 1929, so that notice may now be given of municipal ordinances creating improvement districts although no newspaper is published in the town affected. But there has been no amendment of the Constitution in respect to issuing municipal bonds after publication of notice in some newspaper published in the city affected.

I submit, with all deference to the majority, that the practical effect of their opinion is to eliminate this requirement of the Constitution. Some newspaper circulates and has a *bona fide* circulation in every city in the State, and it is a matter of common knowledge that these newspapers have correspondents in the cities having no newspapers, and that space is assigned in these newspapers to these correspondents, with appropriate headlines designating the sources of the correspondence, and if publication of the notice of the bond elections in such a newspaper suffices, this limitation of the Constitution has been annulled, for all practical purposes.

We had occasion to consider the place of "publication" of a newspaper in the case of *Drainage Dist. No. 9 of Miller County* v. *Merchants' & Planters' Bank,* 176 Ark. 474. We there considered the requirements of

§§ 3607 and 3615, C. & M. Digest, relating to the notice of the formation of drainage districts, the publication of which notice was held to be jurisdictional. These sections of the statute required publication of notices in some newspaper published and having a general circulation in the county where the district was to be organized.

The facts in that case were as follows: "The clerk complied with the order of the court by publishing such a notice in the Texarkana Evening News, a newspaper actually printed in the State of Texas about one-half block across the State line from the Arkansas side, but which carried a Texarkana, Arkansas, headline and dating, and the whole issue of such newspaper, after being so printed in Texas, was actually carted to the office of the Texarkana Evening News on the Arkansas side of the State line, and about one-half block therefrom, and there, for the first time, released and distributed to the public, both by newsboys and by mail."

After a review of the authorities we held, under the facts stated, that the Texarkana Evening News was published in Arkansas. It was there said: "The Illinois Supreme Court, in *Polzin* v. *Rand-McNally & Co.*, 250 Ill. 561, 95 N. E. 623, Ann. Cas. 1912B, 471, defined the word 'published' as follows: 'By the word 'published' is clearly meant the place where the newspaper is first issued or printed, to be sent out by mail, or otherwise.' See also (numerous authorities cited). And in 29 Cyc. under the head of 'Notices,' it said: 'The place of publication of a newspaper is that indicated on its face, and such paper is printed in the place so designated within the meaning of a statute requiring the publication of a certain advertisement, and it matters not that part or even all of its issue is printed elsewhere, or that part of its issue is mailed elsewhere. The whole city, village or township in which a newspaper is published is its place of publication within the meaning of a statute requiring an advertisement to be published in a newspaper.' "

Under these definitions the Chicot Spectator was published in Lake Village, and not in Eudora. Certainly it was not published in both places, and as it was "for the first time released and distributed to the public" from Lake Village, and not from Eudora, the former, and not the latter, was the place of its publication.

I find nothing in the cases of *Wheat* v. *Smith,* 50 Ark. 266, and of *Hogins* v. *Bullock,* 92 Ark. 67, 121 S. W. 1064, which gives any support to the conclusion which the majority has reached. It is true, as the majority say, that the court in those cases "adopted a liberal rule governing the sufficiency of notices of special elections," but in the Hogins case, *supra,* the court quoted from the Supreme Court of Indiana as follows: "All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void." *Jones* v. *State,* 153 Ind. 440, 55 N. E. 229.

Here, it will be remembered, the election has not been held, and the citizen and taxpayer seeks to compel the giving of proper notice before holding the election, and, as was there said, "all provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose." The provision for proper notice must therefore be held as mandatory, because its enforcement is sought before the election has been held.

I do not, however, rest my dissent upon this proposition alone. "The provisions (in regard to notice) affect an essential element of the election," and for this reason is mandatory, because the power granted—that of

issuing bonds—is one which may only be exercised in the manner provided by the amendment which confers the power. Notice must be given in the manner which the amendment provides, and as this, in my opinion, has not been done, I respectfully dissent, and I am authorized by Mr. Justice MEHAFFY to say that he concurs in the views here expressed.

LINDSEY *v.* PIERCE PETROLEUM CORPORATION.

Opinion delivered May 26, 1930.

Oliver & Oliver, for appellant.

Louis M. Cohn, for appellee.

HUMPHREYS, J. Appellant brought suit in the circuit court of Clay County, Western District, against appellee to recover $185 for commissions alleged to be due him on account of the sale of appellee's commodities and products consisting of gasoline, oil, etc., in the territory of Corning under written contract; and for $2,800 damages resulting from the alleged breach of an implied term of the contract binding appellee to promptly meet competitive prices of other major companies selling like commodities or products, or both, in the same territory.

The material allegations of the complaint were controverted, and the cause was transferred by agreement of the parties from the circuit to the chancery court for

trial, which resulted in a decree in favor of appellant for $103.14 on account of commissions due from sales of appellee's commodities, and against him for damages on account of the alleged breach of the contract, from which is this appeal.

Testimony was introduced by appellant tending to sustain the amount of his claim for commissions for selling the commodities and products of appellee, and, over the objection and exception of appellee, tending to show that a custom prevailed in the Corning district for all major companies selling commodities and products therein, to promptly meet competitive prices, and that, on account of appellee's failure to promptly do so, appellant sustained losses in commissions exceeding the amount sued for. Appellee introduced the written contract between appellant and itself which contained the following provision:

"It is further understood and agreed that the agent shall be authorized to sell commodities herein named only upon such conditions and terms as may be from time to time specified to him by the corporation."

The testimony of the custom existing between the major companies doing business in the Corning district relating to competitive prices and damages resulting to appellant on account of the failure of appellee to promptly meet competitive prices was properly excluded from consideration in the rendition of the decree by the trial court, as proof of the custom varied the terms of the written contract quoted above. Usages and customs of trade cannot be heard to contradict the terms of a written contract. This court said in the recent case of *Southern Coal Co.* v. *Searcy Transfer Co.*, 152 Ark. 471, 238 S. W. 624: "It is the settled rule of law in this State that usages and customs of trade cannot be invoked to defeat the express terms of a written contract, and that such usages and customs are only applicable where the contract is silent or where its terms are ambiguous."

A reversal of the decree is also sought because the court deducted two items representing shortage in stock

when same was checked by the auditor on February 10, 1927, from the amount due him as commissioner at the time. When the auditor checked the amount on hand, there appeared to be a shortage, and appellant acknowledged in writing his indebtedness to appellee on account of these two items, but in the trial of the cause undertook to show that the shortage was due to leakage of appellee's gas tanks. The proof was not definite or certain as to the amount of leakage, so we cannot say that the trial court erred in allowing these items as an offset against appellant's claim for commissions.

No error appearing, the decree is affirmed.

BANK OF HOXIE *v.* WOOLLEN.

Opinion delivered May 26, 1930.

George M. Gibson and *Chas. D. Frierson,* for appellants.

Smith & Blackford, for appellee.

MEHAFFY, J. On June 17, 1929, appellee, M. R. Woollen, began this action in the Lawrence Chancery Court against the Bank of Hoxie, and afterwards filed an amendment to her complaint, making Mrs. A. E. Richardson, as administratrix, a party defendant. She also on the 17th of June, 1929, began suit against the Lawrence County Bank, and Mrs. A. E. Richardson, as administratrix, was afterwards made a party defendant. Appellee on June 17, 1929, filed a suit against the Bank of Portia, and later amended, making Mrs. A. E. Richardson, administratrix, defendant. She alleged that the defendant Bank of Hoxie claimed to hold a note purporting to be executed by her in the approximate sum of $2,200; that, if said bank in fact has such note, it was not signed by her, or by her authority or consent, and that she received no benefit whatever because of the execution of said note, and it was signed without her knowledge or consent; that she is in feeble health, and desires, for the protection of her estate, to have the said bank to exhibit said note for cancellation by order of this court; that the claim of said bank against her for said sum greatly impairs her credit from a financial standpoint. The prayer was that the note be surrendered for cancellation, so far as she is concerned, and that said note and all liability of plaintiff thereunder be declared fraudulent and void and canceled. Mrs. A. E. Richardson, as administratrix of the estate of J. G. Richardson, deceased, was made defendant because J. G. Richardson appears to have signed and indorsed the note in question. The complaints in the other two cases are substantially the same as the complaint in the case against the Bank of Hoxie. Defendants filed answers and cross-complaints, the cases were consolidated, and there was a finding and decree in favor of appellee. This appeal is prosecuted to reverse said decree. The undisputed evidence shows that the appellee, Mrs. M. R. Woollen, did not sign the notes. Appellants state in their brief: "J. G. Richardson being dead, the appellants are

deprived of any evidence as to whether or not Mrs. Woollen personally signed the three notes in controversy." J. G. Richardson was appellee's brother and was one of the directors of the Bank of Hoxie at the time one of the notes was executed. Mrs. Woollen testified that she did not sign the note, and that at the time she testified was the first time she had ever seen the note; that in her judgment the signature of M. R. Woollen to the note was her brother's, (J. G. Richardson's); that he also signed his individual name below hers; that she did not authorize him to sign the note. The first she knew her name appeared on any note to the Bank of Hoxie was when Carroll McCarroll wrote her about it when she was in Tucson; that she did not authorize Mr. Richardson or any other person to sign her name to the note, and did not know any such note existed until Mr. Richardson died. He died December 26, 1928; that her brother had transacted some business for her some years ago, but never without her authority. She did not receive any notice from the bank about the note. Mr. Bassett, who was in the bank a while, testified that Mr. Richardson was president of the Lawrence County Bank from 1915, except one year, and was on the board of directors of the Bank of Portia. Mrs. Woollen testified that her name was on the note to the Bank of Portia in her brother's handwriting, and that his genuine signature was under her name; that she did not authorize him or any one else to sign this note or any other note. The same evidence was introduced by plaintiff as to all the notes. The evidence shows that Richardson took all the notes to the banks, and no one testified that appellee signed any of them. There was some evidence that notices had been sent to appellee, but no witness testifies that she ever received any notice. There was considerable testimony about when the notes were originally given and about renewals, but it is unnecessary to set it out here. Appellee's name was on all the notes. The evidence shows that Richardson always paid the interest,

and that appellee was never called on to pay any interest. Most of the appellants' witnesses testified as to what the record showed as to the notes. Mr. Bassett testified that he at one time showed Mrs. Woollen two notes when she came into the bank to pay a $1,300 note. She did pay this note, but he said he showed her the other one also; that he handed them to her, and she handed them back to him and said she would pay the $1,300 note. He does not think she made any statement about the other note. It was not discussed; did not remember but does not think that he told Mr. McCarroll that he never showed Mrs. Woollen this note nor that he laid it down on the desk when she paid the $1,300 note, and she might have seen it. "As to whether she understood the other note, I do not know. It was not discussed." McCarroll testified that Bassett told him: "As to whether or not she saw the other note I could not swear, and I do not know." Mrs. Woollen testifies that Bassett never showed her the other note.

The only evidence in the record tending to show that Mrs. Woollen authorized Mr. Richardson to sign her name to notes is the testimony of Mr. McCorkle that sometime about 1911 Mr. Richardson introduced Mrs. Woollen to him in the bank, and that Mr. Richardson said to her: "Sissie, it is perfectly all right for me to use your name in the bank here on the paper." Witness adds that he knew they were just laughing and talking in a jovial way, and that was about the sum and substance of it according to his recollection. Witness was then asked if she made any statement relative to it, and he answered: "I have a faint recollection that her reply was that it was perfectly all right for Buddie to use her name in any way he wished." This conversation was in 1911 or 1912. This testimony was denied. We do not think that testimony as to witness' faint recollection of a conversation occurring nearly twenty years ago is sufficient to show authority to sign negotiable instruments.

"Authority to execute, indorse, or transfer negotiable instruments, such as a bill of exchange or promissory note, need not be in writing but may be conferred by parol, although the authority is not to be lightly inferred but must be clearly shown." 2 C. J. 451.

"And the rule as to any agent is that an agent having general authority to manage his principal's business, has, by virtue of his employment, no implied authority to bind his principal by making, accepting or indorsing negotiable paper. Such an authority must be expressly conferred or be necessarily implied from the peculiar circumstances of each particular case. It may undoubtedly be conferred by implication, but it will not be presumed from the mere appointment as general agent." *Morris* v. *Friend,* 116 Ark. 424, 173 S. W. 199.

There is no evidence in this case that Mr. Richardson was Mrs. Woollen's general agent, but even if the evidence showed that he was her general agent, this would not authorize him to sign her name to negotiable instruments.

Agency cannot be established by the acts or declarations of the agent. The agent cannot confer authority upon himself or make himself agent merely by saying he is one. *American Southern Trust Co.* v. *McKee,* 173 Ark. 147, 293 S. W. 50. The preponderance of the evidence in this case shows that Richardson had no authority to sign Mrs. Woollen's name to the notes in controversy. It is however, earnestly contended that Mrs. Woollen ratified the acts of Mr. Richardson in signing the notes. There is no evidence that Mrs. Woollen ever received any benefit from these transactions, and she was never called on to pay any interest when the notes were renewed. While there is some testimony that appellee saw one of the notes and some witnesses testified to conversations with her about the notes, all this testimony is denied. The evidence is in conflict about these matters. The general rule is that, in order that a ratification of an unauthorized transaction of an agent may

be valid and binding, it is essential that the principal have full knowledge of all the material facts. 2 C. J. 477; *Arkansas Valley Bank* v. *Kelley,* 176 Ark. 387, 3 S. W. (2d) 53, 58 A. L. R. 808; *Haines* v. *Rumph,* 147 Ark. 425, 228 S. W. 46; *DeCamp* v. *Graupner,* 157 Ark. 578, 249 S. W. 6; *Martin* v. *Hickman,* 64 Ark. 217, 41 S. W. 852.

The evidence does not show that appellee had knowledge of the facts, and does not show any ratification. Of course, if appellee had received any benefits from the transactions, a different question would be presented, but there is no evidence that she received anything. There is some conflict in the evidence, but the chancellor's findings are supported by the preponderance of the evidence, and the decree is affirmed.

GOSSETT *v.* FORDYCE LUMBER COMPANY.

Opinion delivered May 26, 1930.

Gaughan, Sifford, Godwin & Gaughan, for appellant.

S. F. Morton, for appellees.

McHaney, J. The land involved in this controversy is the north half northeast quarter, section 27, township 10 south, range 15 west, Dallas County, Arkansas. It is located in Road Improvement District No. 1 of Dallas County, Arkansas, created by special act 56 of 1919, and became delinquent for the taxes due said district for the year 1922, payable in 1923, and for some prior years. The Road Improvement District defaulted in the payment of its bonds and interest, and, in the suit of the trustee in the bond issue, was placed in the hands of a receiver by the Federal District Court for the Western Division of the Eastern District of Arkansas, on July 20, 1923. Suit was brought in said district court to foreclose the lien against this and other lands for the delinquent taxes due the road district, which resulted in a decree of foreclosure on January 28, 1925, ordering the delinquent land sold to pay the taxes if not paid within a certain time fixed by the court. The tax on the land in controversy was not paid, the land was sold on March 24, 1925, and, there being no purchasers, same was bid in by the receiver, who was also the commissioner making the sale, for the tax, penalty and costs in the sum of $19.79. A deed was made to the receiver and approved by said district court on April 20, 1925. The deed to the receiver contained the following recital: "By the terms of which said order of confirmation the said purchaser takes the lands hereinafter described subject to the lien thereon

respectively of the unpaid assessments of said Road Improvement District No. 1 of Dallas County, Arkansas, for any year or years other than the said respective years 1920, 1921, 1922, and subject to the lien of the unpaid assessments of any other improvement district, and subject to the rights of redemption as in said order of confirmation and hereinafter set forth, but in all other respects the said purchaser's title to the lands hereinafter described to be indefeasible and unassailable in either law or equity, and by the terms of which said order of confirmation any person who would have been permitted to redeem the said lands had the sale been made by the Dallas County, Arkansas, Collector for State and county taxes, or who was in possession under color of title at the time of the said decree in said ancillary cause may redeem any of the tracts of land hereinafter described at any time within two years from said March 24, 1925, but not thereafter."

On December 12, 1927, said road district, being then out of the receiver's hands, conveyed said land to appellants for a consideration of $24.99.

Appellee, Fordyce Lumber Company, was the owner of the timber on said land and paid all State and county taxes thereon separately from the land, same being separately assessed. In 1924 the land was forfeited to the State for the nonpayment of general taxes, and no exception of the timber was made in extending the taxes against it, although, as above stated, the timber was separately assessed and the general tax thereon fully paid. On December 23, 1927, the State Land Commissioner conveyed all the State's right and title to said land to appellant without excepting the timber therefrom.

In 1927 the Legislature enacted act 112, Acts 1927, p. 312, entitled "An act to provide for the collection and disposition of taxes in road improvement districts, a redemption of land sold for taxes, and for other purposes." Section 14 of said act reads as follows: "Lands heretofore sold for the nonpayment of road taxes, where the

period for redemption has not yet expired, may be redeemed within three years from the date of the passage of this act by refunding to the purchaser the amount paid by him with legal interest. Lands purchased by the district, and still owned by the district, may be redeemed by paying the amount of the tax and costs of sale with legal interest without the penalties. On tender of the amount required to redeem, the holder of the legal title shall execute and deliver the necessary deed or release to the party entitled to redeem."

This act contained an emergency clause and was approved March 4, 1927. After the land was sold to appellants by the road district and after the period of redemption as fixed by the decree of said district court had expired, but within the period of redemption as enlarged by the above-mentioned act, appellees sought to redeem the land and timber from appellants, tendering them a sufficient sum of money to do so, but same was refused. Appellees thereupon on July 21, 1928, brought this suit to redeem, deposited a sum of money with the clerk of the court of more than enough to redeem said land as a tender thereof in said action. The court sustained appellees' right to redeem, found that $87.48 was the amount due appellants to redeem from the sale in the road district and from the State, and including all taxes and special assessments paid by appellants with interest.

For a reversal of the decree appellants contend, (1) that the land was sold to the receiver for the use and benefit of the trustee in the bond issue of the road district and not to the State or a State agency; (2) that if it should be held to be wrong about that proposition, and that the land was sold to the receiver for the use and benefit of the road improvement district, § 14 of act 112 above set out is in conflict with the decree of the district court, and therefore of no force and effect.

1. Appellants' contention as to the first proposition cannot be sustained. Appellants make the mistake of assuming that the land was sold to the receiver per-

sonally or to him for the use and benefit of the trustee. The receiver was acting for the district in the collection of taxes to pay the road district's debts, and when the land was struck off to the receiver and deed issued to him by the commissioner, title vested in him, not individually but as receiver for the use and benefit of the district. The act creating the district, in § 22, provides that under certain conditions a receiver might be appointed to collect the taxes, and that the receiver "may be directed by suit to foreclose the lien of said taxes on said land; and the suits so brought by the said receiver shall be conducted in all matters as suits by the board as hereinbefore provided, and with like effect; and the decrees and deeds therein shall have the same presumptions in their favor." So it will be seen that the receiver, for the time being, steps into the shoes of the board of commissioners and acts for them. The necessary result is that a deed executed to the receiver was for the use and benefit of the districts the same as if the board had been acting and the deed executed to it. Therefore, the title to the land by virtue of the sale in the federal district court, although taken in the name of the receiver, was really in Road Improvement District No. 1 of Dallas County, Arkansas.

2. The title remained in the district until December 12, 1927, when it conveyed said land to the appellants. In the meantime act 112 of the Acts of 1927 had become a law, by § 14 of which the period of redemption was extended three years from the passage of said act and the rule announced in *Walker* v. *Ferguson,* 176 Ark. 625, 3 S. W. (2d) 694, applies, unless said act is void by reason of being in conflict with the decree of the district court. We there said: "The principles of law applicable to cases of this sort and numerous decisions announcing them are cited and reviewed in *Northern Road Imp. Dist.* v. *Meyerman,* 169 Ark. 383, 275 S. W. 762, and no useful purpose could be served by again extensively reviewing these principles. Where lands are sold at a tax

sale and are struck off to a private purchaser, the sale for the delinquent taxes constitutes a contract between the purchaser and the State, or the instrumentality of the State, the obligation of which cannot be impaired by subsequent legislation extending the period of the right to redeem. Hence this court has held that the right to redeem in such cases from a tax sale is governed by the statute in existence at the time the sale is made, and no subsequent statute extending the period of time for the right to redeem is constitutional.

"The title acquired by the State, or an instrumentality thereof, at a tax sale is not the same as that vesting in a private purchaser, since the object of the purchase is not the acquisition of the property, but rather the collection of the taxes. 37 Cyc. 1355, and *Commissioners* v. *Lucas,* 93 U. S. 108, 23 L. ed. 822. Hence the rule that a statute extending the time to redeem from a tax sale is not constitutionally applicable to sales made before its enactment is subject to an exception where the State or one of its instrumental subdivisions was the purchaser."

In the first place, we do not think the act is in conflict with the decree. By the terms of the decree interested parties were given the right to redeem "at any time within two years from said March 24, 1925, but not thereafter." The time for redemption under the decree expired March 24, 1927, but prior thereto, to-wit, on March 4, 1927, the above act became a law, the effect of § 14 thereof being to extend the period of redemption from sales in all road districts for three years from March 4, 1927. The decree of the court fixing the time to redeem was only declaratory of the period given by the act creating the district, which was made two years in § 15 thereof.

The federal court could not by its decree have shortened the period of redemption as fixed by the statute, and it did not attempt to do so. The right to redeem, as fixed by statute or as extended or enlarged by subsequent acts, is a "positive and substantial" right con-

ferred on the landowner by the Legislature, and cannot be abrogated by rule or decree of court, State or Federal, unless violative of the obligations of contract. *Brine* v. *Hartford Fire Ins. Co.,* 96 U. S. 627; *Conn. Mut. Life Ins. Co.* v. *Cushman,* 108 U. S. 51, 2 S. Ct. 36; *Dupree* v. *Mansur,* 214 U. S. 161, 29 S. Ct. 548; *Mason* v. *United States,* 260 U. S. 545, 43 S. Ct. 200.

By extending the period of redemption three years from the passage of said act 112, the Legislature was trying to save the landowner from the devastating burden imposed upon him in the form of taxes on betterments in road improvement districts prior to 1927, and give him an extension of time in which to redeem his land from a sale for taxes he was wholly unable to pay. It had entirely lifted the burden for taxes accruing subsequent to January 1, 1927, in such districts, and the above section was enacted to give him the additional time to redeem from sales for prior taxes. Since, as we have already seen, the land passed to the district by reason of said foreclosure sale, and was still in the district when act 112 was enacted, the rule announced in *Walker* v. *Ferguson, supra,* applies.

The decree of the chancery court is correct, and must be affirmed. It is so ordered.

[redacted]

MOLINE TIMBER COMPANY *v.* SCHAAD.

Opinion delivered May 19, 1930.

[redacted]

Charles W. Mehaffy and *Cockrill & Armistead,* for appellant.

S. L. White, for appellees.

SMITH, J. Appellees brought this suit to reform a fire insurance policy, and to collect the proceeds thereof after a loss had been sustained by fire, and in support of their cause of action offered testimony to the following effect: Appellees sold some sawmill machinery to J. L. Young. Part of the purchase price was paid in cash, and the balance was evidenced by what was termed "title retaining notes." The contract of sale provided that Young should carry fire insurance on the machinery until the indebtedness was fully paid, the loss, if any, being payable to appellees as their interest might appear. Young operated two sawmills before buying the machinery above referred to, which was installed in a third mill. Young operated all these mills in sawing lumber for the Moline Timber Company, and represented to appellees that he had taken out insurance as agreed, and after the fire attempted to collect the insurance for the benefit of appellees. The fire loss was adjusted on the basis of $2,140, which amount was collected and appropriated by appellant. This amount was in excess of the balance due appellees by Young, and judgment was rendered in favor of appellees for the amount of their debt on account of the conversion of this insurance money.

The appellant timber company is a corporation under the laws of the State of Maine, and was represented in all of the transactions out of which this litigation arose by F. M. Lay and L. L. Adair. These gentlemen testified that, representing the appellant timber company, they made advances to Young in his sawmill operations, and that the balance due on these advances at the time of the fire amounted to about ten thousand dollars. That, to secure this indebtedness, they had, with Young's knowledge and at his direction, caused policies of insurance to be issued on all three of the mills and the lumber thereat, and had paid the premiums thereon, which they charged

to Young, and all the policies were payable to the appellant timber company as its interest appeared, and that after the fire proof of loss was duly made and adjusted, and the amount thereof paid to appellant.

The court made no special finding of fact, but we assume the finding was made that Young represented to appellees that he had insured the property, as his contract of purchase required him to do. Young testified that Lay and Adair knew of his purchase of the machinery, and that the title had been reserved, but he did not testify that they had told him that the insurance had been made payable to appellees, and the testimony shows this was not done.

Lay, appellant's manager, testified that Young had never requested him to procure insurance for the benefit of appellees, and that he had never done so, but that he caused the insurance policies to be issued for the benefit of appellant, his employer, to secure the advances being made Young and for Young's benefit after the advances had been paid.

Adair testified that he was the cashier and office manager of appellant timber company, and that for its security against the advances being made Young he insisted that Young allow appellant to insure his mill properties, with loss payable to appellant; that Young agreed to this, and pursuant to this agreement the policy sued on was issued. That appellant company was not requested by any one to procure insurance for the benefit of appellees, and had not done so.

The appellant timber company was a subsidiary corporation of Deere & Company, which latter company maintained an insurance department to keep property insured in which it was interested, and the manager of this department of Deere & Company testified that he had never heard that appellees claimed any interest in the policy until after the fire, and that he procured the issuance of all the policies.

It is, no doubt, true that Young represented to appellees that he had insured the property for their benefit, as his contract of purchase required him to do, but that testimony is not sufficient to support a recovery by appellees.

The suit is in the nature of one to reform an insurance policy; in fact, that relief was prayed, and upon this allegation suit was brought in the chancery court. Such relief is only granted upon testimony that is clear and convincing, and the testimony does not measure up to that standard; in fact, we think the preponderance of the testimony is to the effect that there was neither fraud nor mistake in procuring the issuance of the policy and that it was issued as applied for.

The machinery, to which appellees had reserved the title, was not the only property covered by the policy sued on; but, even as to this property, Young had an insurable interest, which he might have insured for his own benefit or for that of a creditor. *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475, 96 S. W. 393; *Ponder* v. *Gibson-Homans Co.,* 166 Ark. 591, 266 S. W. 682; *Crouthers* v. *State,* 154 Ark. 375, 242 S. W. 815.

For the reasons stated, the decree appealed from must be reversed, and as the cause appears to be without equity it is dismissed.

MITCHELL *v.* FOWLER.

Opinion delivered May 26, 1930.

Oscar Barnett, for appellant.

KIRBY, J. This is a partition suit for division of the estate of Sam Mitchell, Sr., deceased, among the parties and his heirs entitled thereto, the north half southwest quarter and north half southeast quarter, section 13, township 4 south, range 17 west. The case was submitted to the chancellor on the pleadings and testimony and decree rendered on March 15, 1928, adjudging the interest of the parties, and decreeing a partition of the lands in accordance therewith.

On September 12, 1929, Si Bayliss Mitchell and others filed a motion and intervention to set aside the decree of March 15, 1928, and have the lands sold because no part of same was allotted to them by the commissioner and the decree of the court. None of the grounds specified in the statute, §§ 6290-93, C. & M. Digest was alleged in the motion to modify or vacate the judgment.

The decree of March 15, 1928, ascertaining and adjudging the interest of the several parties in the lands in controversy and directing a division thereon in accordance with their rights, became final and binding upon all the parties thereto upon the lapse of the term of court at which it was entered, the term necessarily expiring on the first Monday in June thereafter, the day fixed by law for the beginning of the next term of the chancery court.

No appeal was taken from this decree which could not be vacated or modified after the expiration of the term at which it was rendered, except upon allegation and proof of some one of the grounds for such action specified in the statute § 6290, C. & M. Digest. None of the grounds as specified therein was contained or included in the motion and intervention to vacate or modify the decree, and the court erred in attempting to vacate said decree and modifying it to adjudge an interest in the lands in controversy to appellees, to which they had not been held entitled or which had not been adjudged

to them in the original and final decree of March 15, 1928, it being without authority to do so. *Ingram* v. *Wood,* 172 Ark. 226.

The decree is accordingly reversed, and the cause remanded with directions to cancel the commissioner's deed to the lands executed under said erroneous decree and to reinstate said decree of March 15, 1928, partitioning the said lands in accordance with the interest of the parties as adjudged therein, and for all other necessary proceedings in accordance with the principles of equity and not inconsistent with this opinion.

ASHBY *v.* PATRICK.

Opinion delivered May 26, 1930.

Ross Mathis, for appellants.

BUTLER, J. Hunter Special School District of Woodruff County, Arkansas, is a special school district in the town of Hunter, and at the May election for directors of said district in 1928 the two persons elected failed to qualify by taking and filing the oath of office within the time prescribed by statute, and for that rea-

son there was a vacancy in the board. *School District* v. *Bennett,* 52 Ark. 511, 13 S. W. 132; *Boyett* v. *Cowling,* 78 Ark. 494, 94 S. W. 682. At the May election following there were five directors to be elected. Just why the other vacancy occurred in the board is not shown. Two directors were to be elected for a three-year term, two for a two-year term, and one for a one-year term. There were rival sets of candidates.

On the face of the returns appellants were elected, and a contest was filed with the county board of education by the appellees contesting the election on the ground, among others, that a majority of the qualified electors had voted for the appellees. This contest was heard by the board, the votes were recounted and the ballot purged, resulting in the elimination of twenty-two votes cast for the appellants and eight for the appellees, and, after the elimination of these votes, it was found that the appellants still had a majority of the votes cast at the election, and they were declared duly elected. From this order an appeal was taken to the circuit court, which court, at the conclusion of the evidence, held that the election was void because of the form of the ballot, and judgment was rendered declaring neither the appellants nor the appellees elected. From that judgment is this appeal.

As the school district was a special school district within an incorporated town, the election is governed by §§ 8963 to 8971 of Crawford & Moses' Digest, inclusive, and there is no form of ballot prescribed therein. Therefore, if the ballot voted on was such as not to mislead the electors but to give them an opportunity to express their will, it was sufficient. The ballot in question was so prepared that the names of the rival sets of candidates were placed thereon as follows:

FOR SCHOOL DIRECTORS

For 3-Year Term (Vote for Two)

J. I. Ashby

J. W. Burns

_____

_____

For 2-Year Term (Vote for Two)
H. O. Penrose
W. P. Dawson
.....
.....

For 1-Year Term (Vote for One)
Garvin Melvin
.....

For 3-Year Term (Vote for Two)
Mrs. Jas. Patrick
Mr. H. F. Suhr
.....
.....

For 2-Year Term (Vote for Two)
Mr. J. F. Acton
Mrs. Elmer Brinneman
.....
.....

For 1-Year Term (Vote for One)
Chas. Forth
.....

By this it is apparent that the candidates of the rival factions were grouped together, the candidates of one faction being two each for the three and two-year terms and one for the one-year term occupying the first part of the ballot and immediately following this on the same ticket and immediately below the candidates of one faction appeared the names of the candidates of the other faction in the same order and same directions. We see nothing in this that would have been likely to confuse the voters. It is perfectly apparent that the candidates were purposely grouped so as to give the electors the most convenient method of registering their will, and that they were not in any way deceived. The real inquiry is as to whether or not the appellants or the appellees received the highest number of votes cast. All legal votes should be counted that were cast, and, if any elector was deceived or confused by the form of

the ballot so that he did not vote as he intended, this might have been shown, but there was no evidence offered to this effect, and we conclude that none were in fact deceived. As we have seen, there was no form of ballot prescribed by the statute, and therefore any form might be used, and the election conducted in any manner which would not deprive the legal voters of their right to participate in the election or to create such an uncertainty that there would be no means of ascertaining which of the candidates the voters meant to favor with their ballot. *Stafford* v. *Cook,* 159 Ark. 438, 252 S. W. 597; *Rhodes* v. *Driver,* 69 Ark. 501, 64 S. W. 272; *Cain* v. *CarlLee,* 169 Ark. 887, 277 S. W. 551; 9 R. C. L. 1092.

It seems that the only question about which witnesses were called to testify or which was made an issue in the court was that there was no vacancy on the board by reason of two electors, elected at the May, 1928, election, failing to qualify. The regularity of the election was not challenged by any evidence in the circuit court or any contention made that the board excluded legal votes or included illegal votes in their recount, and at the conclusion of the trial, when it was announced that the reason of any production of the proof was to show that the directors did not qualify (those elected at the May, 1928, election) the court said: "I am going to decide the case upon the ballot and refuse to decide on the director matter. After hearing the evidence the court holds the election void because of the form of the ballot." Thereupon judgment was rendered accordingly.

For the error of the trial court in declaring the election void because of the form of the ballot, the judgment is reversed and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

MISSOURI PACIFIC RAILROAD COMPANY *v.* FISH.

Opinion delivered June 2, 1930.

R. E. Wiley and *Henry Donham,* for appellant.

J. T. Wimberley and *Eric M. Ross,* for appellee.

KIRBY, J., (after stating the facts). The three-mill levy of tax complained of was regularly made against the property of appellant under the authority of amendment No. 11 to the Constitution of the State of Arkansas and § 4, of act 210 of the Acts of the General Assembly of 1925, the enabling act for its enforcement.

The amendment provides: "To secure funds to pay indebtedness outstanding at the adoption of this amendment, counties, cities and incorporated towns may issue interest-bearing certificates of indebtedness or bonds with interest coupons for the payment of which a county or city tax, in addition to that now authorized, not ex-

ceeding three mills, may be levied for the time as provided by law until such indebtedness is paid."

Section 4 of the enabling act provides that the quorum court of the county, before or after the issue of said bonds, "shall levy a tax, which on the existing assessed value of the property of such county * * * will suffice to retire said bonds as they mature with five per cent. added for unforeseen contingencies, provided that said tax shall not exceed three mills on the dollar of such assessed value. If said taxes proves insufficient to meet the maturities of the bonds with interest, it shall be the duty of the quorum court of such county * * * to increase such levy of taxes, but not beyond three mills upon the dollar of the then assessed valuation, and if, by reason of the increase in the assessed value of the property of such county, * * * a lower rate of tax will prove sufficient to meet the bonds and coupons as they mature, the amount of the tax may be lowered accordingly, but no tax shall be levied which will produce less than the sum required to meet the maturing of the bonds with five per cent. added for unforeseen contingencies, nor shall any tax in excess of three mills on the assessed value existing at the time of such levy ever be levied in any year. * * *"

This court, construing the amendment and the enabling act, has held the word "may" in the amendment to mean "shall" and to compel the levy of the tax to pay the maturing bonds issued for paying the county indebtedness under the authority of said amendment. *Stranahan, Harris & Oatis, Inc.,* v. *Van Buren County,* 175 Ark. 678, 300 S. W. 382.

Appellant insists that the word "may," as used in said section 4 of the enabling act, should likewise be construed to mean "shall" in authorizing the quorum court to lower the rate of taxation when a lower rate would produce sufficient revenue to pay the maturing bonds and interest. We do not agree with this contention.

The enabling act provides that the quorum court of the county "shall levy a tax, which, on the existing as-

sessed value of the property of such county, * * * will suffice to retire said bonds as they mature with five per cent. added for unforeseen contingencies, * * * said tax shall *not exceed three mills on the dollar of such assessed* value." If the tax proves insufficient, "it shall be the duty of the quorum court of such county * * * to increase such levy of taxes, but not beyond three mills upon the dollar of the then assessed valuation, and if, by reason of the increase in the assessed value of the property of such county, * * * a lower rate of tax will prove sufficient to meet the bonds and coupons as they mature, the amount of the tax may be lowered accordingly, but no tax shall be levied which will produce less than the sum required to meet the maturing of the bonds, etc."

The money derived from the tax must be preserved as a separate fund for the retirement of the bonds, and its misuse by any officer is made a felony.

It is obvious, from the language used, that it was the intention of the Legislature to leave the matter of reduction of the amount of the levy to the discretion of the quorum court in its determination of the amount necessary to be levied and collected for the retirement of the maturing bonds and interest. This court cannot say that the refusal to reduce the amount of the tax levy for the year 1930 was an abuse of discretion or but an arbitrary exercise of power in the absence of a showing that there was sufficient money already on hand in the separate fund for the redemption and retirement of such bonds to pay the amount of all maturing with interest in the particular year without the levy of any tax for the purpose. The levy of this tax was regularly made by the quorum court within the authority granted by the Constitution and enabling act, and the chancellor was without power to enjoin its collection, it not being an illegal exaction or an unauthorized tax within the meaning of the statute § 5786, C. & M. Digest, and Constitution, article 16, § 13, complaint being made only that it was excessive.

Appellant company could have objected to the amount of the tax levy before the county court at the time of the levy of the tax and shown by testimony the lack of necessity for the amount of the levy under the statute (§§ 9867-9870, C. & M. Digest), but elected to attempt to enjoin the levy as illegal and unauthorized, and the court correctly held it could not be done.

The decree is accordingly affirmed.

STREET IMPROVEMENT DISTRICT NO. 130 OF HOT SPRINGS *v.* CROCKETT.

Opinion delivered June 2, 1930.

C. T. Cotham, Murphy & Wood and *A. T. Davies,* for appellant.

George P. Whittington, for appellee.

MCHANEY, J. Appellees, property owners in Street Improvement District No. 130 of the city of Hot Springs, Arkansas, hereafter called the district, brought this suit to enjoin the district, its board of commissioners and the contractor, Besler, from performing the contract en-

tered into between the district and Besler for the paving of the street and other improvements contemplated by the district. The complaint alleged that the commissioners advertised for bids to do the work according to the plans and specifications prepared by the city engineer, and that same would be let to the lowest bidder; that the three lowest bidders and the amounts of their bids were, Besler $44,251, Connelly $42,100, and Mooney $40,908; that, although two bids were lower than that of Besler, two of the commissioners, over the objections of the third, awarded the contract to Besler; that the result would be that the property owners would be required to pay more taxes to the extent of the excess of his bid over the lowest; and that this action was without authority in law, and was a fraud on the district. Appellants answered denying all the material allegations of the complaint relative to illegality, unfairness or fraudulent conduct. They denied that they advertised that the contract would be let to the lowest bidder, but that they reserved the right to reject any and all bids; that, in awarding the contract to Besler, they took into consideration a number of factors and elements to be considered in connection with the qualification of bidders, in addition to the amount of the bids, as follows: That Besler's lump sum bid of $44,251.64 was accompanied by a bid on a unit basis with the agreement that, if, on the final estimate of the completed job as measured and determined by the engineer, computed at the unit prices set out in his proposal, the amount thereof should be less than his lump sum bid, the district should have the benefit of the difference. In other words, the lump sum bid was the maximum amount the district would ever have to pay, but, if the amount based on his unit prices should be less, the district would benefit to the extent thereof; that the bid of Besler relieved the district of all liability for extras on account of possible errors of the engineer, which, based on experience in other districts, was a considerable item; that no other

contractor made such a bid, though all had the opportunity to do so; that Besler agreed to give a five-year maintenance bond and his personal bond for an additional five years maintenance; that Mooney failed to include in his bid any agreement to give a maintenance bond whatever, and that Connelly only agreed to maintain the street for five years after completion; and that this guaranty of Besler more than offset the excess amount of his bid over the others. It is alleged that other matters were taken into consideration in awarding the contract to Besler.

On a trial the court entered a decree enjoining the enforcement of the contract for the reason that it was not let to the lowest bidder, was not let on a competitive basis, was not submitted on an equal and full understanding of the kind of bids desired, and that Besler's bid was not in accordance with plans and specifications made by the city engineer, and was therefore void and unenforcible.

We are of the opinion that the trial court erred in so holding. The applicable statute, § 5710, C. & M. Digest, provides that the board "may" advertise for bids for doing any work by contract and may accept or reject any or all such bids. Whether the word "may" as first used in the statute should be construed to mean "shall," and, therefore, mandatory and not directory, we do not decide, as it appears unnecessary. The commissioners did advertise for bids, and the court found that eight persons submitted bids on the proposed work, three of which have already been mentioned. However, we might say in passing, that this court construed this section, which was § 870 of Mansfield's Digest, in connection with § 871 *Ib.*, to be directory merely, and that the board, after rejecting all bids, might let the contract without readvertisement. *Fitzgerald* v. *Walker,* 55 Ark. 148, 17 S. W. 702. Section 871 of Mansfield's Digest, considered in that case, appears to have been repealed and does not now appear in the statutes. There is no provision in

the statute that the contract shall be let to the person whose bid is lowest in terms of money. The language is that the board "may accept or reject any proposals." It is the duty of the board to act at all times for the best interests of the district, but the statute, by giving it the power to accept or reject any proposals, necessarily conferred on the board the discretion to determine which of the bidders, if either, would best accomplish their purpose, taking everything into consideration, including the amount of his bid. Everything else being equal, we are of the opinon that the spirit, if not the letter, of the law, would require the board to let the contract to the lowest bidder. But when, as here, everything else is not equal, when there are other important elements to be considered in connection with the amount of the bid, we think the statute vests in the board the power as well as the duty of determining which of the bidders will best accomplish the purposes of the district. This necessarily involves judgment and discretion, and the courts will not substitute their judgment for that of the board when a mere matter of discretion is involved. As said by this court in *McCrory* v. *Richland Township Road Imp. Dist.*, 171 Ark. 462-4, 284 S. W. 727, "The courts will not undertake to review mere questions of discretion, for the power of the commissioners to act is fully recognized, and the courts will not therefore substitute their judgment for that of the commissioners of the district, when there is involved merely a question of judgment. But when it is made to appear that there was a conscious or reckless indifference to the interests of the district, which the commissioners are supposed to represent, the courts have the right to interfere upon the ground that the commissioners have exceeded the power conferred upon them by law." The inquiry of the court generally "is to determine whether the contract is so improvident as to demonstrate its unreasonableness," as said in *Bowman Eng. Co.* v. *Ark. & Mo. Highway Dist.*, 151 Ark. 47, 235 S. W. 390. Here we think the evidence wholly fails to show

that the board was guilty of "a conscious or reckless indifference to the interests of the district," or that the contract made with Besler was "so improvident as to demonstrate its unreasonableness," and the chancery court did not so find.

We are also of the opinion that the court misconceived the evidence in holding that the bids were not on a competitive basis in that Besler bid on a turnkey job, and the other bidders were not requested to bid on that basis. Commissioner Goslee, testifying for appellees, stated to the contrary. He testified that they were all given an opportunity of checking the work to be done against the engineer's estimates either by themselves or by an engineer of their own choosing for the purpose of making a lump sum bid. Both Connelly and Mooney made such bids, but their lump sum amounts were conditioned on the correctness of the figures furnished by the city engineer.

We also think the court was clearly wrong in holding that Besler's bid was not based on the plans and specifications furnished by the district's engineer. There were no other plans. The fact that Besler employed another firm of engineers to make a check of the work against the engineer's estimates was for the purpose of enabling him to make an accurate lump sum bid without any strings tied to it.

We have carefully reviewed all the evidence in the case, and find that the decree is not supported by a preponderance thereof. Same will therefore be reversed, and the cause dimissed. It is so ordered.

HART, C. J., HUMPHREYS, and KIRBY, JJ., dissent.

SMALLEY *v.* BUSHMIAER.

Opinion delivered May 19, 1930.

C. M. Wofford, for appellant.

Partain & Agee, for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered by the circuit court of Crawford County dismissing a petition for mandamus to compel appellee, the sheriff of said county, to allow the county clerk to inspect his jail record to ascertain the number of prisoners fed by him, so that he could audit the accounts of said sheriff in feeding the prisoners. The writ of mandamus was sought to enforce the provisions of act 367 of the Acts of the Legislature of 1929, which is as follows:

"Be it Enacted by the General Assembly of the State of Arkansas:

"Section 1. That, from and after the passage of this act, the sheriff of Crawford County, Arkansas, shall be allowed seventy-five cents (75c) per day for the feeding of each prisoner confined in the Crawford County jail; and provided, further, that it shall be the duty of the county clerk of Crawford County, Arkansas, to keep a jail record of the names and number of all prisoners confined in said jail on file in his office, and shall file a certified list of the names and number of said prisoners confined in said jail during the previous month with the county and probate judge, said list to be filed on the first day of each month in each year.

"Section 2. All laws and parts of laws in conflict herewith are hereby repealed."

The trial court ruled that the act was void because the enactment thereof was prohibited by Amendment Number 17 to the Constitution of the State of Arkansas, which is as follows:

"The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of any local or special act."

We think the trial court correctly adjudged that the act in question was in contravention of Amendment No. 17 inhibiting the passage of local or special legislation. In the case of *Webb* v. *Adams,* 180 Ark. 713, this court said: "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." Citing the following authorities: 58 Atl. 571, 572; *L. R. & Ft. 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.

In 25 R. C. L. p. 834, paragraph 81, it is said: "And where a statute fixes the compensation of an officer in a particular locality upon a basis entirely different from that of all other persons filling like offices in the State, it has been held not to be a general law, but within the constitutional prohibition against special legislation."

The effect of the act was to arbitrarily separate the clerk and sheriff of Crawford County, and legislate with reference to their duties and fees upon a basis different from that of other clerks and sheriffs in the State.

The judgment is therefore affirmed.

SMITH and MCHANEY, JJ., dissent.

HELD *v.* MANSUR.

Opinion delivered May 19, 1930.

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H. M. Barney and *W. H. Arnold,* for appellant.

G. G. Pope and *Shaver, Shaver & Williams,* for appellee.

HART, C. J., (after stating the facts). A person who has been induced to enter into a contract for the purchase of property by the false representations of the vendor concerning its quantity or quality may, at his

election, pursue one of three remedies. First, he may cancel the contract and, by returning or offering to return the property purchased within a reasonable time, entitle himself to recover whatever he had paid upon the contract. In the second place, he may elect to retain the property and sue for the damages he has sustained by reason of the false representations of the vendor as to the land; and in this event the measure of the damages would be the difference between the real value of the property in its true condition and the price at which he purchased it. In the third place, to avoid a circuity of actions and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped against the sum he had paid for the land. *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546; and *Danielson* v. *Skidmore,* 125 Ark. 572, 189 S. W. 57.

In the present case, the purchaser of the real estate mortgage elected to pursue the second of these remedies. He might have sued for damages at law; but, under the authorities above cited, no objection having been made to the jurisdiction of a court of equity, none can be raised on appeal. Besides this, the plaintiff also asked for a foreclosure of the mortgage; and, in order to avoid a multiplicity of suits, it is settled in this State that when equity takes jurisdiction of a case for a matter cognizable only in equity, it retains the case to administer the legal after the equitable relief. *Short* v. *Thompson,* 170 Ark. 931, 282 S. W. 14.

While the general rule is that the statement of the value of the property is a mere matter of opinion and cannot be made the basis of an action for fraud, still there are exceptions to the general rule. The rule established in this State is that false statements of fact, intentionally made, to one who is ignorant of the quality or value of the property under consideration under such circumstances as indicate a purpose that such statements are to be relied upon, where the purchaser has no oppor-

tunity to examine the property, may be treated as an affirmation of fact and fraudulent. Where the vendor knows that the purchaser is wholly ignorant of the value of the property, and knows that he is relying upon his representations, the representations do not take the form of a mere expression of opinion, but are in the nature of a statement of fact. The reason is that the vendor knows that the statements he has made are untrue or are made in reckless disregard of the truth, and it cannot be doubted that he knows and believes that such statements will have a material influence upon the purchaser. *Carwell* v. *Dennis,* 101 Ark. 603, 143 S. W. 135; *Hunt* v. *Davis,* 98 Ark. 44, 135 S. W. 458; *Bell* v. *Fritts,* 161 Ark. 371, 256 S. W. 53; *Cleveland* v. *Biggers,* 163 Ark. 377, 260 S. W. 432; *Laney-Payne Farm Loan Co.* v. *Greenhaw,* 177 Ark. 589, 9 S. W. (2d) 19.

Under all these cases, and under many more which might be cited, this court is committed to the rule that if the vendor, having actual knowledge of the matter or in reckless disregard of the truth, induces the buyer to rely on his false statements, he will not be heard to say that the purchaser could have ascertained the truth. In the first place, the false representations relied upon may have caused the purchaser to forbear from making further inquiry; and in the second place, as is true in the present case, the purchaser may have lived in a distant State, and it was not practical for him to come to the county in which the land was situated and make an examination of it. There was nothing to put a person on notice that the representations were false. These cases all hold that, while ordinary statements of value of property are mere expressions of opinion on which the purchaser is not entitled to rely, yet statements of fact which affect the value of property, if false, and made for the purpose of inducing the purchaser to rely thereon, are false representations which will constitute fraud in law. The false representations may be established by positive and direct testimony, or by circumstantial evidence, or by both.

In the present case, we think the false representations were established by a preponderance of the evidence, and that there can be no doubt about the fact that the purchaser of the note and mortgage involved in this case relied upon the representations. Mansur admits in his testimony that he was a mere figurehead in the transaction, and that he acted for the Dorsey Company. The Dorsey Company and the security company which made the loan had offices in the city of Texarkana, Arkansas, and during much of the time covered by this transaction had offices in the same building. The security company was in the business of making farm loans, and in aid thereof had a set of abstract books. Mansur was introduced to the president of the security company by the president of the Dorsey Company. The money borrowed was paid to the Dorsey Company. The security company paid the recording fees for the deed from the Dorsey Company to Mansur, and for the mortgage from Mansur to the security company. The attendant circumstances and the relationship of the officers of these two companies all point to the fact that the officers of the security company knew that the representations as to the value of the land were false, or that they were made in utter disregard of the truth. The land was situated in Miller County, and, according to a clear preponderance of the evidence, was subject to overflow and has never been susceptible of cultivation. They were cut-over lands, and half of the tract was cleared and a small house was built on it for the purpose of securing the loan. The land was represented by the borrower to be worth $9,700, and the inspector sent out by the security company reported it to be worth $8,000. The inspector was an officer of the company. While there is a dispute over this point, we think a clear preponderance of the evidence shows that the lands were practically worthless because they were subject to overflow, and could not be drained except at a prohibitive cost. It is fairly inferable that the officers of the security company knew that Mansur was a mere figurehead, and had no property whatever. They

must have known that his representation in his application that he had 1,000 acres of land and $18,000 worth of personal property unincumbered was false.

It is true that the officers of the security company testified that they transferred the loan to Rosentiel and thereafter had no connection with it. In this respect, however, they are contradicted by the attendant circumstances. Rosentiel was a stockholder in the security company, and had been acquainted with its officers for a good many years. He was accustomed to buying these farm loan mortgages at a small discount and transferring them to other parties. By arrangement between the security company and Rosentiel, the former collected the interest, paid the taxes, and generally looked after the loans. In 1925, when the Dorsey Company ceased to pay the interest on the loan, and was about to be placed in the hands of a receiver, the Security Mortgage Company employed a lawyer to foreclose the mortgage. When all these facts and circumstances are considered together, we think that the assignment and transfer of the note and mortgage by the security company to Rosentiel was colorable merely, and that Rosentiel acted for the security company in selling and transferring the note and mortgage to Held. Rosentiel and Held were intimate friends, and Held did not discover the fraud which had been practiced upon him until the latter part of 1927, or the first part of 1928. Therefore, we are of the opinion that he had a right to sue for damages for false representations, which induced him to buy the note and mortgage in question, and that the chancery court erred in not so holding.

It is contended, however, by counsel for appellees, that the decree of foreclosure had in 1925 should not be set aside because no fraud was practiced upon the court in the foreclosure proceeding. We do not agree with counsel in this contention. It is true that it was held in *H. G. Pugh & Co.* v. *Ahrens,* 179 Ark. 829, 19 S. W. (2d) 1030, and the cases cited therein, that the fraud which

will justify the setting aside of a judgment or decree must be such as prevented the unsuccessful party from presenting his case fully, or which operated as a fraud or imposition upon the jurisdiction of the court, and that mere false testimony is not enough if the disputed matter was in issue in the case in which it was given. Held did not know anything whatever about the foreclosure proceeding which was had in 1925. The security company procured an attorney to institute the foreclosure proceedings, and Held was left in ignorance of the whole matter. The attorney presented a copy of the mortgage and note in question, and procured the court to grant the decree upon the reliance that he had authority to bring the suit, and the custody of the note and mortgage sued upon. No matter whether the attorney knew of the fraud practiced on Held by the Security Mortgage Company or not, he acted for the security company, and will be deemed in law to have participated in the fraud practiced by that company upon the court. It cannot be doubted that the chancery court would have refused a decree of foreclosure if it had been informed of the fact that Held, the holder of the note and mortgage, was in ignorance of the whole proceeding, and had no part in it. Therefore, we are of the opinion that the foreclosure proceeding in the chancery court in 1925 was obtained by fraud, and that the decree should be set aside on that account.

The result of our views is that the chancery court erred in not awarding damages to appellant for false representations in selling him the loan and mortgage, and in refusing to set aside the decree of foreclosure of the mortgage. From the authorities above cited, the measure of damages will be the difference between the price for which the land may be sold under the foreclosure proceedings, and the amount which Held paid for the note and mortgage, together with the accrued interest and the taxes due on the land. Therefore, the decree will be reversed, and the cause will be remanded for further proceedings in accordance with this opinion,

and not inconsistent with the principles of equity. It is so ordered.

ARKANSAS POWER & LIGHT COMPANY *v.* HUBBARD.

Opinion delivered May 19, 1930.

Rose, Hemingway, Cantrell & Loughborough and *Elmer Schoggen,* for appellant.

Wills & Wills and *W. R. Donham,* for appellee.

BUTLER, J. This suit was brought by the appellee, Nettie Hubbard, to recover damages for personal injuries received from contact with appellee's high-powered transmission line. There was a judgment in the court below for $5,000 in favor of the appellee, from which this appeal is prosecuted.

The testimony regarding the alleged negligence of the appellant in the maintenance of its lines is in conflict, that upon the part of the appellant tending to show

that the line was properly erected and maintained, the wires being the ordinary and suitable distance above the surface of the ground, having no slack except such as was necessary for the proper maintenance and operation of the lines. The testimony of witnesses for the appellee was to the effect that the wires had become slackened because of a leaning pole, to the extent that midway between the poles the wires extended downward from horizontal to within from nine feet to about eighteen feet above the ground surface, as estimated by the different witnesses for the appellee. It was testified that the proper height at which the line should have been strung and maintained was several feet higher. The line extended along the side of the highway between Little Rock and Conway. About three or four miles from North Little Rock, on this highway, the appellee and her husband owned a store which was twenty-four feet back from the transmission line of the appellant, and they were also engaged in running a filling station, the pumps and tanks of which were 9 feet 7 inches high, and immediately under the transmission line. Just preceding the accident the appellee's husband had cut a long pine pole to which, near the top, had been fastened a large rectangular metallic sign at right-angles to the pole. Two long wires were fastened to the sign for the purpose of holding the pole steady and guiding it while it was being set in a hole prepared between the two pumps. The appellee was called to assist in lifting the pole; she held one of the steadying wires and a youth the other. As the pole was being raised it fell against the transmission line, either the guide wire on the pole, or a portion of the sign coming in contact with the electric wire, resulting in a severe electric shock to the appellee, the extent of which injury was a matter of dispute.

The appellant insists that incompetent and prejudicial testimony was admitted; that the court erred in instructing the jury, and, lastly, that the court erred in refusing to instruct a verdict for the defendant, because the testimony was insufficient to support the verdict in

several particulars, which were alleged, the last of which is that the plaintiff was guilty of contributory negligence as a matter of law. It is unnecessary to discuss the assignments of error as presented, as we are constrained to the opinion that the evidence fails to support the verdict on the last ground mentioned, and that as a matter of law the plaintiff was guilty of contributory negligence, which bars a recovery.

All of the testimony tended to establish the fact that the electric wires were uninsulated, and the gasoline tanks and pumps were on a line immediately under the high transmission line of the appellant, and that a hole had been dug between the two and in line with them for the purpose of inserting the pole upon which the sign was fastened. According to the testimony of the appellee, the transmission line was not more than four to five feet above the pumps, and fifteen feet above the surface of the ground, and none of her witnesses put the height as over nineteen feet, so that the fact that these wires were uninsulated was readily discoverable from the place where the appellee was when engaged in helping to raise the pole, and she must be charged with knowledge of this condition. *Himes* v. *Consumers' Ice & Light Co.*, 173 Ark. 1103, 294 S. W. 409. The pole was of green pine, and, according to witness' own figures, when set, was at least twenty-two feet high exclusive of the part set in the ground. To sustain a pole of the height and weight of this one, it is probable that it was set in the ground not less than from two to three feet, so that the pole, at the time appellee was helping to raise it, must have been from twenty-four to twenty-five feet long. Whatever the length of the pole which they were attempting to raise, and whatever the height of the wire above the ground, it must have been true that the pole was much longer than the wires were high above the ground. The top of the sign was approximately five feet below the top of the pole, and this sign must have been as high or higher than the wires, for when "it swung around and hit the live wire,"

the current of electricity passed down into the body of the appellee; otherwise, the part of the pole above the sign would have touched the wire without damage, or the pole would have fallen under the wire without touching same. There were four people attempting to raise this long green pine pole, which must have been very heavy, to an upright position to be slipped into the hole in the ground which had been dug for that purpose—two men, a boy, and a woman, the appellee. It must have been apparent to any one of ordinary prudence that there was danger that the pole might fall before it reached the perpendicular, and was set in the ground, and that, if this happened, the pole would come in contact with the bare high-tension wires of the appellant. The appellee knew that the transmission wires were electric wires, but seeks to avoid the consequences of her negligent act by the statement that she did not know the wires were dangerous.

On January 18, 1900, in the case of *Danville Street Car Co.* v. *Watkins,* 97 Va. 713, 34 S. E. 984, where, as in the case at bar, the plaintiff sought damages for injuries occasioned by contact with an electric wire, in passing upon the question of plaintiff's contributory negligence, the Supreme Court of Virginia said: "Watkins states in his evidence that he knew nothing about electricity, and had never been in a power house, and did not know what effect it would have; that he did not know that contact with a wire charged with electricity would have any effect other than would be caused by contact with any other wire suspended over a street. We are indisposed to entertain at this day, when electricity is so generally applied as a motive power to machinery, a plea of ignorance of its dangerous properties." Three decades since the opinion in *Danville* v. *Watkins,* the use of electricity has become so general and wide-spread as to be a public necessity, and its properties are so universally known and recognized as to be a part of the common knowledge of the people, and it seems to be the general rule, where such is the case, all persons of ordinary intelligence and

experience will be presumed to know of its dangerous qualities. *Stackpole* v. *Pa. G. & E. Co.*, 181 Cal. 700, 186 Pac. 354; *Riggs* v. *Standard Oil Co.*, (Minn.) 130 Fed. 199; *Morrison* v. *Lee*, 16 N. Dak. 377, 13 L. R. A. (N. S.) 650; *Aljoe* v. *Penn. C. L. & P. Co.*, 281 Pa. 368, 126 Atl. 759.

In the case at bar the appellee is a woman of mature years and of sound business judgment, and at least of ordinary intelligence, for she is shown to be capable of managing the business in which she and her husband are engaged, and of earning more than $100 a month. Electricity is used in connection with her business; her home and place of business are lighted by electricity. Appellee must have known that the transmission line, before reaching her place of business, had served others along its route, and that it extended on beyond to a neighboring town carrying on its wires the energy sufficient to serve the needs of that community. Common experience and observation must have given her knowledge that these wires carried a considerable voltage, and that they were dangerous, and whether or not she knew of the dangerous character of the transmission wires, the true test is, what would one of ordinary prudence and caution be presumed to know with reference to such wires, and what would one of such caution and prudence do or refrain from doing under similar circumstances? *St. L. S. F. R. Co.* v. *Carr*, 94 Ark. 246, 126 S. W. 850; *Bulman Furn. Co.* v. *Schmuck*, 175 Ark. 442-50, 299 S. W. 765, 35 A. L. R. 1039.

Appellee cites and relies upon the recent case of *Arkansas Power & Light Co.* v. *Cates*, 180 Ark. 1003, 34 S. W. (2d) 846, where it is held that the plaintiff, in helping to hang a sign, detached a wire which had caught on the side of a wall by pulling it from the ground, and which came in contact with an electric wire causing his injury, was not guilty of contributory negligence. The facts in that case were essentially different from those of the case at bar, which, as stated by the court, were as follows: "Spradling, who was on the 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 electric current passing through Cates' body, which caused his death." The mere statement of the facts marks the distinction, and that case has no application to the instant case, nor is it in conflict with our holding herein.

It is insisted, however, by the appellee that the appellant waived its defense of contributory negligence, because it asked that that question be submitted to the jury. We do not think this ground is well taken, for the reason that at the close of the testimony the appellant moved for a peremptory instruction, which motion was denied, the appellant objecting and saving its exceptions. This preserved all its rights in the case as to insufficiency of the testimony on any one of the defenses made by it, including that of contributory negligence, and a subsequent request for an instruction defining contributory negligence, and to submit that question to the jury was not a waiver of the request for an instructed verdict first made. Under the undisputed facts of this case, we are of the opinion that the appellee was guilty of negligence contributing to her injury, which bars recovery on her part. The judgment of the trial court is therefore reversed, and the cause is dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

McHANEY, J., absent and not participating.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION OF OMAHA *v.* HUNNICUTT.

Opinion delivered June 2, 1930.

[redacted]

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

Saxon, Wade & Warren and *H. G. Wade,* for appellee.

McHANEY, J. On February 28, 1927, appellant issued and delivered to appellee its policy of health and accident insurance which contained this paragraph: "The association will pay, for one day or more, at the rate of $100 per month for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which confines the insured continuously within doors and requires regular visits therein by legally qualified physician, provided said disease necessitates total disability and total loss of time."

The policy went into effect at noon of February 28, and for any disease originating between that date and noon March 30, 1927, the appellant was not liable. The principal question to be determined in this case is, Did the disease which caused appellee's total disability originate within that period of time? If it did, there is no liability. If it did not, appellant is liable. There was a verdict and judgment for appellee.

The question to be determined is one of fact, and appellant concedes the well established rule of this court that, if there is any substantial evidence to support the verdict, it must stand. But it contends that there is no substantial evidence to support the verdict; that the undisputed evidence shows that the kidney affliction from which appellee was disabled originated prior to noon of March 30, 1927; and that therefore there should have been an instructed verdict in its favor. In determining this question we must consider the facts in the light most favorable to appellee. When considered in this light, and, giving them the strongest probative force of which they are reasonably susceptible and every reasonable inference deducible therefrom, as we must do under the rule of this court, we cannot say there is no substantial evidence to support the verdict in this case. The evidence, when considered in the light most favorable to appellee, is substantially as follows: Appellee had some trouble with varicocele which was relieved by an operation on April 4. On March 31, he began to have some trouble in the region of the left kidney. This was not considered serious on April 4, when he was operated on for varicocele, but on April 14, he went to the Baptist Hospital in Little Rock and was operated on to drain the kidney, the drain from the left kidney to the bladder being stopped, which caused a pressure on the kidney and great pain. This was an acute condition which necessitated an operation. Dr. Eubanks, one of the surgeons, testified that this is a disease that develops suddenly. In "Physician's Final Proof of Illness" Dr. Eubanks stated that the date of the onset of the disease was March 31. Appellee stated that it developed April 14, the date of the operation. While this evidence is meager and is contradicted by other evidence, yet it was submitted to the jury on instructions from the court that are not questioned, and we cannot say there was no substantial evidence to support the verdict.

It is finally insisted that the court erred in rendering judgment for the statutory penalty and attorney's

fee, on the ground that appellant is admitted to do business in this State under the provisions of act 139, Acts 1925, p. 405, and that under said act it is exempt from the provisions of § 6155, C. & M. Digest, subjecting defaulting insurance companies to a 12 per cent. penalty and attorney's fees. This contention is based on § 10 of said act, which provides that "associations organized or admitted to do business in this State under this act shall not be subject to any other law of this State governing insurance companies or construed to apply to associations operating under this act."

We do not think appellant's contention in this regard is sound. The clear meaning of § 10 of said act is that the general insurance laws relating to the organization and conduct of the insurance business shall not apply to companies operating under said act. Section 6155, C. & M. Digest, is not a law governing the organization and conduct of the business of insurance companies. The same contention was made relative to the provisions of § 16, act 137 of 1925, p. 390, in *Old American Ins. Co.* v. *Hartsell,* 176 Ark. 666, 4 S. W. (2d) 25. Section 16 provides "that the general insurance laws of this State or any laws governing the organization and control of mutual assessment companies shall not apply to or govern companies organized under this act." We there said: "We think, however, that counsel misinterprets the purpose and effect of § 16, above quoted, as the purpose of that section was to make the organization and control of companies 'operating on the stipulated premium plan' subject to the provisions of that act. Section 6155, C. & M. Digest, does not relate to the organization or control of insurance companies, as that section was passed to require prompt settlement of any liability 'in all cases where loss occurs, and the fire, life, health or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor,' and the provisions of that section apply

to the companies named, regardless of the manner in which they may be organized or controlled."

In *Springfield Mutual Ass'n* v. *Atnip,* 169 Ark. 968, 279 S. W. 15, we held that the provisions of § 6155, C. & M. Digest, apply to mutual assessment associations, not doing business as fraternal benefit societies, as defined by C. & M. Digest, § 6068. See also *Mutual Relief Ass'n* v. *Poindexter,* 178 Ark. 205.

We therefore conclude that § 10 of act 139 of 1925 does not exempt appellant from the provisions of § 6155, C. & M. Digest. Affirmed.

HOWELL *v.* TODHUNTER.

Opinion delivered June 9, 1930.

Harney M. McGehee and *A. L. Rotenberry,* for petitioner.

Hal L. Norwood, Attorney General, for respondent.

PER CURIAM. W. H. Howell has appealed from a judgment of the circuit court denying his petition for a writ of certiorari to review the proceedings to try his present sanity or insanity before S. L. Todhunter, warden

of the State penitentiary. His counsel allege in their petition certain errors and irregularities of the warden in the hearing before him. The prayer of the petition is that a writ of certiorari be issued out of the circuit court to S. L. Todhunter, as warden of the State penitentiary, requiring him to certify to the circuit court the original or a copy of the proceedings in the insanity hearing held before him on the 25th day of March, 1930, in which a jury of twelve men rendered a verdict of sanity of the said W. H. Howell, and that this verdict be vacated and set aside.

W. H. Howell was convicted in the circuit court of the crime of murder in the first degree, and his punishment fixed at death by the jury trying him. The judgment of the circuit court was affirmed by this court on October 28, 1929, and a petition for rehearing was denied on December 3, 1929. *Howell* v. *State,* 180 Ark. 241, 22 S. W. (2d series) 47.

On a petition presented by the attorneys for said Howell, the court held that he had a right to have his present sanity or insanity inquired into before the warden of the State penitentiary as prescribed by the provisions of our statute. *Howell* v. *Kincannon, ante* p. 58. There was a majority and also a dissenting opinion prepared and filed in that case. Both opinions recognized that writers on criminal law and courts generally concur in the humane provisions of the common law, and agree that no person in a state of insanity should ever be tried for crime while in that condition or made to suffer the judgment of the law, while insane. We all recognize that in the application of this humane provision of the common law, in the absence of a statute to the contrary, the power of the circuit court upon proper application is undoubted to try the present sanity of a prisoner after conviction and sentence, and upon inquiry, if he was found to be insane, then to stay his execution until a recovery.

The majority opinion, however, held that the power thus conferred upon the trial judge by the provisions of the common law had been modified by the provisions of our statute. We all agree that the Legislature had the power to change or modify the common law in this respect as it pleased, but the dissent was based upon the theory that the statute was not passed for this purpose, but for the purpose of aiding the Governor in the proper exercise of his power of commutation or of pardon. That this was the meaning of the opinions will be seen by reference to the *per curiam* opinion in *Howell* v. *Todhunter, ante* p. 250. In that case, the court said that where the warden of the penitentiary had empanelled a jury and no verdict was reached, he thereby declared that he had reasonable grounds for believing that the defendant was insane, and it became his duty to empanel another jury for the purpose of securing a verdict on the question. See also *Nobles* v. *Georgia*, 168 U. S. 398.

Under the allegations of the petition in the present application, it will be seen that another jury was empanelled and that a verdict of sanity was reached by it. It became the duty of the counsel for the defendant to preserve a transcript of the testimony and other matters relating to that proceeding if they desired to have the same reviewed by the circuit court. If they did not do so, the circuit court could not intelligently act in the matter.

Counsel for appellant rely upon the procedure recognized in *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041. It will be noted, however, that in that case the evidence before the board was carefully preserved and a transcript furnished to the circuit court, so that there could be no doubt about what happened before the board. Here no record whatever was made of the proceedings had before the warden, and the case stands just as if, after the trial of the prisoner in the circuit court, no bill of exceptions had been made, preserving alleged errors and irregularities for review in the appellate court.

We have uniformly held that, where no bill of exceptions has been filed in the time and in the manner prescribed by law, the appellate court can only review for alleged errors appearing upon the face of the record itself. In the present case there are no errors appearing from the face of the record. The petition itself shows that the jury upon inquiry as prescribed by the statute found the prisoner to be sane. The statute, as we have already seen, prescribed the manner in which the inquiry should be made, and the manner in which the question of the present sanity or insanity of the prisoner should be determined was purely a matter of legislative regulation. Any other construction would greatly obstruct and embarrass the administration of the criminal law; otherwise, as pointed out in *Howell* v. *Todhunter, supra,* it would be within the power of convicted felons, or their friends, to indefinitely delay the execution of the sentence by repeated suggestions of insanity, followed by inquisitions in each instance and appeals therefrom. As we have already seen, it was a subject within the control of the State Legislature, and, the provisions of the statute having been complied with, and no errors appearing upon the face of the record, the circuit court properly denied the petition for a writ of certiorari, and the judgment must be affirmed upon appeal. It is so ordered.

BOARD OF COMMISSIONERS OF MCKINNEY BAYOU DRAINAGE DISTRICT *v.* BOARD OF DIRECTORS OF GARLAND LEVEE DISTRICT.

Opinion delivered May 19, 1930.

H. M. Barney and *W. H. Arnold,* for appellants.

Henry Moore, Jr., for appellee.

McHaney, J. The principal question presented by this appeal, if not the only one, is that of priority of liens, if any, for taxes on assessed benefits or betterments in overlapping improvement districts, organized by legislative authority at different times, and under different acts of the Legislature. Appellants will hereafter be referred to as the drainage district and appellee as the levee district.

The levee district was created by Special Act 311, Acts of 1913, p. 1267, and the provisions thereof were reenacted, and the district validated by Special Act 56, Acts 1917, p. 235. Additional bonds were authorized by Act 451, Acts 1921, p. 944, and by Act 516, Acts 1923, p. 1113. The validity of the levee district was sustained by this court in *Dorsey Land & Lumber Co.* v. *Board of Directors, Garland Levee Dist.,* 136 Ark. 524, 203 S. W. 33.

The drainage district was created by order of the county court of Miller County, Arkansas, on May 4, 1923, under and by virtue of the provisions of the general drainage district laws, known as the alternative system, § 3607 *et seq.* C. & M. Digest of the Statutes of this State.

The levee district, prior to the organization of the drainage district, had issued bonds in the sum of $267,500, of which amount $150,000 are still outstanding. A levee was built along the west bank of Red River, connecting with another levee on the north, and running southerly to McKinney Bayou, near the hills, but left a gap between the south end and the hills of about one-fourth mile. About 45,000 acres of land are in the levee district. The

drainage district is composed of the south two-thirds of the lands in the levee district, about 30,000 acres, and was organized to supplement the work of the levee district by building a levee along the bank of McKinney Bayou, in a southeasterly direction, and connecting with the south end of the levee built by the levee district, which protected the lands in both districts from overflow through the gap heretofore referred to. Ditches were also constructed to drain off the surface water, and flood gates constructed to let the water through to the bayou. Improvements made in the drainage district cost approximately $450,000, and large bond issues are now outstanding. Having defaulted in the payment of bonds, it is now in the hands of a receiver. The levee district is also in default.

Certain of the levee district taxes for 1926 not having been paid, it brought suit to collect same. Decree of foreclosure was had in July, 1928, and the delinquent lands ordered sold by a commissioner appointed for the purpose. The commissioner reported on July 28, 1928, that he had advertised said delinquent lands for sale, had publicly offered same, but that, although parties were present, "No one offered to purchase for the levee taxes subject to the lien of the existing drainage district taxes in favor of McKinney Bayou Drainage District, and your commissioner, in accordance with § 3646 of Crawford & Moses' Digest, reports the above facts to the court that the court may take proper action thereon." At the suggestion of the levee district, an attorney *ad litem* was appointed to notify the drainage district, its receiver and the trustee for its bondholders that it was the intention of the levee district to proceed further in said suit according to the provisions of § 3646, C. & M. Digest. Thereafter the drainage district and the trustee for bondholders were made parties to the suit to foreclose. An order was sought directing a sale of the lands for the delinquent levee tax for 1926, free from the lien of the drainage district assessments, but subject to future taxes

in the levee district. Appellants opposed the procedure, and contested the right of the levee district to a superior lien on any grounds, but on a trial the court held with appellee that its lien was superior to that of the drainage district, and again ordered the land sold for delinquent levee taxes for 1926, but free of incumbrances of the assessment of benefits and drainage tax of appellant district, but subject only to subsequent installments of benefits in the levee district, in accordance with the court's view of the proper construction to be placed on § 3646, C. & M. Digest. This appeal followed.

Said section of the statute is as follows: "On sales of land condemned to be sold for the taxes of drainage districts, and other improvement districts in this State, the land shall first be offered subject to the lien of all improvement district assessments then existing thereon. If no one will purchase on those terms, the commissioner appointed to make the sale shall report that fact to the court, and the land shall not again be offered for sale until after the lapse of one year, nor until an attorney *ad litem* has been appointed to notify the commissioners or directors of other improvement districts, and the trustees of all bondholders having liens thereon that said lands have been offered for sale on those terms, and that no purchaser therefor has been found. Upon the coming in of the report of such attorney *ad litem,* showing in detail the notice that he has given to the commissioners or directors of other improvement districts having liens upon the property, and to the trustees of the bondholders of all districts having liens on the property, the court shall make an order for the sale of the lands free of incumbrances of the assessments of all other improvement districts that are subordinate to the lien that is foreclosed, but subject to subsequent installments of the assessments of benefits in the plaintiff district. And when such sale is made, any balance that may remain after paying the cost of foreclosure and the amount of the lien that is foreclosed shall be distributed by the court in

such manner as may be found equitable. If the board of commissioners or directors of any drainage district having a lien on the lands, or the trustee of any bondholders having such lien is not notified of the application for such sale, they may, on motion at any time within three years have the sale set aside and the lands resold."

It becomes necessary to determine the meaning of said section. We have never had the exact question as now presented before us heretofore, and this court has never been called upon in any other case to construe this section of the Act of 1913 (§ 14, Acts 1913, p. 738). It was evidently enacted to cure a defect in the drainage district law, and its provisions were made broad enough to include all other improvement districts which overlap each other, such as the case now before us. Many such districts were in existence at the time of the passage of said act, and many more have been created since, all of which have assessments of benefits with annual taxes thereon to retire bonds issued to pay the cost thereof. If the construction placed on this statute by the learned trial court is correct, that is, that the first district in point of time has the prior and paramount lien, and that, by following the procedure outlined in said statute, it is entitled to an order of court directing a sale of delinquent land in the prior district free of all assessment of benefits in subsequent districts and taxes levied thereon, it is easy to see that the consequences to the subsequent district will be disastrous. Let us now examine the statute to see if the Legislature meant to entail such consequences on subsequent districts. The first sentence in said section is: "On sales of land condemned to be sold for the taxes of drainage districts and other improvement districts in this State the land shall first be offered subject to the lien of all improvement district assessments then existing thereon." Manifestly, the land cannot be sold for taxes that are not due, but only for delinquent taxes. So, when the land is offered for sale at the first sale provided for in said section, it is offered "subject to

the lien of all improvement district assessments then existing thereon." In other words, if there be a purchaser at such sale he buys with the understanding that he will have to pay all accrued taxes in other districts, and subject to the taxes for which liens will accrue in the future in all districts. But if there be no purchaser at such sale, and the procedure is resorted to as provided in said section, then the statute further provides that "the court shall make an order for the sale of the land free of incumbrances of the assessments of all other improvement districts that are subordinate to the lien that is foreclosed, but subject to subsequent installments of the assessment of benefits in the plaintiff district." We are of the opinion that the lawmakers meant accrued assessments, and that they did not intend to destroy or free the land of the lien of subsequent installments of the assessment of benefits in subsequent districts, but free of the lien of taxes that have already accrued in subsequent districts. In other words, the levee district, being prior in point of time, by following the procedure set out in said section, may sell the land for delinquent taxes due it free of the lien for accrued taxes in the drainage district; its lien being "subordinate" only to this extent.

Nor do we think either district has any priority of lien over the other, except as stated above. Both districts are created by virtue of legislative authority. Both are State agencies. Each is authorized to construct certain improvements by issuing bonds to pay therefor, and to levy a tax on assessed benefits to pay the bonds and the interest thereon. The act creating the levee district provides that an annual tax shall be levied upon the real estate in the district not to exceed 10 per cent. of the assessed valuation as it appears upon the real estate assessment books. Section 7 gives the taxes so assessed, and the tax lists the effect of a *bona fide* mortgage for a valuable consideration, and a first lien on all the lands, as against all persons having any interest therein. Another section pledges the taxes to be collected in the future to

the payment of the bonds and interest. The validating act of 1917 provided in § 35 that "this act shall be liberally construed so as to make the lien of said assessment valid, and prior to all other liens." The effect of these various provisions was to give the levee district a lien for taxes. In the drainage district, by § 3617, C. & M. Digest, the county court is required to enter an order on its records, having "all the force of a judgment, providing that there shall be assessed upon the real property of the district a tax sufficient to pay the estimated cost of the improvement, with ten per cent. added for unforseen contingencies," payable in annual installments. "The tax so levied shall be a lien upon all the real property of the district, from the time that same is levied by the county court, and shall be entitled to preference over all demands, executions, encumbrances or lien whatsoever created, and shall continue until such assessment * * * shall have been paid." So it will be seen that the act under which each district was created gives a lien which is entitled to preference over all contract liens, or liens that are acquired by virtue of contractual relations between individuals, persons or private corporations. The statute does not mean that such liens shall be superior to the State's lien for taxes. Nor does the State's superior lien for taxes extinguish improvement district taxes on forfeiture and sale to the State. While the title rests in the State, the tax-lien in improvement districts is merely suspended, and, on redemption from the State, accrued improvement district taxes must be paid, as well as accrued State and county taxes. Section 2, Act 261 of 1925, p. 781; *Turley* v. *St. Francis County Rd. Imp. Dist. No. 4,* 171 Ark. 939, 287 S. W. 196; *Wyatt* v. *Beard,* 179 Ark. 305. This act 261 of 1925 tends very strongly to show that the Legislature did not intend to give priority of assessment liens in improvement districts, but to place them all on a parity. The decision in the Turley case *supra* further supports the same view, where the court said that "the lawmakers, in the exercise of their au-

thority, have provided for coordinate enforcement of liens of the State for general taxes, and improvement districts in recognition of the continuation of both liens." It was there further said, with reference to the act above mentioned: "This statute is well within the legislative power, as we have already seen, for it does not amount to an exemption from taxation, or to relinquishment of the State's lien, but merely operates as a continuation of the coordinate lien of one of the State's agencies, and establishes a method of preserving each one of the liens without extinguishing the other. That statute, of course, has no application to the present litigation, for it was enacted after the liens were acquired, and after appellants had purchased the land in controversy from the State. But we think that the other statute quoted above (C. & M. Dig., § 5433) is equally potential in continuing the lien of the improvement district, and in preventing its extinguishment by a sale for general taxes. The words 'all demands, executions, incumbrances or liens whatsoever created,' have no reference to the State's paramount lien for taxes. But the words which follow unmistakably carry the meaning that the special taxes of the improvement district shall continue until fully paid, and are not extinguished. Of course, the forfeiture to the State of lands for general taxes necessarily suspends the enforcement of the special tax lien as long as the title remains in the State, but as the lien, under the terms of the statute, is not extinguished, and continues until the special taxes are paid, the same can be enforced when the land goes back into private ownership. This construction of the statute gives full recognition to the State's paramount right of taxation, and in nowise detracts from the dignity and power of the State as against subordinate agencies."

If a sale of lands, under the paramount lien of the State for delinquent taxes does not extinguish the inferior or subordinate liens of improvement districts, it necessarily follows, we believe, that a sale for delinquent

taxes in an improvement district that is prior only in that it was first created would not extinguish the lien of another district subsequently created by the State. This view seems to be strengthened somewhat by the decision of this court in *Hoehler* v. *W. B. Worthen Co.*, 154 Ark. 444, 243 S. W. 822, although the question now presented was not before the court in that case.

There are holdings by some courts in other States that the improvement district first created has the prior lien, while in others it is held that the last created has the prior lien. But, as we see it, great confusion will result from either holding. No doubt the Legislature has the power to provide that the one or the other is prior, but, until it has done so in plain and unmistakable language, we do not feel that we should so hold. Furthermore, the view we now take is just and equitable. It is conceded that the levee district without the drainage district failed to accomplish the purpose of its creation. It is likewise true that the drainage district without the levee district would be practically useless. Each therefore is complementary to the other. It would therefore appear to be unfair and inequitable for either lien for taxes to be held to be prior to the other, except as indicated herein, unless the Legislature has made it so in plain and unmistakable language, and we do not think it has done so. The acts under which both districts were created provide that each lien shall be superior to all other liens, but, as we have already shown, such liens are not superior to the State's lien for taxes, and are only superior to contract liens. The declaration in the third sentence of § 3646 that at the second sale the land shall be sold "free of the incumbrances of the assessments of all other improvement districts *that are subordinate* to the lien that is foreclosed, but subject to subsequent installments of the assessments of benefits of the plaintiff district," fails to define which is the "subordinate" district, and the clause beginning with "but" does not add anything to enlighten us, and it is merely declaratory of the common law. This statute

therefore has no application except to accrued assessments, or taxes that are due.

This construction of the statute under consideration disposes of all the questions raised by this appeal. The result is that the decree must be reversed and remanded with directions to order a sale of the delinquent land of the levee district involved in this action free from the lien of accrued taxes in the drainage district. It is so ordered.

HART, C. J., KIRBY and MEHAFFY, JJ., dissent.

HUNTER *v.* FIRST STATE BANK OF MORRILTON.

Opinion delivered May 26, 1930.

[redacted]

Edward Gordon, J. S. Utley and *Wm. T. Hammock,* for appellant.

E. A. Williams and *W. P. Strait,* for appellee.

HART, C. J., (after stating the facts). As suggested by the circuit court in directing a verdict for the defendant, the first impulse of nearly every one would be in the circumstances of the case to find for the plaintiff; but, under the well-established principles of law heretofore decided by this court, this cannot be done.

The suit is predicated upon the theory that the facts called for the application of the doctrine of *respondeat superior*, which rests upon the proposition that, in doing the acts out of which the accident arose, the servant was representing the master at the time and engaged in his business. It is conceded that the doctrine cannot be invoked unless, at the time of the negligent act causing the injury, the servant was engaged in performing a service for the master or incidental thereto. It is generally stated by text writers and in judicial decisions that the test of the liability of the master for his servants acts is whether the latter was at the time acting within the scope of his employment. The phrase "in the scope of his employment or authority," when used relative to the acts of the servant, means while engaged in the

service of his master or while about his master's business. It is not synonymous with "during the period covered by his employment."

In the application of the rule in *Sweeden* v. *Atkinson Improvement Co.,* 93 Ark. 397, it was held that a master was civilly liable for an injury caused by the negligent act of his servant when done within the scope of his employment even though the master did not authorize or know of such acts or may have disapproved or forbidden them. It was further held that a master is not liable for an independent, negligent or wrongful act of his servant done outside of the scope of his employment, and that the act of a servant for which his master is liable must pertain to something that is incident to the employment for which he is hired, and which it is his duty to perform or do for the benefit of the master.

Again, in *Wells Fargo & Co. Express* v. *Alexander,* 146 Ark. 104, it was held that the test of a master's liability for his servant's tortious acts is not whether they were done during the existence of the servant's employment, but whether they were committed in the prosecution of the master's business, and pertained to the particular duties of the servant's employment.

In the later case of *American Railway Express Co.* v. *Mackley,* 148 Ark. 227, a review was made of all our earlier decisions on the subject. The court declared that the established rule to be in this State that the test of a master's liability for the act of a servant is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business. This rule has been recognized and applied by this court in a suit for damages against the owner of an automobile for injuries sustained by a third person on account of the negligence of the chauffeur.

In a case note to 32 A. L. R. at page 1398, it is said that it is the well-established general rule that an owner of an automobile is not liable for an injury or

for damage resulting from the negligent operation of his car by his employee while the latter is using it for his own purposes without the owner's permission or consent, since, to hold the latter liable, the relation of master and servant must exist at the time, and the act must be within the scope of the servant's authority. Among the numerous cases cited is *Healey* v. *Cockrill,* 133 Ark. 327.

The same rule is laid down in a case note to 45 A. L. R. 478, and among the cases cited in support of it is *Bizzell* v. *Hamiter,* 168 Ark. 476. To the same effect, see *Crowell* v. *Duncan,* 145 Va. 489, 134 S. E. 576, 50 A. L. R. 1425; and the case note to 50 A. L. R., page 1450.

In the case note to 22 A. L. R. at page 1419, it is said that the owner of the automobile is not liable where the employee, furnished a car for business, uses it for his own purposes.

In the application of the rule in *Slater* v. *Advance Thrasher Co.,* 97 Minn. 305, 5 L. R. A. (N. S.) 598, 107 N. W. 133, it was held that where a company furnished one of its agents with an automobile for his own use in expediting its business, and the agent, after business hours, used the automobile for his own purposes, not connected with the master's business, the company is not liable for an injury resulting from the agent's negligence, since such use of the automobile was not within the scope of the agent's employment. To the same effect see *Mullia* v. *Ye Planry Building Co.,* (Cal. Ct. of Appeals) 161 Pac. 1008; *Martinelli* v. *Bond,* (Cal. Ct. of Appeals) 183 Pac. 461; *Solomon* v. *Commonwealth Trust Co.,* (Penn.) 100 Atl. 534; and *Kilroy* v. *Chas L. Crane Agency,* 203 Mo. App. 302, 218 S. W. 425.

So it will be seen that the test of the owner's liability for the negligence of his employee in injuring the property or person of third persons while driving the former's automobile is the nature of its use at the time of the accident, whether or not it is being used in the transaction of the business of the owner of the auto-

mobile. The very basis of the rule of *respondeat superior,* as applied to automobile accidents as well as to other cases, is that the driver of the car is acting for the owner and not for himself personally at the time of the accident. When the servant steps outside of the master's business and enters upon the performance of some individual purpose of his own, he ceases to act as the servant of the owner, and the latter's responsibility for his act terminates.

This brings us to a consideration of whether Ferrell, at the time of the accident, was acting within the scope of his employment, and this involves an inquiry into the contract of his employment, and the relation of his acts at the time of the accident to the services he actually performed pursuant to his employment.

According to the testimony of Luther Finch, he got in the car of the defendant with Frank Ferrell on Sunday evening for the purpose of going across the Arkansas River near Morrilton to look at a cow on the farm of Emmett Mitchell, Finch agreed with Ferrell about the price of the cow, and gave him a check payable to Emmett Mitchell. When they got back to Morrilton, Finch got out of the car, and Ferrell went on to the house of a neighbor, and stayed for a short time. He then left in the car and went on home and ran over and injured the plaintiff and her husband by his negligent driving on the way there.

According to the testimony of R. L. Deal, he was vice president and cashier and managing officer of the First State Bank of Morrilton, Arkansas, and represented the Bank Commissioner in the collection of some old debts due the Bank of Morrilton. During the fall of 1927, he hired Frank Ferrell to act as chauffeur for Dr. Oates and Joe Irving who were employees of the bank, and who were engaged in driving about the country and collecting the assets of the Bank of Morrilton for the First State Bank. Frank Ferrell, being familiar with the people and being a good judge of stock, was

employed to act as chauffeur to Dr. Oates and Joe Irving. In addition to driving the car, he had no duties except to assist them in collecting stock or in advising them as to the value of the same when called upon to do so. He was paid at the rate of $10 per week, and was not required to work on Sunday. He had no authority to sell the property or assets of the bank. Ferrell had no authority to use the car or to have it out at all on Sunday; the duties of his employment did not require him to work on Sunday, and none of the bank officers knew that Ferrell did perform any work on Sunday for the bank. Each day's work was routed in advance. Sometime Dr. Oates and Joe Irving would permit Ferrell to take the car home and keep it overnight. They allowed him to take the car home on the Saturday evening before the accident occurred, and he was to keep it until the next Monday morning in the garage at his home. The officers of the bank did not know that he was using the car on the Sunday that the accident occurred.

The testimony of Deal was corroborated in all respects by that of Frank Ferrell.

According to the testimony of Joe Irving, when the car was not in use, it was presumed to be kept at night in his garage, but when Ferrell and he would come in off a trip, Ferrell would sometimes drive him home and he would permit Ferrell to take the car to his home and keep it in his garage until it was used again on the business of the bank. Thus, it will be seen that Ferrell did not have any authority to use the car for his own purposes, and the bank did not know that he was using the car on the Sunday that the accident occurred. He had been driving around the country with a friend for pleasure, and then took Finch in the car for the purpose of selling him a cow that belonged to Emmett Mitchell. It is true that Mitchell was a director of the bank, but the bank did not have any interest whatever in the cow and was not interested in the sale of her. Hence it cannot be said that Ferrell was acting within the apparent scope

of his authority in using the car for the purpose of carrying a prospective customer to look at a cow belonging to Emmett Mitchell. The officers of the bank did not know that Ferrell was using the car on Sunday, and did not give him permission to do so. He was not required to use it in the performance of his duties to the bank. It is true that there is testimony tending to show that he was allowed to keep a pair of the mules and a cow belonging to the bank on his own premises and to sell them, but this was not done on the Sunday the accident occurred, and he was given specific instructions in the matter. He did not use the car in the performance of any business entrusted to him by the bank on the Sunday in question. He had also been given permission to keep and sell a cow of the bank, but the permission to sell a cow or pair of mules for the bank had no relation to his authority to sell a cow for Mitchell.

The only ground upon which the defendant could be held liable was that an automobile is such a dangerous instrumentality that the owner of it must be deemed responsible for the tortious act of his servant in driving it, whether that act was done in the performance of the master's business or regardless of the fact of whether the master had knowledge of it. We think such a rule would be contrary to the principles of law already decided by this court. If the master is not liable for the tortious acts of the servant when he deviates from his employment for his own business or pleasure, with equal reason the master should not be held liable where the employee is furnished a car for business use, and takes it out of the garage without the master's consent and uses it for his own purpose. The rule of law applicable to the care and protection of dangerous instrumentalities does not apply as will be clearly seen from the rule laid down in *Healey* v. *Cockrill,* 133 Ark. 327, and *Bizzell* v. *Hamiter,* 168 Ark. 476, and *Keller* v. *White,* 173 Ark. 885. Ferrell, in driving the car around on the Sunday of the accident, was using it for purposes of his own, and his

act in so doing had no relation to his services as chauffeur for the bank, and the latter's immunity to liability is settled by the principles of law above announced.

The evidence on this breach of the case is undisputed; and in the application of the rule of law decided and applied herein there was no question of fact to be submitted to the jury. The rights of the plaintiff to recover depended wholly upon the law as declared by the court, as applied to the undisputed facts. Having reached the conclusion that the owner is not liable for the tortious act of his servant in injuring the person or property of third persons where the servant is not using the car for the performance of the business of the owner, but is using it wholly for his own purposes, there is no question of fact to submit to the jury.

Therefore the judgment will be affirmed.

SUTTON *v.* LEE.

Opinion delivered May 26, 1930.

C. T. Cotham, for appellant.

Murphy & Wood and *B. N. Florence,* for appellee.

HUMPHREYS, J. This suit in ejectment was originally commenced by appellee against appellant in the circuit court of Garland County to recover the possession of the following described real property, situated in said county, State of Arkansas, being a part of lot three (3) and a part of lot four (4), block thirty-six (36) of the United States Reservation, as surveyed, mapped and platted by the United States Hot Springs Commissioners, and more particularly described as follows:

"Commence at the junction of Lead Street and Reserve Avenue, and run south on the east line of lot four (4) and the west line of Lead Street, two hundred eighty-six (286) feet to an iron stake and the place of beginning; thence south on the west line of Lead Street one hundred thirty-one (131) feet to the common corner of lots three (3) and four (4) of said block thirty-six (36) and to the junction of Lead Street and Grand Avenue; thence southwesterly along the west line of Grand Avenue, one hundred eighty (180) feet to the corner of lots two (2) and three (3) of said block thirty-six (36) marked with an iron pipe and 100 feet east of Reserve Avenue; thence north one hundred (100) feet east of Reserve Avenue to an iron stake; thence northerly one hundred (100) feet parallel to Reserve Avenue to an iron pipe on the line dividing lots three (3) and four (4) of said block thirty-six (36) and one hundred (100) feet east of Reserve Avenue; thence northerly parallel

with Reserve Avenue one hundred (100) feet to a point and stake two hundred twenty-one (221) feet west from the place of beginning; thence easterly in a straight line two hundred twenty-one (221) feet to the place of beginning."

After the issues were made up the cause was, by consent of the parties, transferred to the chancery court where the same was tried and a decree rendered in favor of appellee for the possession of said real estate, from which is this appeal.

The facts necessary to a determination of the issues involved are undisputed and are as follows: Appellee inherited said real estate from her father, Benjamin Hutchinson, who received a patent to lots 3 and 4 in block 36 in the city of Hot Springs, Arkansas, on the 30th day of March, 1882, from the United States. Prior to his death he conveyed certain parts of said real estate by definite description to three different parties, and in 1888 died seized and possessed of the remainder of said real estate which is involved in this action. Each purchaser from him assessed and paid taxes on the part he purchased under the following description: "Part of lots 3 and 4 in block 36 in the city of Hot Springs, Arkansas." Benjamin Hutchinson left surviving him a widow, Julia, who afterwards married a man by the name of Brown and subsequently died. Prior to her death she paid taxes on said real estate under the following description: "Part of lots 3 and 4 in block 36 in the city of Hot Springs, Arkansas." She failed to pay the taxes for 1917 on a part of lot 4, block 26; and in 1921 on a part of lots 3 and 4 in block 36. There was a forfeiture, sale and conveyance of said real estate to the State for these years under an assessment to Julia Brown by the indefinite and uncertain description of "part of lot 3 and part of lot 4 in block 36 in the city of Hot Springs, Arkansas." Appellee was never in the actual possession of the real estate involved in this action, and never paid any taxes thereon either before or after the death of her mother, Julia Brown.

Appellant ascertained that the real estate in controversy was unoccupied, and that same had been forfeited to the State of Arkansas for nonpayment of taxes for 1917 and 1921 under indefinite descriptions, and further information to the effect that appellee was dead. She then had the real estate in controversy surveyed, and under the definite description furnished her thereof by the surveyor proceeded under act 365 of the Acts of 1923 to purchase the said real estate from the State. She complied with all the provisions of said act and became the purchaser thereof at the sheriff's sale and received a certificate from him which contained a definite description of the land in controversy. She then paid the purchase price, presented her certificate and applied to the State Land Commissioner for a deed thereto. The Land Commissioner refused to make her a deed according to the description contained in her certificate from the sheriff, but made her a deed according to the description by which the land had been forfeited and conveyed to the State for the nonpayment of taxes for the years 1917 and 1921. Immediately upon receipt of said deed appellant took possession of the land in controversy, and made valuable improvements thereon.

Appellant contends for a reversal of the decree because neither appellee nor her predecessors in title had been in possession of said lands within five years before the institution of her suit in ejectment, and in support of this contention relies upon § 6948 of Crawford & Moses' Digest, which reads as follows:

"No action of ejectment, when the plaintiff does not claim title to the lands, shall be brought or maintained when the plaintiff, or his testator or intestate, has been five years out of possession."

The statute in question has no application to the instant case, as appellee asserted title to said real estate as a basis for her action.

Appellant also contends for a reversal of the decree because the description contained in the deed she re-

ceived from the State can be made definite and certain by referring to the deed describing the parcels of lots 3 and 4 in said block sold by Benjamin Hutchinson to his grantees, and deducting said parcels from the total area of said lots. Even if such a method were permissible in order to definitely ascertain what particular part of said lots were forfeited in the name of Julia Brown, it would be necessary to show that the purchasers of the several parcels of said lots assessed and paid their taxes for the years 1917 and 1921 by definite and certain descriptions. They did not do so, but, on the contrary, assessed and paid their taxes as parts of lots 3 and 4 in said block. This court ruled in the case of *Hershey* v. *Thompson,* 50 Ark. 484, that (quoting from the syllabus) "Proof that the person in whose name land was assessed owned no other in the legal subdivision of which it is a part is not sufficient to identify it."

Appellant also contends for a reversal of the decree because no affidavit was filed before the suit was brought with the circuit clerk showing that a tender for taxes and improvements had been made as required by § 3708 of Crawford & Moses' Digest. The requirements of this section of the statute do not apply to void tax sales made without power or authority. *Kelso* v. *Robertson,* 51 Ark. 397; *Winn* v. *Little Rock,* 165 Ark. 11. In the instant case the sale was unauthorized because the description of the land in the assessment and all proceedings involved was insufficient to identify it. It amounted to no description at all.

Appellant also contends for a reversal of the decree because the certificate of purchase acquired under a compliance with the requirements of act 365 of the Acts of 1923, contained a definite and certain description of the real estate in controversy. This act only applies to purchasers of lots from the State to which it has acquired title. The State acquired no title to the real estate in controversy in the instant case as the assessment and forfeiture were void from the want of a description by which

same might be located. The certificate was issued without authority, and could not and did not confer color of title to said real estate although definitely describing it.

Appellant also contends for a reversal of the decree because the court did not allow her for the improvements made upon the real estate in controversy under the Betterment Act, §§ 3703-3710 of Crawford & Moses' Digest. This act does not protect an occupant of land for the value of improvements made unless he or she has color of title thereto. Appellant's certificate of title was void because issued without authority, and her deed was void because it described nothing. No color of title conferred upon her by either.

Lastly, appellant contends for a reversal of the decree because appellee was barred from bringing the action under § 6947 of Crawford & Moses' Digest, which is a two-year statute of limitations running in favor of a person or persons actually occupying lands under color of title to the exclusion of the true owner. It has no relation or application to the instant case, because appellant had no color of title to the real estate in controversy.

No error appearing, the decree is affirmed.

PAVING IMPROVEMENT DISTRICT NO. 105 OF PINE BLUFF *v.* WRIGHT.

Opinion delivered May 26, 1930.

C. B. Thweatt and *Coleman & Gantt,* for appellant.

Rowell & Alexander, for appellee.

MEHAFFY, J. The city council of the city of Pine Bluff created an improvement district for the purpose of improving Fifth Avenue and Ohio Street in said city. The commissioners for said improvement district are J. F. Hilton, Dr. O. W. Clark and J. F. Rutherford. On November 20, 1929, the district through its commissioners entered into a contract with Chris L. Wright as engineer for said district. Section 7 of said contract is as follows: "If, because of the second party's instructions, permission or neglect at any time, it shall appear that the work of the improvement is not being carried out according to the plans and specifications, the State Highway Commission shall have the right to terminate this contract." The commissioners of the improvement district thereafter discharged the engineer, and he thereupon began this action in the Jefferson Chancery Court for a mandatory injunction to restore him as engineer, and to require the commissioners to perform said contract. Appellee prayed that, if the relief above asked could not be granted, he be given judgment against the district, and that commissioners be ordered to pay same out of the first money coming into their hands. He also prayed, if the relief above asked could not be granted, that he be given judgment against the commissioners individually. Appellants filed demurrer, motion to strike and answer. Numbers of witnesses testified, and the evidence is voluminous. Much of the evidence is as to the improper conduct and management of the parties. It would serve no useful purpose to set it out because the only question for us to determine is, did the commissioners have the right to discharge the engineer? If they had that right under the law, they could exercise such right, and their motives would be immaterial. After the hearing by the court a permanent injunction was issued, and the district and

commissioners have appealed. Appellee calls attention to the case of *Philpot* v. *Taylor*, 179 Ark. 356. The court in that case held that a contract let to a contractor who was a business partner of the engineer of the district was against public policy. The contract was also held to be against public policy and void for other reasons, but that case has no application here. Appellee earnestly contends, however, that the 7th section of the contract quoted above deprives the commissioners of the right to discharge the engineer. The law (Acts Sp. Sess. 1928, No. 8), provides that the commissioners of the improvement district shall employ the engineer, and not the State Highway Commission. It provides, however, that they shall select an engineer who is acceptable to the State Highway Commission. This provision was evidently put in the act because the State Highway Commission was to pay part of the cost of improvement. It is reasonable, if the Highway Commission is to pay part of the cost of the improvement, that the engineer in charge of the work should be acceptable to it. It did not either under the law or the contract have anything to do with the election of the engineer. The commissioners of the improvement district elected the engineer. The law gives the State Highway Commission no power to elect or discharge the engineer. The right of the State Highway Commission to discharge the engineer is given in the contract entered into between the commissioners and the engineer, and that gives the right to discharge for the things mentioned in the contract. There might be other things besides those mentioned in section 7 of the contract that would make the services of an engineer unsatisfactory and make his discharge necessary, and no one would contend that the State Highway Commission could discharge him except for the causes mentioned in the contract. The contract is not with the State Highway Commission. It simply approved the selection of the engineer. It probably would not have approved the selection of the engineer if the commissioners of the improvement district

had not given it the right to discharge for the causes mentioned. The law imposes certain duties on the commissioners which they must perform. They are required under the law to control the construction of the improvement. They are prohibited from being interested in any contract they may make as commissioners, and there are other provisions prescribing their duties and liabilities. They cannot make a valid contract where they are interested, and they cannot make a valid contract depriving themselves of the right to discharge an employee or to relieve themselves from the performance of any duty. 6 R. C. L. 743; *Bryant Lumber Co.* v. *Fourche River Lumber Co.,* 124 Ark. 313. This court has decided that the authority of appointment and removal is in the board of commissioners. *Seitz* v. *Merriwether,* 114 Ark. 289.

The commissioners of the improvement district in this case have the same right to employ an engineer as in other cases. The only additional requirement is that the engineer selected shall be acceptable to the State Highway Commission. They also have the right to discharge, but they have by their contract with the engineer given the State Highway Commission the right to discharge for certain causes. The commissioners of the improvement district may discharge, not only for the causes mentioned in the contract, but for other causes also. This is a suit to compel the specific performance of the contract employing appellee as engineer, and the remedy at law is complete and adequate, and for that reason a court of equity has no jurisdictions. *Leonard* v. *Board of Directors,* 79 Ark. 42; 32 C. J. 199; *Ryan* v. *Reddington,* 87 Atl. 285; Lewis & Spelling on Injunctions 500; *Chapman & Dewey L. Co.* v. *Bd. of Imp. Dist.,* 127 Ark. 318; *Pharr* v. *Knox,* 145 Ark. 4.

Holding as we do that the commissioners of the improvement district had the right to discharge appellee, it is unnecessary to consider the other questions discussed by counsel. The decree of the chancery court is reversed,

and the cause remanded with directions to dismiss the complaint.

HART, C. J., HUMPHREYS and BUTLER, JJ., dissent.

WRIGHT CHEVROLET COMPANY *v.* KENT.

Opinion delivered May 26, 1930.

N. A. McDaniel, for appellant.

Brouse & Brouse, for appellee.

MCHANEY, J. Appellant sold appellee one Chevrolet coach automobile on July 2, 1928, to be delivered August 15, 1928, at a price of $719.75. Appellee on the same date delivered to appellant his second-hand car at a price of $125 to be applied on the purchase price of the new car which left a balance of $594.75 to be paid. The contract was in writing. It provided that the price of the new car was subject to change by the manufacturer, and that the price effective on the day of delivery would govern, but the purchaser had the right to cancel the order if the change in price was not satisfactory. The provision with reference to the trade allowance was as follows: "If my used car has been delivered to you, and this order is thereafter canceled, you will return said car

to me, and I will pay a reasonable charge for any storage of, or repairs to, said car during the period from delivery to notice of cancellation, and if you have sold the said car you will refund to me the amount actually received from said sale, less a selling commission of 15 per cent. and my expense incurred in storing, insuring, conditioning and advertising said car for sale." Another provision of the contract provided that if the appellee failed to take the car ordered (except for change in price as aforesaid) "forfeits my deposit as liquidated damages for your expense and trouble, and permits you to otherwise dispose of the car without any liability to me whatsoever."

Appellant sold the used car for $135, and appellee thereafter declined to take the new car and pay for it because he said he was not able to pay for it. He demanded of appellant the $135 for which his car was sold, less 15 per cent. commission, but appellant refused to pay, contending that appellee had forfeited that amount by virtue of the contract heretofore mentioned, and that the second-hand car, or the money for which it was sold, constituted a "deposit" within the meaning of the clause of the contract above quoted providing for forfeiture of the "deposit" in the event he refused to take the car except for the cause stated. Appellee thereupon sued appellant for the sale price of the second-hand car less the commission of 15 per cent. At the conclusion of the testimony the court directed a verdict for the appellee in the sum of $121.87 which was the amount sued for with interest, and this appeal followed.

Appellant contends that the second-hand car of the agreed value of $125 was a "deposit" within the meaning of the contract. We do not think so. The contract provided that the price of the new car should be diminished by the "deposit" and by the agreed value of the second-hand car. No deposit was made. The word "deposit" as used in the contract meant cash deposit. Since there was no deposit made, there was no forfeiture

by reason of appellee's failure to take the new automobile. It was not agreed that he should forfeit the second-hand car or its agreed value of $125. The contract was written by appellant on a form provided for the purpose, and will be construed most strictly against it. It would take a liberal construction of the contract in appellant's favor to hold that appellee forfeited his second-hand car or its value by refusing to take the new car. If appellant suffered any damages by the breach of the contract of sale and purchase, he might maintain an action against appellee to recover such damages as he actually sustained. The undisputed proof shows that appellant sold the car ordered for appellee to another for the same price, and could not therefore have been damaged. The judgment of the circuit court was correct, and is therefore affirmed.

HERRING *v.* BOLLINGER.

Opinion delivered May 26, 1930.

Cravens & Cravens, for appellant.

J. Seaborn Holt, for appellees.

BUTLER, J. The occurrence out of which this litigation arises was a collision between the automobile of the appellant and a truck of the appellee at the intersection of North 13th and "O" Streets in the city of Fort Smith, Arkansas. The testimony of the appellee, which was corroborated by other testimony, tended to show that one Walter Standard, the employee of the appellee, was driving a new Chevrolet truck loaded with gravel and traveling north on 13th Street which intersects "O" Street at right angles. "O" Street runs from east to west. The appellee was going at a moderate rate of speed, not greater than twelve or fifteen miles per hour. When within about fifteen feet of "O" Street, he saw the appellant's car about a block and a half away traveling west and coming at a very rapid rate of speed. Appellee looked then in the opposite direction to see if any other car was approaching, continuing to drive until he was well within the intersection of 13th and "O" Streets when the appellant's car, still advancing at a high rate of speed and without pause, collided with his truck demolishing it and scattering its contents over a considerable space in the vicinity. "O" and 13th Streets, at and near the point of collision, was a residential section of the city.

There was testimony on the part of the appellant contradicting the testimony of the appellee, and to the effect that the appellant was not driving at an unusual or rapid rate of speed, and that the speed did not exceed twenty miles per hour; that appellee's automobile had

reached the intersection of 13th and "O" Streets and the truck was approaching from his right-hand on 13th Street; that he tried to avoid the collision by turning to the left, but was unable to do so and the truck struck the side of his automobile at the right front door, badly damaging it and injuring the appellant.

There was testimony tending to impeach the credibility of the appellant. At the conclusion of all of the testimony the court, over the objection and exception of the appellant, gave instructions numbered one and two at the request of the appellee, and refused to give instruction B requested by the appellant, to which action exceptions were duly saved. The jury returned a verdict for the appellee and the court entered judgment in accordance therewith, from which judgment this appeal has been duly prosecuted.

The appellant assigns as error the giving of instructions 1 and 2 at the instance of the appellee, which instructions are as follows:

"No. 1. You are instructed that:

"Sec. 8. Speed Generally. No person shall drive a vehicle upon any public street or highway in this city at a greater rate of speed than is reasonable or proper, having regard to the traffic and the use or condition of the way, or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any vehicle operated in a resident district exceeds twenty miles an hour, such a rate of speed shall be *prima facie* evidence that the person operating the vehicle is running at a speed greater than is reasonable and proper, having regard to the traffic and the use and condition of the way."

"If you find from the evidence in this case that the defendant, Joe Herring, was operating his automobile along and upon North "O" Street, this city, in a resident section at a speed greater than twenty miles per hour, then I instruct you that such rate of speed is *prima facie* evidence that he was operating his car at a speed

greater than is reasonable and proper, having due regard for the traffic and the use and condition of the way. And, if you find that such speed was the proximate cause of the collision and damages, if any, proved by the evidence, then you should return a verdict for the plaintiff. You are instructed that a resident district, as used in these instructions, means a territory contiguous to a highway not comprising a business district when the frontage on such highway or street for a distance of three hundred feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business."

"No. 2. You are instructed that:

"(a) The drivers of vehicles approaching a street intersection at approximately the same time shall give the right-of-way to the vehicle approaching from the right. So that, if you find from the evidence in this case that the plaintiffs' employee and driver, Walter Standard, was driving plaintiff's automobile truck along and upon North 13th Street in a southerly direction at a point where North 13th intersects "O" Street, and you further find that the plaintiff's automobile truck and the defendant's automobile reached said intersection at approximately the same time, then I instruct you that the plaintiff's automobile truck and the driver thereon, Walter Standard, had the right-of-way over the defendant, and that it was the duty of the defendant, Joe Herring, to yield said right-of-way to plaintiff's driver. And if you find that defendant failed to yield said right-of-way, and that this was the proximate cause of the collision and of the damages resulting from said collision, if any, then I instruct you to return a verdict for the plaintiffs."

It is insisted that instruction No. 1 contains three prejudicial errors:

(a) That the statement in the instruction that the running of a motor vehicle in a resident district in excess of twenty miles an hour is *prima facie* evidence that the operator of the vehicle is running at a

greater rate of speed than is reasonable and proper is in conflict with the statute. We do not agree with the appellant. By paragraph 7 of § 4 Act No. 223, Acts of 1927, the speed in resident districts is fixed not to exceed twenty miles an hour unless otherwise fixed by local authority, and by paragraph 8 of that act thirty-five miles is fixed as the speed limit under all other conditions. Immediately following paragraph 8 is this language: "It shall be *prima facie* unlawful for any person to exceed any of the foregoing speed limitations except as provided in subdivision 'c' of this section." (Subdivision "c" authorizes the local authorities by ordinance to increase the speed limit).

The statement of the instruction was in line with the language of the statute and was correct.

(b) It is further insisted that the instruction is objectionable because it tells the jury to find for the plaintiff if the violation of the statute was the proximate cause of the collision and damage, without requiring the jury to find whether the appellant was negligent in failing to comply with the law. We think this objection is well taken, for it was a declaration in effect that violation of a traffic law was *per se* negligence, whereas violation of the law merely cast upon the appellant the burden of showing that under the circumstances he was acting with ordinary care notwithstanding the violation of the law. It is not enough that the violation of the statute be the proximate cause of the injury, but it must also appear that this violation of the law was negligence, which question should have been submitted to the jury. Of course, if a violation of any statute was not the proximate cause of the injury, there could be no legal ground for complaint, but where such violation is the proximate cause of the injury the burden rests upon the party offending to show by a preponderance of the testimony that under the facts and circumstances of the case the conduct of such party was not negligence. If it is so shown, there can be no liability, even though the violation of the law

might have occasioned the injury. That the appellant was driving at a speed greater than twenty miles per hour was one of the facts in the case which the jury had a right to consider along with the other facts and circumstances in determining whether or not he was negligent. *Mayes* v. *Ritchie Gro. Co.*, 177 Ark. 305; *Pollack* v. *Hamm*, 177 Ark. 348. But, as we construe the instruction, the right to consider any other circumstances was withdrawn from the jury, leaving them only to determine the negligence of the appellant from the single fact of the rate of speed at which he was driving.

(c) The further contention is made that the instruction was prejudicial because it assumed that the collision took place in a resident district without any proof having been adduced to establish that fact. Without reviewing at length the testimony on this question which is not very clear, we think there was enough testimony to submit that issue to the jury, and the instruction in this respect was not erroneous.

Instruction No. 2 is erroneous for the same reason as instruction No. 1, *supra*, in that it tells the jury that a violation of the traffic law with respect to drivers of vehicles approaching a street intersection in effect is negligence, and that if a violation of such law was a proximate cause of the injury they should find for the plaintiff. What we have said as to instruction No. 1 above is applicable to instruction No. 2. Appellees argue that if these instructions were erroneous in the particular discussed this error was cured by the giving of instruction No. 8 at the request of the appellant, by which the jury were told that the violation of the traffic law was not of itself necessarily evidence of negligence, but that the same, if any, might be so considered by the jury in connection with other circumstances disclosed by the evidence. This instruction is in conflict with instructions 1 and 2. By instruction No. 1 as we have seen, the jury are virtually told that the violation of the law was negligence, while instruction No. 8 not only told the jury in

effect that the violation of the traffic law is not of itself negligence but that it is not even "of itself necessarily evidence of negligence." We think that instruction No. 8 is not correctly phrased. The jury might well have been instructed that a violation of the traffic law is not of itself necessarily negligence, but to say that it is not necessarily evidence of negligence is incorrect. It *is* evidence of negligence, the weight and sufficiency of which, tested by the light of surrounding circumstances, is a question for the jury.

In *St. L. I. M. & S. R. Co.* v. *Rogers,* 93 Ark. 564, we held that where "the instructions given may be apparently conflicting, if, from the language used or the relation which the instructions are made by the whole charge to bear toward each other, it is readily seen that they are to be read together without conflict and as a harmonious whole, and they can be so read, then it is our duty to so treat them." In the case at bar instruction No. 8 is wholly disconnected from instructions 1 and 2, and it is not at all evident that they are to be read together and as a harmonious whole, for they cannot be so read because they are irreconcilable with each other.

In *Garrison Co.* v. *Lawson,* 171 Ark. 1122-5, we referred to the case of *St. L. I. M. & S. R. Co.* v. *Rogers, supra,* and quoted with approval therefrom as follows: "Separate and disconnected instructions, each complete in itself and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole."

We have seen, therefore, that instructions No. 1 and No. 2 are not only erroneous, but prejudicial.

There is another vice in these instructions which has not been briefed by the appellant, but, as there must be a new trial of this case, we think proper to mention it. As a defense to the action appellant pleaded the negligence of the servant of the appellees in bar, and on this issue introduced testimony and submitted the issue to the jury by instruction No. 7 given on motion of the

appellant. In instructions 1 and 2 this issue was ignored. "An instruction which ignores a material issue in the case about which the evidence is conflicting and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruction which correctly presents that issue is found in other parts of the charge." *St. L. I. M. & S. R. Co.* v. *Rogers, supra.*

In the case of *Temple Cotton Oil Co.* v. *Skinner*, 176 Ark. 17, we said: "We all agree that an instruction should be complete in itself when it undertakes to tell the jury when a verdict should be returned for the plaintiff, and that the trial court should not instruct the jury that it must find for the plaintiff or the defendant, as the case might be, upon a partial or incomplete statement of the law applicable to the material facts of the case. * * * The result of our views is that it is established as a settled law of this State by the decision in *Garrison Co.* v. *Lawson,* 171 Ark. 1122, and *Natural Gas & Fuel Co.* v. *Lyles,* 74 Ark. 146, that an instruction is inherently erroneous, and therefore prejudicial, which leaves out of consideration the plaintiff's contributory negligence * * * and leaves to the jury the determination of the defendant's conduct as the sole issue of the jury's verdict, by concluding with the phrase, "you will find for the plaintiff," since, under the evidence, the conduct of the plaintiff as well as that of the defendant is essential to a proper verdict."

In *Murray* v. *Jackson,* 180 Ark. 1144, we held that "the word 'intersection' does not mean the point where two automobiles approaching at right angles would meet if they continued on their course, nor the point where the middle or center line of the two streets would cross each other, but the space occupied by the two streets where they cross each other, the whole space between the lines of the two streets." The appellant requested an instruction B in which he attempted to define the word "intersection" under the rule an-

nounced in *Murray* v. *Jackson, supra.* The requested instruction was as follows: "Under the evidence in this case, you are instructed that the word 'intersection' as used in the other instructions of the court means that space on North "O" Street between the east line of 18th Street and the west line of 13th Street." The appellant calls attention to the peculiar alignment of "O," 18th and 13th Streets and insists that the definition requested conformed with the rule stated. We have examined the plat, and do not agree with the appellant in this contention, but think the intersection in this particular case is the space in "O" Street within the east and west lines of 13th Street extended to and across said "O" Street, and the court's refusal to give the instruction as requested was not error.

As we have already said, this case must be remanded for a new trial, and we therefore desire to call attention to another instruction which is incorrect, namely, instruction No. 17 on the measure of damages. This instruction is almost identical with one condemned in the case of *Kansas City Sou. Ry. Co.* v. *Biggs, ante* p. 818 decided this date. We refer to that decision for a discussion of the error and for citation of authority.

The evidence in this case was ample to support the verdict of the jury, but the appellant was entitled to have his theory of the case fairly and correctly presented to the jury, and since, as we have seen, the instructions before criticized were erroneous and prejudicial, the judgment of the trial court will be reversed, and the cause remanded for a new trial.

EASON *v.* HIGHLEY.

Opinion delivered June 2, 1930.

[redacted]

[redacted]

O. E. Williams, for appellants.

W. A. Utley, for appellees.

HART, C. J., (after stating the facts). It is the settled law of this State that where an estate comes to an intestate by gift or devise, without consideration other than that of blood, it is an ancestral estate; but that, if any part of the consideration is a valuable one, the estate acquired is a new acquisition. The court has held frequently that the purpose of the statute creating ancestral estates was to keep such estates in the line of blood from which they came, and that blood must be the only consideration by which they are acquired, whether by devise or gift. Hence, if an estate is ancestral and comes to the intestate by gift, devise, or descent, on the part of the father or mother, it goes to the heirs of the intestate who are of the blood of the ancestor from whom it came. If, on the other hand, the land is a new acquisition, on the death of the mother after that of Van Franklin Highley, the land passed to his brothers of the half blood. *Martin* v. *Martin,* 98 Ark. 93; *Hill* v. *Heard,* 104 Ark. 23; *McElwee* v. *McElwee,* 142 Ark. 560; *Earl* v. *Earl,* 145 Ark. 559; *Beard* v. *Beard,* 148 Ark. 23; and *Carter* v. *Carter,* 129 Ark. 7 and 573.

It is contended by counsel for appellants that a preponderance of the evidence shows that the lot in controversy was an ancestral estate. They point to the fact that the records of the bank show that Mrs. Alice L. Highley had on deposit in the bank the sum of $1,400 on the day that the deed to Van Franklin Highley was executed. They state that this fact, coupled with the other circumstances attending it, show that the whole consideration was paid by the mother. It is true, as contended by appellants, that the pension attorney testified that, under

the laws of the United States, the pension was received by Mrs. Alice L. Highley for herself and her minor son, but a consideration of the whole testimony of the pension attorney shows that he was referring to the amount received after September 27, 1916, at which time the minor became sixteen years of age. The mother had applied for and received a pension commencing November 16, 1911, and from that time until her minor son became sixteen years of age, on September 27, 1916, it appears that she received the pension, both for herself and for her minor son. In any event, she so considered the matter and so reported it to the probate court. She was the guardian of her minor son, and in her final settlement, which was filed on the 2d day of March, 1920, she charged herself with the sum of $752 on account of the minor's pension. She also asked for credit from the death of his father up to September 27, 1916, for funds expended in his education and maintenance. This shows that she regarded his claim for minor's pension as belonging to him, and that she must account for it to the probate court. It is true that her account was approved by the probate court, but this does not end the matter. She had not obtained any previous order of the court allowing her to expend this sum for the support and maintenance of her minor son.

It is the established law in this State that the probate court cannot approve the expenditures of a guardian for the maintenance and education of his ward in so far as they exceed the income of the ward's estate, unless such expenditures have been under the direction of the court. *Campbell* v. *Clark,* 63 Ark. 450; *Thomas* v. *Thomas,* 126 Ark. 579; and *Diffie* v. *Anderson,* 137 Ark. 151. There is nothing in the record tending to show that there had been any previous order of the probate court directing Mrs. Highley to expend any part of the principal of her ward's estate for his education and maintenance. On the other hand, such proof as the record contains on the point was, that the son, while in poor health, worked during the

week-ends in delivering groceries and endeavoring to earn what he could to help support himself and his mother. She earned her own support by daily labor, but there is nothing to show that she was authorized to expend any part of her ward's money towards his education and support.

The testimony of Mrs. Hutcheson, who deeded the lot to the minor, was that his mother told her that it was to be paid for her out of the pension money belonging to herself and to her minor son. While the mother had on deposit in the bank in her own name the amount, which she paid for the lot, still when her daily deposit slips in the bank for the time previous to the execution of the deed are examined, we must come to the conclusion that it required the pension money of her son to make out the $1,400. Another witness testified, that when the mother told him in the presence of her son that she wished to purchase them a home but did not have sufficient money for that purpose, her son replied that he wished his pension money to be used in part payment of the purchase price of a home for them. Hence we are of the opinion that a preponderance of the evidence is that a part of the purchase price of the land in question was paid by the minor; and, under the principles of law above set forth, the estate was a new acquisition, and, upon the death of the mother after that of the minor, it descended to his half brothers as his heirs at law.

There is nothing in the case of *United States Fidelity & Guaranty Co.* v. *Hicks,* 180 Ark. 118, 21 S. W. (2d) Ark. 421, which conflicts with the views we have expressed here. In that case, the record showed that the United States had allowed the mother a monthly pension of $20 for the support of her ward, and that the probate court had allowed her a monthly sum of $25 for the same purpose. The court also said that the testimony showed that, after the allowance was made, the guardian supported and maintained her ward and spent more than the sum allowed upon her ward. So, it will be seen that the

facts in that case showed that an allowance had been made in the probate court for the support and maintenance of the ward, and that the mother had expended more for that purpose than the sum allowed by the probate court, or allowed as a pension for the minor by the United States; but was only permitted to hold as her own money the amount so allowed her.

It follows that the decree of the chancery court was correct, and must be affirmed.

CAMP *v.* BARR.

Opinion delivered June 2, 1930.

Alonzo D. Camp and *O. A. Graves* and *E. F. McFaddin,* for appellants.

L. F. Monroe, for appellees.

SMITH, J. In this case three different sets of school directors are assuming to act as directors of Patmos Special School District in Hempstead County, and the purpose of this litigation is to determine which set has lawful authority to act.

Prior to February 12, 1930, there were four school districts in the southern part of Hempstead County, known as Patmos Special School District, Rural Special School District No. 3, Rural Special School District No. 8, and Rural Special School District No. 15. On February 12, 1930, the county board of education of that county, acting upon the petitions of a majority of the qualified electors in the territory to be affected, made an order

which combined all these districts under the name of the Patmos Special School District, and the question in the case on this appeal is whether these districts were consolidated, or whether districts numbered 3, 8 and 15 were dissolved and attached to Patmos Special School District.

It appears that the consolidation movement was inaugurated by the directors of districts 3, 8 and 15, but before the petitions for the consolidation were prepared or circulated it was agreed that the Patmos district might also be included, and the following petition was circulated and signed by the required number of electors:

"To the Board of Education of Hempstead County:

"We, the undersigned, a majority of the qualified electors in the territory to be affected, respectfully petition your honorable board to change the boundary lines of Patmos Special School District in Hempstead County, Arkansas, so as to include the territory now in Rural Special School Districts Numbered Three (3), Eight (8) and Fifteen (15) in Hempstead County; and that said territory now incorporated in said Rural Special School Districts Numbered Three (3), Eight (8) and Fifteen (15) be annexed to and made part of the said Patmos Special School District."

Upon this petition the board of education made the following order:

"It is therefore considered, ordered and adjudged by the county board of education of Hempstead County, Arkansas, that the prayer of this petition be, and the same is, hereby granted, and that boundary lines of the said Patmos Special School District be, and the same are hereby so changed and extended as to include the said Rural Special School Districts, Numbers Three, Eight and Fifteen, and that the said Rural Special School Districts be, and the same are hereby dissolved, and all the territory thereof be attached to and made part of Patmos Special School District of Hempstead County, Arkansas; and that all funds belonging to the said Rural Special

School Districts Numbers Three, Eight and Fifteen be transferred to and become the property of the said Patmos Special School District, and that all the property belonging to said Rural Special Districts Numbers Three, Eight and Fifteen become by this order the property of the said Patmos Special School District; and that the said Patmos Special School District assume and pay all indebtedness of said Rural Special School Districts Numbers Three, Eight and Fifteen; and that the directors of the said Rural Special School Districts Numbers Three, Eight and Fifteen transmit without delay all records of said districts to the County Superintendent of Hempstead County, Arkansas, for preservation in his office; and that copies of this finding and order be filed with the county clerk and the county treasurer of Hempstead County, Arkansas."

At the time this order was made the opinion of this court had not been delivered in the case of *Special School District No. 60* v. *Special School District No. 2, ante* p. 253, and there was uncertainty as to who constituted the board of directors of the new district. There appears to have been an agreement made, after the board of education had entered the order set out above, that four of the directors of the original Patmos district should resign, and the remaining two should select four directors residing in the territory of the other districts. It does not appear that the four directors resigned, as it had been agreed they should do, but their successors were appointed and undertook to qualify by taking the oath of office, and these persons compose a board referred to in the record as the New Patmos Board.

The directors of the old Patmos board took the position that the other districts had been annexed, and that they were the directors of the new board. The directors of the other districts took the position that there had been a consolidation of the districts, and that the directors of all the districts composed the new board of directors for the consolidated district and were entitled to

serve as such until a new board could be elected, and this suit was brought by them to prevent the old and the new Patmos boards from interfering with them.

The chancellor was of the opinion that the case of *Special School District No. 60* v. *Special School District No. 2, ante* p. 253, applied to the facts of this case, and upon the authority of that case held that there had been a consolidation of the four districts, and granted the relief prayed, and both the old and new Patmos boards have appealed.

At the trial from which this appeal comes there was offered in evidence, without objection, a certified copy of the petition upon which the county board of education in Nevada County had made the order involved on the appeal in the case of *Special School District No. 60* v. *Special School District No. 2, supra,* the prayer of which was that "the above described territory, being all the land now included in district No. 1 and district No. 60, which districts and which territory we respectfully ask to be annexed and become a part of said district No. 2 in Nevada County." Upon this petition the county board of education of Nevada made an order granting the prayer of the petition, extending the "boundaries of school district No. 2 to include school districts Nos. 1 and 60."

In the case cited we construed this order as being an order of consolidation, and held, that under § 8847, C. & M. Digest, "the consolidated school district would be governed by a board of directors composed of all of the directors of the several school districts entering into the consolidation" until the next regular school election.

It thus appears that the facts in the two cases are practically identical, and we perceive no reason why we should not hold, with the chancellor, that the instant case is controlled by the former opinion.

It is earnestly insisted that this holding is in conflict with the opinion in the case of *Manley* v. *Moon,* 177 Ark. 260; but we do not think so. The point decided in

that case was that act 156 of the Acts of 1927, page 549, authorizing the county board of education to change the boundaries between any existing school districts, left to the board a discretion in changing the boundaries, whether to do so by consolidation or otherwise.

There was no change of boundaries here except to consolidate four districts into one, and it is immaterial that the consolidated district took the name of one of the districts consolidated. The effect of the order of the board of education was to consolidate the four districts, and, upon this being done, the directors of all the districts became the directors of the consolidated district, with authority to serve until the next school election, when the new board would be elected. This is the effect of the Nevada County case, *supra,* and, as we think it applies here, the decree of the chancery court, which conforms thereto, must be affirmed, and it is so ordered.

DREW COUNTY BANK & TRUST COMPANY *v.* SORBEN.

Opinion delivered June 2, 1930.

Williamson & Williamson, for appellant.

A. J. Johnson, for appellees.

HUMPHREYS, J. The question presented for determination by this appeal is whether appellant's mortgage for $400 executed to it on January 4, 1927, by L. M. Stratton and E. C. Stratton on the south half, southeast quarter, section 21, and the southeast quarter, southwest quarter, section 22, all in township 10 south, range 7 west, in Lincoln County, Arkansas, containing 120 acres of land, is paramount to appellees' mortgage executed to them on the 25th day of March, 1925, for $405.39 by the same mortgagees on the south half, southeast quarter, section 21 and southwest quarter, southwest quarter, section 22 in said township and county, containing 120 acres.

Appellant's mortgage was acknowledged in statutory form and filed for record on January 6, 1927; and appellees' mortgage was not acknowledged in statutory form, but notwithstanding was filed for record on November 7, 1925.

The trial court ruled that appellees' mortgage lien was superior to that of appellant's on all the land described in appellees' mortgage, because their mortgage was filed for record prior to appellant's mortgage. This ruling of the court would have been correct, had appellees' mortgage been acknowledged in accordance with the statute in Arkansas governing acknowledgments. The acknowledgment, however, was fatally defective because it failed to state that the mortgage was executed "for the consideration and purposes therein mentioned and set forth," as required by § 1521 of Crawford & Moses' Digest. In construing said section of the statute, this court said, in the cases of *Johnson* v. *Godden,* 33 Ark. 600, and *Wright* v. *Graham,* 42 Ark. 141, that the words "consideration" and "purposes," or words of similar import, are material and must appear in an acknowledgment in order to give any validity to an instrument for the conveyance

of real estate as far as third parties are concerned. A mortgage of real estate is not entitled to record under § 7380 of Crawford & Moses' Digest until properly acknowledged, and, when properly acknowledged, does not become a lien under § 7381 of Crawford & Moses' Digest on the mortgaged real estate as to third parties until filed in the recorder's office for record in the county where the real estate is situated. According to the statute, the lien attaches to the real estate described in the mortgage at the time of filing, and thenceforth is notice to all persons of the existence of such mortgage.

In the instant case the record reflects that appellees' mortgage was insufficiently acknowledged because the acknowledgment omitted the words "consideration" and "purposes," or words of similar import and, on account of the fatal defect in the acknowledgment, was illegally admitted to record. The record thereof constituted no notice to third parties of the existence of the mortgage. Appellant's mortgage, under the statutes and decisions referred to, was and is paramount to appellees' mortgage, although executed and filed for record subsequent to appellees' mortgage, so far as the mortgages cover the same real estate. Both mortgages cover the eighty-acre tract described as the south half, southeast quarter section 21, township 10 south, range 7 west, in said county, but do not cover the same forty-acre tract. As to the eighty-acre tract appellant's mortgage was and is paramount to that of appellees' mortgage; as to the forty-acre tract described in appellees' mortgage as the southwest quarter, southwest quarter, in said section, township and range and not described at all in appellant's mortgage, appellees' mortgage lien was and is paramount to appellant's. The reason is that as to the forty-acre tract appellant gained no priority of lien over appellees by reason of recording its mortgage. It had no mortgage lien on said forty-acre tract and obtained none by recording its mortgage. It is true that the record reflects that the intention was to include the southwest quarter, south-

west quarter, of said section, township and range, but such intention did not avail to establish precedence between mortgages that gained precedence under the statute by virtue of priority in filing same for record. The issue as to priority of the mortgages was joined and the rights of the parties fixed before an attempt was made to reform appellant's mortgage so as to correctly describe the forty-acre tract in question. Even a reformation of appellant's mortgage would not relate back to the date same was recorded so as to bind or affect third parties. It follows that the decree must be reversed in so far as it declares appellees' mortgage lien paramount to appellant's on the south half, southeast quarter, of said section, township and range and remanded with directions to declare appellant's lien paramount to appellees' on said eighty-acre tract, which is accordingly done. In all other respects the decree is affirmed.

FEDERAL COMPRESS & WAREHOUSE COMPANY *v.* PARROTT.

Opinion delivered June 9, 1930.

Dudley & Dudley, for appellant.

Richardson & Richardson, H. L. Ponder and *Smith & Blackford,* for appellee.

MEHAFFY, J. Appellee brought suit in the Lawrence Circuit Court to recover damages for an injury received

while in the employ of appellant. The appellee was employed by the appellant as a tie man, but it was his duty to help load cotton on the cars and to do any work which he was directed to do. Appellant provided what it called a "gang plank," one end of which rested on the platform and the other end was in the door of the car into which the cotton was being loaded. This gang plank, which was iron, was about four feet long and three feet wide. The bale of cotton was placed on a truck and carried on said truck from the cotton shed or platform over the gang plank into the car. The gang plank slipped from the car door, causing appellee to fall and injuring him. It is alleged that appellant was negligent in not making the gang plank secure, and that this negligence was the cause of appellee's injury. The appellant contends that the condition of the plank and the danger was obvious, and that appellee assumed the risk. The appellee and seven or eight other employees of appellant were loading bales of cotton, conveying the cotton from the warehouse to the car on trucks. Each truck carried one bale. The appellee testified that it was the duty of the car man to fasten the gang plank, and that it was not his duty to inspect it. There is evidence tending to show that one of the loaders would place the gang plank and also evidence tending to show that the plank should have been nailed. The undisputed evidence shows that some one other than appellee had placed the plank, and it was done before appellee began work at this place. Appellee worked at another place in the forenoon tying cotton. They were loading the car when appellee went there to work. The undisputed evidence shows that the plank had been placed and employees were loading the cotton on the car when appellee went there to work. He had no opportunity to inspect the plank or to find out whether it was securely fastened or not. One truck was immediately behind another, and there were seven or eight engaged in loading the cotton. If the plank had been securely fastened, it would not have fallen. All the witnesses testify that, if it was raining or

damp, or if the car door was higher or lower than the platform, it was necessary to nail the gang plank. The evidence is in conflict as to whether the car door was higher than the platform. If it was higher, the gang plank should have been nailed to prevent it from slipping. The undisputed evidence shows it was not nailed. Appellant contends earnestly that the condition and danger was obvious, and that appellee assumed the risk.

Attention is called to many decisions of this court discussing the question of assumed risk and holding that where the danger arising from the negligence of the master is so apparent and obvious in its nature as to be at once discoverable to one of ordinary intelligence, an employee, by voluntarily undertaking to perform the work, assumes the hazards which exempt the employer from liability on account of injury to the employee. A servant assumes the usual and ordinary risks and dangers incident to his employment, but he does not assume the risk of injury from the negligence of his master or his fellow servants, unless he knows of the risk or unless the risk is open and obvious.

In this case the gang plank was not fastened or nailed, and both appellant's and appellee's witnesses say this is necessary unless the car door and platform are level with each other. The evidence on this question is not very strong, but there was sufficient evidence to submit the question to the jury.

The evidence shows clearly that the appellee worked tying cotton in the forenoon, and that when he got to the place where they were loading there were several others using trucks, and he was asked the question: "Did you know it was not fastened until it fell?" A. "No, sir, I did not." Q. "Was there anything there plain to you that you could see by looking that it was not fastened?" A. "No, sir, because when we went to work we grabbed up the trucks and just went at it. This car man, that is his place to always fasten the stage everywhere that I have worked." From the evidence in this case it appears that

the appellee had no opportunity to inspect and determine whether the gang plank was nailed or not, but he went to work immediately when he got to the place, and the plank fell with him when he had put in the second bale of cotton. The car was already practically full. A servant has a right to assume that the master has performed its duty. He has a right to assume that his fellow servants have performed their duty. Of course, if he had known that the gang plank was insecure and proceeded with his work, he would have been held to assume the risk, but there was no duty on him to inspect for the purpose of ascertaining whether or not somebody had been guilty of negligence. The negligence and danger was not obvious, and there is no assumption of risk by the servant of danger arising from the negligence of the master or his fellow servants, unless the risk and danger are open and obvious or unless he knows they exist. *Ark. Land & Lbr. Co.* v. *Fitzhugh,* 143 Ark. 122, 219 S. W. 1022; *Southern Cotton Oil Co.* v. *Spotts,* 77 Ark. 458, 92 S. W. 249; *St. L. I. M. & S. R. Co.* v. *Birch,* 89 Ark. 424, 117 S. W. 243; *Aluminum Co. of North America* v. *Ramsey,* 89 Ark. 522, 117 S. W. 568; *A. L. Clark Lbr. Co.* v. *Northcutt,* 95 Ark. 291, 129 S. W. 88; *C. R. I. & P. Ry. Co.* v. *Smith,* 107 Ark. 512, 156 S. W. 166; *Mosley* v. *Mohawk Lbr. Co.,* 122 Ark. 227, 183 S. W. 187; *Central Coal & Coke Co.* v. *Fitzgerald,* 146 Ark. 109, 225 S. W. 433; *Arkansas Cent. Ry. Co.* v. *Jackson,* 70 Ark. 295, 67 S. W. 757; *Wisconsin & Ark. Lbr. Co.* v. *Otts,* 178 Ark. 283, 10 S. W. (2d) 364.

Appellant also contends that the court erred in referring to the amount sued for. While this court has said it is unnecessary and improper for the trial court to make reference in an instruction to the amount sued for in the complaint, it has also said that where the instruction containing reference to the amount sued for also contains a direction to find only such amount as the evidence warrants, the giving of such instruction is not reversible error. It could not have been prejudicial in this case because the court instructed the jury that it would assess

appellee's damages at such a sum as it believed from a preponderance of the evidence would reasonably compensate him. The amount sued for was $3,000, and the verdict was for only one-fourth the amount. *St. L. I. M. & S. R. Co.* v. *Boyles*, 78 Ark. 374, 95 S. W. 783; *St. L. I. M. & S. R. Co.* v. *Snell*, 82 Ark. 61, 100 S. W. 67; *St. L. Sw. Ry. Co.* v. *Myzell*, 87 Ark. 123, 112 S. W. 203; *St. L. Sw. Ry. Co.* v. *Aydelotte*, 128 Ark. 479, 194 S. W. 873; *St. L. I. M. & S. R. Co.* v. *Holmes*, 96 Ark. 339, 131 S. W. 692.

Appellant does not urge any other objection to instructions.

If the apron was left unfastened or insecure by reason of the negligence of the master or a fellow servant, plaintiff would not have to exercise care to ascertain whether the master had performed its duty. The question of the master's negligence and the contributory negligence of the servant were questions of fact, and the jury has settled these questions against the appellant, and, while the evidence is not very strong, yet there is substantial evidence to support the verdict. This court does not pass upon the credibility of witnesses or the weight to be given to their testimony, and, as the verdict of the jury is supported by substantial evidence, the judgment is affirmed.

WELLS *v.* FARMERS' BANK & TRUST COMPANY.

Opinion delivered June 9, 1930.

[redacted]

Ward & Caudle, for appellant.

Robert Bailey, for appellee.

SMITH, J. Appellant filed an intervention in a suit brought by appellee, the Farmers' Bank & Trust Company, hereinafter referred to as the bank, to foreclose a mortgage, and the bank filed a demurrer to the intervention, which was sustained, and, as appellant refused to plead further, the intervention was dismissed, and this appeal is from that order of the court.

The bank's complaint alleged that on May 5, 1923, H. F. and J. F. Hays executed to it a mortgage to secure an indebtedness, which had not been paid, and a foreclosure of the mortgage was prayed.

In the intervention it was alleged that on December 6, 1909, J. F. Hays and Anna L. Hays, his wife, procured a loan from intervener's guardian in the sum of $1,700, which was evidenced by a note of that date, due one year later, which was secured by a mortgage on certain lots in the city of Russellville, which note had become her property. That the mortgage which the bank sought to foreclose was executed by J. F. Hays and his wife to secure an indebtedness then owing by their son, H. F. Hays, to the bank, which was then past due; that the suit of the bank to foreclose its mortgage was filed November 18, 1927, and the original intervention on December 2, 1927, and on December 2, 1927, there was placed, upon the margin of the record of mortgages where intervener's mortgage was recorded, the dates and amounts of payments each year upon said note, showing that the statute of limitations had not run against the note. That, after this notation had been placed upon the margin of the mortgage record, the bank abandoned its suit to foreclose its mortgage and took a deed from J. F. Hays and wife with full knowledge of the fact that said intervener had a valid subsisting lien upon the property, evidenced by the indorsement of the payments on her note, entered upon

the margin of the record where said mortgage was recorded. That, during the pendency of the bank's suit to foreclose its mortgage, not only upon the lands upon which intervener had a mortgage, but also upon other lands included in its mortgage, the bank voluntarily dismissed its suit and took a deed direct from J. F. Hays and his wife.

It was further alleged in the intervention that the cashier of the bank was fully advised, when its mortgage was taken, that intervener's mortgage was outstanding and unpaid, and it was agreed, when the bank's mortgage was taken, that intervener's mortgage should be first paid, and that but for this representation J. F. Hays and his wife would not have executed the said mortgage to the bank.

It is our opinion that the demurrer to the intervention was properly sustained. It alleges that the note given to intervener's guardian, and now owned by her, was dated November 6, 1909, and due twelve months thereafter, and while payments were made thereon from time to time in a manner to keep the note alive as between the parties, no indorsement of these payments was made on the margin of the mortgage record until December 2, 1927.

The mortgage securing appellant's note had ceased to be a lien upon the land when the bank took its mortgage. Section 7382, C. & M. Digest, reads as follows:

"No agreement for the extension of the date of maturity of the whole or any part of any debt or note secured by mortgage, deed of trust, or vendor's lien, or for the renewal thereof, whether made in writing or otherwise, and no written or oral acknowledgment of indebtedness thereon, shall, so far as the same affects the rights of third parties, operate to revive said debts or extend the operation of the statute of limitations with reference thereto unless a memorandum showing such extension or renewal is indorsed on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk. * * *."

In construing this statute in the case of *Morgan* v. *Kendrick,* 91 Ark. 398, it was said: "The effect of that statute, as to strangers to the transaction, is that when the debt secured by a mortgage is apparently barred by limitation, and no payments which would stay the limitation are indorsed on the margin of the record of the mortgage, it becomes as to such third parties an unrecorded mortgage; and like an unrecorded mortgage it constitutes no lien upon the mortgaged property, as against such third party, notwithstanding he has actual knowledge of the execution of such mortgage. (Citing cases)." See also, *Clark* v. *Lesser,* 106 Ark. 207, 211. *Merchants' & Planters' Bank* v. *Citizens' Bank of Grady,* 175 Ark. 417, 418.

Of the cases cited by appellant for the reversal of the decree from which this appeal comes, the one most nearly in point is that of *Merchants' & Planters' Bank* v. *Citizens' Bank of Grady,* 175 Ark. 417. There it was held (to quote a headnote) that "where a first mortgagee and a second mortgagee agreed to extend their mortgages with the understanding that the first mortgage had priority, the second mortgagee was estopped thereafter to assert that its mortgage had secured priority on the ground that the first mortgage had on the record apparently become barred by limitations, since the first mortgagee might have foreclosed its mortgage or have caused the mortgagor to make a small payment and indorsed it on the margin of the record, thereby preserving priority of its mortgage."

Just here is the distinction—and it is a controlling one—between the case cited and the instant case. There the mortgage was not barred when the agreement in regard to its extension was made. Here the intervener's mortgage (except as between the parties thereto) had long been barred when the bank took its mortgage, which became, as against the bank, an unrecorded mortgage, and, like an unrecorded mortgage, did not constitute a lien upon the mortgaged property as against the bank,

 [redacted]

notwithstanding it had actual knowledge, through its executive officers, of the existence of the intervener's mortgage.

The mortgagors are not parties to this appeal, and we need not therefore consider the effect of the allegations of the intervention as to the agreement between them and the bank.

Under the allegations of the intervention the intervener's mortgage had ceased to be a lien upon the property when the bank took its mortgage, and the demurrer was therefore properly sustained, and the decree is affirmed.

[redacted]

FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* CUNNINGHAM.

Opinion delivered May 26, 1930.

[redacted]

John A. Luhn, Chas. H. McComas, W. E. Beloate and *Horace Chamberlin,* for appellant.

W. A. Cunningham and *G. M. Gibson,* for appellees.

BUTLER, J. For a history this case reference is made to the opinion in the case of *Fidelity & Deposit Company of Maryland* v. *Cunningham,* 177 Ark. 638, when the case was first here on appeal. There are 1,862 pages of typewritten matter in the transcript now before us, and the abstract and briefs of counsel contain 933 pages. With a record of this magnitude it is impracticable to do more than briefly review the most salient features of the testimony and only such as are necessary for an understanding of the points raised in this appeal, and this will be done as we proceed with the discussion of the questions involved.

On the first appeal this court held that the case should have been transferred to the chancery court. On remand, this was done, and a special master was appointed to take the testimony and make certain findings. The appellant challenges this appointment on the ground that the term of court had lapsed on the date of the appointment. It is unnecessary for us to determine whether or not the court was legally in session on July 23d, for to render the appointment of the master valid it is not necessary that the same be made on a day of the court.

Crawford & Moses' Digest, § 1364 (Act of April 16, 1873, at which time the circuit court sat in chancery) provides that the clerk of the circuit court shall be ex-officio master or commissioner, and § 1365 provides that the "*judge* may appoint any other person master or commissioner in special causes in said court." Therefore, the appointment of a master by the judge in vacation would be a valid appointment.

It is contended also that the appointment was premature and too extensive. The objection interposed at the time of the appointment was not that it was premature, but for the reason that the court was not in session and that the order was *coram non judice*. We do not think that the appellant was shown any prejudice by reason of the premature appointment, if it was such, or the powers with which the master was clothed.

During the taking of the testimony the chancellor was called by the appellant to testify as to a certain matter, and for that reason his disqualification was suggested, which was overruled. This was a matter within the discretion of the chancellor. Section 4193, Crawford & Moses' Digest. We cannot see anything in the record which would warrant us in concluding that there was any abuse of discretion in the refusal of the judge to disqualify. The testimony given by him was entirely favorable to the appellant on the matter about which he was called, and the fact testified to by him might well have been proved without calling him as a witness.

There are two main questions in this case. The first is presented by the appellant's exceptions numbered 22, 31, 41, 45 and 46. By these the position is taken that the evidence demonstrated that the liability of the appellant on its bond was canceled by the conduct of the appellees. The second question is raised by exceptions 19, 20 and 23, where the contention is made that there was no embezzlement by Neil Cole of the funds coming into his hands as collector of revenue during the year 1926 for the taxes of 1925.

1. Neil Cole, as collector of revenue for Lawrence County, made the bond required by statute with the appellees as his sureties on the bond. The bond sued on was executed by the appellant to indemnify the appellees against any liability on their part as sureties for the larceny or embezzlement by Cole of any of the revenue collected by him. This bond imposed upon the assured, or any of them, the duty, on becoming aware of any act which might be made the basis of any claim thereunder, to immediately give the insurer notice; and, further, that there should be no liability under the bond for any act of embezzlement or larceny committed by the principal after the assured, or either of them, should become aware of any act of Cole which might be made the basis of a claim. The execution of the bond avoided liability under the bond previously made. It is insisted that the appellees were well aware of these conditions which were identical with those of the previous bond executed by the appellant for their protection against the larceny or embezzlement by Cole for the collection of taxes for the year 1924 in the year 1925, and that at the time of the execution of the bond sued on the appellees knew that Cole had embezzled funds collected by him for the taxes of the year 1924; that after the execution of the bond the appellees knew that Cole was embezzling tax moneys collected for 1925 and applying the same to a private obligation of his own; that, knowing these facts, the appellees, or any of them, failed to give any notice to the appellant company of such larceny and embezzlement within the time stipulated in the bond or at any other time, and that therefore the bond became void and unenforcible. If the evidence established the facts contended, the position of the appellant would be well taken and there would be no liability.

There is but little conflict in the evidence. The dispute is not so much as to what the witnesses testify, but rather what are the proper inferences reasonably deducible therefrom. The appellant contends that the cor-

rect inference establishes its contention while the appellees insist that the true inference to be drawn is that the acts of Cole and the appellees are consistent with honesty of purpose and conduct.

Briefly stated, the facts are as follows: H. L. Ponder was the local agent for the appellant company in the city of Walnut Ridge. The bonds, and the one in suit, were all written on the application of Neil Cole and the favorable recommendation of Ponder, who was not only the local agent of the appellant, but also a stockholder and officer in the Planters' National Bank, a banking corporation doing business in said city. On a Sunday in August, 1924, the day before Mr. Cole's settlement with the State for the taxes collected for the year 1924, he approached Mr. Ponder and informed him that he (Cole) lacked approximately $8,000 of having enough money with which to make his settlement, and stated as a reason that certain taxpayers, whose tax receipts had been issued and held by him on their promise to pay same in time for him to make his settlement, had failed to pay as promised. He requested Mr. Ponder to help him secure the money needed, and told Ponder at the time that he had certain collateral consisting of amounts due on the tax receipts before mentioned, notes due for automobiles sold, and county scrip. Ponder undertook to secure, if possible, the money needed, and on that afternoon interviewed the officials of the Planters' National Bank, at which the understanding was reached that the bank would advance the money required. At that time Cole was in the automobile business, and had borrowed from the bank his limit under the rules governing the credit to be extended to any one of Cole's business rating. Cole, on this account, procured three of his friends who undertook to, and did, execute to the bank three notes aggregating the sum required, which notes were indorsed by Clarence Whitlow, whose name made the risk acceptable to the bank. To secure Whitlow for the indorsement, Cole surrendered to him the unpaid

tax receipts, the automobile notes and the county scrip, with the agreement that Whitlow should collect these and apply the proceeds to the payment of the three notes. This transaction was had early on the morning of the day on which Cole was to make his settlement, and the money or its equivalent was paid to him in time for him to catch the train to Little Rock. From these facts the conclusion is drawn that Cole was an embezzler of the 1924 revenue, and that Ponder and those of the appellees who were officers of the Planters' National Bank were made aware of the same and aided him in concealing it; and further that subsequent facts demonstrated that Cole embezzled a part of the 1925 revenue with the knowledge and approbation of the officers of the Planters' National Bank, and that the sums so embezzled were applied to the payment of the money procured by Cole to cover up his defalcation for the preceding year.

The evidence relied on to establish this last proposition may be thus stated: Clarence Whitlow was one of Cole's deputies and he, with W. F. Rowsey, another deputy, were the ones designated to, and who did, carry the tax books through the county to make collections at the various voting precincts, after which the books were returned to the collector's office, from which the taxes were collected for the balance of the time in which taxes were payable during the year 1926. On the flyleaf of one of the books carried around by the said deputies were various notations, among which was a series headed "Planters' Bank," showing deposits made in said bank beginning January 9, 1926, continuing through that month and until February 11, 1926. These deposits aggregated approximately $4,318.88. Opposite each sum was the notation "on note." The records of the Planters' Bank disclosed that on or about the dates noted on the flyleaf there had been deposited by Clarence Whitlow like amounts which were applied as credits on the three notes executed the preceding August for the benefit of Neil Cole. The appellant draws the inference that these

sums represented taxes collected, and that there was a diversion of these funds and a payment made with them to the personal obligation of Cole to the bank, evidenced by the notes of his three friends, which amounted to an embezzlement by Cole of said funds, and that the appellees had knowledge of this. It was admitted by Whitlow that he did, in fact, pay those sums on the notes before mentioned, but he testified that these funds were not tax moneys but were collected by him while making his rounds as deputy tax collector from persons who had not paid Cole for the taxes of 1924 and from other collateral deposited with him when he indorsed the three notes, *supra,* and with these funds and money borrowed by him he discharged the same. The officer of the bank who received these deposits testified that he had no knowledge that they were 1925 taxes and assumed that they were not, but that they were collected by Whitlow from the said collateral.

It is further contended by the appellant that the evidence shows that H. L. Ponder, at about the time of the execution of the three accommodation notes, gave the bank to be used by Cole a check for $6,973.40, which he had in his possession. This check was one of the Missouri Pacific Railway Company, which had been sent to Ponder to pay a judgment against the railway company. The circumstances relied upon to support the appellant's contention as to Ponder's conduct aforesaid is that the bank handled this check through a Little Rock bank so that Cole, in fact, secured its proceeds with which to make his settlement. The evidence shows that Ponder deposited this check in the Planters' National Bank, and was given credit for it on his account. The check was handled in the regular way by the bank, and, even though the proceeds of this check might have been given to Cole, the chancellor saw nothing unusual in the handling of this transaction. Nor do we. A witness testified that Ponder told him he had loaned Cole $..... of the railroad's money. This was disputed by Ponder,

and it is undisputed that in due time Ponder paid the judgment for the railway company.

To further support the first contention, appellant insists that Cole was overdrawn at the Lawrence County Bank in the sum of $2,702.41 from August, 1925, to January, 1926; that a number of the appellees who were officers of the Lawrence County Bank concealed this fact, and that it was their duty to acquaint the appellant of this overdraft at and before the execution of the bond sued on, the inference being that said overdraft was a shortage and embezzlement of tax funds collected by Cole for the year 1924. The testimony of the cashier of said bank was to the effect that there was in fact no overdraft, but the apparent overdraft was caused by his failure to credit Cole's account with the amount of certain tax receipts, and to charge the same to the account of Mr. J. G. Richardson, the president of the bank, whose tax receipts they were. As a further fact tending to establish the guilty knowledge of the appellees as to the alleged defalcation of Cole, the appellant endeavored to show that Cole's collectors bond for the year 1925 covering the 1924 taxes was circulated by J. G. Richardson, president of the Lawrence County Bank, and sureties thereon solicited, and that at that time Richardson gave as an explanation of his interest in the matter that Cole was short in his accounts for the taxes previously collected, but that the sureties on the bond which he was then endeavoring to have made would be protected because an indemnity bond was to be obtained from the appellant company. At the time the testimony relative to this incident was given Richardson was dead, and the testimony was in conflict.

The bond in this case was executed at the request of Cole and on the recommendation of Ponder. Ponder at that time had not been a surety on Cole's previous bond which had also been executed by the appellant company at Ponder's request, but later on Ponder did become a surety on the 1926 bond. The evidence does not show

that any one else among the sureties on Cole's last bond in any way solicited the appellant to execute the bond involved in the instant case.

In order to absolve the appellant from liability on the contentions above made, two facts must have existed: first, that Neil Cole was an embezzler at the time of the execution of the bond in the instant case of a part of the 1924 revenue, or that, after the execution of the bond he embezzled a part of the 1925 revenue and applied the last sums embezzled to the payment of the first; and, second, that the appellees were aware of such embezzlements and did not notify the appellant company of such fact.

The effect of the finding and decree of the chancellor is that the evidence did not warrant a finding that either of the facts existed. The chancellor might have thought that the evidence showed merely an ill-considered confidence on the part of Cole in others and negligence in the discharge of his duties, but not a moral delinquency, and that there was no circumstance to warrant the finding that the appellees, or any of them, if any embezzlement existed, knew of same or that the facts were sufficient to put them on inquiry. It is our opinion that the finding of the chancellor was not against a preponderance of the testimony, and that the provision in the bond requiring the appellant to be notified of any act which might be made the basis of any claim did not require any notice under the facts as found by the chancellor. Under the terms of a bond indemnifying the assured against the larceny or embezzlement of the principal and requiring notice by the assured to the insurer on their becoming aware of same, to render the notice necessary, more than mere suspicion is required; circumstances must have existed and been known by the assured, which would have induced the belief in an ordinarily prudent person that a larceny or embezzlement had been committed. *American Surety Co. of N. Y.* v. *Pauly,* 170 U. S. 133, 18 S. Ct. 552. As the appellant was not liable for any

act of Cole short of embezzlement or larceny, it was unnecessary, under the terms of the bond, to notify the appellant of any negligence or unbusinesslike methods of Cole, although these might have ultimately created a condition causing larceny or embezzlement, where such negligence is not reasonably attributable to moral turpitude and dishonesty. *Long Bros. Grocery Co.* v. *U. S. F. & G. Co.*, 130 Mo. Appeals 421, 110 S. W. 29; *Pacific Fire Ins. Co.* v. *Pacific Surety Co.*, 93 Calif. 7, 28 Pac. 842; *Gilbert* v. *State Ins. Co.*, 3 Kan. Appeals 1, 44 Pac. 442.

2. The contention that Cole was not an embezzler of the revenue of 1925 rests also upon a question of fact. In the case of *Fidelity & Deposit Co.* v. *Cunningham, supra*, on evidence substantially the same as that in the instant case, this court held that the facts were sufficient to sustain the finding that Cole was an embezzler. It cannot be gainsaid that Cole did not collect large sums of the 1925 revenue for which he has not accounted or given any reason for not doing so. There was a conference at which Cole, a number of the appellees, and the representatives of the appellant company were present at which conference the amount of Cole's shortage was discussed, and it was approximated that at that time such shortage amounted to more than $30,000. There is some dispute as to what Cole's admissions were during the conference, some of the witnesses stating that the agent for the appellant asked Cole if he had embezzled this money, and that Cole answered in effect that he had. Other witnesses denied this, but it is practically undisputed that Cole admitted that he had spent the money—if not all, at least a part of it. It is immaterial as to whether or not Cole admitted in so many words that he was an embezzler. The fact that he received the money in his official capacity and appropriated the whole or any part thereof to his own use for any purpose was sufficient to constitute the crime of embezzlement. *Russell* v. *State*, 112 Ark. 282, and cases there cited. We are of the opinion that the finding of the trial court that Cole,

the principal, had embezzled sums for which the appellant was liable under its bond was sustained by the evidence in the case.

3. The trial court, having found that Cole had embezzled the public revenue, and that the appellant was liable on its bond, the question next arises, what was the extent of this peculation and appellant's liability? Appellant contends that Cole, the principal, and his sureties, the appellees, failed to furnish the data deemed necessary for a determination of the facts and that its motion for an audit of the accounts of Cole with the ten banks of Lawrence County was denied, and therefore it was unable to collect and present the facts to the court. The appellant's motion for an audit was so sweeping in its terms that, if granted as requested, it would have given it the privilege to range at will through the records of these banks covering a period of four years, three of which were prior in time to the year covered by the bond. This motion was overruled, but an order was made for the production by Cole of all documents of every description relating to the "performance of his duties as tax collector" and to the banks to produce certified copies of all transactions had with Neil Cole in his individual capacity or as tax collector during the years 1923, 1924, 1925 and 1926, and that "they hold all originals of such accounts, books, papers and evidence subject to the inspection of the parties interested in this case under the personal supervision of the master at such times and places as he may designate." This was a reasonable order, and if during the course of appellant's investigation it might have deemed it necessary to examine any specific record or account, it might have so requested.

Cole and the banks complied substantially with this order, and appellant's accountant proceeded from these documents and the public records to make an audit of the various transactions of Cole with the said banks, and stated an account showing the amount and extent of Cole's liability. It does not appear that in the course

of the audit any request was made for an examination of any particular book account or document, the appellant contenting itself with the request first made and resting on its objection and exception then saved. It appears that with the information furnished appellant's accountant was enabled to, and did, make a comprehensive audit sufficient to convince appellant that there was no embezzlement, and that the appellees, in paying the alleged default to the State and improvement districts, had been overreached, and that the true amount really unaccounted for by Cole was negligible, to-wit, the sum of $2,235.94, whereas the appellees had paid to the State and improvement districts sums aggregating $30,843.20. From the testimony and audit made by the accountant and the exhibits made by the banks of their records, able counsel has drawn the deduction that Cole had deposited much larger sums from revenues collected with the various banks than appeared credited to him on the accounts rendered, and that various items charged against him on his settlement had either not been collected or had been properly accounted for without corresponding credits, and that the net amount unaccounted for was the small sum before stated.

In conflict with the testimony and audit was the audit of an accountant furnished by the State Auditorial Department at the instance of the appellees, which accountant was later appointed by the master to complete the audit; also, the testimony of the cashiers of the several banks and the explanations made by them as to the true purport of certain deposit slips and other records which they testified appellant had misinterpreted. After hearing the evidence in the case, the trial court found against the contentions of the appellant as to the items properly charged to Cole and unaccounted for by him, and with slight modifications, sustained the findings of the master. Able counsel for the appellant has made a most searching and exhaustive analysis of the evidence and his deductions based on such and the attending cir-

cumstances are persuasive, but it is our opinion that the contrary conclusions reached by the trial court are supported by the preponderance of the evidence except as to two items. Respecting these the evidence falls short in its probative force, and fails to establish an embezzlement on the part of Cole.

(a) On the 12th day of June, 1926, and continuing until the 23d day of September, 1926, there was on deposit in the Citizens' Bank of Imboden to Cole's credit as collector, the sum of $6,625.30, and in making his last settlement Cole drew a check against this amount in favor of the State Treasurer for $5,526.08. This check was presented to the Bank of Imboden on a date prior to September 8, 1926, and payment was refused. The bank attempted to justify its action by saying that Cole was indebted to the Lawrence County Road Improvement District in a sum equal to, or greater, than the amount of Cole's deposit and for which a check had been drawn on July 12, 1926, and which had not been paid for the reason that it was drawn for a greater sum than Cole had in the bank at that time. It is admitted that Cole had paid the proper official of the road improvement district all of the revenue due it collected by him in 1926 for the year 1925, and the amount claimed as still due the Road Improvement District was for revenue due it for the year 1924. But it is also shown that on July 12th Cole drew a check in favor of the secretary of the Road Improvement District for the sum of $5,526.08, the amount claimed for the taxes unpaid for 1924 on the Bank of Strawberry, and this check was duly paid. From this it appears doubtful if there were any back taxes due the improvement district on the date of the presentation of Cole's check in favor of the State Treasurer, and, even if there were, we do not think that under the circumstances the People's Bank of Imboden was justified in refusing to pay the check in favor of the State Treasurer. It is singular that the alleged check of Cole in favor of the improvement district should have

remained on file from July 12, 1926, until September 23 following. The naive explanation given by the cashier for not paying the check drawn in favor of the State was that "we would be doing a favor like for the Western Lawrence County Road District. They carried their money in our bank, and our money was very precious to us at that time, and, rather than pay out this $5,500 that would go to Little Rock, I took a chance of favoring the road district in order to retain that deposit." The money in the People's Bank of Imboden was for revenue collected for the year 1925, and, as Cole was endeavoring to make a proper payment to the State Treasurer, there was clearly no embezzlement of that fund because of the wrongful action of the bank, and therefore the appellant is not liable for this amount under the terms of its bond.

(b) On the 21st day of August, 1926, Neil Cole, as collector, drew his check on the Planters' National Bank of Walnut Ridge, Arkansas, in favor of the secretary of the Black Spice Drainage District in the sum of $2,514.95. This check was deposited in the Bank of Alicia, and in the due course of business was transmitted to the First National Bank in St. Louis by which it was sent to the Lawrence County Bank, its correspondent. The check bears the indorsements "Lawrence County Bank, Walnut Ridge—Paid August 25, 1926," and "Planters' National Bank, Walnut Ridge, Arkansas—Paid August 26, 1926." The check was returned to the Bank of Alicia, and has attached to it a debit memorandum charging the check back to the drainage district. Accompanying the check was the alleged certificate of a notary public certifying that the check was presented to the Planters' National Bank and payment refused because the account of Cole was closed. This certificate bears date of August 24, 1926. The individual whose name was signed to the protest as notary public testified that the same was a forgery. The cashier of the Planters' National Bank testified that the account of Neil Cole as collector was closed on August 25, 1926, and that its

records do not show that this check had ever been handled by it. But there is no explanation given by the cashier or any one else as to why the check should have borne the customary indicia denoting payment, nor is there any explanation given or attempted for the alleged protest or the forgery.

In view of these singular circumstances and the connotation implicit in the total failure to make any explanation regarding them, we are led to the conclusion that it cannot be said that the facts warranted a finding that this fund was embezzled by Cole, and that, while it is probable there is a mistake somewhere, it is equally as reasonable to assume that it was the mistake of someone else other than Cole, and that he should not be charged with having embezzled the amount of this check. Especially as at this time Cole's extremity both with respect to his public liability and his personal obligations was beginning to be known, and it was then "let him save himself who can."

4. Throughout the argument and brief of appellant are many exceptions to the conduct of the master and the rulings of the chancellor and to items of cost allowed and his rulings on the matters raised by the appellant's cross-complaint. It is impracticable to review each of these, nor do we think a discussion of their merit would serve any useful purpose. Owing to the length of the record and the involved accounts contained therein, a correct consideration and determination of all the questions presented is most difficult. However, when due weight is given to the rulings and findings of the chancellor, we cannot say that his discretion has been abused, or that his findings are erroneous except in the particulars above mentioned. As to those, the decree will be modified, giving credit on the judgment for the sum of the two erroneous charges against Cole as to the Western Lawrence County Improvement District and the Black Spice Drainage District, and, as modified, the decree will be affirmed.

KIRBY, J., dissents.

McHANEY, J. I dissent from the findings and conclusions of the court as to the two items last mentioned in the opinion. It is my opinion that the case should be affirmed as a whole, and not reversed in part. Mr. Justice HUMPHREYS agrees with me in this regard.

MERCHANTS' & FARMERS' BANK *v.* REEL.

Opinion delivered June 9, 1930.

[redacted]

Hays, Priddy & Rorex, for appellant.

Robert Bailey, for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted that the deed to the one-acre tract of land on which the store and dwelling of Conner was situated should be set aside as being made in fraud of creditors. It is pointed out that the first two items of the indebtedness claimed by Reel to be owed him by Conner were barred by the statute of limitations. These were items claimed to be owed for the balance of wages for 1921 and 1922. In this contention, counsel for plaintiff are correct. The record shows that each year's contract was separate in itself, and there was no account of debits and credits kept between the parties. Hence the balance due for the wages of each year constituted a separate indebtedness.

The record shows, however, that Conner owed Reel a balance of $175 at the end of 1926, $25 for the balance of wages at the end of 1924, and $300 for the balance due at the end of 1927. These items aggregated the sum of $500. No testimony was introduced tending to contradict them, and the chancellor was justified in finding that Conner owed Reel the sum of $500 at the time the deed to the one-acre tract of land was executed in September, 1927. The record also shows that the small store building and dwelling house on the land, together with the land itself, were not worth more than $500. It is true that the deed was not filed for record until after the death of Conner in April, 1928, but Reel testified that it was delivered to him on the date of its execution. It is also true that Reel was the son-in-law of Conner at the date of the execution of the deed and lived with Conner as a member of his family. Conner had been in bad health, however, and Reel and his wife lived with him for the purpose of taking care of him. Conner had tuberculosis and was not able to attend to his business for the last year of his life, and Reel ran the store for him. But, when all these matters are considered, we are of the opinion that the

chancellor was justified in finding that the deed was not made in fraud of the rights of the creditors of Conner, and for that reason the decree in this respect will be affirmed.

The chancellor was also right in holding that the sale of the stock of goods and fixtures by Conner to Reel was void because it was made in violation of our bulk sales law, and that fraud must be conclusively presumed. *Stuart* v. *Elkhorn Bank & Trust Co.*, 123 Ark. 285, 185 S. W. 263; *Prins* v. *American Trust Co.*, 169 Ark. 455, 275 S. W. 714.

The chancellor erred, however, in allowing the exemption of Conner as a single man in the sum of $200 to be deducted from the value of the stock of goods. In *Griffin* v. *Batterall Shoe Co.*, 137 Ark. 37, 207 S. W. 439, it was held that, under the bulk sales law, one who buys a stock of goods without giving notice to creditors as required by such act becomes a receiver and liable *pro rata* to creditors, although the sale was made in good faith. It was also held that, where a debtor's personal property was worth more than $500, he must make a schedule of his property and specify the particular property he wishes exempted. Conner was indebted to the plaintiff at the time he executed the bill of sale and did not comply with the statute, and did not claim his exemptions when he transferred his stock of goods to Reel. Therefore, under the authority above cited, Reel cannot claim the exemptions for him in this suit.

For the reason that all of the amounts which Conner owed Reel were canceled in the purchase of the land in September, 1927, as above indicated, we are of the opinion that the only amounts which Reel could claim to be owing him at the death of Conner were the amounts which he had agreed to pay and did pay for his funeral expenses and to his creditors, which, as will be seen from our statement of facts, amounts to $674.80. In addition, Reel claims that Conner was indebted to him in the sum of $25 a month for something over a year prior to the

death of Conner for taking care of the latter. Reel admitted, however, that he kept no account of this and made no charge against Conner on his books. We are of the opinion that under the circumstances Reel and his wife lived with Conner as members of his family, and that all of them were supported out of the store. Reel cannot be allowed any sum for the support and maintenance of Conner.

We are of the opinion that the balance in the bank, amounting to $225, which Conner gave by check to Reel on the day before his death, was given for the purpose of enabling Reel to apply it towards the payment of his debts, and that this money did not belong to Reel.

The result of our views is that the deed from Conner to Reel will be allowed to stand, but that the personal property, including the stock of goods in the sum of $750 and the $225, balance of the bank account, amounting in the aggregate to $975, should be applied to the payment of Conner's debts. As we have already seen, there are only two creditors, the plaintiff and Reel. According to the decision above cited, Reel will be deemed to have received these amounts to be applied *pro rata* towards the creditors of Conner, being the bank and himself. It follows that the decree sustaining the deed is valid and will be affirmed. In other respects, the decree will be reversed and the cause remanded with directions to the chancery court to distribute the funds in accordance with the directions of this opinion, and for other proceedings in accordance with the principles of equity.

BERRY *v.* COUSART BAYOU DRAINAGE DISTRICT.

Opinion delivered June 2, 1930.

Danaher & Danaher, for appellant.

A. F. Triplett, for appellee.

MEHAFFY, J. Cousart Bayou Drainage District was created by special act No. 283 of the Acts of 1907, and at that time included land in Jefferson County only. The act creating the district was amended several times and includes land in Jefferson and Lincoln counties. Under the original act and amendments thereto, a system of drainage was constructed, assessment of benefits was made and bonds issued to pay for the improvement. The system is inadequate, and does not properly drain the lands within the district. The work provided for by the plans has been completed. In order to protect the system of drainage contemplated, the board of directors upon petition of real estate owners alleged to be a majority of those to be benefited by the proposed improvement, but not a majority in either number, acres or value of the owners of real property in the entire district, filed an application in the circuit court of Jefferson County, setting up the necessity for the proposed improvements describing the same and the plans for the construction of said improvement, and also describing certain lands not within the district which would be

benefited, and asking authority to include such lands within such drainage district. The application was made under § 4 of act 677 of the Acts of 1923. The board of directors complied with all the requirements of act 677 of the Acts of 1923. The circuit court made an order annexing certain lands which were adjacent on the west and north to the original boundaries of the district. After the circuit court made the order of annexation the board of directors of the district filed plans for the work, and an assessment was made of the benefits to accrue from the improvement. The assessment of benefits was not on the entire lands of the district, but was an additional assessment of benefits against the lands which the assessors found would be benefited by the proposed improvement. The assessment was made under special acts, and not under the provisions of the general drainage laws. The appellants began this suit alleging the things above recited, and that the district is planning to issue bonds and has levied a tax of three per centum for each of the years 1930 to 1944, inclusive, upon the entire assessments in said drainage district including additional benefits assessed against the lands benefited, and that, in order to secure the payment of said bonds, the board is about to pledge the entire assessment of benefits against all lands in the drainage district; that plaintiffs are owners of a large quantity of land annexed by the order of the circuit court and also lands situated elsewhere in the drainage district; that some of the latter lands have not been assessed and some of them have; that defendants have no authority to do such additional work, and no authority to annex territory after the completion of improvements originally planned; that, in order to do such additional work, the petition must be signed by a majority in number or acres or value of all the owners of land within the entire district. There are a number of other allegations in the complaint, but we think the above is sufficient to present the issues. The answer denied the material allegations, and defendant also filed

demurrer to plaintiff's complaint which the court sustained, except with reference to the pledge of the entire assessment of benefits to secure the present issue of bonds, and dismissed the complaint for want of equity. This appeal is prosecuted to reverse this decree.

It is the contention of appellants that improvements and extensions of the kind contemplated here must be done, if at all, under the provisions of the general drainage law, while the appellee contends that authority exists under the provisions of special acts. Act No. 227 of the Acts of 1927 provides that all drainage districts created by special acts are made drainage districts under the terms of act No. 279 of the Acts of 1909, as amended with all powers conferred by said act No. 279, and with all liabilities and restrictions thereby imposed.

This court on April 28, 1930, in the case of *Winton v. Bartlett, ante* p. 669, held that act 227 of the Acts of 1927, is valid, and, among other things, said: "The act in question is a general law placing drainage districts, created by special acts with reference to procedure therein and thereafter, under the terms of the general law as provided in act No. 279 of the Acts of 1909, as incorporated in Crawford & Moses' Digest in §§ 3607-56, inclusive." Drainage districts created by special acts are now drainage districts under act 279 of the Acts of 1909 as amended.

The appellees, however, contend that the proviso in act No. 227 of the Acts of 1927 preserves its power and right to proceed in the same manner that it might have proceeded prior to the passage of act No. 227. The proviso reads as follows: "Provided, nothing in this act shall be construed as taking away from any improvement district created by special acts any powers which are thereby conferred upon it, nor shall it displace any commissioners or directors of such districts now in office."

The question to be decided is whether the district can proceed to annex the property and make the improve-

ment contemplated under the provisions of the special act or whether it must proceed under the provisions of the general drainage law. A decision of this question depends upon the construction of act 227 of the Acts of 1927. The primary rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature. The intention and meaning of the Legislature must primarily be determined from the language of the statute itself. *Howell* v. *Lamberson,* 149 Ark. 183; *Cowan* v. *Thompson,* 178 Ark. 44; 25 R. C. L. 961.

The carrying out of the legislative intention is the prime and sole object of rules of construction. Significance and effect must, if possible, be given every part of the act. The court must view the whole and every part of the act taken and compared together. Section 1 of act 227 makes the drainage district a drainage district under the general drainage law "with all the powers conferred by the general law, and with all the liabilities and restrictions thereby imposed." One of the powers conferred by the general law is the power to annex territory, as the district seeks to do in this case, and one of the restrictions imposed is that the petition must be signed by a majority in numbers, acreage or value. Under act 203 of the Acts of 1927, the improvement may be made either before or after the completion of the plans for the work therein. It is true that the proviso in act 227 says that nothing in the act shall be construed as taking away from the improvement district created by special acts any powers which are thereby conferred upon it. When the whole act is considered, it is evident that the powers mentioned in the proviso means powers that are not inconsistent or in conflict with the general law. The general law confers the power to make the improvements contemplated by the district in this case. One of the recitals in the preamble shows clearly, we think, the intention of the Legislature. This recital is as follows: "Whereas the general drainage law, which appears as act No. 279 of the year 1909, furnishes an

adequate uniform system for the operation of drainage districts." It is manifest that the Legislature intended that the system for the operation of drainage districts should be uniform, and it therefore gave improvement districts created under special acts the powers conferred by the general law and imposed all the liabilities and restrictions of the general law. The powers mentioned in the proviso are, as we have said, those powers of the special districts not given by the general law. There is no necessary conflict in the provisions of the act, and, when construed as a whole, it provides a uniform system for the operation of all drainage districts, and this was, we think, the intention of the Legislature. The court erred in dismissing the complaint. The decree is reversed, and the cause remanded with directions to take such further proceedings as necessary, not inconsistent with this opinion.

SMITH and MCHANEY, JJ., dissenting.

SHEEKS *v.* DAUGHERTY.

Opinion delivered June 2, 1930.

Ingraham & Moher, for appellant.

Joseph Morrison, for appellee.

BUTLER, J. The appellee, John Daugherty, brought suit against the First State Bank of Stuttgart, alleging that the bank had in its possession a warranty deed executed by Mrs. Katie Sheeks by which certain property in the city of Stuttgart was conveyed to him; that the deed was placed in escrow with the said bank to be held until

the performance of a contract entered into between the said Mrs. Sheeks and appellee; that the terms of this contract had been complied with, and that appellee was entitled to delivery of said deed which the bank refused to deliver. The bank answered, and Mrs. Sheeks intervened.

The cause was tried on the following agreed statement of facts:

"That Homer Sheeks and his wife, Katie Sheeks, deeded the property involved in this lawsuit to Jake Irwin, by separate deeds, and Jake Irwin and his wife then reconveyed to Katie Sheeks; that all of these conveyances were without valuable consideration. The deeds, duly recorded, are hereto attached and marked exhibits "A," "B," and "C," respectively. That on July 1, 1927, Katie Sheeks entered into a written contract with John Daugherty for the sale of the property involved in this lawsuit and authorized in said contract Homer Sheeks to be her agent to collect the payments due thereunder. The contract is attached hereto and marked exhibit "D."

"That, on February 15, 1928, Katie Sheeks deposited in the United States mail, under registered cover a notice addressed to John Daugherty, and same was received by him some time thereafter, notifying him not to pay Homer Sheeks any further payments under the contract, which is hereto attached marked exhibit "E."

"That thereafter, John Daugherty sent by registered mail to Katie Sheeks his response, refusing to change the terms of the contract, a copy of his reply to her notice is hereto attached and marked exhibit "F," and was received by Katie Sheeks.

"On January 16, 1929, John Daugherty paid all of the notes to Homer Sheeks, amounting to $1,026, including interest. That the Arkansas Building & Loan Association is paid by.....and this mortgage is released of record.

"That Homer Sheeks paid no part of this sum, to-wit, $1,026, to Katie Sheeks.

"That at the time of the execution of the contract warranty deed to the premises was duly executed by Katie Sheeks and Homer Sheeks and with a copy of the contract placed in escrow in the First State Bank; that the First State Bank was served with a notice similar to the notice served upon John Daugherty, and, although demand has been made upon the said bank, it now refuses to deliver the deed to either or any of the parties hereto; that all exhibits hereto are made a part of this stipulation, the same as if they were copied in full in the body hereof."

The letter from Daugherty to Mrs. Sheeks referred to in the above statement of facts as exhibit "F," among other things stated: "At the time I bought this property, one of the material considerations for executing contract was that I could pay Homer Sheeks and get my notes without difficulty or trouble. Inasmuch as you have decided to change the terms of the contract, which I feel will be a material change, and which were not stipulated at the time the contract was executed, I do not care to acquiesce in such change and will therefore state to you frankly that I do not wish to carry out the contract in its changed form.

"I have paid the sum of $171 to the Arkansas Building & Loan Association since July 1, 1927. I have paid to Mr. Homer Sheeks, your agent, the sum of $200 and have paid insurance in the sum of $15, and have expended the sum of $40 to have the house papered, making a total of $426.

"Kindly make arrangements to return the above amount to me by April 15, together with release from the contract, and my notes, and I will release to you the contract and instruct the bank to return the deed to you."

The contract referred to in this letter was exhibit "B" to the agreed statement of facts, and was entered

into the first day of July, 1927, by which Mrs. Sheeks agreed to sell and convey to Daugherty certain property described for which Daugherty agreed to pay the sum of $1,400 by assuming and paying the Arkansas Building & Loan Association of Little Rock the sum of $380, and the balance in cash to appellant, $200 of which to be paid on or before January 1, 1928, and the balance after the building and loan association should be paid, at the rate of $20 per month, the deferred payments bearing interest at the rate of eight per cent. Daugherty agreed to keep the premises insured, loss payable to Mrs. Sheeks as her interest might appear. It was agreed that, in default of the payment of the sums due the loan association, or in the balance of the payments, or in default of the payment of taxes or to keep the premises insured, Mrs. Sheeks might declare all of the indebtedness due and payable at once. It was also agreed that a copy of the contract with the deed to the premises should be placed in escrow with the First State Bank of Stuttgart, to be delivered to Daugherty upon the completion and fulfillment of his obligations. Embodied in the contract was the following statement: "The party of the first part hereby authorizes Homer Sheeks to accept payments and to receipt therefor to the party of the second part, the same as if paid direct to the party of the first part."

Upon the execution of the contract, Daugherty took possession of the property and has retained possession until now. On February 15, 1928, Mrs. Sheeks sent from Mitchell, Indiana, the notice to John Daugherty referred to in the agreed statement of fact as exhibit "E." In this notice attention was called to the contract and the provision therein authorizing Homer Sheeks to accept payments and to receipt therefor, and gave notice to Daugherty that she was canceling the authority of Homer Sheeks to receive payments of money or to receipt therefor, and directed Daugherty not to make any payments to any other person except herself. He was also notified that he was in arrears for the payment of the $200 due

January 1, 1928, and attention was called to the acceleration clause in the contract and request was made for immediate payment directly to Mrs. Sheeks, advising that a copy of the cancellation of authority was mailed to Homer Sheeks and to the First State Bank of Stuttgart.

On March 28, Daugherty, writing from DeWitt, Arkansas, answered this by the letter referred to, *supra,* exhibit "F" to the agreed statement of facts. There was no further correspondence between the parties.

In the intervention of Mrs. Sheeks to the suit of Daugherty against the bank, it was asked that Homer Sheeks be made a party. Homer Sheeks filed an answer to the intervention of Katie Sheeks, alleging that the property conveyed to Daugherty was in fact his own, and that for convenience the title had been placed in Mrs. Sheeks and the contract and sale made for his use and benefit, and this was the reason for the authority contained in the contract for the payments to be made to him; that, after the execution of the contract, Mrs. Sheeks was endeavoring to divest him of his property, and that the withdrawal of the authority contained in her notice of February 15, 1928, was made pursuant to that purpose. No proof was taken on the controversy between Mrs. Sheeks and Homer Sheeks, and the intervention was dismissed as to Homer Sheeks prior to the hearing. The court directed the bank to deliver to Daugherty the deed in question and adjudged the costs of the action against Mrs. Sheeks. From that decree is this appeal.

The appellant has devoted a part of his brief to the discussion of the right of Katie Sheeks to appoint her husband as her agent. We think this right so well established that we pass from its consideration with the statement that such right unquestionably exists.

On the question of Mrs. Sheeks' right to revoke the agency of her husband, the appellee takes the position that if the agency was of the usual character and the con-

tract solely between the principal and the agent, the right of revocation would be conceded, but that when "a written contract, having been entered into by two or more parties, before it can be modified, altered, amended, or revoked, must be done so by the mutual agreement of both parties," and that the appointment of Sheeks as the agent was "one of the material considerations for the execution of the contract" as is shown by the reply of Daugherty to the notice served upon him by the intervener. We are unable to appreciate the force of appellee's contention. The contract was for the purchase of a house and lot in the town of Stuttgart to be paid for in the manner designated, with the stipulation that the property should be kept insured and the taxes paid until the purchase price had been paid. This was a contract, not between Katie Sheeks and Homer Sheeks, but between Katie Sheeks and John Daugherty, and the authority of Homer Sheeks to accept payments was mentioned in said contract merely as a direction as to payment of funds, and was no part of the mutual undertaking of the contracting parties. By virtue of this direction, Daugherty was protected in the payment of money to Homer Sheeks until Sheeks' agency was revoked and until appellee had knowledge of this revocation. This rule is stated in 21 R. C. L., § 37, page 860, as follows: "So far as third persons are concerned the principal, as a rule, may revoke the authority of his agent at any time, but it is settled that the acts of an agent after his authority has been revoked, bind a principal as against third persons, who, in the absence of notice of the revocation of the agent's authority, rely upon its continued existence." This rule has been adopted and followed by this court, and, indeed, it appears to be the generally accepted one. *Hinson* v. *Noland,* 14 Ark. 710; *Burlington, etc.,* v. *Threlkeld,* 60 Ark. 539; *Courtney* v. *Linaker Co.,* 173 Ark. 777.

It was clearly the duty of Daugherty, upon receiving the notice of February 15 to make all subsequent pay-

ments to Mrs. Sheeks. At the time of the receipt of this notice Daugherty was in default in the payment due January 1, 1928, of $200. In his letter of March 28, it is true he stated that he had paid that $200, but he does not state that it had been paid before the receipt of the notice from Mrs. Sheeks, and in the agreed statement of facts it is shown that he did not pay it until January 16, 1929, when, arbitrarily ignoring the notice of revocation, he paid the entire sum due Mrs. Sheeks, $1,026, including interest, to Homer Sheeks. He did this without authority and at his peril.

It is contended, however, that Mrs. Sheeks is estopped from now asserting her right to the purchase money of the property conveyed to Daugherty. We can see nothing in Mrs. Sheeks' conduct to justify the invoking of the doctrine of estoppel. There was nothing in her acts or behavior to lead Daugherty to do something which he would not otherwise have done and which resulted in a loss or injury to him. It is true, she did not reply to Daugherty's letter of March 28, but her failure to do so worked no injury to Daugherty, for he could have protected himself by complying with her wishes and the loss, if any, which he may suffer is attributable only to his own folly.

The rights of Homer Sheeks are urged, but we have no evidence of any rights he may have had. The statement of facts and the exhibits thereto upon which the trial court heard the case contain nothing that would establish the contention made by the appellee, and the allegations of his response, without proof, cannot be considered. In his proposal of March 28th, where he was alleging the payment of certain amounts and requesting a reimbursement as a condition for his surrendering the contract, he did not take into consideration the rents of the property from July 1, 1927, and, as we have said, this offer contained nothing which required a reply.

Under the undisputed facts in the case, it is our opinion that the trial court erred, and that the appellant is

entitled to the relief prayed. The decree is therefore reversed, and the cause is remanded with directions that the amount of money remaining unpaid due to Mrs. Sheeks from and after February 15, 1928, be ascertained; that the appellee, Daugherty, be required to specifically perform his contract, and that the appellant have judgment against him for the balance due, to secure the payment of which a lien be declared on the lands described in said contract and deed.

SMITH *v.* NORTH LOUISIANA SANITARIUM.

Opinion delivered March 24, 1930.

Marsh, McKay & Marlin, for appellant.

Mahony, Yocum & Saye, for appellees.

BUTLER, J. This case involves the validity of a claim against the estate of T. L. Smith by the appellees, Doctors Abramson and Herold, for medical services, and by the appellee, North Louisiana Sanitarium, for hospital fees and services performed for a Mrs. L. R. Simmons. The probate court, and circuit court on appeal, allowed said claim in the sum demanded, and no complaint is made as to the items or amount of the claim, but the appellant, administrator of the estate of T. L. Smith, deceased, contends that the estate is not liable for services rendered Mrs. Simmons, first, as no competent evidence of any agreement on the part of T. L. Smith to be responsible therefor has been offered; second, that, if such undertaking was made by him, it is within the statute of frauds, being a collateral and not an original undertaking; and third, that in any event the estate is not liable for any services rendered to Mrs. Simmons by either the hospital or the physicians after the date of the death of T. L. Smith, December 17, 1926.

The testimony relevant to the issues involved, viewed in the light most favorable to the appellees, tends to establish the following facts: T. L. Smith and Mrs. Simmons were contemporaneously shot and wounded by the wife of T. L. Smith on or about the 4th day of December, 1926. Both were immediately taken to the appellee's sanitarium in Shreveport, Louisiana. The sanitarium is a corporation, of which Dr. Abramson is president. The wounded persons were there treated by the

appellees, Drs. Abramson and Herold, and cared for in the sanitarium until the death of Smith and the recovery of Mrs. Simmons. At the time of the arrival of Mrs. Simmons at the sanitarium the cause of the shooting appears to have been known and discussed by the officials of the sanitarium, and there was some question as to whether or not she should be permitted to remain in the institution. When Smith, who had already arrived, learned of this, he became greatly agitated and urged the sanitarium officials to care for her and the doctors to attend her, and assumed responsibility for her bills, agreeing to pay all her expenses, including hire of special nurse. Some days later Smith offered to sign a draft to take care of Mrs. Simmons' bills and hospital fees, nurses' hire, *et cetera,* but at that time he was so ill from the effect of his wounds the offer was not accepted, the doctors giving as a reason that they intended to wait until he could get better and then he might make the draft. The agreement of Smith relative to Mrs. Simmons was made with Dr. Abramson, chief officer of the institution, and with the superintendent of nurses and in the presence of some of the attendants; and from time to time Smith manifested great concern regarding Mrs. Simmons' condition, and reiterated his desire that she be given all the attention necessary. Smith gradually grew worse, suffering great pain, and died thirteen days after his entry into the hospital, and while still its inmate. Mrs. Simmons recovered, and was discharged in about ninety days from the date of her entrance into the sanitarium.

On a consideration of the case, the trial court concluded that there was sufficient competent testimony to establish the validity of the claim of the physicians and the sanitarium, and that the agreement of Smith was not a collateral oral promise to pay the debt of another, but was an original undertaking by which he secured the services of physicians for Mrs. Simmons, and the credit for this was extended to him and not to Mrs. Simmons, and that the estate was liable for services rendered Mrs.

Simmons after Smith's death. The evidence appears sufficient to support the court in its findings.

1. In considering the testimony relevant to the rights of the appellee sanitarium, it must be borne in mind that Abramson was not a party to the suit as to it, although suing for himself and his partner, Dr. Herold. The sanitarium is a corporation, and Dr. Abramson is its president. The testimony of the officers of the corporation would not be incompetent under § 4144 of Crawford & Moses' Digest, which provides: "* * * In actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party. * * *" We have held that this statute applies only to those who are technically parties to the suit, and cannot be extended to parties interested in its result. *McRae* v. *Holcomb*, 46 Ark. 306; *Stanley* v. *Wilkerson*, 63 Ark. 556, 39 S. W. 1043. Nor does it include officers or agents of a corporation defendant. *Moseley* v. *Mohawk Lumber Co.*, 122 Ark. 227, 183 S. W. 187. Therefore, Dr. Abramson was a proper witness, in so far as the sanitarium was concerned, as to transactions had with the intestate. As to his own claims and that of Dr. Herold, his testimony was excluded by the trial court, but, as there were other competent witnesses testifying as to the agreement with respect to the employment of the physicians, there was legal testimony to support the finding of the court as to the validity of the claim of the doctors.

2. The evidence also warranted the conclusion that the oral agreement of Smith was the inducing cause for the care and treatment afforded Mrs. Simmons, and the credit was extended to Smith. In the case of *Grady* v. *Dierks Lumber & Coal Co.*, 149 Ark. 306, 232 S. W. 23, this court said: "* * * In the case of *Millsaps* v. *Nixon*, 102 Ark. 435, [144 S. W. 915], the court said, in determin-

ing whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded, and in determining such intention the words of the promise, the situation of the parties, and all the circumstances attending the transaction should be taken into account, the purpose of the inquiry being to determine to whom the credit was originally given."

3. The last contention made is that, although the oral undertaking of Smith was properly established by competent evidence, original in its nature, and not within the statute of frauds, yet under the facts in this case, in whatever light they are viewed, the estate of T. L. Smith is not chargeable with any part of the account accruing after his death. This contention cannot be sustained, because the presumption must be indulged from the nature of the employment that it was to continue until the services were no longer needed. Therefore, the contract of employment and for services was for a definite period of time uncertain in its duration, but certain as to events which would determine its ending, namely, the death or recovery of the patient, and from the nature of the case that these determinative events would occur within a time which might reasonably be anticipated. The need of the patient, and not the demise of the employer, must be the factor in the determination of the time in which the contract should cease. This principle was announced in the case of *Dale & Banks* v. *Donaldson Lbr. Co. and Putnam,* 48 Ark. 188, where it was said: "If he (physician or surgeon) is called to attend in the usual manner, and undertakes to do so by word or act, nothing being said or done to modify this undertaking, it is quite clear as a legal proposition that not only reasonable care and skill should be exercised, but also continued attention as long as the condition of the patient might require it, in the exercise of an honest and properly educated judgment." This principle is also laid down and approved in the case of *Toland* v. *Stevenson,* 59 Ind. 485, and *White's Executors* v. *The Commonwealth,* 39 Pac. St. 167.

Counsel for the appellant endeavors to distinguish these cases from the case at bar in this, they stress upon our attention the moral obligation resting upon the intestate in his lifetime, in the case quoted, to provide for the wants of his family, and insist that such was sufficient to make the employment a continuing one, and urge the lack of such obligation in the instant case. On this point we take issue with able counsel for the appellant. By his own unsocial conduct, Smith created a situation which brought to pass the tragedy resulting in his own death, and the serious and painful wounding of Mrs. Simmons, and her open shame. The wronged and revengeful wife of Smith was the one who inflicted upon Smith and Mrs. Simmons the wounds from which they suffered. It is common knowledge, that it is the woman, often more sinned against than sinning, who must bear the weight of society's disfavor in cases such as this. This Smith, desperately wounded as he was, fully realized, and, sensible that it was his own lawless passion which had plunged the frail and yielding partner of guilt in so great a depth of pain and woe, and, seeing her about to be denied the ministrations which it would have been inhuman to refuse even a wounded beast, felt moved by every sense of honor and loyalty in the behalf of the partner of his guilt to secure for her the relief and care she so much needed. The writer thinks a strong moral obligation rested on Smith; he was in honor bound to do no less.

Since the contract in this case was for a definite time, and for services to be rendered another, and since it was within the contemplation of the parties that the services should be rendered as long as needed and regardless of the death of the employer, the position of appellee is further supported by the authority of the case of *Barrett* v. *Towne,* 13 L. R. A. (N. S.) 643, where it was held that in the employment of an attorney to defend the brother of the client in a criminal prosecution, that "the best possible defense should be made" and

"from the beginning to the end," such employment was not terminated by the death of the client, and the attorney could recover for services thereafter rendered. In that case the court said: "Undoubtedly, at common law, when not coupled with an interest, the death of the principal revokes the authority of the agent. The agency ceases, because the power to act is dependent upon the control and direction of another, which has been withdrawn by death. (Citing cases). If the plaintiffs had died, it may have been terminated, for performance by them depended entirely upon their personal efforts. (Citing cases). But, as no act was required to be done, either by the testator himself, or in his name, a complete performance was possible without any direction or intervention on his part. If, at his own expense, he had procured the attendance of a physician to treat his brother until cured of a physical ailment, or had contracted with a grocer to furnish him provisions for a year, there would be great difficulty in saying that in either instance his death during performance ended all further liability, because his estate was not bound. Manifestly such a construction instantly would defeat the very object for the accomplishment of which he purposely had obligated himself. In principle the present case must be treated as parallel with the illustration. The various services were neither to be performed, nor was the case to be conducted, in his behalf. * * * The employment of the plaintiffs was coextensive with the subject-matter with which the parties dealt, and they were not only engaged to assist in its preparation, but to make 'the best defense' of the brother's case. * * * No express limitation of time within which these services should be performed, or the required disbursements made, was named. Very plainly, the plaintiffs rightly understood that the testator contemplated and intended that the period of performance should be measured solely by the time which ordinarily would be requisite in the orderly progress of litigation of this class and magni-

tude. (Citing cases). The general rule is settled, that, where express words of limitation to the contrary are not found, the presumption is that the promisor intends to bind his personal representatives. (Citing cases). The intention of the parties furnishes the true criterion, which must be gathered from the language they employ, while each case as it arises must be largely decided upon its particular facts. It was his unqualified purpose to procure an acquittal of his brother through the means of a full preparation of the defense, and the professional efforts of competent counsel, by becoming pecuniarily responsible, as he certainly did, to pay all expenses. But his undertaking went no further. He did not intend to assume the power of control, either by himself, or by a substitute, over the proceedings at any stage. The alleged conspirators, while thus receiving the benefit of his aid, were left absolutely free to conduct their own case from beginning to end as they deemed best, and the requirements of appropriate legal procedure demanded. If thus construed, each contract remained in force, while this condition of affairs compelled the active continuance of the services of the respective plaintiffs. It therefore survived the death of the testator, and his executors became bound to its performance."

We can see no valid distinction in principle in the case last cited from the instant case, and those cases cited, *supra,* and relied upon by the appellant are readily distinguishable from the case at bar, and the cases of *Toland* v. *Stevenson* and *Barrett* v. *Towne, supra.* The agreement did not create the relation of principal and agent between the parties, for there was no supervisory control on the one part or dealing with the subject-matter of the agreement in a representative capacity on the other part. Neither would appellant's intestate have been liable to Mrs. Simmons for any neglect or malpractice on the part of either of the appellees. Therefore, the undertaking was not a contract of agency, but of employment for a particular purpose, the method of the

services rendered discretionary with the employed, and over which the employer neither expected to, nor could have, any control; and, as the contract was not for services indeterminate in their nature, and indefinite in their duration, the cases cited by the appellant have no application. *Campbell* v. *Faxon,* 73 Kan. 675, 85 Pac. 760, 5 L. R. A. (N. S.) 1002; *Lacey* v. *Gateman,* 119 N. Y. 109, 6 L. R. A. 728; *Babcock* v. *Goodrich,* 3 How. Pr. N. S. 52; *Howman* v. *Redick,* L. R. A. 1915C, 601; *Mendenhalt* v. *Davis,* 21 L. R. A. (N. S.) 914.

From the conclusions reached, it follows that the findings and judgment of the trial court must be affirmed, and it is so ordered.

[redacted]

LOVE *v.* COUCH.

Opinion delivered June 9, 1930.

[redacted]

John M. Rose, for appellants.

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

BUTLER, J. The appellants were the owners of oil properties in Union County on which two or more small producing wells had been brought in. In November, 1921, for reasons about which there is some dispute, an arrangement was effected by which these properties were purchased by the appellee, to be developed and operated by a corporation. The terms of the agreement were set out in the following instrument:

"This memorandum of agreement, made this the 7th day of November, 1921, by and between H. C. Couch and associates, M. W. Love and Love Brothers, Incorporated, witnesseth:

"That M. W. Love and Love Brothers, Incorporated, are the owners of the following described properties, to-wit:

"(1) 10 acres, section 31, Rodgers lease, Union County, Arkansas; one-fifth interest of Love Brothers and two-fifths interest of M. W. Love. Well No. 1 producing 112 bbls. per day. Well No. 2 producing 35 bbls. per day.

"(2) 10 acres, section 8, Pratt lease, Union County, Arkansas; one-fourth interest of Love Brothers. Well No. 1 capped. The first $14,500 worth of oil from this well to go to Couch interest. Well No. 2 producing 200 bbls. per day. Well No. 3 drilling. Debt of $6,000 out of first oil from this well to go to Harrell & Hatcher, drillers, $1,500 of which Couch interests pay.

"(3) 5 acres, section 17, Calvert lease, Union County, Arkansas; 51 per cent. interest of Love Brothers, Inc. Well No. 1 producing 200 bbls. per day.

"(4) 10 acres, section 8, DeCou lease, Union County, Arkansas; one-half interest of Love Brothers, Incorporated. Well No. 1 producing 65 bbls. per day. Well No. 2 drilling, to be completed by Love Brothers, Incorporated, Couch and associates to pay $6,250 of said drilling expense, to be deducted from purchase price, and Love Brothers to bear like expense.

"(5) 10 acres, section 20, Pendleton lease, Union County, Arkansas; one-half of 51 per cent. interest of Love Brothers. Well No. 1 to be completed by Love Brothers, including flow lines, separators and two 1,200-bbl. wooden tanks, free of any cost to Couch and associates. Operation of this lease to be vested in Couch from date of transfer.

"(6) 20 acres, section 5-19-15, Greenwood lease, Union County, Arkansas; 5-16 interest of Love Brothers. Well No. 1 to be drilled by Love Brothers, Incorporated, free of any expense to Couch and associates. Flow lines, tanks and standardization to be paid equally by Love Brothers and Couch and Associates.

"(7) Couch and associates to have full ownership of royalty on the 40 acres in section 31.

"(8) Couch and associates to have full ownership of the 700 acres of wildcat leases, description of which is attached hereto, and made a part hereof, marked exhibit A.

"(9). Whereas, Couch and associates expect to consolidate all oil property interests in the El Dorado field into one company, possibly under the corporate name of 'The Southwestern Oil Company,' the company so formed agrees to take over and pay for said properties in the following manner, to-wit:

"(10)	In cash upon consummation of this deal	$ 5,000.00
	Upon completion of Greenwood well No. 1	7,500.00
(a)	To be paid Love Brothers, Incorporated, and M. W. Love, monthly from net earnings of the property interests herein conveyed in the manner described below	19,000.00
(b)	Indebtedness of Love Brothers, Incorporated, to be satisfactorily	

adjusted and paid by Couch and Associates	45,000.00
Total	$76,500.00
Paid by Couch and Associates toward drilling of well No. 2 DeCou	6,250.00
Total	$82,750.00

"(a) It is agreed and understood by and between the parties hereto that Love Brothers, Incorporated, and M. W. Love, shall receive 20 per cent. of the net earnings accruing from the property interests herein conveyed until Couch and associates have been reimbursed for the $12,500 advanced under article 10 hereof, after which they shall receive 25 per cent. of such net earnings until they have been paid the aggregate sum of $19,000.

"(b) It is further agreed that Couch and associates, through the corporation to be formed, shall satisfactorily adjust and pay the outstanding obligations of Love Brothers, Incorporated, as minutely set forth in the attached list marked 'Exhibit B,' from 60 per cent. of the net earnings of the property interests herein conveyed until Couch and Associates shall have been reimbursed for the $12,500 advanced under article 10 hereof, after which 75 per cent. of such net earnings shall be applied to the retirement of said indebtedness.

"(11) Upon retirement of the total indebtedness, including the item of $19,000 due Love Brothers, Incorporated, and M. W. Love, and $45,000 outstanding obligations, M. W. Love and Love Brothers, Incorporated, are to receive without cost $75,000 in stock at par of the oil company to be formed by Couch and Associates, said stock to be deposited in escrow upon consummation of this deal for delivery when retirement of said indebtedness shall have been accomplished.

"(12) All earnings from the Rogers and DeCou leases from October 1, 1921, and all earnings from the

Pratt and Calvert leases after October 17, 1921, shall go to Couch and associates.

"(13) The sum of $15,000 derived from sales of 7/8 of the first oil produced from Pendleton Well No. 1, is due Love Brothers, Incorporated, of which Couch and associates are to receive $75,000.

"(14) It is further agreed that Love Brothers, Incorporated, and M. W. Love shall use their best endeavors to secure and turn over to Couch and associates, either by direct purchase, or under an operating agreement, control of the Pratt lease as described under article 10 hereof, and that as the wells now drilling are completed the control and operation thereof are to pass to the purchaser.

"(Signed) H. C. Couch and Associates,
"Love Brothers, Inc.
"By M. W. Love, President.
"By J. W. Love, Vice-President.

"(Signed) By K. J. Michel, Secretary,
"By M. W. Love."

At the time the contract was executed, a corporation existed bearing the name of the Southwestern Oil Company, of which H. C. Couch was president, with an authorized capital stock of $500,000, only $300 of which had been issued and which corporation held title to certain oil properties. Instead of organizing a new corporation to take over the properties acquired from the appellants, the existing corporation was utilized, and the appellants conveyed to it the properties described in the contract. At the time of the execution of the contract and for some time before, the production of the properties had been slowing down and their value diminishing. When they were being operated under the aforesaid contract, the production became progressively less, so that finally they could not longer be operated at a profit, and in the latter part of October, 1922, operation of the properties was abandoned. It is not seriously contended that the properties were mismanaged or that they could no longer be

made profitable. The appellants were paid the cash items of $5,000 and $7,500 and $6,250 as stipulated. A payment was made on the $19,000 item which reduced that item to $16,417.74. The $45,000 item was reduced by various payments to the appellants' creditors to $18,614.69, for which balance the appellants were liable. A small balance against the appellants on another transaction was deducted, the balance then remaining being $34,865.26. These are the transactions from which this litigation arose and from a decision adverse to the appellants (plaintiffs below) is this appeal.

A number of points are presented by counsel for the litigants in their able and exhaustive briefs, but the main question, which is largely determinative of the issues involved, depends on a single proposition and is involved in the construction of article 10 of the contract set out above. It is a familiar rule of construction that contracts should be interpreted so as to give effect to the intention of the parties, which is to be ascertained by a consideration of the instrument as a whole and of each part in connection with other related paragraphs. Where the language used is of doubtful import, the situation of the parties and the attendant circumstances should be considered and that construction should be adopted which is most fair and reasonable. But, when the language used leaves no doubt as to its meaning, it is conclusive as to the intention of the parties and must be enforced as written. With this elementary proposition of law in mind we proceed to an examination of article 10 of the contract to determine whether as to the items of $19,000 and $45,000 (the only items in controversy) there was an absolute and unconditional promise to pay as contended by the appellants, or whether the same were conditional and contingent upon the happening of some other event as is the contention of the appellees.

It is clear from a consideration of the entire contract that the $5,000 item and the $7,500 item first mentioned in article 10, amounting to $12,500, were paid in cash by

Couch at or about the time of the execution of the contract. Item A, article 10, is as follows: "(a) To be paid Love Brothers, Incorporated, and M. W. Love, monthly from net earnings of the property interests herein conveyed in the manner described below, $19,000." In the same article appears clause "A": "(a) It is agreed and understood by and between the parties hereto that Love Brothers, Incorporated, and M. W. Love, shall receive 20 per cent. of the net earnings accruing from the property interests herein conveyed until Couch and Associates have been reimbursed for the $12,500 advanced under article 10 hereof, after which they shall receive 25 per cent. of such net earnings until they have been paid the aggregate sum of $19,000."

Item "b" of article 10 is as follows: "(b) Indebtedness of Love Brothers, Incorporated, to be satisfactorily adjusted and paid by Couch and associates, $45,000," and clause "b"; "(b) It is further agreed that Couch and associates, through the corporation to be formed, shall satisfactorily adjust and pay the outstanding obligations of Love Brothers, Incorporated, as minutely set forth in the attached list marked 'Exhibit B,' from 60 per cent. of the net earnings of the property interests herein conveyed until Couch and Associates shall have been reimbursed for the $12,500 advanced under article 10 hereof, after which 75 per cent. of such net earnings shall be applied to the retirement of said indebtedness."

As to item "a," it, standing alone within itself, clearly indicates how the $19,000 shall be paid direct to Love Brothers, Incorporated; as to item "b," as explained by its related clause "b" following, it is equally clear how the $45,000 item should be paid. Both items "a" and "b" are to be paid out of the net earnings of the *properties conveyed,* and, as there is nothing else in the contract which in any way refers to these items and further explains or limits the terms of their companion clauses, it follows that the payments are limited and conditional on the net earnings of the properties. We must

hold the language unambiguous and conclusive as to the intention of the parties. Therefore, the parol evidence tending to contradict or alter these plain provisions of the written contract was incompetent. As the properties since October 22, 1922, could, and can, no longer be operated at a profit, the appellants were entitled to receive on item "a" and to have applied to item "b," in the manner stated in the companion clauses, only the net profits already realized, and this, in effect, is the application of the rule hereinbefore stated made by the chancellor to the facts in the case at bar, in which he is supported by our decision on an analogous state of facts in the cases of *Gilbert* v. *Patterson,* 174 Ark. 61, and *Hirsch* v. *Cadrin,* 178 Ark. 209, 10 S. W. (2d) 2.

It is the theory of the appellants that H. C. Couch is personally liable under the terms of the contract, while the appellees insist that the $19,000 and the $45,000 items were to be paid merely from the net profits derived from the operation of the Love properties, "if, as and when such profits were realized (which theory a proper construction of article 10 justifies) and responsibility for making such payments out of profits of operation was placed entirely on the corporation acquiring the properties and not on Couch personally"—in short, that the corporation was personally liable, and not Couch. Treating the contract as ambiguous in so far as this question is concerned and the parol testimony adduced legitimate to ascertain its true meaning in that regard, this testimony was conflicting; that of the appellants tending to establish appellee's personal obligation for the payment of said items in accordance with the provisions of article 10, and that of the appellee supported by the testimony of others tending to negative this contention. The trial judge adopted that view of the evidence tending to establish the contention of the appellees. It is earnestly insisted by counsel for the appellants that, when the value of the properties conveyed is considered, the financial standing of Couch, and the uncertainty as to the financial

standing of a prospective corporation, are taken into account, the contention of the appellees as to the non-liability of Couch is unreasonable, and that these facts, taken into consideration with the testimony of the appellants as to their understanding as to who should pay the items in question, makes the finding of the chancellor against the preponderance of the testimony. On the other hand, it is as seriously contended that the circumstances attendant upon the transaction are persuasive that Love Brothers, Incorporated, was so financially embarrassed that it could no longer develop and operate the properties which were showing marked diminution in producing power; that the values of these properties were highly speculative, and that a careful analysis of the testimony discloses that they were in fact, even on a speculative basis, worth no more than the purchase price named in the contract, and that the cash of $18,750, with the prospect of the further development and operation of the properties and the forbearance of the creditors, made it not at all unreasonable that the agreement should be as contended by the appellees.

We have carefully examined and considered the evidence in support of these respective contentions and cannot say that the judgment of the trial court in upholding the contention of the appellees was against the preponderance of the evidence, or that the circumstances warranted the assumption that the finding was unreasonable. Therefore, under the established rules of procedure, the finding of the trial court will not be disturbed.

It is insisted, however, that the net profits were greater than shown by the audit because of certain items under the head of "General Expenses" which were not proper charges against the production, in that these items were the expenses of the corporation as a whole which was operating other properties besides those acquired from the appellants, and while the appellee was not liable (as found by the chancellor) under the terms of the written contract as explained by the parol testimony, he

was, and is, personally liable under the terms of § 1726 of Crawford & Moses' Digest, because as president of the corporation he failed to make and file the annual statement prescribed by § 1715, *ib.* The appellants are in error in this contention. The corporation was organized in April, 1921; the properties were taken over in November of that year, and operations ceasing October 22, 1922, the liability, if any, became fixed on that date.

In the appellants' original complaint filed September 16, 1925, the cause of action stated was for a breach of contract. Various amendments were filed to the complaint, among which was one filed August 5, 1926, in which an independent cause of action than that stated in the original complaint or in any of the preceding amendments was alleged, namely, a statutory liability based on § 1715 and § 1726, *supra.* The period of limitation applicable for the enforcement of statutory liability is three years. *McDonald* v. *Mueller,* 123 Ark. 233; *Zimmerman* v. *W. & S. Fire Ins. Co.,* 121 Ark. 408. The statutory cause of action was not included in the original complaint and the statute of limitations was not tolled by its filing, but continued to run until the filing of the amendment August 5, 1926, at which time the statute bar had attached. *Cottonwood Lumber Co.* v. *Walker,* 106 Ark. 108.

It is insisted by the appellants that the amendment will relate back to the filing of the original complaint, citing *Holland* v. *Rogers,* 33 Ark. 251, and *Western Coal & Mining Co.* v. *Corkille,* 96 Ark. 388, 131 S. W. 963, in support of this contention. But those cases are not authority for the contention made in the instant case for the reason that the amendment of August 4, 1926, was not an amplification of the cause of action set out in the complaint first filed or of any of the amendments thereto, but was an independent and distinct cause of action, and an adverse judgment on the cause of action alleged in the original complaint would not be a bar to recovery on the cause of action stated in the amendment of August 5,

1926. *McDonald* v. *Mueller, supra; Cottonwood Lbr. Co.* v. *Walker, supra;* 34 C. J., page 802. It follows from the view above expressed that the decree of the chancellor is in all things correct, and it is therefore affirmed.

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FIRST NATIONAL BANK *v.* GODBEY & SONS.

Opinion delivered June 16, 1930.

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W. P. Strait, for appellant.

Robert Bailey and *E. A. Williams,* for appellee.

HART, C. J., (after stating the facts). The chancellor was justified in finding that the 22 bales of cotton in controversy belonged to the plaintiffs. It is true that the testimony is contradictory on this point, but we think that the chancellor was warranted in finding that a preponder-

ance of the evidence shows that the cotton belonged to the plaintiffs. Two employees of the firm and two of the members of the firm testified to that effect. It is true that their testimony was contradicted by that of Patterson, and by the further fact that the space in the cotton yard where the cotton was stored as it was purchased was marked in the name of Patterson, but the Godbeys testified that this was done for the sake of convenience, because the members of the firm were also buying cotton, and the cotton purchased by Patterson was stored at a place in the cotton yard in his name in order to distinguish it from the other cotton purchased by the plaintiffs. In all instances the plaintiffs furnished the money which paid for the cotton. Patterson did not handle any of the money. He would give the owners of the cotton tickets showing the price he had agreed to pay and the number of pounds bought, and the seller would carry this ticket to the store of Godbey & Sons, and the money would be paid there by a member of the firm.

It is next insisted that, even if the cotton belonged to the plaintiffs, that Patterson had a right to sell it. The evidence showed that some eleven other sales of cotton had been made by Patterson, but it also showed that Wylie Godbey supervised the selling of the cotton and received the proceeds of sale. Patterson was allowed to actually handle the cotton in the sale because he was to receive as his commission all profits derived from the purchase and sale of the cotton. Wylie and Buck Godbey both denied in positive terms that Patterson had any right to sell the cotton without the consent or supervision of some member of the firm. They are corroborated by the attendant circumstances. The cotton was purchased and stored in a cotton yard at Atkins. Patterson took the cotton without the knowledge of any member of the firm of Godbey & Sons and hauled it to Morrilton and deposited it in a compress warehouse and received receipts therefor. He carried these compress receipts to a bank and borrowed $1,500 on them. The bank did not

see the cotton at all. It was not necessary for Patterson to have hauled the cotton itself to Morrilton in order to borrow the money. At the time he hauled the cotton there, he owed the plaintiffs' firm over $2,000 and received the amount borrowed and refused to pay the plaintiffs any part of the amount which he owed them. The attendant circumstances justified the chancellor in finding that he had no actual authority to sell the cotton.

It is next insisted that he had apparent authority to sell the cotton. Apparent authority in any case is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing. It is such authority as a reasonably prudent person would naturally suppose the agent to possess from the attendant circumstances. *Ozark Mutual Life Assn.* v. *Dillard,* 169 Ark. 136; and *American Southern Trust Co.* v. *McKee,* 173 Ark. 147.

In the present case, it cannot be said that the plaintiffs knowingly held Patterson out as having authority to sell the cotton which he purchased for them. It is true that he had actually sold the cotton, but the sale had been made under the supervision of Wylie Godbey, and the proceeds of sale were paid to the plaintiffs because they had furnished the money for the purchase of the cotton. A preponderance of the evidence shows that the plaintiffs did not hold out Patterson as having authority to do anything except to buy cotton for the firm, and it is well settled that one dealing with an agent without inquiring of the principal his authority does so at his peril. There is no testimony in the record tending to show that the bank knew any facts or circumstances which would lead it to believe that the plaintiffs held out Patterson as having authority to sell cotton for them. On the other hand, the officer of the bank who conducted the transaction for it with Patterson merely asked the latter if the cotton belonged to him. He had the compress warehouse receipts for it, and they supposed from that fact and from his statement that the cotton belonged to him and that

he had the right to sell or pledge it, and they did not lend him the money on it under any sort of belief that he was acting for the plaintiffs or anyone else but himself. It is a fundamental principle of law that a principal can only be bound by the acts of his agent coming within the real or apparent scope of his authority. *Ozark-Badger Co.* v. *Roberts,* 171 Ark. 1105.

It is next contended that the plaintiffs are estopped from recovering from the bank by the circumstances in the case. We do not think that it can be said in any sense that the plaintiffs are prevented by equitable estoppel from asserting their rights as against the bank as the purchasers of the cotton in controversy. The plaintiffs did nothing whatever to mislead the bank, and did not in any sense by word or conduct induce it to purchase or lend money on the 22 bales of cotton in question. While mere silence may operate as an estoppel in equity, in order to constitute such silence as an estoppel, there must be both the opportunity and the duty to speak, and the action of the person asserting the estoppel must be the natural result of the silence, and the party maintaining the silence must have been in a situation to know that some one was relying thereon to his injury. *Baker-Matthews Lumber Co.* v. *Bank of Lepanto,* 170 Ark. 1146; *American Southern Trust Co.* v. *McKee,* 173 Ark. 147; and *Merchants' & Planters' Bank* v. *Citizen's Bank of Grady,* 175 Ark. 417.

The whole principle of equitable estoppel is that when a man has done an act or said a thing and another person, who had a right to do so, has relied on that act or word and will be injured if the former can repudiate the act or recall the word, it shall not be done. In the case at bar, the plaintiffs did nothing that would induce the bank to lend the money to Patterson on the faith that he had the right to handle the cotton for them. In fact they were wholly ignorant that he had done so. A member of the firm had gone to Morrilton to see about the cotton as soon as the plaintiffs learned that Patterson

had hauled it there. Patterson stated he had not sold the cotton but had merely left the compress receipts in a bank. That showed that he had already pledged the compress receipts to the bank, and had received the loan of $1,500 before the plaintiffs knew anything about it. Indeed, the officer of the bank who acted for it does not claim that he was in possession of any facts which would have induced him to believe that Patterson had authority to act for the plaintiffs or any one else in the matter. The bank lent Patterson the money on the theory that the cotton belonged to him. They relied entirely on his statement about the ownership of the cotton, and on the fact that he had the compress receipts in his possession. The fact that he had the compress receipts in his possession added nothing to the transaction under the circumstances of the case. He had hauled the cotton to Morrilton from Atkins without the permission of the owners of it, and had secured the compress receipts on the credibility that he owned the cotton. He had no authority to deliver these receipts to the bank unless the cotton belonged to him or unless he had authority from the owners of it to deliver the receipts to the bank, and pledge them for a loan.

Therefore the decree will be affirmed.

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WASHINGTON *v.* STATE.

Opinion delivered June 16, 1930.

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Milton McLees and *Joe N. Wills,* for appellant.

Hal L. Norwood, Attorney General and *Pat Mehaffy,* Assistant, for appellee.

HART, C. J., (after stating the facts). It is first earnestly insisted by counsel for the defendant that the court erred in refusing to sustain their motion in arrest of judgment. They contend that, inasmuch as the defendant was indicted and tried for murder committed in the perpetration and in the attempt to perpetrate robbery in violation of the provisions of § 2343 of the Digest, the indictment is fatally defective and does not charge an offense under that section. Their contention is based on the allegations of the indictment using the word "intent" instead of the word "attempt" to rob W. H. Roberts. They claim to constitute an attempt, something more than an intention or purpose to commit crime is necessary. It is true that generally speaking the word "attempt" is more comprehensive than the word "intent," including both the purpose and an actual effort to carry the purpose into execution; but, in crimes which require force as an element in their commission, there is no substantial difference between an "assault with intent" and an "assault with attempt" to perpetrate the offense. *Smith* v. *State,* 126 Ga. 544, 55 S. E. 475; *Johnson* v. *State,* 14 Ga. 55; 2 Bishop's New Criminal Procedure (4th ed.), page 80; and Kelley's Criminal Law and Procedure, (4th ed.) § 486.

By the common law, every homicide committed in the perpetration of a felony was murder, and this, whether there was any precedent intention of doing the homicidal act or not. *Rhea* v. *State,* (Neb.) 88 N. W. 789; *Conrad* v. *State,* 75 Ohio St. 52, 8 Ann. Cas. 966; and 4 Cooley, Black. Comm., star pages 200 and 201.

Our statute has modified the common law rule so that murder committed in the perpetration of or attempt to perpetrate certain named felonies including robbery is deemed murder in the first degree. Crawford & Moses' Digest, § 2343; *Palmore* v. *State,* 29 Ark. 248;

Rayburn v. *State,* 69 Ark. 177; *Powell* v. *State,* 74 Ark. 255; *Sheppard* v. *State,* 120 Ark. 166; *Clark* v. *State,* 169 Ark. 717; and *Harris* v. *State,* 170 Ark. 1073.

As will be seen from the body of the indictment which was set out in our statement of facts, the grand jury charged that George Washington, with the felonious intent to rob W. H. Roberts, did assault and kill W. H. Roberts by shooting him with a pistol. This, in plain language, charged the defendant, George Washington, with killing W. H. Roberts with the felonious intent to rob him, or in the attempt to rob him. Consequently, when the indictment charged an assault with intent to kill Roberts, this was necessarily an attempt by violence to rob him. The crime of robbery requires force as an element in its commission, and there can be no substantial difference between an "assault with intent to rob" and an "assault with attempt to rob." Hence a verdict of guilty of murder in the first degree was in conformity with the indictment. Murder committed in the perpetration or attempt to perpetrate robbery under our statute is not a distinct offense, but merely one way of committing murder in the first degree. The authorities above cited hold that the malice in such a case is evidenced by the act of killing while attempting to perpetrate the felony, and that premeditation is not essential to murder in the first degree in such a case. Hence we hold this assignment of error is not well taken.

It is next insisted that the court erred in giving certain instructions to the jury. We do not deem it necessary to set out these instructions. The assignment of error is predicated upon the theory that the indictment did not charge the offense to have been committed in the perpetration of or in an attempt to perpetrate robbery, and that it is error therefore to instruct the jury that if they found beyond a reasonable doubt that the defendant, in the perpetration of or in the attempt to perpetrate robbery, shot and killed Roberts, he would be guilty of murder in the first degree. Reliance is had to sustain

their contention on *Rayburn* v. *State,* 69 Ark. 177, and *Sheppard* v. *State,* 120 Ark. 160. As we have already seen, the indictment is a good and valid indictment under § 2343 of the Digest, and it was proper for the court to instruct the jury on the law of the case under that section of the statute as laid down under the authorities above cited. Hence we do not deem the assignment of error with regard to the instruction is well taken. The jury, by its verdict, showed that it believed the witnesses for the State, and the testimony given by them warranted the jury in finding that the defendant was guilty of murder in the first degree, committed by killing W. H. Roberts while attempting to rob him.

It is next contended that the court erred in refusing to withdraw from the consideration of the jury two photographs of the scene of the killing introduced by the State. It is conceded that these photographs were properly introduced, and that their introduction was competent in order to show the jury the premises where the crime was charged to have been committed. It is alleged, however, that the court erred in allowing the State to show from the photographs the purported positions of the parties by illustration from men in the pictures. It is insisted that there is no verification of the photographs with reference to the position of the parties, and for this reason the photographs should have been withdrawn from the jury. We think that the photographs were properly verified with respect to the position of the defendant and the deceased by the admission of the defendant himself. According to the testimony of the sheriff, the defendant admitted that the position of certain men in the picture were about the same as they were when the shooting occurred; that is to say, he admitted that he was about where W. L. Hall, one of the parties in the picture, was, when the shooting took place. He said that Roberts was standing in the door of the filling station.

In *Sellers* v. *State,* 91 Ark. 175, the court recognized the general rule laid down by authorities on

criminal evidence that 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. The reason is they aid the jury to understand the evidence of the witnesses by illustrating the situations of the persons, places, or things connected with the inquiry. It was only material to show the position of the defendant and of the deceased at the time of the shooting. The defendant admitted to the sheriff the position of these two parties and also testified relative to the same at the trial. He admitted shooting the deceased and only contradicted the witnesses for the State as to which one shot first. According to the evidence for the State, the person with the smaller pistol shot first, and it was shown that the defendant had the smaller pistol. According to the testimony of the defendant, the deceased shot first. Hence we hold that this assignment of error was not well taken.

It is next contended that the court erred in refusing to instruct the jury on the lesser degrees of homicide. We do not think that this assignment of error is well taken. There was no evidence to establish a lesser degree of homicide than murder in the first degree. The evidence showed that the defendant, if guilty at all, was guilty of murder in the first degree; and it was not error for the court to refuse to give instructions authorizing the jury to return a verdict of guilty of one of the lesser degrees of homicide when there was no evidence upon which to base such instruction. In this connection, it may be stated that the court instructed the jury on the subject of self-defense or excusable homicide. *Clark* v. *State,* 169 Ark. 717; and *Harris* v. *State,* 170 Ark. 1073.

We also call attention to the fact that the court told the jury that if it found from the evidence beyond a reasonable doubt that the defendant went to the place of business of the deceased for the purpose of robbing him, and that he attempted to perpetrate the robbery, he could

not claim the benefit of self-defense unless the jury found that he in good faith abandoned his attempt to commit the robbery and that he retreated as far as consistent with his own safety before shooting the deceased. The court also gave proper instructions to the jury on the question of reasonable doubt and that the confessions of the defendant must be voluntarily made.

Finally, it is insisted that the judgment should be reversed because the court erred in not granting a new trial for the reason that J. H. Brooks, one of the jurors, was at the scene of the crime when the photographs representing the situation of the parties were taken. According to the testimony of the juror, he did not recollect about having been present when the pictures were taken when he was questioned as to his qualifications as a juror in the case. He admitted that he was present when the pictures were taken and might have heard some of the witnesses say something about the case, but, if he did hear them, their statements made no impression upon his mind, and he did not recollect anything about the occurrence when he was examined on his *voir dire*. He happened to be present when the pictures were taken because he was riding in an automobile with the sheriff which the latter was demonstrating to him. His testimony is corroborated by that of the sheriff, who testified that in summoning a special venire to try the defendant, he did not recollect that Brooks had been present at the time the pictures of the scene of the killing showing the positions of the parties were taken. The juror testified that he had no bias or prejudice for or against the defendant, and that his mind was perfectly free from any prejudice, and that he could and did give the defendant a fair and impartial trial. Therefore, we hold that this assignment of error is not well taken. *Pendergrass* v. *State,* 157 Ark. 376.

We have carefully examined the record and are of the opinion that the defendant received a fair and impartial trial. We find no prejudicial error in the record, and the judgment will therefore be affirmed.

AHERN *v.* PAVING IMPROVEMENT DISTRICT NO. 53 OF TEXARKANA.

Opinion delivered June 16, 1930.

[redacted]

Jones & Jones, for appellant.

J. M. Carter and *B. E. Carter,* for appellee.

SMITH, J. Appellant filed a complaint which contained the following allegations. Appellant owned certain town lots in Paving Improvement District No. 53 of the city of Texarkana, hereinafter referred to as the district. More than ten owners of property in the district filed with the city council on March 8, 1927, a petition praying the creation of the district, and an ordinance was passed designating the boundary lines of the district, it being recited in the ordinance that the district was created for the purpose of grading, curbing, guttering and paving the streets named in the ordinance. Appellant did not sign the petition upon which the ordinance was passed.

Thereafter the second or majority petition was circulated among the owners of real estate included in the district, but a majority in value had not signed when the petition was presented to appellant by Finis Pharr, who was then and is now a member of the city council. Appellant refused to sign the petition, for the reason that Fourteenth and Fifteenth streets, running west from Garland Avenue, which were included in the district, were not to be paved. Pharr represented to appellant and assured him that Fifteenth Street would be paved

if plaintiff would sign the petition, and similar representations were made to appellant by other members of the city council, and by property owners within the district. "That, relying upon said representations so made to him that Fifteenth Street would be paved west from Garland Avenue and believing that the promises and agreements made to him by members of the city council and by others that Fifteenth Street would be paved, he signed said petition, and would not have done so if such representations had not been made and relied upon."

He further alleged that after he had signed the petition, but before it had been filed, or presented to the city council, he was informed that it was not contemplated that Fourteenth or Fifteenth street would be paved, and thereupon filed his request in writing with the city council that he be permitted to withdraw his name from the majority petition. That, upon the presentation of this request, the council passed an ordinance instructing the assessors not to make an assessment of the betterments "until this matter had been perfected and reported back to the council," and J. P. Ahern (appellant) "is not to suffer any expense on account of the pavement of said streets mentioned above."

That, relying upon the representations of the council that no taxes would be levied upon his property until arrangements had been made and perfected to pave Fourteenth and Fifteenth streets, he permitted his name to remain on the majority petition. That an ordinance was passed and assessors elected, who assessed benefits against appellants property amounting to $7,283, and it was ordered that six per cent. of the betterments be paid annually on or before the 1st day of February of each year, commencing February 1, 1928, and pursuant to this ordinance appellant paid one annual assessment amounting to $436.98. That Fourteenth Street was paved, but the commissioners have failed and refused to pave Fifteenth Street, and have advised appellant

that they did not intend to pave it unless they are protected by an order of court in so doing. That appellant did not know, and was not informed, that the paving district had not paved, and did not intend to pave Fifteenth Street, until September, 1929, which was after he had paid his taxes for that year. It was further alleged that the commissioners of the district were, at the time of the filing of the complaint, engaged in the work of paving and grading the streets, and would not pave Fifteenth Street unless they were required to do so. There was a prayer that the commissioners be required to pave Fifteenth Street, or, if that relief was denied, that the district be restrained from collecting the taxes assessed against and levied upon appellant's property.

A demurrer, which was interposed to the complaint, was sustained, and this appeal is from this decree.

We think the demurrer was properly sustained. The power of the council to act is derived from the petition of a majority of the property owners. The law requires this petition to be in writing and to specify the improvement contemplated. The improvement district can only be created upon this petition, and must, of course, conform to it. The petition makes certain the improvement proposed, and all property owners have the right to rely upon the recitals of the petition; otherwise a property owner, by signing a petition for a particular improvement, might later learn that his consent to one improvement had been used to place the burden of a more extensive program upon other property owners as well as upon himself. What was said in the case of *Cox* v. *Road Imp. Dist. No. 8 of Lonoke County*, 118 Ark. 119, is applicable here. It was there said: "There is not, of course, the same necessity for accurate description of the roads which an improvement district embracing rural property is intended to improve as there is for an accurate description of streets in a town or city; but the legal principles which govern in one case must be applied in the other. It is essential

in both cases that there be no uncertainty about the improvement which it is proposed to make. All of the cases under our improvement district law treat the petition as jurisdictional, and hold that its recitals must meet the requirements of the statute. All of these decisions make it plain that there must be no uncertainty about the improvement proposed. The details and plans of the improvement may be worked out by the board of improvement after the establishment of the district petitioned for, but the discretion of the board is limited to carrying out the purpose of the petition. It is not contemplated that upon and after the establishment of the district there shall be any doubt about the improvement to be constructed. Otherwise, property owners might sign the petition under the apprehension that a certain road or street was to be improved, only to learn after the district had been established, and the plans had been approved, that they were mistaken or had been deceived. One of the purposes of requiring a petition in writing is to prevent such controversies. (Citing numerous cases)." Later cases to the same effect are: *Kempner* v. *Sanders,* 155 Ark. 321; *Nelson* v. *Nelson,* 154 Ark. 36; *Householder* v. *Harris,* 147 Ark. 349.

The law furnished appellant and all other property owners a certain source of information, upon which he and they might safely have relied, to-wit: the petition which he signed, and he had no right to assume that the council would order the construction of an improvement for which other property owners had not petitioned.

In the case of *Pharr* v. *Knox,* 145 Ark. 4, an improvement district, established by order of the county court, was attacked upon the ground—among others—that the plaintiff had signed the petition for the establishment of the district upon a representation of the county judge as to cost, which was false and fraudulent, and that the plaintiff had "relied on the statements of the county judge as a county official." A general demurrer was sustained to this complaint, and in

upholding that ruling it was there said. "The alleged false and fraudulent representations, set up by one of the affiants, upon which signatures to the petition are said to have been obtained, were not statements of past or existing facts, and were not such fraudulent representations as entitled appellants to have the judgment creating the district declared invalid. The appellant had no right to rely upon such representations. The act itself 'provides an appropriate scheme for advising the landowners of the character of the improvements to be undertaken and the cost thereof, so that they could act upon the petitions intelligently.' *Lambersón* v. *Collins,* 123 Ark. 205. The act itself, if complied with, protects the property owners from such frauds as are set up in that affidavit. See § 2, *Luck* v. *Magnolia-McNeil Road Imp. Dist. No. 1 of Columbia County,* 141 Ark. 603.

Not only did the majority petition describe the streets to be improved, but the ordinance enacted pursuant to the petition also described the improvement, yet no attack was made upon this ordinance for nearly two years after its enactment, and under numerous decisions of this court this delay bars the attack here made. See also § 13 of act No. 64 of the Acts of 1929, vol. 1, Acts 1929, page 252.

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

[redacted]

SMITH ARKANSAS TRAVELER COMPANY *v.* SIMMONS.

Opinion delivered June 16, 1930.

[redacted]

Buzbee, Pugh & Harrison, for appellant.

Frank B. Pittard and *Walter A. Isgrig,* for appellees.

HUMPHREYS, J. This is an appeal from judgments against appellant in favor of W. F. Simmons for $5,000 and Jennings Motors for $401.60, both of whom are appellees herein, for the alleged negligence of R. W. Hoehn, appellant's motorman, in driving one of its busses in such a careless and reckless manner as to cause a collision between the bus and a Chrysler car owned and being driven by appellee Simmons at the time in a careful manner.

The suit was instituted by appellee, W. F. Simmons, against appellant to recover certain amounts for damages to his automobile and for personal injuries to himself resulting from the collision, and appellee Jennings Motor Company intervened in the suit to recover the balance of the purchase money due it by W. F. Simmons for the automobile which he had purchased from it under a conditional sales contract. The issue joined by the pleadings was whether the automobile was damaged and appellee, W. F. Simmons, injured by the negligent driving of appellant's motorman or by said appellee's own negligence in failing to drive his automobile according to the traffic rules of Little Rock, and to keep a proper lookout for traffic in the direction he was going.

When the jury was being impaneled to try the cause, the following questions were propounded and answers thereto made:

By Mr. Pittard (attorney for appellee W. F. Simmons). Q. I want to know if any of the jurors are employed by a liability insurance company or engaged in the insurance business, or employed in the insurance business? Mr. Robertson (attorney for appellant). I

object. Court: What is the object of that question? Mr. Pittard: Just to know who the people are they are working for. Court: Why are you asking that question? Mr. Pittard: Some people working for insurance companies are not usually in favor of giving damages. Court: Have you any reason to believe that there is an insurance company interested in this case? Mr. Pittard: Yes, sir. Court: Is there an insurance company interested in this case (addressing Mr. Robertson). Mr. Robertson: If there is, I don't know about it. Court: Are you employed by any insurance company? Mr. Robertson: All I know about it is that I am employed by the Traveler Bus Company. Mr. Brown here really is the one that employed me. Court: I will ask Mr. Brown—Is there any insurance company interested in this case? Mr. Brown: Yes, sir. Court: The objection is overruled.

(To which ruling of the court the defendant at the time duly excepted and asked that its exceptions be noted of record, which was accordingly done).

The collision occurred at the intersection of Eighth and State streets in Little Rock, Arkansas. Appellee was traveling south on the right-hand side of State Street and appellant's bus was traveling east on the right-hand side of Eighth Street. Just as appellees automobile was passing out of the intersection of said streets the right-hand wheel of his automobile was struck by appellant's bus and knocked at an angle of about forty-five degrees across State Street, turning the same entirely around. The bus had turned slightly toward the right or south just before striking the automobile, and after striking same continued to run across the street and over the curb and sidewalk into an adjoining yard where it ran into a tree that stopped it.

The testimony introduced by appellee tended to show that he entered the intersection of the two streets before the bus reached State Street; that he was traveling at a reasonable rate of speed and could have passed

over Eighth Street before being struck if the motorman of the bus had not been traveling at a reckless and unreasonable rate of speed. Appellee's witness testified that when appellee entered the intersection the bus was from one-third to one-half of a block-west on Eighth Street and did not enter the intersection until appellee had almost passed out of same, and that the collision occurred on account of the motorman driving into the intersection at a rate of twenty or twenty-five miles an hour or over, without slowing down as he approached same and then because he turned slightly to the south or right instead of keeping straight ahead.

The testimony introduced by appellant tended to show that each reached the intersection about the same time; that the motorman of the bus approached at a speed of about ten or twelve miles an hour and appellee at about twenty-or twenty-five miles an hour, the latter running immediately in front of the bus before he had time to stop it, thereby causing the collision; that the purpose of the motorman in turning slightly to the right was to give appellee a chance to turn to the left or east on Eighth Street and avoid the collision.

The testimony thus detailed presented a conflict of testimony for determination by the jury as to whether the collision and consequent damage was occasioned by the negligence of the motorman or contributory negligence of appellee. This issue was submitted to the jury and determined adversely to appellant.

The appellant first contends for a reversal of the judgment because the trial court elicited information in the presence of the jury to the effect that appellant carried accident or casualty insurance to indemnify it against injuries that it might inflict upon other parties and their property.

The court elicited the information by inquiry after counsel for appellee had propounded over the objection of appellant, the following question to the jurors, upon their *voir dire* examination:

"I want to know if any of the jurors are employed by liability insurance companies or engaged in the insurance business, or employed in the insurance business?"

The objection was made and exception saved to said question, and the exception was preserved in appellant's motion for a new trial, but the questions propounded by the court in eliciting the information that an indemnity insurance company was interested in the suit were not objected and excepted to.

The question propounded by counsel for appellant was a proper one in order that he might intelligently exercise appellant's right of challenge. *Pekin Stave & Manufacturing Co.* v. *Ramsey,* 104 Ark. 1.

Appellant's only other contention for a reversal of the judgments is that the court erred in giving, over its objection, appellee's requested instruction number 3, which is as follows:

"Ordinary care requires of every man who drives a motor vehicle upon a public street to keep a lookout for vehicles or persons who may be upon the street, and to keep his motor vehicle under such control as to be able to check the speed or stop it absolutely if necessary to avoid injury to others when danger may be expected or is apparent."

The identical statement of law was approved by this court in the case of *Madding* v. *State,* 118 Ark. 506. We think it a necessary and wholesome rule of law that drivers of automobiles in approaching street crossings or an intersecting street must have their automobiles under control, prepared to stop, if automobiles or other vehicles or pedestrians are passing over the intersection. Danger may always be expected or anticipated at street crossings or at intersections of streets, and every driver of an automobile should keep a lookout and approach same with his machine under control, else he cannot be regarded or treated as exercising ordinary care.

We think the instruction comes within this rule and was applicable and appropriate in the case.

No error appearing, the judgments are affirmed.

WILKIN *v.* SPECIAL SCHOOL DISTRICT OF HAZEN.

Opinion delivered June 16, 1930.

Samuel S. Jefferies, for appellant.

Chas. B. Thweatt, for appellee.

HUMPHREYS, J. This is an appeal from a decree sustaining a demurrer to and dismissing the complaint of appellant filed in the chancery court of Prairie County, Southern District, praying that appellee be enjoined from issuing $30,000 of bonds and executing a mortgage on the school property to secure same for the purpose of making repairs upon the school building, and to pay the outstanding indebtedness against said school district. It was alleged in the complaint that appellees had advertised, received bids for and entered into a contract for the sale of $30,000 negotiable bonds in accordance with the procedure required by §§ 8984 and 8986 of Crawford & Moses' Digest, as amended by later acts, for purpose provided in acts 62 of 1927 and 164 of 1929. The injunction was sought upon the alleged invalidity of said acts 62 and 164 because neither act contained any procedure to be followed in issuing bonds, nor any authority to secure same by a mortgage upon the school property; and because appellees were proposing to cover two purposes in one issue of bonds.

Said acts 62 and 164 were passed by the Legislature to enlarge the purposes for which bonds might be issued by a special school district so as to embrace debts which had been incurred for general operating expenses. This court ruled in the case of *Phillips* v. *Baker,* 172 Ark. 726, that § 8984 of Crawford & Moses' Digest was not broad enough to authorize the issuance of bonds by a special school district to make ordinary repairs or for the operation of schools. Subsequent to this decision said acts 62 and 164 were passed to authorize the issuance of bonds by special school districts to pay their debts, whether incurred for the construction of buildings or the operation of the schools or other legal purposes, in addition to the authority already conferred on said district to issue bonds under and in accordance with act 180 of the Acts of 1917 of which §§ 8984 and 8986 of Crawford & Moses' Digest are parts. *Phillips* v. *Baker*, 174 Ark. 403. All three acts related to the same subject, and the rule is that analogous acts or acts *in pari materia* should be read together in order to ascertain and carry out the intention of the Legislature. Said acts 62 and 164 were passed to supplement said act 180 as subsequently amended. When these acts are read together, the procedure to be followed in issuing bonds is set out and authority is conferred to execute mortgages to secure same. This construction of the three analogous statutes disposes of two objections to the validity of act 62 of 1927 and 164 of 1929. The other objection to the validity of the acts has been disposed of by this court in the case of *Indian Bayou Drainage District* v. *Dickie,* 177 Ark. 728. It was said in that case that "If separate bond issues may be authorized for each purpose, a single issue would suffice for both purposes." The instant case in this particular is ruled by the principle therein announced and quoted above.

No error appearing, the decree is affirmed.

SMITH *v.* KIRKPATRICK FINANCE COMPANY.

Opinion delivered June 16, 1930.

Horace Sloan, for appellant.

Roy Penix, for appellee.

MEHAFFY, J. The Jonesboro Machine Company was a corporation engaged as a retail dealer of automobiles at Jonesboro, Arkansas, in November and December, 1928, and for a number of years prior thereto. N. B. Stroud was the president and general manager of the corporation, owned a majority of the stock and was in absolute control of the affairs of the corporation. On November 28, 1928, N. B. Stroud, as general manager of the corporation, sold an automobile to himself and wrote a series of twelve notes for $45 each, payable to the Jonesboro Machine Company, signed the notes himself, sent one of the boys into the warehouse where the corporation kept its automobiles to get the number of the car Stroud was driving. In each of the notes the automobile was described and its number given. The notes describing the car retained title in the corporation to the automobile until all the notes were paid. It was also stated in the notes that, on default of payment of said notes at maturity or any of said payments, all should become due and Stroud forfeited his right under the contract. Stroud indorsed on the back of the notes the following words: "Jonesboro Machine Co., by N. B. Stroud, President," and sold and transferred said notes to Paul Smith. This automobile claimed by Stroud to have been purchased

from the corporation remained with the other cars belonging to the corporation which were kept for sale, had a dealer's tag on it and nothing to indicate that it was owned by Stroud or that it was not a car belonging to the corporation kept for sale just as its other cars. On December 1, 1928, this same car was sold to Pearcy Marlar for $812.10. Marlar paid at the time he purchased the car $243, leaving a balance of $569.10 payable in twelve monthly installments of $47.47, beginning January 1, 1929. This was a conditional sales contract, the corporation retaining title, the notes being similar in this respect to the notes executed by Stroud to the corporation. The Jonesboro Machine Company sold the notes executed by Marlar before maturity to the Kirkpatrick Finance Company. Four or five months later the Jonesboro Machine Company was adjudged a bankrupt. Marlar paid all of the purchase price of the automobile to the Kirkpatrick Finance Company except $332. He failed to make the payments when due, and the Kirkpatrick Finance Company brought suit in the chancery court of Craighead County against Marlar, Paul Smith and J. Q. Lane, as trustee in bankruptcy of the Jonesboro Machine Company, alleging that Marlar had purchased the car under a conditional sales contract from the Jonesboro Machine Company and that the balance due was $332, and caused a writ of specific attachment and summons to be issued and served on Marlar attaching the automobile. He alleged that Lane was the trustee in bankruptcy, and Paul Smith claimed a prior lien on the automobile.

Paul Smith filed an answer alleging that Stroud had purchased the car, and that he had purchased the notes from the Jonesboro Machine Company before maturity, claimed title to the automobile, and that his title was superior to any interest claimed by the Kirkpatrick Finance Company. He claimed that he purchased the notes prior to the time the car was sold to Marlar, and that he was an innocent purchaser for value before maturity. He also alleged that the Kirkpatrick Finance Company had

waived any title it had by suing for a money judgment with an attachment instead of suing in replevin for the automobile. It was also alleged that Marlar was insolvent, that the automobile was deteriorating, and asked that a receiver be appointed, that the plaintiff's complaint be dismissed, and that he be declared the owner of the automobile.

Pearcy Marlar also filed answer and cross-complaint in which he denied the allegations in Smith's cross-complaint.

There is very little conflict in the evidence, and the evidence will not be set out in full, but attention called to such parts of it as appears necessary in order to understand the facts.

N. B. Stroud was president and general manager of the Jonesboro Machine Company, a dealer in automobiles. Stroud owned a majority of the stock in the Jonesboro Machine Company and had absolute control and management of its affairs. No one connected with the Jonesboro Machine Company except the bookkeeper knew anything about Stroud selling the car to himself, and the evidence does not show that the matter was discussed with the bookkeeper. She knew about it evidently because she was bookkeeper.

The court entered a decree in favor of the appellee and ordered the automobile sold if the judgment was not paid and found against Smith. N. B. Stroud, the general manager of the Jonesboro Machine Company, made the contract and notes, signed them himself and then indorsed them as president of the company and sold them to Smith. This, if it could be said to be a sale at all, was a sale by Stroud to himself. One cannot make a contract with himself. Appellant calls attention to 2 C. J. 702, holding that a sale to an agent is not absolutely void, and that it may be ratified by the corporation. But here there was no sale in good faith. Not only was this an attempted sale by Stroud to himself but there was no delivery and no intention to deliver. The automobile remained in the

possession of the corporation just as it was before, had a dealer's tag on it, was apparently a new car and was in fact sold two days after the notes were delivered to Smith, to Marlar as a new car. No pretense was made of delivery. "For as we understand the law, in order to make the sale effectual against subsequent purchasers, or attaching creditors, there must have been actual delivery; a visible and substantial change in the possession." *Davis Mallory & Co.* v. *Meyer & Co.,* 47 Ark. 210.

This court later held that it was not necessary in all cases that there be actual and visible possession by the vendee, and the court said: "Whenever there is a completed contract of sale and an agreement by the vendor to hold as bailee for the vendee in lieu of an actual delivery, the sale is complete against creditors, if it is not otherwise fraudulent." *Shaul* v. *Harrington,* 54 Ark. 305.

Under the doctrine announced in the last case there was no sale here. If the parties intend that the property is to be resold by the dealer in the ordinary course of business, this will enable him to transfer title to a *bona fide* purchaser. 24 R. C. L., p. 458.

It was not only the intention of Stroud and the Jonesboro Machine Company to sell the automobile, but Mr. Smith either knew this or was in possession of facts sufficient to put him on inquiry. He talked to Mr. Stroud about turning in cars, and was advised that Stroud always turned them in in three or four months; turned them in so he would not have to take any loss. This necessarily meant that he sold them as new automobiles. The rule announced in the case of *Buchanan* v. *Com. Investment Trust Co.,* 177 Ark. 579, is applicable here, and the decision in that case is decisive here. The decree is affirmed.

MALONEY *v.* STATE.

Opinion delivered April 14, 1930.

Jeff Bratton, for appellant.

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

BUTLER, J. Appellant was tried and convicted on a charge of selling whiskey, and sentenced to serve one year in the penitentiary. He urges, for reversal of the judgment, error of the court in refusing to grant a continuance because of the absence of his attorney, and because the evidence was not sufficient to support the verdict, and for admission of improper testimony.

The indictment was returned on the 4th day of December, 1929, and on the 9th he appeared, by his attorney, and filed a motion for continuance, because of the sickness of his attorney, M. P. Huddleston. The motion itself discloses that the attorney was seriously sick at the time he was alleged to have been employed. It is also disclosed by the record before us that he was represented by an attorney at the time of filing his motion, and that the same attorney represented him in the trial of his case. There was no abuse of discretion in the trial court in the refusal to grant the continuance.

The appellant also argues that the court erred in permitting a witness to testify that, previous to the transactions which resulted in the indictment, he had made search of defendant's premises on two occasions, one about four or five months, and one about two or three months before the alleged date of the sale for which defendant was indicted, and found whiskey and empty containers, which had an odor of whiskey.

In permitting the introduction of this testimony the court cautioned the jury not to consider it as evidence showing the sale with which defendant was charged, but only as tending to show the business in which defendant was engaged, and in its instructions the court renewed its caution to the jury. With the cautionary charge, there was no error in the admission of this testimony. *Taylor* v. *State,* 169 Ark. 589, 276 S. W. 577; *Newcomb* v. *State,* 177 Ark. 509, 7 S. W. (2d) 802; *Johnson* v. *State,* 177 Ark. 1051, 9 S. W. (2d) 233; *Evans* v. *State,* 177 Ark. 1076, 9 S. W. (2d) 320.

We have examined the record, and find that there was substantial testimony to support the verdict. An eyewitness testified positively to seeing appellant make the sale of the liquor, and this testimony is corroborated by other testimony in the case. While there was testimony tending to impeach the eyewitness, and show that her reputation for truth and morality was bad, and there was also testimony contradicting her statements, the jury were the sole judges of the credibility of the witness, and it was their province to pass upon the conflicts in and the weight of the testimony, and the fact that the testimony is conflicting, and that there was evidence tending to impeach the veracity of the State's witness, furnishes no grounds for reversal. This rule of law has been many times declared by this court, and the judgment of the court below will be affirmed.

WARREN & OUACHITA VALLEY RAILWAY COMPANY *v.* EDERINGTON.

Opinion delivered June 16, 1930.

Fred L. Purcell and *Wynne & Miller*, for appellant.

Wilson & Martin, for appellee.

BUTLER, J. Appeal from a judgment awarding damages to the appellee for personal injuries sustained.

The appellee was in the employ of the Warren & Ouachita Valley Railway Company, appellant, as a motorman on its motor passenger car operating between Warren and Tinsman, the shops being located in Warren. Appellee was first employed by the appellant about 1920 and worked as a helper of the master mechanic in the shops of the appellant for a time, after which he began

operating the motor car, first operating it at intervals until, more than a year preceding the occurrence out of which this litigation arises, he was the regular employee operating said motor car. On the 20th day of December, 1926, the appellee suffered an injury to his thumb. In some six or nine days thereafter blood poison developed which necessitated the amputation of his arm near the shoulder.

The testimony relative to the occurrence of the injury and the attendant circumstances is in direct conflict. That on the part of the appellee is to the effect that in the forenoon of the 20th day of December, 1926, and after the appellee's first round trip on that day, he discovered that an instrument called a valve lifter which was necessary for the proper operation of the engine could not be found. He requested another from the master mechanic, foreman of the shops and the superior of the appellee, who had employed him and under whose direction he worked. The appellee was informed by the master mechanic that he did not have another valve lifter, and directed him and a negro helper to make one. The lifter was a V-shaped instrument with a handle, and the foreman picked up from a point in the shop a piece of automobile spring and handed it, with a tool called a cold cutter, to the appellee, directing him where to place the cutter, how to place and hold it and the piece of spring, and, at the same time, directing the helper to strike the cutter with a sledge hammer. The cutter was made of steel, tempered so that it would cut cold iron. It was an instrument measuring about four or five inches one way and one and a half inches the other, through which was an eye for a handle about two feet long. The instrument and the handle presented in size and appearance an Indian tomahawk, having a cutting edge with a head on the other end on which blows might be given in forcing the cutting edge into the iron. The negro helper, in obedience to the orders of the foreman, struck the cutter one or more blows which were not sufficient to cause the

cutter to bite into the iron spring. The foreman directed him to strike harder, and thereupon, while appellee was holding the cutter by the handle and on the automobile spring, he struck the base of the head of the cutter a very heavy blow, breaking a sliver from one corner of the head of the cutter which passed with violence through the thumb of the appellee and on beyond, striking and sticking into the wall. At that time the foreman had gone. The appellee went immediately to the appellant's physician where first-aid treatment was given and the thumb bound up. The injury gave appellee no great inconvenience and he continued to operate the motor car, keeping his thumb protected all the while until December 29, following. On the morning of the 29th of December, he told the foreman that his thumb was giving him pain, and that he would have to see the doctor. The foreman informed him that, after he had made his second run, he could then go and see the doctor. Appellee worked about two hours longer in the shops and then told the foreman that he felt unable to take the car out. He was told there was no one else to do this, so he operated the car on the second round, and after he reached Tinsman he became violently ill. A local physician treated him at Tinsman, and he was returned to Warren and treated for a couple of days at his home, and then taken to a local hospital where he stayed for perhaps forty days. During all of that time he suffered great pain, the cause of which was blood poison. Appellee's thumb was first removed, then his arm, and finally it became necessary to make another amputation close up to the shoulder. A short time after the injury the appellee examined the cold cutter and discovered that where the sliver was broken off the steel showed a mark which witnesses call a water crack and which, witnesses say, was due to improper handling during the process of tempering, causing the crack to form. There was testimony to the effect that the degree of temper or hardness could be known from the color—that where the color was light gray the steel was tempered

too much, rendering it hard and brittle, and that the appearance and color of the cutter indicated this condition. Appellee testified that at the time the cutter was handed to him the foreman stated that he had tempered the cutter and that it was all right.

It is undisputed that the disease and the condition resulting from the operations have rendered, and will render, the appellee unable to perform manual labor, and that he is now suffering and will continue to suffer pain. There was testimony to the effect that the injured thumb was carefully tended and protected and the wound was the direct and proximate cause of the infection.

Regarding the circumstances connected with the attempted making of the valve lifter, as already stated, the evidence is in conflict. The foreman testified that he was not present and did not direct the appellee to make the valve lifter, did not hand him the cold cutter and did not select for him the piece of automobile spring out of which it was to be made. The negro helper testified that the foreman was not present, and that appellee himself called him to assist in the making of the instrument. On this state of the testimony, it was the theory of the appellee that his injury was occasioned by the negligent conduct of the foreman in directing him to work with a tool which was unsafe because of its improper tempering and, further, by the heavy blow struck by the helper at the direction of the foreman. On the other hand, it was the theory of the appellant that the appellee, without the knowledge of the foreman, selected the cold cutter and the piece of automobile spring and chose his own method for the performance of the work, and that whatever was done by the helper was at the request and direction of the appellee, himself, for all of which the appellant was not liable. Moreover, that the blood poisoning was the result of appellee's negligence in not obeying the directions of the physician and not properly protecting the injured thumb.

We think the respective contentions are supported by sufficient substantial evidence to warrant their submis-

sion to the jury, and that the amount of damages awarded is not excessive. It follows that the contention of the appellant that a verdict should have been directed in its favor in the court below cannot be sustained. It is insisted that there is no evidence that the cold cutter was defective, or, if so, that its condition was known to, or could have been discovered by, the appellant in the exercise of ordinary care. In this the testimony on the part of the appellee is ignored. As we have seen, the appellee testified that the master himself selected and gave him the cold cutter, and that there was no other that he knew of in the shops. There was evidence that the color of the cold cutter indicated its having been too highly tempered, and that the water crack could have been discovered by an inspection of the instrument. Moreover, there was evidence that the foreman had tempered the cutter himself, and that the streak or water crack was caused by taking the cutter out of the water too quickly while tempering it. From what we have said it is apparent that the appellant is in error when it states that the defect was assumed simply because the tool slivered, and, if said defect did exist, it was known, or could have been discovered by reasonable inspection.

It is next insisted that, because the cutter used was a simple instrument, no duty of inspection rested upon the appellant, and in support of this position is cited the case of *Arnold* v. *Doniphan Lbr. Co.*, 130 Ark. 487. In that case a demurrer to the complaint was sustained, the court saying: "Few tools could be simpler in their construction and use than the hatchet, and the defect which occasioned the injury was developed by its use by the servant himself." That case is distinguished from the case at bar in this: the defect of the hatchet in the Arnold case was developed by its use by the servant himself, while in the instant case the defect in the cold cutter was occasioned by its being improperly tempered, so that a crack was formed, and it was rendered too brittle, and this, not the act of the appellee, but of the fore-

man who selected and gave the tool to the appellee with directions to use it. In *Arnold* v. *Doniphan Lbr. Co., supra,* we said: "This doctrine ('simple tool'), as such, has never had recognition by this court; yet the principles upon which that doctrine is based have been recognized in a number of decisions of this court. That is, the simplicity of a tool, and the skill or lack of it required in its use, have been treated as questions to be considered in determining the degree of care to be used by the master in the selection of such tools for the purposes of his servant, and of the directions and instruction which should be given the servant in its use." In the case at bar, accepting the testimony of the appellee, he had no choice in the selection of the tool nor in its preparation for use. The selection of the tool was made by the foreman, and the defect in said tool caused by the manner in which it had been tempered, which defect might have been discovered by casual observation.

It is also insisted that the injury and its resulting consequences were due to an "adventitious or fortuitous circumstance." There are few occurrences which are wholly accidental in their nature. We cannot say as a matter of law that the injury in this case was due to accident, for, if the tool was too highly tempered and too quickly withdrawn from the water, it may have been reasonable to anticipate that it would break or sliver upon receiving a heavy blow. Appellee quotes from 3 Labatt on Master & Servant, § 1042, where the rule is laid down that the master is not liable where the defect is secret or latent, or not discoverable on inspection and that no culpability is predicable where the most careful scrutiny would not have disclosed the defect, or where the appliance was apparently in sound or good condition, and that injuries due to conditions of this character are unforeseen accidents. It was a question for the jury under the proof in this case to say if the defect could or could not have been discovered by a reasonable inspection, or whether or not there was anything to suggest a suspicion of unsoundness.

In *LaGrand* v. *Arkansas Oak Flooring Co.,* 155 Ark. 592, cited and relied on by the appellant, it was held that if the master, in the exercise of ordinary care to furnish a safe place and tools, could not have reasonably anticipated or foreseen the injury, he would not be negligent in failing to provide means to prevent it. The principle stated in that case is applicable to the case at bar, and in that case, as in this, the question was submitted to the jury.

Instruction No. 14 requested by the appellee and given by the court, and instruction No. 5 given at the instance of the appellant, submitted to the jury the respective theories of the parties to this suit. The other instructions given may be said to be explanatory and illustrative of these propositions, except instruction No. 11 requested and given for the plaintiff and instruction No. 7 given at the instance of the appellant, which last submitted the question of an efficient supervening cause being responsible for the injury. We think the instructions, taken as a whole, fairly present the issues.

The tenth and eleventh assignments of error urged to the court's attention allege that the court erred in its charge to the jury in instruction No. 11 and instruction No. 14, requested by the plaintiff. Instruction No. 11 submits the question of liability for the negligence of a fellow servant, and the further question as to whether or not the negro helper was a fellow servant of the appellee. This instruction, we think, was more favorable to the appellant than it should have been, for it would have been immaterial whether the helper of the appellee was negligent in the manner of his striking the cutter, for, if the cutter was defective in the manner heretofore stated and was prepared and selected by the master for the use of the appellee, appellant would be liable without regard for the care or lack of care of the helper in striking the cutter, if the defect was the cause of the sliver breaking off.

Instruction No. 14 complained of has been approved by this court in the case of *Hunt* v. *Hurst,* 170 Ark. 644,

where the facts were quite similar to those of the instant case. Instruction No. 14 is as follows: "You are instructed that the burden of proof is upon the plaintiff to prove that it was the duty of the defendant to exercise reasonable care in furnishing the plaintiff reasonably safe tools with which to work, the defendant being required in such respect to exercise the same degree of care and caution which would have been exercised by an ordinarily prudent man under the same circumstances. And if you find from a preponderance of the evidence in this case that the cold cutter furnished plaintiff, if you believe and find from a preponderance of the evidence that it was furnished to the plaintiff and not selected by the plaintiff himself from the tools of defendant for use in the performance of his duties, was in a defective or dangerous condition, which condition would have been discovered by the employer in the exercise of ordinary care, and if you find that such defective or dangerous condition was not apparent to the plaintiff, and would not have been discovered by him in the exercise of reasonable care for his own safety, and if you further find that the plaintiff suffered an injury on account of such alleged defective condition of the cold cutter, then you are told that the defendant was guilty of negligence. In other words, it is for you to determine whether the defendant was under obligation to inspect the cold cutter in question before delivering it to plaintiff, you being instructed that the duty of the defendant under such circumstances was to act as an ordinarily prudent man would have done under similar circumstances."

By an examination of the instruction approved in *Hunt* v. *Hurst, supra,* it will be seen that the instruction above set out follows exactly the language of the Hunt case except where change in the language is necessary to make it applicable to a slightly different state of facts.

The final assignment of error is that the court erred in giving appellee's instruction No. 15, because it ignored the defense of assumed risk and failed to take into con-

sideration the contention that an intervening cause was the proximate cause of appellee's present condition. Instruction No. 15 is as follows: "If you find from a preponderance of the testimony that the plaintiff's injury was caused by the negligence of the defendant and the puncture of his thumb by the piece of the cold cutter was the proximate cause of his injury and all the attendant pain and suffering resulting therefrom, then you are instructed that the defendant is liable for said injury, and for all the consequences and effects of same, even though you might believe from the evidence that, if the plaintiff had not taken blood poison after receiving the injuries that said injuries would have been only temporary, provided plaintiff exercised due care for the protection of his injured thumb."

It will be seen from the last provision of this instruction that it does not ignore the contention of the supervening cause, and, when read in connection with appellee's instruction No. 4, and appellant's instruction No. 4, it is sufficient on the question of assumed risk. This instruction is unlike that held erroneous in *Natural Gas & Fuel Co.* v. *Lyles,* 174 Ark. 146, *Garrison Co.* v. *Lawson,* 171 Ark. 1122, and *Temple Cotton Oil Co.* v. *Kenner,* 176 Ark. 17, in that it did not undertake to tell the jury to "find for the plaintiff." It is often impracticable to state the entire law of the case in a single instruction or to take notice of each and all of the defenses that might be interposed. Unless an instruction is in conflict with other instructions, the mere fact that it is incomplete will not render it prejudicial if from an inspection of it and a comparison with other instructions given the meaning of the court is clear.

In conclusion, we may say that the trial judge fairly and correctly stated the law, when the charge is considered as a whole, and, while there was a direct conflict in the testimony as to all the material issues, the jury were the sole judges of the credibility of the witnesses, and it was the opinion of the jury that the testimony tending to

support the theory of the appellee was reasonable and true, and, as there was substantial testimony to support this conclusion and finding, it cannot be disturbed. The judgment is therefore affirmed.

BOARD OF EDUCATION OF LONOKE COUNTY *v.* LONOKE COUNTY.

Opinion delivered June 16, 1930.

George E. Morris and *O. E. Williams,* for appellant.

Guy E. Williams and *Chas. A. Walls,* for appellee.

BUTLER, J. On January 8, 1927, the Bank of Central Arkansas closed its doors on account of its insolvency. It was the county depository of Lonoke County, and was indebted to the county and its various school districts for public funds deposited with it in the aggregate sum of $111,150.50 secured by a bond upon which a number of citizens of the county were sureties, all of whom were then, and are now, solvent and collectively worth more than the amount of the liability arising in favor of Lonoke County on the depository bond. On the day after the bank closed its doors the county judge of Lonoke County entered into a contract with C. A. Walls, an attorney, to represent the county in the collection of the bank's indebtedness. On January 17th, following, the county court confirmed the action of the county judge by making an order appointing and employing C. A. Walls, wherein it was recited that he was to be paid a retainer fee of $500, and was to have a reasonable compensation for such services as might be performed in the matter of representing the county in the collection of the public funds, whether collected by suit, settlement, compromise or otherwise. After considerable negotiation, Mr. Walls collected the majority of the indebtedness without suit, and the remainder was collected by suit instituted which suit progressed to final adjudication. The entire amount of the county and school funds with accrued interest was collected from the sureties on the bond, which amounted in the aggregate to the sum of $113,505.94. From this

sum was deducted the attorney's fee of $4,000 which was allowed him, and a further sum due the prosecuting attorney was also deducted, and the balance paid over to the county treasurer.

On the 7th day of January, 1929, the court made an order, which, after fixing and allowing the amount of the attorney's fee, among other things, provided that "the $4,000 paid to the said Chas. A. Walls should be paid out of the funds recovered in proportion that each fund bears to the total of $111,150.50 and the common school fund should be charged with $2,500.80 of said amount and the other funds should be charged with $1,499.20, making a total of $4,000 so paid." From this order the county board of education and the England Special School District prayed and were granted an appeal on the second and fifth days of July, respectively, which appeals were consolidated in the circuit court and by agreement transferred to equity. From the decree there rendered upholding the order of the county court is this appeal.

As stated in its brief, the appellants contend that the employment of the attorney was unnecessary, and the incurring of the $4,000 fee was a useless expenditure of the public funds. In disposing of this contention, it may first be said that the appellants are concluded by the recitals of the order appointing the attorney made by the county court on January 17, 1927, and entered of record by order *nunc pro tunc* on February 14, following, from which there was no appeal. This order made the finding that the county depository bank had closed its doors, and was in the process of liquidation by the State Bank Commissioner, and that at the time the depository was indebted for public funds in the sum of $111,150.50, demand for which had been made which was not complied with, thereby creating the default in the conditions of the depository bond, and that, because of the official duties with relation to the prosecuting attorney's attendance upon the terms of circuit courts in the district, the necessity arose for special counsel.

Aside from the conclusiveness of the findings of the above order, it is well settled that the matter of employment of special counsel rests within the sound discretion of the county court, which, while subject to review, will not be disturbed, unless it is shown that there was an abuse of such discretion, the presumption being that in any given case the court will not create an unnecessary expense, but will act for the county with that degree of prudence which careful business men exercise in relation to important affairs, and, even in cases where it is the duty of the prosecuting attorney to act, the court may employ other counsel when in its judgment the interests of the county and the matter involved are of sufficient importance to demand it. *Oglesby* v. *Ft. Smith, etc.,* 119 Ark. 67; *Buchanan* v. *Farmer,* 122 Ark. 562; and cases there cited; *Johnson County* v. *Patterson,* 167 Ark. 287. Without deciding that it was the duty of the prosecuting attorney to represent the county, there was testimony to the effect that he was not ignored, but that on the day the special attorney was employed, the prosecuting attorney was consulted, and he indicated that because of the press of official business the employment of special counsel was satisfactory; that his official duties required his presence in the court of a neighboring county at a regular term, and there were to be six regular terms of the courts in his judicial circuit to be held within the months of January, February and March. From this and the fact that the entire revenue of the county and its school was in jeopardy and a condition existed which reasonably excited great apprehension in the minds of the county judge and the citizens, it is apparent that immediate action was deemed necessary. Therefore, it cannot be said that the employment of the special counsel was unnecessary or unreasonable, notwithstanding the fact that the sureties on the depository bond were men of wealth and probity, since experience teaches that even men of this class are seldom ready to pay security debts that can be avoided, and that resourceful individuals have found, and

do frequently find, the means to escape liability or to greatly lessen it. If it is admitted that the county court had the authority to employ special counsel in matters in which the county has an interest which the appellants do not specifically deny and of which in proper cases there can be no doubt then that authority must extend not only to those matters in which the county has the primary and sole interest, but to those also in which that interest exists by reason of an obligation under which the county rests for the protection or enforcement of the rights of others.

In the instant case the county court, acting under the authority of law, concluded in the name of the county a contract with the depository bank and with its bondsmen whereby the public revenue, those belonging solely to the county and also the county school fund and the road fund, were surrendered to that depository for safe keeping and for payment on demand to the proper authorities. The county was obligated to see that the depository was a solvent institution, and its bond executed by responsible persons. As a necessary incident to the power to contract was the corresponding power (in the absence of some statutory limitation) to enforce the liability, not only as to the funds belonging solely to the county, but as to those which, as trustee for the use and benefit of the school fund and the various school districts, it had surrendered under its contract to the county depository. *Polk County* v. *Sherman,* 99 Iowa 60. But in this case, we think this authority springs not only from implication, but also from the express language of the statute under which the deposit was made in the depository bank. By the provisions of this act (act No. 208, Acts of 1907, and amendatory act No. 258 of the Acts of 1911), the county court of Lonoke County was directed to select in the manner prescribed a county depository for all the public funds of the county "including school funds and road funds," requiring the execution of a bond for an amount sufficient to cover the total revenue

of the county including road and school funds, to guarantee the safety of the deposits and their payment according to law. In this act as amended was the following provision: "And for any breach of said bond the county or any person injured may maintain an action in the name of the county to the use of the county or persons thereby injured." From this language it is apparent that the county had authority to take the necessary steps to protect the interests involved, and, on its failure or refusal to act, any one of the several school districts had such authority. The county court exercised its implied and express authority to protect said interests and employed counsel, which, as we have seen, was within its sound discretion. As the authority to take the necessary steps to enforce a right carries with it the right to employ counsel, so does the latter right include the power to compensate. 24 R. C. L. 597, § 51; *State* v. *Aven,* 70 Ark. 291; *Blount* v. *Baker,* 177 Ark. 1162. Therefore, the county court was justified in contracting with its counsel for a reasonable fee to be paid, and we are of the opinion that, in sustaining the fee fixed by the county court, the ruling of the court below was not against the preponderance of the evidence. The amount involved was large; the depository, one of the well-established and reputedly sound financial institutions, had just collapsed, entailing a probable loss of the county's entire revenue, and, while before then the sureties on its bond and the bank were thought to be solvent and responsible, confidence was shaken and grave uneasiness was felt of great and irremediable loss. The attorney employed was one of repute and standing, and the amount of his fee contingent to a considerable extent on the amounts recovered. His duties entailed a series of meetings with those interested, in which the interests he represented were opposed by several of the leading lawyers of the State whose duty it was to protect their clients by every method compatible with honor and to take advantage of every proper legal strategem. It was

necessary to engage in a protracted litigation, and because of the duties of special counsel he was forced to forego other profitable employment. He manifestly conducted the various negotiations, compromises, settlements, and litigations with skill and fidelity, for the entire sum with accrued interest was recovered. A number of reputable lawyers familiar with the transactions and with the value of the appellee's services, testified that the fee was a reasonable and proper one, and we cannot say that their opinion, or the finding of the trial court, in the light of the attendant circumstances, was unfounded or unjustifiable. *Jacks* v. *Thweatt*, 39 Ark. 340; *Johnson County* v. *Patterson, supra.*

The contention of the appellants most seriously made and insistently argued is that, if the necessity for the employment of special counsel and the authority of the county court is admitted, there was no authority to pay any part of the fee out of the school fund, but that all of it should have been paid out of the general revenue of the county. Indeed, it is their contention that "neither the county board of education nor the school districts could have used these funds to pay any part of the fee of special counsel employed by the county court to represent Lonoke County." This contention is unsound. To give effect to it would be impracticable, for, assuming that the several school boards had employed special counsel instead of the county, and it had been necessary to institute suits which proved to be expensive and protracted, but which would result in the recovery of all the school funds due, then, as the county was not interested and could not be made to bear the expense of litigation to which it was not a party, it is not reasonable to expect that any attorney could be found to conduct such litigation. In other words, to give effect to the contention of the appellants would be to say that "in a supposable case those who are charged with the administration of the school interests of a school district must stand idly by and lose all for want of power to save their rights

by the use of those means which must be employed by others under similar circumstances." It may also be said that the contention is inequitable for the reason that, where recovery is had for several, natural justice requires that the expense be borne by each in proportion to the benefits received. This view is not in conflict with article 14, § 2, of the State Constitution, which provides: "No money or property belonging to the public school fund, or to this State for the benefit of schools or universities, shall ever be used for any other than for the respective purposes to which it belongs." The use made of the fund in the instant case was not to divert it or to use it "for any other than for the respective purposes to which it belongs." It was used only to recover school funds and was a legitimate expenditure.

Our conclusion in this particular is supported by the case of *State* v. *Aven, supra.* In that case a firm of lawyers was employed to prosecute an action to recover a sum of money due certain school districts in St. Francis County. The firm collected the amount of the indebtedness and, after deducting its fee, paid the remainder to the county treasurer of said county. The treasurer charged himself with the amount actually received by him and made settlement accordingly. Suit was brought to set aside his settlement for fraud and to recover judgment against him and his sureties for the amount retained by the lawyers as a fee for their services. A decree was entered dismissing the complaint and judgment was rendered in favor of the defendants, from which decree the plaintiff appealed. This court, in affirming the decree of the trial court, said: "The school districts were authorized to employ attorneys or ratify the employment of them in their behalf. * * * But the statutes authorize them to contract and to sue. As a necessary incident to this power, they have the right to employ attorneys to institute and prosecute actions in their behalf; and such attorneys are, of course, entitled to a reasonable compensation for their services."

The case of *Taylor* v. *Matthews,* decided by the Court of Appeals of Georgia, February 24, 1912, and reported in 75 S. E. at page 166, is a case where the people had voted the local tax law. This law, as voted, was attacked in the courts, and attorneys were employed on behalf of the school districts who successfully resisted the efforts to set aside the law and afterward appeared before a committee of the State Legislature and argued against the passage of a local bill introduced for the purpose of abolishing the school district for which the local tax had been voted. The attorneys were paid a fee for their services out of the school funds and for expense of witnesses before the legislative committee, and suit was brought to recover the same on the ground that such payment was against that law which forbade the application of public school funds to any other than educational purposes. In upholding the legality of the payment of the attorney's fee and the traveling expenses of witnesses before the legislative committee which had been added to said fee and paid, the court said: "It is true that public school money is a trust fund, and cannot be applied except for educational purposes, but it would never do to give so strict a construction to this language as to confine the expenditure to the payment of teachers and nothing else. All language is to be given a construction which will effectuate the purpose sought to be accomplished; and so, while money raised for the maintenance of a public school may in one sense be said to be money raised for educational purposes, it is not raised for all educational purposes, but only for the benefit of pupils in strictly public or common schools. * * * But, while the expenditure of public school funds is confined to public schools, we are of the opinion that in the conduct of the public schools the proper authorities (such as the trustees of a school district) may, in their discretion, make any expenditure of the funds which is absolutely necessary for the proper maintenance of the school intrusted to their charge. They might properly expend

a portion of the money in repairing or improving the school building, or in fitting it with proper appliances and conveniences. They might insure the school property against loss by fire, and pay the premium from the school fund. By a parity of reasoning we have no hesitation in holding that funds derived from local taxation within a school district may properly be expended by the trustees of the district in protecting or preserving the right of local taxation for educational purposes by the employment of an attorney, or in other legitimate expenses necessary for presenting their rights in the adjudication of the case."

Since the county court was authorized to employ counsel for the recovery of the school funds, it follows under the authorities, *supra,* which are supported by sound reason, that the school funds recovered should bear their proportionate share of the attorney's fee, and that the decree of the court below so holding is correct and is therefore affirmed.

FORT SMITH BUILDING & LOAN ASSOCIATION *v.* LITTLE.

Opinion delivered June 23, 1930.

[redacted]

Joseph R. Brown, for appellant.

Daily & Woods, for appellee.

HART, C. J., (after stating the facts). Counsel for the defendant seek to uphold the judgment upon the theory of our cases where it is held that a director or other fiduciary officer of a corporation may be entitled to compensation under an implied contract where ser-

vices clearly outside of his ordinary duty as such director or officer are performed under circumstances authorizing an inference that he was to be paid therefor. *Red Bud Realty Co.* v. *South,* 96 Ark. 281; and *Clifford* v. *Walker,* 180 Ark. 592. In such cases, the question of whether or not there is an implied contract for additional compensation is one of fact rather than of law. We are of the opinion, however, that, under the undisputed facts of the present case, this principle of law has no application.

It is equally well-settled that a person who receives a salary from a corporation is not entitled to extra compensation for the performance of duties within the scope of those pertaining to his office or position, and it is held that he is not entitled to compensation for services outside his regular duties, in the absence of a regular agreement. 14A C. J. 139; and *Carr* v. *Chartier Coal Co.,* 25 Pa. St. 370.

As will appear from our statement of facts, the duties of the secretary are prescribed in § 5 of the by-laws of the corporation. The section expressly provides that the secretary shall be the manager of the association, and shall have charge of the deeds, mortgages, and other securities belonging to the association. It further provides that he shall keep a correct account of all money received and paid out, and that he shall receive all moneys paid to the association. According to his own testimony, he first commenced to collect the rents from the mortgaged premises for the mortgagors and continued to collect them after the mortgages fell due and default was made in the payment of the mortgage indebtedness. The mortgages provided for an assignment of the rents to the association, and that, if default was made in the payment of the indebtedness by the mortgagors, the association should take possession of the property at once and collect all the rents. It thus clearly appears from the defendant's own testimony that the services in collecting rents after default made in the

payment of the mortgage indebtedness was in his character of secretary and manager of the association. His services were of the character which as manager he would ordinarily be expected to perform for his company. In addition, it will be noted that the by-laws expressly provided that the secretary should have charge of all the mortgages of the association and should keep a correct account of all money received and paid out. In another sentence, it provides that he shall receive all money paid to the association. Therefore, his own evidence shows that the rents collected by him after the default made by the mortgagors in the payment of their mortgage indebtedness were collected in his capacity of secretary and manager of the association, and were such duties as the by-laws expressly provided that he should perform. He was paid a salary annually of $1,800 for his services as secretary and manager of the association. The commissions deducted from the rents he collected amounted to $105, and the plaintiff was entitled to judgment for this amount.

Proof of the custom of other associations in charging commissions on rents collected was not admissible because the contract was unambiguous, and the proof would have the effect to defeat the express terms of the contract. *Batton* v. *Jones,* 167 Ark. 478; and *Ozark-Badger Co.* v. *Roberts,* 171 Ark. 1105.

Again, the defendant retained $20 for the commission claimed to be due on investment stock sold to Otis Wingo. In his letter subscribing for the stock, Wingo stated that he wished the contract for the new stock to begin on January 1, 1929. On December 31, 1928, Wingo sent a telegram to withhold his subscription for new stock, and this was done. In his letter of February 16, 1929, Little wrote to Wingo to let him know whether he kept the stock, thereby recognizing that Wingo had a right to cancel his subscription before the first day of January, 1929. The contract provided that Little was to receive four dollars per thousand on all unpledged

investment stock sold. By the language used, it was contemplated that an actual sale should be made, and that payment to Little should be had from the price obtained. Until the price of the stock became payable or the association refused to issue it to Wingo, Little could not demand any commission for selling the stock or maintain an action for breach of the contract with him on the part of the association. *Vaughan* v. *O'Dell*, 154 Ark. 165.

Moreover, the defendant was not entitled to retain either the commissions for rent collected or for selling the investment stock for another reason. According to the testimony of Leon A. Williams, a vice president of the association, at the first meeting of the board of directors after Little resigned as secretary and manager, the board of directors gave Little a $1,000 bonus for the services he had rendered the association. This bonus was accepted by Little, and must be deemed to have been given in payment of any unusual or extraordinary services which had been performed by him while he was secretary and manager of the corporation.

It follows that the court erred in not instructing a verdict for the plaintiff. For that error the judgment must be reversed, and, inasmuch as the case has been fully developed, judgment will be entered here in favor of the plaintiff against the defendant for the sum of $125, with six per cent. interest from this date. It is so ordered.

ANDREWS *v.* BLOOM.

Opinion delivered June 23, 1930.

E. M. Pipkin, Jr., and *Wynne & Miller*, for appellant.

W. G. Dinning, for appellee.

SMITH, J. Appellee recovered judgment for personal injuries and for damages to his automobile, resulting from a collision with the automobile which he was driving with one owned by appellant. There was a conflict in the testimony as to whose negligence caused the injury, but that question was submitted to the jury under instructions conceded to be correct, and has been settled by the verdict of the jury.

Another question in the case arises out of testimony about which there is no substantial conflict. It is to the following effect. Mr. Will Ragsdale owns and operates a garage in the city of Helena, and does a general repair business, and, as an incident to his business, sends out and gets cars, when requested by the car owner, and has them brought to his place of business. This is a part of the service which he has rendered for a number of years for those patrons who desire that service. On the morning of the collision the wife of appellant called Ragsdale and advised him that she wanted her car greased and the oil changed and a door of the car repaired. The car belonged to her husband, and she gave this order at his request. Upon receiving the order Ragsdale sent Oscar Gullett and Fred Sims, two of his employees, for the car, and while Gullett was driving it to Ragsdale's garage by a direct route the collision occurred. Gullett and Sims were regularly employed by Ragsdale, and were paid by him.

There was nothing unusual about this service, as it was one rendered to all regular customers, such as appellant was, and no extra charge was made against appellant, or other similar customers, for going out and getting cars. Ragsdale would have charged the same price for the service rendered if the car had been driven to the garage and left there, and it was for appellant's

convenience that he sent for the car. This and other similar services are rendered without charge to customers like appellant who pay their bills regularly and as an incident to the business for which charges are made. It is Ragsdale's custom, in order to get the business, to send for cars, which his employees bring to his garage, and no extra charge is made for this service. He does not advertise that he renders this service without charge, and he does it as a favor when requested so to do by the owners, and he does it for their accommodation. The facts stated all appear from the testimony of Ragsdale himself.

Under this undisputed testimony the question for decision is, whose servant was Gullett at the time of the collision?

The facts stated do not, in our opinion, present the case of a borrowed servant. There are many decisions holding one liable for the negligence of a servant temporarily or specially employed, although no compensation is paid for the service during the temporary relation of master and servant.

The case of *Janik* v. *Ford Motor Co.*, 147 N. W. 510, 52 L. R. A. (N. S.) 294, which appellee cites and upon which he relies for an affirmance of the judgment here appealed from, is such a case. The Supreme Court of Michigan there said: "The essence of the best considered cases upon the temporary loan or hire of a servant for a special purpose is thus well stated in 26 Cyc. 1522: 'A person who avails himself of the use, temporarily, of the services of a servant regularly employed by another person may be liable as master for the acts of such servant during the temporary service. The test is whether, in the particular service which he is engaged or requested to perform, he continues liable to the direction and control of his original master, or becomes subject to that of the person to whom he is lent or hired, or who requests his services. It is not so much the actual exercise of control which is regarded, as the right to exercise such

control. To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under control of a third person. Subject to these rules the original master is not liable for injuries resulting from acts of the servant while under the control of a third person.' "

That case was a suit against the Ford Motor Company, whose servant, at the request of the purchaser of a car, undertook to drive the car to the city limits, where it was to be turned over to Werner, the purchaser, who was a dealer in cars and who had bought the car to be delivered to a purchaser from him, but before reaching the city limits the car ran into a man as he was alighting from a street car. It was there held, in a suit for the damage thus occasioned, that the motor company was not liable, because its employee, who was driving the car at the time of the collision, was not acting as its servant, but was the servant of the purchaser of the car. Other facts in that case are to the effect that, having bought the car and paid for it, Werner asked the salesman of the motor company, from whom he had purchased the automobile, if they would let him have a driver to take them to the city limits, as Werner was not familiar with the city streets. Further stating the facts, the court said: "In the instant case there was no agreement or suggestion, as a part of the negotiations and purchase, that the motor company should assume or undertake any instructions to the purchaser relative to operating the car, or to see that when it left the salesroom it was properly run for any length of time, or to any place. He was a dealer in cars himself, experienced in their use, and knew what was necessary. The deal was closed, he had his receipt, and the car had been delivered to him at the time he asked for the accommodation. Groholski was sent along to drive as a 'mere favor to the purchaser.' At the time of the accident Werner, an experienced driver, not only owned the car, but was in actual occupa-

tion and possession of it, riding with a prospective purchaser out from the city towards their home. He was in no sense helpless, looking to, and dependent upon, the driver, as would be the case of an inexperienced purchaser. Like many other experienced drivers from the country or small towns, he felt less confidence in driving through the congested thoroughfares of a large city, and for that reason asked the loan of a driver to the suburbs. The fact that he found no occasion to give instructions to the driver, except to tell him along what street to drive, and relied upon his skill and experience, in no way affected Werner's absolute right to control him in everything he did in connection with the car. *Samuelian* v. *American Tool & Mach. Co.,* 168 Mass. 12, 46 N. E. 98, 1 Am. Neg. Rep. 447. Under the undisputed testimony, the motor company had no control over nor interest in the car after it left its salesrooms, nor in the manner in which it was run, nor in where it went. It could not dictate how the car should be run; the most it could do would be to recall from this special employment the servant it had loaned. During Groholski's absence from the salesrooms in this service he was doing the work of Werner, to whom he was gratuitously loaned, on the initiative and request of Werner, who had full right to dictate as to his own property and direct in what manner the car should be operated. He unquestionably could have taken charge and driven it himself, if he saw fit at any time, and, if so disposed, could have discharged the driver and proceeded without him; he was therefore for the time being the special master."

We think that case was correctly decided under the principles there announced and herein applied. We shall not attempt to review other cases on the subject, as the number of them is almost without limit. The legal principles applied in all these cases are the same, but the cases apply the principles to an almost infinite variety of facts.

At § 748 of Huddy on Automobiles (8th Ed.) page 856, it is said: "The general rule in the law of master

and servant is that the owner of a motor vehicle is liable for the acts of his chauffeur when the latter is acting within the scope of the master's business. The reverse is also true, that the owner is not liable for the conduct of the servant when the latter is not acting within the scope of his employment." Among the large number of cases cited in support of the text quoted are three from this court: *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229; *Hughey* v. *Lennox,* 142 Ark. 593, 219 S. W. 323; *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6.

In the case of *Terry Dairy Co.* v. *Parker, supra,* we quoted from the case of *Singer Mfg. Co.* v. *Rahn,* 132 U. S. 523, as follows: "'* * * The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.'" After thus quoting from the Supreme Court of the United States, we said: "This is also the doctrine announced by our own decisions."

At § 255 of Huddy on Automobiles, page 252, it is said: "Where a garage keeper has control of the motor vehicle of another, so that the relation of bailor and bailee exists between the parties; the garageman, not the owner, is the person responsible for the chauffeur's negligence which results in an injury to a third person."

In volume 2, Blashfield's Encyclopedia of Automobile Law, at page 1362, this statement of the law appears: "Under the rules stated in the foregoing sections, a mechanic holding possession of an automobile for the purpose of repairing it in his own way by the job, and free from direction or control of the owner as to detail or the manner of repairing, is an independent contractor, and the owner is not liable for injuries caused by the mechanic's negligent operation of the car while in the latter's possession for such purpose; and this is true whether or not, at the time of the accident, the repairman is testing it or returning it to the garage designated

by the owner, since the contract of bailment is not complete until delivery of the machine to the owner."

The annotator's note to the case of *Marron* v. *Bohannon,* 46 A. L. R. 838, 104 Conn. 467, 133 Atl. 667, is devoted to the specific question of the "Responsibility of owner of car for negligence of one in general employment of repair man or keeper of garage while getting or delivering car," and the effect of the numerous cases there cited is summarized in the statement by the annotator to be that, "But as a general rule the owner of a car is not liable for the negligent driving of his car by a person in the general employment of a garage man while getting or delivering his car."

The distinction between the instant case and the Michigan case of *Janik* v. *Ford Motor Co., supra,* from which we have quoted and upon which, as we have said, appellee relies, is well defined and of controlling effect, and that distinction is just this: In the Michigan case the driver of the car, whose negligence caused the injury, was, at the time, the servant of the owner of the car; while in the instant case the driver of the car, at the time of the injury, was not the servant of the owner of the car.

It is true, as we have said, that Ragsdale made no separate or higher charge for sending for cars upon which he expected to perform service. But this practice was a means whereby Ragsdale's business was enlarged, and in charging for work done upon a car he received compensation for sending for it and delivering it. He had the choice of selecting the servant who was sent for the car, and had sole control over him while that service was being performed. Gullett had no communication with appellant, and received no instructions from him. Gullett received his instructions from Ragsdale, and continued liable to the direction and control of Ragsdale, his original master, and he was therefore the servant of Ragsdale, and not that of appellant, at the time of the collision.

 [redacted]

It follows therefore that the judgment of the court below holding appellant liable for Gullett's negligence must be reversed, and, as the case has been fully developed, it will be dismissed. It is so ordered.

[redacted]

FERGUSON *v.* MASSACHUSETTS BONDING & INSURANCE COMPANY.

Opinion delivered June 23, 1930.

[redacted]

C. V. Holloway and *Trimble, Trimble & McCrary,* for appellants.

Dillon & Robinson, for appellee.

SMITH, J. Appellants were the beneficiaries in a policy of insurance issued by appellee, the Massachusetts Bonding & Insurance Company, on December 7, 1928, upon the life of Eddie Harris. Attached to the policy and made a part thereof is what is known as a paymaster's order, which was signed by Harris, the insured, a section hand employed by the Missouri Pacific Railroad Company, authorizing that company to pay to the insurance company the sum of $5.90 out of his wages for the month of January, 1929, and the sum of $2.95 for each subsequent month, beginning February 1, 1929. The premium of $2.95 was payable monthly, and the paymaster's order of $5.90 was intended to pay the premiums for the months of December, 1928, and January, 1929. The insured was killed on January 13, 1929, and this suit was brought to collect the insurance. After hearing all the testimony, the court directed a verdict in favor of the insurance company, for the reason that the

premium had never been paid, and that therefore the policy had lapsed, if, indeed, it had ever been in effect, and this appeal is from the judgment rendered upon the verdict thus returned.

Nellie Ferguson, the sister of the insured and one of the beneficiaries in the policy, testified that her brother, the insured, visited her about a week before his death, and delivered to her the policy here sued upon; that he showed her his railroad pass, his identification card and a receipt for the money he had paid on the policy. The receipt was not produced at the trial, and the appellee insurance company denies that a receipt was ever issued.

The testimony of the witness Nellie Ferguson is very vague and indefinite in regard to this receipt, as she stated that she "just got a glimpse of it." She did not know what sum of money the receipt showed to have been paid, but that "the receipt had his (the insured's) name written in it in black type and red type filled in part of it." That the word "Massachusetts" was the only word in the receipt that she could pronounce, but it showed that her brother's premium was paid to February 1, 1929, which date was later than that of her brother's death.

The probative value of this testimony is wholly destroyed by certain undisputed and incontrovertible facts.

To begin with, the agent of the insurance company who wrote and delivered the policy testified that the insured did not personally pay anything on the premium, and that it was not contemplated that he should do so, and the recitals of both the insurance policy and the paymaster's order corroborate this testimony.

The first paragraph of the policy provided that, in consideration of the statements and representations contained in the application for the insurance and of the payment of the premium as provided for in the paymaster's order, the company had insured the applicant.

The paymaster's order bore the same date as the policy and was signed by the insured, and the relevant portions thereof read as follows:

"PAYMASTER'S ORDER.

"Dated at St. Louis, 12-7-1928.

"To the Paymaster of the Missouri Pacific
Railroad Company,
"St. Louis, Missouri.

"I hereby request and authorize you to deduct and pay for me to the Massachusetts Bonding & Insurance Company, or its duly authorized agent, the sum of $5.90 out of my wages for the month of January, 1929, and $2.95 out of my wages for each consecutive month thereafter during the period of my employment with my said employer, for premiums on above numbered policy of insurance issued to me by said insurance company. * * *

"Express agreement: It is expressly agreed (1) that the first payment is to cover the insurance for the first period of insurance specified in said policy, and each subsequent payment shall be considered as the premium for one calendar month; (2) that each payment shall apply only to its corresponding insurance period; (3) that the company shall not be liable for any loss or disability resulting from injury sustained or illness beginning while I am in default in the payment of any premium; and (4) that this order is made a part of the contract of insurance."

The insured voluntarily left the service of the railroad company on December 21, 1928, at which time he drew all the wages then due him. Testimony to this effect was given by the paymaster of the railroad company, who also testified that no payment was ever made by the railroad company to the insurance company under the paymaster's order, for the reason that the insured had quit the service of the railroad company and had drawn all the wages then due him. The railroad company therefore had no funds on hand with which to pay the $5.90 premium covering the months of December, 1928, and January, 1929.

Had the insured paid the premium to the insurance company's agent, he would not have given a paymaster's

order for the same premium, yet it is an undisputed fact that he did give a paymaster's order on the date the policy was issued for the December and January premiums, and it is also undisputed that the order was not honored because the insured voluntarily quit the service of the railroad company before earning the wages out of which the premiums were to be paid, and drew all of his wages when he quit. It may be said, in this connection, that the insurance agent testified that premium receipts were not issued under policies of this character, and that the paymaster's record showing the deduction of monthly premiums from the insured's wages was the only receipt contemplated.

The insurance agent, after testifying that no premiums had been paid him, further testified that the first deduction of wages contemplated under the paymaster's order was to be made January 1, 1929, but, if this interpretation of that instrument be accepted as correct, no different conclusion could be reached, for the reason, as has been stated, that the insured had, prior to that time, quit the service of the railroad company, and nothing was due him on January 1st.

The case of *Ætna Life Ins. Co.* v. *Ricks*, 79 Ark. 38, is very similar to the instant case. Speaking for the court, Mr. Justice Riddick there said: "If Ricks had remained in the service of the Iron Mountain Railway Company, and had earned wages during the month of September sufficient to pay the premium that was to be paid from the wages of that month, then there might be reason for holding that the policy had not lapsed, even though the insurance company had not, at the time of the injury, actually received payment of the premium. But he left the employ of the railway company before the month of September, and collected all wages due him, leaving nothing to pay the premium." Under these circumstances the court held that it was error not to have directed a verdict in favor of the insurance company.

We conclude, therefore, that the trial court was warranted in declaring, as a matter of law, in directing a verdict for the insurance company, that there was no competent evidence, which the jury had the right to accept as true, to the effect that the premium had ever been paid. The plan for paying the premium had been defeated by the insured's own act before his death, and the policy had therefore ceased to be effective as a contract of insurance.

The judgment of the court below must therefore be affirmed, and it is so ordered.

[redacted]

SMITH *v.* CONTINENTAL CASUALTY COMPANY.

Opinion delivered June 23, 1930.

[redacted]

Oscar H. Winn, for appellant.

Cockrill & Armistead, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in refusing to give numerous instructions requested by him, but they are not sufficiently identified in the motion for a new trial with objections thereto to constitute assignments of error entitled to review here. A careful examination of the instructions given by the court discloses that the charge fully declared the law, correctly directing the jury in the proper consideration of the questions and issues submitted for their determination. The jury having found upon conflicting evidence, against appellant, upon whom the burden of proof rested to show a contract or agreement made entitling him to recover, its verdict cannot be disturbed here.

The case is unlike that of *Gibson* v. *Continental Casualty Co.,* 178 Ark. 1090, upon which appellant relies, the facts being altogether different. In that case the insurance company furnished its agent with forms of receipts containing blanks for stating dates when the insurance

should become effective, apparently authorizing him to fill in these dates and bind the company on the delivery of such receipt from the agent to the applicant for insurance. No policy was issued herein nor was any showing attempted to be made that a receipt containing any such provisions about the effective date of the policy when issued was given the applicant or any receipt at all issued to him. The burden to show the making of a contract of insurance or agreement therefor binding the insurance company to pay the amount designated was in no wise relieved against because of the difficulty thereof on account of the death of the applicant for insurance on the day his application was made, and of the agent soliciting the risk before the trial of the cause and the jury having found against appellant on conflicting evidence and the record disclosing no reversible error, the judgment must be and it is accordingly affirmed.

MALONEY *v.* HARDING.

Opinion delivered June 23, 1930.

June P. Wooten, for appellant.
William L. Baugh, Jr., and *R. E. Wiley,* for appellee.

HUMPHREYS, J. Appellee brought suit against appellant in the circuit court of Pulaski County, Third Division, under §§ 2453 and 2455 of Crawford & Moses' Digest for double the amount due upon a note for $800 executed on May 25, 1926, by appellant to appellee for borrowed money, which note bore interest at the rate of 8 per cent. per annum from date until paid. It was alleged in the complaint that appellant executed a mortgage of even date with the note to secure the payment of same upon the south half (S½) of northwest quarter section 25, township 1 south, range 12 west, in said county, which mortgage was never recorded, and subsequent to the execution thereof, said appellant conveyed said land to the Metropolitan Trust Company for a cash consideration of $1,000 with the intent to defraud, hinder and delay appellee in the collection of her debt. It was also alleged therein that appellee had the right to recover double the amount of the debt under said sections of the statute on account of the wrongful conduct of appellant in selling said real estate after mortgaging same to appellee.

Appellant filed an answer denying the material allegations of the complaint, and also filed a written offer on the day of the trial to confess judgment for $800, the face of the note with interest at the rate of 8 per cent. per annum from November 25, 1926, which offer appellee refused to accept.

The cause was submitted upon the pleadings and testimony introduced by appellee resulting in a verdict and consequent judgment in favor of appellee for $1,600 and interest at the rate of 8 per cent. per annum from November 25, 1926, amounting to $2,001.31 with 8 per cent. interest after the date of the judgment, from which is this appeal.

Appellant contends for a reversal of the judgment because the trial court refused, over his objection and exception, to instruct the jury that appellee was not entitled to recover the statutory damages from appellant. The sections which were made a basis for the recovery

of damages in double the amount of the notes sued on are as follows:

"Section 2453. Every person who shall be a party to any conveyance or assignment of any real estate, * * * with intent to * * * hinder, delay or defraud creditors or other persons, shall be deemed guilty of a misdemeanor," etc.

"Section 2455. Any person who shall violate any of the provisions of the two last preceding sections shall * * * pay to every person so by him injured or defrauded, by any of the means therein mentioned, double the damages sustained by him, to be recovered by proper action."

It was said in the case of *Daniel & Strauss* v. *Vaccaro,* 41 Ark. 316, that, in order "to maintain an action on § 1378 of Gantt's Digest (2453 Crawford & Moses' Digest) against a grantee in a fraudulent conveyance, the plaintiff creditor must prove: 1, that he has a just debt; 2, that his debtor has fraudulently transferred his property to the defendant; 3, that the property was liable to execution or attachment; 4, that the defendant has knowingly aided the debtor to defeat the right of his creditors, and, 5, the amount of the plaintiff's damages."

The facts in the instant case are undisputed. Appellant on May 25, 1926, executed his note to appellee for the sum of $800, due November 25, 1926, with interest at 8 per cent. On the same day he also executed to her as security his mortgage to the land described above. On May 7, 1928, said appellant deeded the said land to the Metropolitan Trust Company for a cash consideration of $1,000. The mortgage was never recorded. Some eight or nine months thereafter appellee retained the note, but turned the mortgage over for safe keeping to appellant, who was her lawyer and confidential adviser. She attempted to collect the note herself, but, failing, placed it in the hands of another attorney, William L. Baugh, Jr., for collection. Mr. Baugh presented the note for collection very often and demanded payment thereon and

finally demanded a return of the mortgage which appellant failed to deliver to him.

Under the construction placed upon § 2453 of Crawford & Moses' Digest in the case cited, before a recovery for double the amount of the debt can be had under the provisions of § 2455 of Crawford & Moses' Digest, it must appear that the debtor transferred his property with the intent to hinder, delay or defraud his creditors or other persons. The record in the instant case fails to show that appellant had such a purpose in mind on May 7, 1928, when he deeded the property in question to the Metropolitan Trust Company, as appellee did not attempt to prove by competent testimony that she could not have collected her note by execution or attachment out of other property owned by the appellant at the time of the transfer. It must have been shown that the effect of the conveyance was to denude himself of all his property, not leaving enough to pay his creditors, else he could not have defrauded appellee. A failure to make this proof by competent testimony entitled appellant to an instruction to the effect that appellee had no right to recover the penalty under the statute quoted. Appellant requested such an instruction, which was refused, over his objection and exception.

It is true, as argued by appellee, that the court submitted the question of appellant's solvency to the jury, but it was not a question for the jury to determine, as there was no evidence in the record upon which to submit such an issue.

The mere fact that appellant refused to pay the note when due or when demand was made for the same is insufficient to show that he was insolvent at the time he made the transfer to the Metropolitan Trust Company.

In view of the fact that the evidence was insufficient upon which to submit the question of appellant's insolvency to the jury, it is unnecessary to determine whether the declaration of the court in submitting said issue was a correct declaration of law.

On account of the error indicated the judgment is reversed and judgment is directed to be entered here upon the supersedeas bond for $800, together with interest thereon at the rate of 8 per cent. per annum from and after November 25, 1926.

ARKANSAS POWER & LIGHT COMPANY *v.* DECKER.

Opinion delivered June 2, 1930.

Robinson, House & Moses, for appellant.

Albert W. Jernigan and *Henry B. Means,* for appellee.

BUTLER, J. On the 4th day of September, 1913, J. H. York, then being the owner of the northeast quarter of section 36, township 3 south, range 18 west, Hot Spring County, Arkansas, executed a warranty deed to W. S. Kirkham for the express consideration of $4,000, by which deed he conveyed all the sand and gravel on and under said land for a term of ninety-nine years, the grantor agreeing for himself and his successors in title to pay the taxes on said land during said term of years.

This deed was recorded in said county on the 23d day of September, 1913, and on December 13, 1913, for $1 and other valuable considerations W. S. Kirkham conveyed by warranty deed the above mentioned sand and gravel to Loula M. Foster, now Mrs. L. M. Decker, which deed was recorded on the proper record of the aforesaid county on the 23d day of December, 1913. The grantee of this deed, who afterward became Mrs. Decker (appellee here) was at that time visiting in Hot Springs, her home being in Texas where she has resided from that date until now. The land in question bordered on Ouachita River and consisted at that point of a sand and gravel bar. It was near this point that afterward the dam known as the Remmel Dam was constructed for the purpose of generating electricity.

In January, 1923, negotiations were begun with York for the purchase of the gravel by the Caddo River Power & Irrigation Company which purchase was finally completed, and the land was then conveyed by said company to the Arkansas Light & Power Company, appellant's predecessor. An abstract was prepared and furnished to these companies in which the deeds from York to Kirkham and from Kirkham to Foster appeared. The title, as disclosed by the abstract not being satisfactory, certain affidavits were obtained to the effect that York had been in continued possession of the land for a considerable number of years; that the deed from York to Kirkham had been placed in escrow until payment of purchase price, and obtained through fraud without anything being paid York for the conveyance. These affidavits apparently satisfied the Arkansas Power & Light Company, and in April, 1923, this company installed machinery and began to remove the sand and gravel from about two or three acres of the land and used the same in the construction of the dam. From April of 1923 until the latter part of September, 1924, the work of removing the sand and gravel was continuous, and about the last of September, 1924, the employees were paid off and the

record shows that on the 4th day of October, 1924, the work of removing the gravel had been completed. The plant was shut down and dismantling of the machinery begun, and on November 28, 1924, the dam was fully completed and the production of electricity started.

Sometime in the summer or fall of 1927 Mrs. Decker, appellee, first learned by rumor that the gravel she had purchased from Kirkham was being removed from the land and thereafter on December 13, 1927, she filed this action against the appellant, successor of the Arkansas Light & Power Company, for the willful trespass on said land in the removal of sand and gravel therefrom in large amounts, for which she asked damages. The trial resulted in a decree in favor of Mrs. Decker, from which this appeal is prosecuted.

A number of questions are presented and discussed in the briefs of counsel which it will be unnecessary for us to consider, since at the outset of the case the appellee is met by the bar of the statute of limitations. Section 6950 of C. & M. Digest provides: "The following actions shall be commenced within three years after the cause of action shall accrue, and not after: First. All actions founded upon any contract or liability, expressed or implied, not in writing. Second. All actions for trespass on lands or for libels. Third. All actions for taking or injuring any goods or chattels."

The facts are undisputed that this suit was instituted more than three years after the cause of action accrued. There was no gravel removed after October 4, 1924, and this suit was not filed until December 13, 1927, a period of more than three years after the cause of action accrued. The appellee seeks to escape the bar of the statute of limitations by virtue of the rule announced in the case of *McKneely* v. *Terry*, 61 Ark. 527-44, where it is held that "a cause of action, kept fraudulently concealed, will stop the bar of the statute in favor of the one against whom the fraud is perpetrated, until the fraud is or should have been discovered." Appellee insists that the facts

of the present case bring it within that rule, and cite in support of her contention: *Conditt* v. *Holden,* 92 Ark. 618; *Walden* v. *Blasingame,* 130 Ark. 452; *Crissman* v. *CarlLee,* 132 Ark. 36; *Catherena* v. *Porter,* 134 Ark. 167. These cases merely restate the doctrine announced in *McKneely* v. *Terry, supra,* and hold it applicable to the facts of those cases.

There was no fraud or concealment of the appellee's cause of action on the part of the Arkansas Power & Light Company, and the rule stated has no application here. Appellant entered with a large crew of laborers on the land, and for more than a year remained thereon excavating and removing large quantities of sand and gravel. The erection of the Remmel Dam was a matter of State-wide interest, and no effort was made in any way to conceal the operations of the Power and Light Company. While York, in the conveyance from him to Kirkham, had agreed to pay the taxes on the land including the sand and gravel, this imposed upon him no duty to guard the land from trespass, and, if so, his failure to notify Kirkham or his assigns, if it could be said to have been a fraud, could not be imputable to York's grantees. All that the appellant's predecessor did was to purchase a tract of land, the title to which was clouded, and to proceed openly to occupy and use it.

The effect of the holding in the case of *Western Union Tel. Co.* v. *Chappelle,* 180 Ark. 432, was that the fact at issue was peculiarly within the knowledge of the company, and that the plaintiff in the case had no information of any circumstance that might lead a reasonable person to believe that such existed, and was therefore not bound by a rule requiring complaint to be made on account of such circumstance within a certain time, while in the instant case knowledge of the trespass was open to all the world.

Mrs. Decker resides in Texas; she had not visited the land in controversy or made inquiry about it for fourteen years, and she must be deemed to have been construc-

tively present and to have known of any act of trespass committed on her property unless the trespasser, by some affirmative act on his part, had diverted her attention or put her watchfulness to sleep. As is said in *McKneely* v. *Terry, supra*: "No mere ignorance on the part of plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself." This rule has been uniformly followed by this court, and its application to the facts of the instant case force the conclusion that the trial judge should have sustained the appellant's plea. *Rock Island Plough Co.* v. *Masterson,* 96 Ark. 446; *McKinney* v. *Beattie,* 157 Ark. 356; *Conditt* v. *Holden, supra; Hibben* v. *Malone,* 85 Ark. 584. The decree is therefore reversed, and the case is dismissed.

KIRBY, J., dissents.

[redacted]

PAYNE *v.* SEYMOUR.

Opinion delivered June 16, 1930.

[redacted]

E. W. Brockman, for appellant.

U. J. Cone, for appellee.

SMITH, J. This suit was brought by appellee to recover the value of certain cotton, upon which she claimed a lien as landlord, and which had been converted by appellant.

Appellant is a merchant, and does a farm supply business, and, beginning in 1921, made advances to James Pope, a tenant of appellee, who was a sharecropper paying one-fourth of his cotton as rent. Appellant made advances to Pope in 1928 and took a mortgage on his interest in the crop, and in the fall of that year remitted to appellee a check for $140.61 as one-fourth of the proceeds of the sale of five bales of cotton grown by Pope. Previous settlements for 1921 to 1927, inclusive, had been made in this manner.

R. W. Seymour, was the son and agent of appellee, had charge of her farm, and the check referred to was remitted to him, but upon its receipt he wrote appellant that the land had been rented to Pope for 1928 for a cash rental of $600 per year, and not for an agreed share of the crop, as had formerly been the case. This was the first knowledge appellant had that Pope did not have the same contract for 1928 which he had previously operated under. Appellant testified that Pope had told him that he was working the land in 1928 under the same contract, and appellant further testified that he would not otherwise have made advances to Pope, and that appellee's agent led him to believe that no change had been made in Pope's contract. The testimony was to the effect that there had been some controversy about the proceeds of the last bale of 1927 cotton sold, and appellant testified that appellee's son and agent told him that, if he (appellant) was going to furnish Pope in 1928, he might credit the entire proceeds of this last bale of cotton on Pope's account, and that he had done so, after which a large balance still remained due him.

Appellant insists that when he bought Pope's cotton he was in possession of no information to warn him that he was buying cotton on which there was a lien on more than one-fourth of it, and that when appellee's agent accepted $140 check, which the statement accompanying the check showed to be one-fourth the value of five bales of cotton, she thereby waived her lien and rati-

fied the sale. Appellee received other cotton from Pope and offered to settle with appellee for one-fourth of its value, and it is undisputed that he received altogether from Pope cotton of a greater value than $600.

Pope admitted the execution of the rent note sued on in January, 1928, and testified that he did not tell appellant that he had not changed his rental contract, for the reason that he supposed appellant had secured this information from appellee, or her agent, and when appellant asked him about his rent contract he told him that he had agreed to pay $600 money rent in 1928, and appellant said then that he ought to have made the inquiry earlier.

Appellee's son and agent testified that when the last of the 1927 crop was being settled for appellant threatened to take Pope's team and tools, and he then agreed that appellant might apply the entire proceeds of the last bale of cotton to his account, upon condition that the team and tools be not disturbed, but that nothing was said then or at any other time about what the 1928 rent would be.

The court found "that defendant could not rely on the fact that the tenant had rented the land previously for one-fourth of the cotton, and that there was no ratification by plaintiff of tenant's sale of the cotton to defendant," and this appeal is from that decree.

It thus appears that this appeal presents only a question of fact, and, without further recital of the testimony, we announce our concurrence in the finding of the chancellor that appellant had no right to assume there would be no change in Pope's rental contract, and that neither appellee nor her agent did anything to induce such a belief by appellant, and also that her acceptance of one-fourth of the proceeds of the sale of the first five bales of cotton was not a waiver of her lien. The cotton had been purchased and converted by appellant when he remitted the check, and appellee was entitled, in any event, to the money paid her. Appellee's son and

agent testified that the letter accompanying the check was the first information he had that appellant did not know the terms of Pope's 1928 rental contract, and that he at once wrote appellant as to what the contract was.

Appellant admits that he knew of appellee's lien when he bought Pope's cotton, but he thought the lien covered only a one-fourth interest in the crop. It does not appear, however, that appellee or her agent did anything to induce this misapprehension, and the decree holding appellant liable for the value of the cotton converted, to the extent of the balance due on rent, is correct, and must therefore be affirmed, and it is so ordered.

BANK OF MANILA *v.* WALLACE.

Opinion delivered June 16, 1930.

Little & Buck, for appellant.

J. F. Gautney, for appellee.

KIRBY, J. This is the second appeal of this cause. For a statement of the case and the decision on the former appeal reversing and remanding it, see 177 Ark. 190.

The judgment was reversed because the court had erroneously directed the verdict. It was there said: "It is a question of fact to be determined by the jury from the evidence whether the appellant was an innocent purchaser. And, as stated in the case last mentioned, if the appellant knew that the note was given for stock of the corporation, then it was not an innocent purchaser, and the question should have been submitted to the jury."

It appears from the testimony that the bank purchased the note sued on, made by J. D. Wallace to C. A. Thompson, before it was due, paying the amount thereof less the discount. That Wallace, the maker, gave the note to C. A. Thompson for "stock in this cotton mill over here," the Jonesboro Cotton Mills. That the stock was never delivered to him. "I was to have stock in that plant they were putting up, but I never did get none;" admitted writing the letter of March 14 to the Bank of Manila, saying it is agreeable with me for you to purchase my note in the amount of $1,480 given to C. A. Thompson for stock in the Jonesboro Cotton Mills, Inc. Said note is dated March 10, 1925, and due in 90 days from date.

Braden testified that he knew the maker of the note, the man C. A. Thompson and Mr. Shaver of the Bank of Manila, who talked with him about the purchase of the note, and that Mr. Shaver called on the phone, and asked if he considered "Uncle Tuck" Wallace or J. D. Wallace's note good, and I told him it was good for whatever amount he mentioned, but, knowing that "Uncle Tuck" was dissatisfied with some notes he had given for stock in the Jonesboro Cotton Mills, I told him Mr. Shaver that, if it was one of those notes, that he would better be careful about buying it, because Mr. Wallace was dissatisfied with his deal, and would perhaps give him trouble about collecting it. Witness was the cashier of the Citizens' Bank of Monette at this time.

Judge Gregg testified he had some stock in the Jonesboro Cotton Mills, and was a director in it, and knew C. A. Thompson, who was acting as agent of the Cotton Mills making sales of its stock—selling stock generally for the Cotton Mills; was one of the board of directors which authorized Thompson to sell the stock, and in some cases he would take notes when he could not get the cash and had authority to do so; thought he was agent at the time stock was bought by Mr. Wallace. He was to sell stock for the company and get commissions on it not

taking subscriptions. Some of the stock sold by Thompson was issued. Did not know whether the particular stock purchased by Wallace was issued or not.

Appellant asked for a directed verdict, and the court gave two instructions to the jury, defining an innocent purchaser in the first and instructing the jury that the bank would not be an innocent purchaser if it knew the note sued on was given, either to the Cotton Mills company or the agent of the Jonesboro Cotton Mills, for stock in that concern; otherwise under the evidence in the case it would be. In instruction No. 2 the jury was told that the law presumed the bank to be an innocent purchaser for value without knowledge of any defects in the note, and that the burden of showing that the bank was not an innocent purchaser was on the defendant, and, unless it found that the bank had knowledge that the note was given to the Cotton Mills company or its agent for stock in the Jonesboro Cotton Mills, then it must find for the plaintiff.

The jury returned a verdict in favor of appellee, from which the bank appealed.

The bank insists that the court erred in refusing to direct a verdict in its favor, and in giving instruction No. 1, and that the verdict is contrary to the evidence and the instructions given.

The bank had notice that the note was given for stock in the Jonesboro Cotton Mills, Inc.; that the stock had never been delivered; that Thompson was the authorized agent of the cotton mills, making sales of its stock, and also was informed, before discounting the note, by the cashier of the other bank where the maker of the note kept his account, that the maker was good for the amount of the note, but that, if it was one given for stock in the cotton mills, they would better be careful about buying it because "Mr. Wallace was dissatisfied with his deal and would perhaps give him trouble about collecting it."

While it is true the testimony does not show that the stock sold, for which the note was taken, was not the property of C. A. Thompson, the seller and payee of the note, the reasonable inference necessarily arose from the testimony introduced that it was stock of the cotton mills sold by Thompson, the authorized agent of the mills, in the usual course of business; and, the testimony was also sufficient to show that the discounting bank had such notice of the transaction that warranted the jury in finding that it was not an innocent purchaser for value of the note sued on. We find no error in the record, and the judgment is affirmed.

ARKANSAS GAME & FISH COMMISSION *v.* STORTHZ.

Opinion delivered June 16, 1930.

Hal L. Norwood, Attorney General, *Robert F. Smith,* Assistant, and *Guy Amsler,* for appellant.

Ingram & Moher, for appellee.

MEHAFFY, J. This is a suit by appellee for the cancellation of contracts, for an accounting, for judgment for the value of fish taken from certain lakes and for a restraining order. Appellee alleged that he was the owner of the soil upon which "H" and "Dry" Lakes are situated in the southern district of Arkansas County; that said lakes are wholly upon his property, and are not connected with any navigable or other stream. He alleges that said lakes are private lakes or ponds. The lakes are described, and it is alleged that the appellant entered into a contract with Eugene Harper, Will Ray and Sanford Bonner, giving said Harper, Ray and Bonner the exclusive right to trap and seine fish in a number of lakes, including H Lake and Dry Lake. The parties agreed to pay the State one cent per pound for the fish taken. The evidence shows that H Lake is located entirely on appellee's land, and Dry Lake is either entirely on appellee's land or on his land and the land of another private owner. Neither of these lakes is connected with any navigable stream except during high water or overflow, and then the whole surrounding country overflows. The following stipulation was by agreement introduced in evidence:

"By agreement between the parties the money paid to the commission by Harper, Ray and Bonner on the fish taken from H, Dry and Parish Lakes was deposited in the People's Trust Company to be held pending the outcome of this litigation. It was agreed that said sum represents whatever damage the plaintiff sustained by virtue of defendant's operations. It is agreed that section 16 of township 6 south, range 1 west, shown on the Quertermous map as school lands, is now the property of the White River Lumber Company. It is also agreed that the lakes involved in this controversy are non-navigable and non-meandered."

The foregoing was all of the evidence introduced on behalf of plaintiff. When plaintiff (appellee) completed the taking of testimony, defendant (appellant) filed its

motion to dismiss, and for cause said that the evidence introduced by plaintiff did not entitle him to the relief sought.

By agreement the cause was submitted upon the complaint; the amendment thereto; the stipulation; the depositions of Strode, Martin, Quertermous, Wheeler and Storthz with the exhibits to same, the answer and exhibits thereto, and the motion to dismiss.

Whereupon the court entered an order dismissing the complaint of plaintiff, Storthz, as to Parish and Dry Lakes and rendering judgment for him in the amount of $417.53, which is supposed to represent one cent per pound on the fish which were taken from H Lake. No ruling was made upon appellant's motion to dismiss, and, after the court's ruling, appellant was not permitted to introduce proof bearing upon the issues as to H Lake.

The commission has appealed from that part of the chancellor's ruling with reference to "H Lake."

It was also agreed that, if Joe Storthz would testify that the plaintiff is the owner of the lands around Dry and H Lakes, this may be used in evidence. Joe Storthz testified that his father, the plaintiff, was at the commencement of the suit the owner of the lands upon which Dry and H Lakes are situated; that he had owned these lands about twenty-five years, and had paid the taxes on all of these lands since he had owned them. Joe Storthz also testified these lakes are located on lands that now belong to him and his brother, but at the commencement of this suit said lands belonged to his father; that these lakes are not connected with any navigable waters; that they are inland bodies of water.

The statute with reference to fish being the property of the State expressly excepts fish in private ponds. C. & M. Digest, § 4753.

There is no provision in § 2 of act 151 of the Acts of 1927 exempting from the application of said act waters wholly on the premises belonging to an individual, but, when this act is considered with § 4753 of C. & M. Digest,

we think it is perfectly plain that the Legislature did not intend that this should apply to waters wholly on the premises belonging to individuals. The intention of the Legislature is shown by the passage of act 82 of 1929, § 1, of which reads as follows: "Hereafter no agreement shall be made by the Arkansas Game and Fish Commission with any person or firm under the provisions of § 2 of act 151 of the 1927 General Assembly, whereby such person or firm is authorized to enter upon any lake that is not meandered by U. S. Government surveys and upon which taxes are paid, for the purpose of removing any fish therefrom for commercial purposes unless permission in writing is first procured from the party or parties owning the lands around and under such lake."

This court has said: "It can be stated without question that primarily the title to game and fish are and have for all time been in the sovereign, but the nature and extent of that title and the purposes for which it is held are not altogether free from doubt. Originally, the title seems to have been regarded as vested in the sovereign as a personal prerogative, but as civilization advanced it grew to be differently regarded, not as a personal right of kings but as a portion of the common property of subjects. It is said that by the Roman law animals *ferae naturae* were classified as common property, which, having no owner, were considered as belonging to all the citizens of the State; yet the right of the owner of land to forbid another from killing game on his property was recognized as a part of the rights of ownership of the land. * * * But nowhere do we find in modern times that the absolute and unqualified ownership of such animals by government has been asserted and exercised further than for the purpose of controlling and regulating the taking of the same. On the other hand, we find frequent denial of the right of government to do more. * * * We assume, therefore, as firmly established by authority, that the State's ownership of fish and game is not such a proprietary interest as will authorize a sale thereof, or the

granting of special interests therein, or license to enjoy, but is solely for the purpose of regulation and preservation for the common use, and is not inconsistent with a claim of individual or special ownership by the owner of the soil, if it be found that there can be any such individual or special ownership. * * * We therefore conceive it to be settled by authority and by long recognition in the law that the owner of the land has a right to take fish and wild game upon his own land, which inheres to him by reason of his ownership of the soil. It is a property right, as much as any other distinct right incident to his ownership of the soil. It is not, however, an unqualified and absolute right, but is bounded by this limitation, that it must always yield to the State's ownership and title, held for the purposes of regulation and preservation for the public use. These two ownerships or rights, that is to say, the general ownership of the State for one purpose, and the qualified or limited ownership of the individual, growing out of his ownership of the soil, are entirely consistent with each other, and in no wise conflict." *State* v. *Mallory,* 73 Ark. 236.

The State, not only under the common law, but under the decisions of this court has the right under its title to regulate and preserve for the public use, but it has no right to prohibit the owner of land upon which there is a lake to take fish therefrom. It would not have the right to make the contract made in this instance, giving persons other than the landowner the exclusive right to take fish, even if the lake was not entirely on the land of one person. The persons owning land bordering on the lake have the right to take fish therefrom subject only to the right of the State to regulate and preserve for the public.

We deem it unnecessary to review the authorities in this case because in the case we have just cited, *State* v. *Mallory,* the court reviewed the authorities and announced the rule which has since been followed in this State.

"The only justification for a law regulating and restricting the common right of individuals to take wild game and fish is the necessity for protecting same from extinction and thus to preserve and perpetuate to the individual members of the community the inalienable rights which they have had from time immemorial." *Lewis* v. *State,* 110 Ark. 204.

In a later case, this court said: "It is unnecessary in the present case to pass on the question as to whether or not the Legislature has the power to regulate fishing in private ponds wholly on the premises of an owner, and we content ourselves merely by deciding the question as to whether or not such an attempt has been made in this statute." *Milton* v. *State,* 144 Ark. 1.

The numerous authorities are again discussed in the Milton case, and while it was not decided whether the Legislature had power to regulate fishing in private ponds wholly on the premises of the owner, it is not necessary to decide that question in this case because the Game and Fish Commission undertook in this case to give other parties the exclusive right to take fish and deprive the owner of the land of that right. We do not think the Legislature intended to pass a law to this effect, and it would not have authority to do so. Numerous authorities are cited and discussed by counsel, but we think the question here has been settled by the decisions of this court, and it becomes unnecessary to review the authorities cited by counsel. We think that where the lake or pond is entirely within the land of the owner, and no means of passage by which fish can migrate to the waters of other owners, such single owner will own the fish as well as the fishing rights. The evidence in this case shows that there is no more means of fish getting into this lake from the river than there is of fish from the river getting all over the surrounding country. We think the evidence shows that both these lakes are inland lakes, and in times of high water fish might go from the river to the lake or from the lake to the river, not because there is

any outlet from the lake or any channel from the lake to the river, but because the entire country overflows, including the lakes.

It is next insisted by appellant that it is entitled to a ruling on its motion to dismiss, and that it should have been permitted to introduce testimony, but the stipulation filed by counsel is in part as follows: "By agreement the cause was submitted upon the complaint, the amendment thereto, the stipulation, the depositions of Stroude, Martin, Quertermous, Wheeler and Storthz with the exhibits to same, the answer and exhibits thereto, and the motion to dismiss. The parties also agreed that the case might be decided by the chancellor in vacation, and it was submitted by agreement without any request on the part of the appellant to take testimony. The decree also recites that it was submitted by agreement, and it was after the court had rendered its decree that the appellant requested permission to introduce testimony. The refusal to permit this after the decree was not an abuse of the court's discretion. As to the motion to dismiss, it is sufficient to say that it was submitted together with the case, and the motion to dismiss was based on the alleged ground that there was no evidence to justify a decree. Of course, the finding in favor of the appellee was in effect an overruling of the motion which was based on the ground that there was no evidence to justify a decree.

The Game and Fish Commission had no authority to make the contracts giving persons the exclusive right to take fish from these lakes, and said contracts should be canceled. The decree of the chancery court is affirmed on appeal, and on cross-appeal as to Dry Lake the decree is reversed, and the cause is remanded with directions to cancel the contracts as to this lake and ascertain the amount of fish taken from Dry Lake and enter a decree for that amount, and to grant the injunction as to Dry Lake.

ST. PAUL FIRE & MARINE INSURANCE COMPANY *v.* GREEN.

Opinion delivered June 23, 1930.

[redacted]

George A. McConnell, for appellant.

James G. Coston and *J. T. Coston,* for appellees.

MEHAFFY, J. The appellee, B. H. Green, filed suit against the appellant to recover on a fire insurance policy in the sum of $2,500, with loss payable clause to appellee, Denton, for the loss by fire of a three-story brick building situated in Osceola, Arkansas. It was alleged that the building was destroyed by fire about May 19, 1929; that the defendant admitted liability to the extent of 80 per cent. of the face of the policy, but denied liability for further amount. Proof of loss was made,

showing the origin of the fire and the extent of appellee's interest in the property, as well as the cash value of the building. The amount of appellee's loss was stated and also other insurance covering the same property. Appellant answered, denying that the building was destroyed by fire, alleging that it was only partly destroyed, and that the damage immediately after the fire was capable of being repaired for a sum much less than the amount of insurance carried on said building. The answer also alleged that the policy sued on required the appellee to protect said building from depreciation and damage after the fire, and that appellant was not liable for any damages which accrued since the building was damaged by the fire. The total amount of insurance on the building was $16,000. That the appellant was not liable for a greater proportion than 80 per cent., that the contribution clause had not been complied with by the insured in that he failed to carry insurance in an amount equal to 80 per cent. of the value of the building, and that appellant is liable only for its proportion of the insurance determined by the application of said 80 per cent. contribution clause; denied that the damage was $35,000, and prayed that its liability be determined in accordance with the contract of insurance sued on.

The appellee, B. H. Green, testified that he was the owner of the three-story building which was destroyed by fire about May 19, 1929; that shortly after the fire he prepared a proof of loss and furnished it to the company, a copy of which was attached to the complaint. The proof of loss stated that the damage to the building was $35,000; the amount was an estimate made by other parties, appellee had a contractor to examine the building, and he agreed to repair it for $20,000. Appellee carried $16,000 insurance on the building.

J. B. Bunn testified that he was manager of the Osceola Lumber Company, which is engaged in selling building material and in building houses; witness had been in the business ten years and was familiar with the

value of building materials; had examined the damaged building, and, if his company took a contract to restore it, it would tear it down to the ground; the walls are not in a condition to put another story on without tearing them down and using the material over; would not tear them down for them; had never torn down an entire building in Osceola; the wall in front has got a number of cracks in it, but does not remember whether there are cracks in the side wall or not. The estimate witness made was in October, and the fire had occurred in May; had seen the building every day since the fire; does not think, if they had begun to reconstruct the building the next day, they could have used the old building.

Jake Counts, a witness, testified that he does general contracting and handling of retail lumber; had examined the building in question; thought possibly the east wall could be used to a good advantage, but would advise tearing down the other walls; the building would be damaged between the time of the fire in May and the time witness inspected it.

Claude Thompson testified that he was engaged in contracting and building, and has been for 25 years; was through the building in question a day or two after the fire; would not consider it wise to use the remnant of the building; does not think it would be safe; some brick in the building could be used, but they would have to be cleaned, and it would cost from one-half to one cent to clean them; thinks the east wall might have been used.

Wasson Pruitt testified that he was fire chief in Osceola and was at the fire which destroyed the building; it was a hot fire and hard to handle; something like 100,000 gallons of water was pumped into the building while it was hot; the next day the water was dripping, and there were from two to six inches of water on the first floor.

R. A. Cartwright testified that it would cost more to raze the building and clean the bricks than they were worth.

Witness Counts was recalled, and said that he did not think the brick part of the building had deteriorated since the fire; when you turn water on a brick wall, it causes the brick to crack and scale.

Witness Bunn was recalled and testified that when you put water on brick or any other clay product when it is hot, it will crack. The water was played all over the building and they tried to break out every window glass in it. There was a composition roof on the building, and it makes the best kind of fire there is.

James E. Fairies, a witness for appellant, testified that he lived in Memphis, was a general contractor, and had engaged in that business for 30 years. He estimated the amount it would take to repair the building at $12,498.56; his estimate contemplated taking off the top floor brick work, ceiling joists, roof joists and burned joists on the second floor, replacing the flooring, etc.; made a careful inspection of the condition of the building; the walls were all right below the third floor; there was no fire below the top floor of the building; the third floor would have had to be rebuilt entirely with new brick; witness was employed by Overstreet, the fire adjuster, to make the estimate and was paid for his work by the insurance company. Witness estimated the building was damaged not over one-third, and that it had been damaged between the time of the fire and the time when he made his estimate.

C. M. Baxter testified that he lived in Blytheville, and was employed by the East Arkansas Lumber Company, engaged in the retail lumber business; that he had been in business 19 years and had made estimates, executed contracts and repaired buildings; was called on by the insurance adjuster to make the estimate; his estimate for repairing the building was $15,747.50. The estimate included the removal of the third story, replacing with new brick and new roof. Witness found on examination of the walls that there was some repair necessary on the front wall and the west wall, that the

rest of them could be used as they were. The building was damaged about one-third. The work done according to his estimate would have made a better building than it was before the fire; was employed by the insurance company to make the estimate.

J. B. Ballew testified that he was called by the insurance company to make an estimate and inspect the building on October 1; was a general contractor and had been engaged in the business at Jonesboro and all through the country, about 25 years; had made a careful inspection of the building to see whether it was a total loss. Estimate contemplated building third story new; estimated that the building was damaged about 35 per cent. to 40 per cent.; that a great deal of the damage had been done to the building between the time of the fire and the time he made the estimate; had had experience in repairing damaged buildings; the amount of his estimate was $12,507.15.

Eric Rogers testified that he engaged in the general insurance and bonding business, and that his company would make a bond for Ballew and guarantee that he would carry out the estimate he made for restoring and repairing the building.

I. C. Sparks testified that he was general representative of the insurance company; that the policy was written for $2,500 that the total insurance carried on the building was $16,000; that the insurance was written at the rate of $1.77 less $0.25 per $100. The regular rate was $1.77; the reduction was given due to the assured's desire to have the insurance written subject to 80 per cent. contribution clause.

B. H. Green was called in rebuttal and testified that the insurance company did not offer to restore his building at the figures given by witnesses for defendant. The building was 25 or 26 years old.

W. E. Overstreet was recalled by appellant, introducing a copy of the proof of loss which showed that the building was worth $35,000 and could be repaired for

something over $20,000. Witness then read the clause from the policy.

The case was tried before a jury and a verdict rendered for the appellees for the amount sued for, with interest at 6 per cent. per annum from September 10, 1929. The appellee thereupon called S. R. Simpson, a lawyer of standing and experience, who testified that he thought $600 or $700 would be a fair fee in the case. Judgment was entered for the amount of the verdict, 12 per cent. damages and $600 attorney's fees. The case is here on appeal.

Appellant contends that the attorney's fee allowed by the trial court is excessive. The suit was for approximately $2,500, and the court allowed an attorney's fee of $600. While the amount sued for was $2,500, the appellant did not contest appellee's right to recover, but contended that there was not a total loss, and that appellant was only liable under the 80 per cent. contribution clause of the contract. The contention of the appellee is that, if the judgment is supported by any substantial evidence, it will not be disturbed by this court. The appellee introduced S. R. Simpson, a lawyer of standing and who had been engaged in the practice for 42 years, and he testified that he thought $600 or $700 would be a fair fee. The general rule is that, if there is any substantial evidence to sustain the verdict of a jury, it will not be disturbed by this court. The reason for this rule is that the jurors are the judges of the credibility of the witnesses and the weight to be given their testimony. When the findings of fact are by the judge sitting as a jury, the same rule applies. This rule, however, has never been followed in cases where the value of an attorney's services was involved.

In a recent case we said: "In *Sain* v. *Bogle,* 122 Ark. 14, it was held, in determining what is reasonable fee for an attorney, 'it is competent to consider the amount and character of the services rendered, the labor, time and trouble involved, the nature and importance of

the litigation or business in which the services are rendered, the amount or value of the property involved in the employment, the skill or experience called for in the performance of the services, and the professional character and standing of the attorneys'." *Shackleford* v. *Ark. Baptist College, ante* p. 363; *Valley Oil Co.* v. *Ready,* 131 Ark. 531; *Bayou Meto Drain. Dist.* v. *Chapline,* 143 Ark. 446. Opinion evidence of expert witnesses as to the value of an attorney's services is not conclusive. 2 R. C. L. 1061; 6 C. J. 762; *Collum* v. *Mock,* 21 La. Ann. 687; *Randolph* v. *Carroll,* 27 La. Ann. 467; *Baldwin* v. *Carleton,* 15 La. Ann. 252.

We are of opinion, after a review of all the evidence, including the nature of the litigation, the amount in controversy, the labor, time and trouble involved, that $300 is a fair compensation.

It is next contended by the appellant that there was not a total loss. The building was a three-story brick building, and the third story was entirely destroyed. The walls of the first and second stories were standing after the fire. There was a conflict in the evidence as to whether the building could be repaired. J. B. Bunn testified that the walls were not in position to put another story on without tearing them down and using the material over, and that he would not tear them down for them. He said the wall in front had a number of cracks in it. This witness said he had seen the building every day since the fire, and he did not think, if they had begun to reconstruct the building the next day, that they could have used that old building. Other witnesses of appellee testified to substantially the same facts. There being a conflict in the evidence as to whether the part of the building left standing could have been utilized, it was a question for the jury. If the material that was not destroyed could not be utilized, the building was a total loss within the meaning of the policy. "The cases all agree that the insurance of a building is upon the building, and not on the materials which compose it, and that

the total destruction of a building within the meaning of an insurance policy means its complete destruction as a building, but not necessarily the absolute extinction of all its materials, or even that no part of it can be left standing. But just the extent to which a building must be destroyed in order to be a total loss is a question on which the courts are divided. Some courts hold that if the building loses its identity and specific character by fire, although a large part of the materials or component parts are left standing, it is a 'total destruction' within the meaning of the policy. Other courts take the position that there cannot be a total loss so long as the remnant of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the fire; and that whether it is so adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as the one in question was before the fire, would in proceeding to restore it to its original condition utilize such remnant as such basis. Under the latter view the remnant must have formed a substantial part of the building." 14 R. C. L., p. 1302.

If a building is destroyed, as a building, so that the walls, although remaining, are in such a condition that they will have to be torn down, there is a total loss. *Williams* v. *Hartford Ins. Co.*, 54 Cal. 442; *Oshkosh Packing & Provision Co.* v. *Mercantile Ins. Co.*, 31 Fed. 200; *Penn. Fire Ins. Co.* v. *Drackett*, 57 N. E. 962; *Teter* v. *Franklin Fire Ins. Co.*, 82 S. E. 40; *German Ins. Co.* v. *Eddy*, 54 N. W. 856; *Seyk* v. *Millers' Nat. Ins. Co.*, 41 N. W. 443; *Roquette* v. *Farmers' Ins. Co.*, 191 N. W. 772; *Lowry* v. *Fidelity-Phoenix Fire Ins. Co.*, 272 S. W. 79; *Fire Association* v. *Strayhorn*, 211 S. W. 447; *Ins. Co.* v. *Heckman*, 67 Pac. 879.

The court gave the jury the following instruction:

4. As to what a total loss is, it becomes necessary for the court to give you some information, and on that point you are instructed: If you find from a preponder-

ance of the evidence in the case that the building was burned, and that it was so far destroyed that no substantial part or portion of it remains in place capable of being utilized to advantage in restoring the building in the condition in which it was before the fire, then it is a total loss. On the other hand, there can be no total loss if the remnant of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the fire, and whether or not the remnant of the building is adapted to use as a basis to restore the burned building to its condition before the fire depends on the question whether a reasonably prudent owner, uninsured, desiring such a structure as the building was before the injury, in proceeding to restore the building to its original condition, would utilize the remnant."

This was a correct instruction as to what constitutes a total loss. The jury having found that there was a total loss, it becomes unnecessary to discuss co-insurance and percentage clauses. Section 6147 of C. & M. Digest reads as follows: "A fire insurance policy, in case of total loss by fire of the property insured, shall be held and considered a liquidated demand against the company taking such risk, for the full amount upon which the company charges, collects or receives a premium; provided the provisions of this article shall not apply to personal property." *Farmers' Home Mutual Fire Assn.* v. *McAlister,* 171 Ark. 574.

Appellant insists that the court erred in permitting witness Counts to testify with reference to the condition of the building at the time of the trial, and to testify that the building would have to be torn down. This witness testified that he saw it a few days after the fire, and that he did not think the building had deteriorated any since the fire. He also testified that the walls would have to be torn down. This testimony was competent. Appellant introduced evidence as to the condition of the building, and that the walls would not have to be torn down.

The question was whether there was a total loss, and each party had a right to introduce testimony tending to show whether the walls could or could not be utilized. If they could be utilized, there was not a total loss; if they could not be utilized and would have to be torn down, there was a total loss. The court did not err in permitting witness Cartwright to testify as to the cost of removing and cleaning the brick. Most courts hold that where there is a total loss of the building but not of the materials, it is proper to show the value of the materials because, if the insurance company pays for a total loss, it is entitled to the value of the materials that are not destroyed. It was therefore proper to show that the cost of removing and cleaning the brick would be as much as they would be worth. Appellant insists that witness Ballew should have been permitted to testify that the building was not a total loss. We do not agree with appellant in this contention. The question to be determined was whether it was a total loss. This was a question of fact for the jury, and it depended in this case on whether the walls could be utilized. This witness was permitted to testify and did testify to the facts, and it was not proper for him to give his opinion as to whether it was a total loss. The court properly instructed the jury, and there was substantial evidence to sustain the verdict.

The attorney's fee will be reduced to $300, and the judgment affirmed.

ROBBINS *v.* ROBBINS.

Opinion delivered June 23, 1930.

Louis J. Moore and *C. B. Andrews,* for appellant.

McHaney, J. Appellant, Lula May Robbins, sued appellees alleging in her complaint that she is the lawful wife of William Harrison Robbins who was, at the time of their marriage, the owner of an undivided one-half interest in certain real estate in the city of Hot Springs; that her husband acquired title thereto by conveyance from A. L. Rowan to her husband and his then wife, the appellee Lois Robbins; that in October, 1929, said W. H. Robbins and appellee Lois Robbins conveyed said real estate to appellee Dozier as trustee for Lois Robbins, who agreed to convey to Lois and had done so; that, as the wife of W. H. Robbins, she was entitled to a dower interest therein of one-third of his one-half interest, for which she prayed judgment.

The court sustained a demurrer to this complaint, dismissed same for want of equity, and the case is here on appeal.

The demurrer was properly sustained. The complaint failed to state a cause of action. Appellant's right of dower is inchoate. Dower does not ripen into an estate or an interest therein until the death of the husband. Whether appellant has a possibility of dower in the real property owned by her husband and a former wife, who is still living, as an estate by the entirety, we do not discuss. It is sufficient to say that her right of dower therein, if any, has not accrued, and the complaint, therefore, failed to state a cause of action.

Decree affirmed.

Whitaker Manufacturing Company *v.* Barber.

Opinion delivered June 23, 1930.

Carmichael & Hendricks, for appellant.

June P. Wooten, for appellee.

McHaney, J. In 1927, appellant sold goods to the Turner-Shannon Company of Little Rock, and on January 1, 1928, the latter was indebted to appellant in the sum of $4,724.27. On January 12, 1928, the Turner-Shannon Company made an assignment to appellee, for the benefit of creditors, who filed same in the Pulaski Chancery Court and invited creditors to present their claims. Appellant filed an intervention, to which was attached an itemized account describing the property it had sold the assignor and which it could identify, and claimed the right to retake the property it could identify as having been purchased from it through fraud. It identified $2,308.28 worth of its property in the hands of the assignee at invoice prices. The court ordered all the assets in the hands of the assignee sold, that claimed by appellant to be sold separately. Although appellant objected to the sale of its property, it did not appeal and must be held to have consented thereto. This property claimed by it sold for $1,000. On a trial the chancery court held appellant was entitled to this $1,000, but the assignee appealed to this court. The decree was affirmed. *Barber* v. *Whitaker Mfg. Co.,* 180 Ark. 183. Appellant was paid the $1,000. It thereafter filed a second intervention claiming interest on this $1,000 from the date of the decree to the time of payment, and also claiming the

right to be a general creditor for the balance of its account, less $1,000, in the sum of $3,724.27. Appellee answered, denying, (1), appellant's right to interest on the ground that the fund was a trust fund, held in court in lieu of the property, and (2), alleging that appellant had been awarded all the goods demanded and identified by it under its first intervention, and was not entitled to have a claim for the difference between the sum realized and the whole bill. The court overruled appellant's demurrer to appellee's answer. Appellant declined to plead further, and its intervention was dismissed for want of equity. Hence this appeal.

We are of the opinion that the trial court correctly held that appellee's answer stated a good defense to appellant's demand for interest. The goods claimed by appellant and identified by it in the sum of $2,308.23 were sold by order of court for $1,000. Appellant had the opportunity of bidding more for the goods, but it failed to do so. The money for which the goods were sold therefore took the place of the goods and became a fund in court, title to which was litigated to a final determination in this court to be the property of appellant. If the goods had not been sold and had been kept intact, and finally awarded to appellant, certainly it would not have been entitled to interest on the judgment for the property. Since it elected to permit the property to be converted into money, and to litigate the title to the money, it necessarily follows that appellant is not entitled to collect interest on the money.

As to the second proposition, however, that appellant is entitled to file a claim for the balance due it and become a general creditor entitled to participate in the distribution of the fund in the hands of the assignee, we are of the opinion that the court erred in overruling the demurrer of appellant to the answer of appellee. The amount of its claim, however, should be the difference between the invoice price of the goods identified by it, $2,308.23, and the whole amount of its bill, $4,724.27, or

$2,416.04. Appellant contends that it should become a general creditor for the sum of $3,724.27, instead of the sum heretofore stated for the reason that it realized only $1,000 for the goods it identified and which were sold for said sum, but we cannot agree with appellant in this regard. It permitted its goods of the value of $2,308.23 to be sold for $1,000 when it might have required the delivery of the goods or might have bid them up at the sale to the invoice price without loss to itself. Having elected to permit the goods to be sold, the whole amount of its bill must be credited with the amount of the invoice price as hereinbefore stated.

It appears to be the general rule, supported by courts of last resort and text writers throughout the country, that where, as here, goods are sold on account of fraudulent representation of the buyer as to his solvency, the seller may, when he discovers the fraud which induced the sale, rescind the contract of sale, repossess such of his property so obtained as he may be able to find and identify in the possession of the buyer, and also maintain an action against the buyer for the value of the goods not found. In 24 R. C. L., § 616, p. 330, it is said: "It has been held, and it seems properly, that if the buyer has resold the goods or a part thereof, the seller, after recovering those which he can reach, may waive the tort as to the balance and maintain assumpsit for the proceeds, on the implied promise to pay for property wrongfully appropriated."

To support this statement of the law the cases of *Silvey* v. *Tift*, 123 Ga. 804, 51 S. E. 748, and *Sleeper* v. *Davis,* 68 N. H. 59, 6 Atl. 201, are cited and support the statement above quoted.

Appellee contends however that appellant is estopped from claiming the difference between the value of the goods found and its whole bill on the theory that in its first intervention it attached an itemized list of such goods thereto which it said it could identify of the full value of its bill, and that, since such of the goods as were

identified were sold and the proceeds turned over to appellant, it ought not to be permitted to file a claim for the balance. We do not agree with appellee. Appellant could have identified all of its goods if they had been on hand and in the possession of the assignee. Only goods of the value of $2,308.23 were on hand to be identified, the presumption being the remainder had been disposed of. Had all the goods been on hand, and sold by order of court, then appellant's claim would have been satisfied in full by delivering to it the purchase price of all its goods. We do not feel constrained to follow the opinion of the court in *Farwell* v. *Myers,* 59 Mich. 179, where the majority held contrary to the views herein expressed. We think the dissenting opinion in that case and the views herein expressed more clearly mete out exact justice.

The decree will therefore be affirmed as to the claim for interest, but in all other respects it is reversed and remanded with directions to allow the claim in the amount herein stated.

[redacted]

LAFLIN *v.* INTERSTATE CONSTRUCTION COMPANY.

Opinion delivered June 23, 1930.

[redacted]

W. N. Martin and *Alley & Olney,* for appellant.

Minor Pipkin, Daily & Woods and *C. W. Knott,* for appellee.

BUTLER, J. The appellant brought suit in the Polk Circuit Court for alleged damages for trespass of land owned by her. The case was submitted to a jury under proper instructions and on conflicting testimony. From a verdict and judgment adverse to her, appellant has prosecuted this appeal on the ground that the court should have directed a verdict in her favor under the undisputed facts in the case, because under any view of the testimony, she would be entitled to nominal damages.

It is well settled that in the absence of a showing of actual damages a judgment will not be reversed and remanded because of a technical evasion of some right which would result in the assessment of nominal damages.

The proof is undisputed that the appellant was the owner of the land over which the highway was built, and that a small house was occupied for a time as a blacksmith shop by the persons building the highway. There is testimony on behalf of the appellant tending to show that the house was damaged by the appellee in the construction operations and her husband, who testified as her agent, testified that the damage amounted to as much as $600. There was also some testimony to the effect that some rock had been piled on appellant's land and brush and stumps taken from the right-of-way and burned, the fire from which spread to, and damaged some young timber; also, that a quantity of rock was taken from the appellant's land and used in the construction of the highway and forest roads cut through her timber for the purpose of moving rock from her lands; that a stone crushing equipment was installed upon said land without appellant's consent and was operated thereon and a quantity of broken rock left near the place where it was situated, but it was not shown in what particular or to what extent the appellant's land was damaged by the alleged unauthorized acts of appellee.

The testimony of the appellee tended to show that the stone crushing outfit was situated on a public road which ran through the land of the appellant, and that the rock used was taken from said road and the residue left from the operation of the crusher amounted to only a small quantity, and this also was on the said road; that all the stumps, timber and brush removed in the construction of the highway were placed on the edge of the right-of-way and there burned at a time designated by the Federal officials in charge of the preservation of the nearby forests; that no stone was piled on the appellant's land but only small quantities were piled on the right-of-way; that no timber was destroyed by fire or otherwise, and that the house used for a time to shelter a forge was an old dilapidated structure having no value and that it was not damaged by any act of the appellee, or his employees.

All of the claims for actual damage were disputed, and this question having been submitted to the jury under proper instructions, their verdict is conclusive here, as they are the sole judges of the credibility of the witnesses and the weight to be accorded their testimony. Under the settled rule the verdict of the jury will not be disturbed in such a state of case. But there is no dispute that there was an unauthorized occupation of appellant's property, and, while there will be no remand for a new trial, under the authority of *Crutcher* v. *Choctaw, O. & G. R. R. Co.*, 74 Ark. 358, 85 S. W. 770, the judgment will be reversed and judgment entered here for appellant for all the costs, including that of this appeal. It is so ordered.

SHAVER *v.* NASH.

Opinion delivered June 23, 1930.

[redacted]

Shaver, Shaver & Williams, for appellant.

King, Mahaffey, Wheeler & Bryson, for appellees.

BUTLER, J. On May 27, 1927, suit was begun in the Miller County Chancery Court by Mrs. Myrtle E. Nash and Vernon J. Bush, respondents herein, against Phyllis Ernestine Gill (also called Phillis Ernestine Nash), a minor, the petitioner herein. The object and purpose of this suit was to annul and set aside a certain adoption proceeding, wherein and whereby said minor had, on the 15th day of January, 1915, under the laws of Texas, been adopted by Mannie J. Nash, and the said Myrtle E. Nash. It was alleged in said complaint that Myrtle E. Nash was the widow of Mannie J. Nash, deceased, who theretofore were married September, 1900, and lived together in the marital relation until the death of Mannie J. Nash, August 25, 1921. That on the 6th day of October, 1908, Mannie J. Nash executed his last will and testament, bequeathing all his property to the said Myrtle E. Nash except a few small devises to near relatives. There was no issue, the result of said marriage, and no adoption other than the adoption of January 15, 1915. Answer to said complaint was filed by James D. Shaver, as guardian *ad litem* for the minor, in which a specific denial was made to each allegation, and, in addition to said denials, it was alleged that said adoption was valid, legal, and binding, and that plaintiffs were estopped to deny its validity, or to contradict or change the statements therein contained. On September 20, 1927, a trial of said cause was had, and decree rendered wherein the court found said adoption proceedings to be valid and in conformity to the laws of Texas. Notwithstanding, the court found said adoption to be in conformity to the laws of Texas, the court by said decree set aside and annulled said adoption and decreed and quieted the title to said property in Mrs. Myrtle E. Nash and Vernon J. Bush,

to the exclusion of any and all rights and claim thereto of the said minor.

The respective contentions of the parties to this suit are stated in brief of the petitioner as follows: "Petitioner contends that the minor's status and rights by virtue of her adoption are the same as if she were a child of the blood of the adopter, and that her right to the property is not cut off or affected by the will. Respondents contend that the status and rights of the minor are in no sense those of a child, but that she possesses only the status and rights of a limited or qualified heir, and that such rights are completely cut off by the will."

We are of the opinion that the chancellor was correct in the conclusion reached. The proceedings in Texas did not in any respect comply with our adoption statute, chapter 2, §§ 252-256, inclusive, Crawford & Moses' Digest. This statute provides that an adoption shall be by court proceeding begun by the filing of the petition in the probate court stating the name of the petitioner, that of the child sought to be adopted, its age, whether it has any property, whether the child has either father or mother living, and, if so, their residence. The consent of the parent is required, which consent must be given in open court except where it is shown by competent testimony that the residence of the parent is unknown. It is also provided that a formal order shall be made and entered of record reciting all of the necessary jurisdictional facts, which order shall declare the child adopted, and thereupon the adoptive parent shall occupy the same position towards such child as if he were the natural parent and be liable and responsible as such, and the child shall receive all the rights and interests in the estate of the parent by adoption that such child would have if it had been the natural heir of the adoptive parent.

By articles 42 and 43 of the Revised Civil Statutes of Texas a mode of adoption is prescribed which was followed by the respondents in the instant case. Article 42 provides as follows: "Any person wishing to adopt

another as his legal heir shall file in the office of the county clerk of the county in which he resides a written statement signed by him and duly authenticated or acknowledged as deeds are required to be, reciting in substance that he adopts the person named therein as his legal heir, and the same shall be admitted to record in said office." Article 43 is as follows: "When such statement is so recorded, it shall entitle any child so adopted to all the rights and privileges, both in law and equity, of a legal heir of the adoptive parent, as a child has by law against lawful parents. If the adoptive parent has at the time of such adoption, or shall thereafter have, a child begotten in lawful wedlock, such adopted heir shall in no case inherit more than one-fourth of the estate of the adoptive parent."

A comparison of the Arkansas and Texas statutes discloses their essential dissimilarity, and it is apparent that the rights conferred on the child and the liabilities assumed by the adoptive parent are different. It is also clear that under the statutes of this State there was no adoption (*O'Connor* v. *Patton,* 171 Ark. 63; *Minetree* v. *Minetree, ante* p. 111), and whatever rights were conferred on the petitioner are only such as accrued by virtue of the Texas statute, and we must adopt the construction placed thereon by the courts of that State.

Section 10,506, Crawford & Moses' Digest, provides that "whenever a testator shall have a child born after the making of his will, * * * and shall die, leaving such child, * * * in any settlement, and neither provided for nor in any way mentioned in his will, every such child shall succeed to the same portion of his father's estate * * * as would have descended or been distributed to such child if the father had died intestate * * *."

Section 10,507. *Id.* provides: "When any person shall make his last will and testament, and omit to mention the name of a child, if living, * * * every such

person, so far as regards such child, shall be deemed to have died intestate, * * *."

There is a similar statute in the State of Texas the same being article 8292 of the Revised Statutes of that State, providing that "if a testator have a child, or children, both at the time of making his last will and testament, shall at his death, leave a child or children born after the making of such last will and testament, the child or children so after born and pretermitted shall, unless provided for by settlement, succeed to the same portion of the father's estate as they would have been entitled to if the father had died intestate; * * *."

The Supreme Court of Texas, in the case of *Bell* v. *Thomsen,* 273 S. W. 1109, in construing and interpreting articles 42 and 43, *supra,* after citing and reviewing a number of cases, said: "It is settled that the effect of adoption under these statutes was not to invest the adopted person with any contractual or property right, nor to induct him into the family of his adopter, but was solely to make him a legal heir for the purpose of inheritance, subject to being pretermitted by will, and, in the absence of the latter, entitled to priority, if he were alive at the death of the adopter, to persons in any remoter rank of descent."

Respondents have cited a number of other cases of the Texas courts to the same effect as the holding in the Bell case, *supra,* which we think it unnecessary to discuss.

Under the adoption statute of Arkansas an adopted child not only becomes an heir, but its surviving parents solemnly renounce parenthood, which vests all its attendant liabilities on the parent by adoption. The adopted child ceases to be a member of the family of its natural parents and becomes a member of the family of the adoptive parent who has the custody and control of it, and it becomes, not merely the heir, but the child, born such by the will of the adoptive parent. The status of a person adopted under the Texas statute cited above as construed by the courts of that State is not that of child;

he retains all his rights to the protection, and to the estate of his natural parent, who does not surrender any of his rights with respect to the child, for, as is said in *Harle* v. *Harle,* 204 S. W. 317, citing with approval the case of *Eckford* v. *Knox,* 67 Tex. 200: "Adoption under our statute does not constitute the adopted person a member of the family of the adopter and does not confer the privileges or impose the duties which arise from the relation of parent and child." In contending that the petitioner inherits, notwithstanding the will of the respondents, counsel for the petitioner states that, because a limited or qualified adoption is unknown to the laws of this State, a contrary view would be in contravention of public policy, because "the unqualified terms of our adoption statute make the adopted child the same as the child of the blood and clothes it with all the rights of inheritance accorded to the child of the blood." A sufficient answer to this has already been made. The child was not adopted under the terms of our statute, nor of a similar statute, and as is said in *O'Connor* v. *Patton, supra,* "the right of inheritance as such is conferred in our State upon a stranger in blood only by pursuing the special statutory proceeding for adoption."

It follows from what we have said that the decree of the chancery court was correct, and, treating the proceedings had as proper, the prayer of the petitioner will be denied.

LINCOLN *v.* MCGEHEE HOTEL COMPANY, INC.

Opinion delivered June 30, 1930.

Carmichael & Hendricks, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

HART, C. J. Appellant brought this suit in equity against the appellee to enjoin it from erecting two smokestacks which will be attached to a fourteen-story building across a street upon which abuts the building of the appellant. The record shows that the appellant and the appellee are the owners of lots in block 79 of the city of Little Rock. Appellant owns lots 1, 2 and 3 on the north side of what is called Bridge Street, extending east and west through said block, and has a four-story building which faces Main Street on the east and Bridge Street on the south. Appellee is building a fourteen-story concrete hotel on lot 12 which faces Bridge Street on the north, and Main Street on the east. Bridge Street is twenty feet five inches from the wall of appellant's building on the north to the wall of the proposed building of the appellee on the south side of Bridge Street. The city council gave the appellee permission to erect two smokestacks, respectively forty-four and forty inches in diameter, which are to be placed on a bracket or shelf eighteen feet above the surface of Bridge Street. The bracket upon which the smokestacks will rest is entirely above the traffic of the street, and will not interfere with it. The smokestacks will be riveted into the hotel building and will be as solid as the wall of the hotel. Bridge Street was dedicated in the year 1839 and the dedication recites that the abutting property owners retain a fee in the alley or street subject to the use of the public.

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

The complaint was dismissed for want of equity, and the case is here on appeal.

Counsel for the appellant base the right to injunctive relief on the ground that the act complained of constituted a permanent encroachment upon Bridge Street and thereby became a public nuisance which the appellant, as abutting owner of real property, was entitled to abate because he was specially injured. *Ruffner* v. *Phelps,* 65 Ark. 410; *Sander* v. *Blytheville,* 164 Ark. 434.

At the outset it may be well to define the rights of all parties concerned. Subject to the easement of the public in a street to enjoy and use as a highway, the fee therein belongs to the owners of the adjacent lots. *Packet Co.* v. *Sorrels,* 50 Ark. 466; *Hoxie* v. *Gibson,* 150 Ark. 432; *Dent* v. *Bowers,* 166 Ark. 414. Under § 7607 of Crawford & Moses' Digest the city council has the care, supervision, and control of all the public streets and alleys within the city, and it is made the duty of the council to cause the same to be kept open and in repair and free from nuisance. Under the principles of law decided in these cases and many more which might be cited, abutting owners of real property have a right to enjoin the council from permitting or any one from making any permanent encroachments on the streets of the city on the ground that such encroachments constitute a public nuisance, and the abutting owners are entitled to injunctive relief where they allege and prove special injury. In the application of these well settled principles of law, this court has repeatedly held that the erection of permanent structures, or the act of closing in part or in whole any public street or alley, entitles the abutting owners of real property to abate the same by injunction. *Davies* v. *Epstein,* 77 Ark. 221, 227; *Simon* v. *Pemberton,* 112 Ark. 202; *Osceola* v. *Haynie,* 147 Ark. 290; *Brewer* v. *Mo. Pac. R. R. Co.,* 161 Ark. 528; *Langford* v. *Griffin,* 179 Ark. 577. The reason for granting injunctive relief in

each case is that the abutting property owners has been deprived of egress and ingress to and from his property, and that this constitutes a special injury to his property which differs in kind from that suffered by his neighbors. In the case at bar no special injury of this kind is shown. The smokestacks are placed on a bracket above the street, so that the ingress and egress to the property of the appellant is not in any wise affected. The smokestacks are securely fastened to the wall of the building, so that, according to the evidence introduced, they are a part of the building itself and will stand as long as the walls of the building stand.

The evidence for the appellee also shows that there will be a shadow cast by the wall of the building which is to be erected by the appellee over the building of the appellant, so that the light entering the building of appellant will not be affected by the erection of the smokestacks. In other words, the testimony shows that the shadow cast by the building would affect the light entering the appellant's building just as much without the smokestacks as with them. It is also contended by counsel for the appellant that his right to the air entering his building will be affected by the erection of the smokestacks in the alley. We do not think the proof on this phase of the case is sufficient to entitle the appellant to injunctive relief. It is a matter of common knowledge that houses are built close together in cities, and the slight interference with the air entering appellant's building will be merely an incident to city life, and, according to the proof, will not be of sufficient disturbance to his rights to entitle him to the injunctive relief prayed for.

The decree is therefore affirmed.

McKim *v.* Highway Iron Products Company.

Opinion delivered June 30, 1930.

R. W. Robins and *Opie Rogers,* for appellant.

J. C. & Wm. J. Clark, for appellee.

Humphreys, J. Appellant brought this suit in the nature of an equitable garnishment against appellees in the chancery court of Faulkner County making a judgment he obtained in the year 1925 in the circuit court of Van Buren County against the Highway Iron Products Company the basis of the action to impound the amount of $1,530 due from Faulkner County to said Highway Iron Products Company for bridge material, and to have same applied toward the payment of his judgment. It was alleged that the Highway Iron Products Company was a foreign corporation, and had no property in Arkansas out of which to collect his judgment except the claim Faulkner County owed it. Appellant prayed that W. M. Harper, county judge, and A. H. Burkitt, county clerk, be enjoined from issuing a warrant for said claim to the Highway Iron Products Company, and that the proceeds thereof be impounded and applied to the payment of his judgment.

The Highway Iron Products Company made no defense of any kind, but Isaac Weil and Abraham Weil, partners doing business as Weil Brothers, filed an intervention claiming an assignment of the claim from the Highway Iron Products Company to them before appel-

lant impounded the proceeds thereof, in part payment of a debt which it owed them.

The issues joined as to whether there was a *bona fide* assignment of the claim by the Highway Iron Products Company to the interveners, and whether the transfer thereof met the requirements of the law, were submitted to the court upon the testimony adduced which resulted in a decree dismissing appellant's complaint for the want of equity, from which is this appeal.

The trial court found that the Highway Iron Products Company assigned its claim against Faulkner County for the bridge material to the interveners on July 6, 1928, in part payment of a mortgage which it owed them, and, after a very careful reading of the testimony, we are unable to say that the finding for them was contrary to a clear preponderance of the evidence. This disposes of the first issue.

This brings us to a consideration and determination of the issue of whether the assignment was valid as against appellant. The assignment of the claim was in the form of an indorsement upon the invoice of the bridge material, and recited that for value received the same was assigned to Weil Brothers of Fort Wayne, Indiana; the indorsement being signed by C. V. Joseph, president of the Highway Iron Products Company. The claim against the county had been filed by the Highway Iron Products Company before it was assigned to the intervener. The filing of the claim against the county was the commencement of an action thereon. It was said by this court in the case of *Jefferson County* v. *Philpot*, 66 Ark. 243, that: "The filing of a demand against a county and presenting it to the county court is therefore, according to the various definitions given, the institution of a suit or action, no other pleading or proceeding for that purpose being required."

Appellant contends that the assignment of the claim did not meet the requirements of § 6303 of Crawford & Moses' Digest, and, on account of a failure to do so, was

not a valid transfer of a pending action, so as to prevent him from impounding the proceeds of the claim and having same applied to the payment of his judgment. The statute invoked by him is as follows:

"§ 6303. The sale of a judgment or any part thereof of any court of record within this State, or the sale of any cause of action, or interest therein after suit, has been filed thereon, shall be evidenced by a written transfer, which, when acknowledged in the manner and form required by law, may be filed with the papers of such suit, and, when thus filed by the clerk, it shall be his duty to make a minute of said transfer on the margin of the record of the court where such judgment of said court is recorded, or if the judgment be not rendered when said transfer is filed, the clerk shall make a minute of such transfer on the docket of the court where the suit is entered, giving briefly the substance thereof, for which services he shall be entitled to a fee of twenty-five cents, to be paid by the party applying therefor; and this act shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowledge of such transfer or not."

The statute is in derogation of the common law, and a strict compliance therewith is necessary in order to obtain protection against persons subsequently dealing with reference to a cause of action. The interveners did not attempt to comply with the statute, but their failure to do so did not render the assignment invalid, so far as appellant is concerned. The assignment was valid as between the parties thereto, and appellant, being a garnisher, occupied the position of his debtor, the Highway Iron Products Company, who was the assignor of the cause of action. As he was not a purchaser of the claim of the cause of action for value, he must be regarded and

treated as a party to the assignment, and did not take the debt as against the interveners, who were prior assignees thereof for value. *Market National Bank of Cincinnati* v. *Raspberry,* 34 Okla. 243.

No error appearing, the decree is affirmed.

[redacted]

WRIGHT *v.* BADDERS.

Opinion delivered June 30, 1930.

[redacted]

Miller & Yingling, for appellant.

KIRBY, J. Certain residents of Cleburne County presented a petition pursuant to the provisions of act 193 of 1929 to the county court asking that certain territory described therein be annexed to and made a part of the existing stock law district in that county, and, upon the order being made, appellees asked to be made parties and filed an affidavit and prayed an appeal to the circuit court, where, upon the trial by the court upon an agreed statement of facts, it was held that the county court was without jurisdiction to grant the petition for annexation of the territory to the stock law district, and reversed and set aside the judgment and dismissed the petition, from which judgment comes this appeal.

The petition was filed pursuant to the provisions of act 193 of 1929 correctly describing the territory in Piney township, which is contiguous to and adjoining Cadron, Clayton and Heber townships of Cleburne County, the petitioners constituting a majority of the qualified electors residing in the described territory. Before the filing of the petition the townships of Cadron, Clayton and Heber had been created into a stock law district in conformity with the statute (§§ 321-332, C. & M. Digest, and amendments thereto), and neither Cadron, Clayton or Heber township was created into or incorporated into a stock law district by virtue of any special act of the Legislature and the majority of the area of Cleburne County had not been created or incorporated into a stock law district or districts under the general statutes or any special act of the General Assembly and no part of said county had been incorporated into stock law districts in any other manner than as provided in said statutes (§§ 321-332, C. & M. Digest, and the statutes amendatory thereof).

Appellants insist that the court erred in its construction of the statute in holding the county court was without authority to make the order of annexation. It is not contended that any of the districts to which the territory was sought to be annexed was created by a special act of the Legislature, and it was conceded that all were created by order of the county court under the provisions of the statutes (said §§ 321-331, C. & M. Digest).

Act 205 of 1927 amends § 321, C. & M. Digest, and the act No. 427 of the Legislature of 1921, providing that, when 10 per cent. of the qualified electors of any county in the State shall petition the county court for the privilege of voting on the question of restraining stock from running at large within the county, such court shall make an order for such election to be held, and, if a majority vote for restraining said stock, notice shall be given of such results by publication, etc. This statute takes the place of said acts and is re-enacted, leaving no

part of the old statute, not so re-enacted, effective. Section 23, art. 5, Constitution of 1874.

As so re-enacted and amended, the statute leaves the county court without authority to order an election for the organization of any part less than the whole territory of the county into a stock law district for restraining animals from running at large within the county.

Said act 193 of 1929 does not purport to be an amendment of any other statute, and provides that in counties where a majority of the area of the county has been incorporated into a stock law district, "or where no portion of the county has been created into a stock law district by an act of the Legislature heretofore, * * * and such legislative act provides that other townships may become attached to and made a part of such stock law district by a majority petition of qualified electors of their respective townships to the county judge, who shall declare such township or townships added to the original territory described in such legislative act." This act provides the procedure for organization of the territory in any county where stock law districts have been created by special acts of the Legislature by order of the county court, said territory so added under the provisions thereof becoming a part of the original stock law district of the county and subject to all the provisions and penalties of the original act as though fully described therein. It does not authorize the county court to annex any territory to an existing stock law district, except where a majority of the area of such county has been created into a stock law district or where any portion of a county has been created into a stock law district by an act of the Legislature and such territory, when annexed to the original district by order of the county court under the procedure prescribed, becomes a part of the original district subject to all the provisions and penalties of the act creating it, etc.

It is not claimed that any of the territory of the county to which the lands described in the petition were

sought to be annexed had been created into or constituted a stock law district by a special act of the Legislature, and it was conceded that such was not the case. The said statute (act 193 of 1929) does not authorize the county judge to annex any territory to a stock law district not created by a special act of the Legislature, as already said, and the judgment of the circuit court so holding correctly construed the law, and its judgment must be affirmed. It is so ordered.

WILBON *v.* WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY.

Opinion delivered June 30, 1930.

[redacted]

[redacted]

W. G. Dinning, for appellant.

Brewer & Cracraft, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in giving each of said instructions directing the jury that, if they found from a preponderance of the testimony that the assured had had heart trouble in December, preceding the application for insurance, and this was known either to the assured or the beneficiary, and was not disclosed to the defendant before the policy was issued, to find for the defendant. The provision in the policy relative to answers in the application being representations and not warranties is like those held to be representations in the cases of *Old Colony Life Insurance Co.* v. *Julian,* 175 Ark. 359, and *Bankers' Reserve Life Ins. Co.* v. *Crowley,* 171 Ark. 135. In the latter case it was said: "The questions propounded in the

application as set out above call for answers founded on the knowledge and belief of the applicant, and a misrepresentation or omission will not avoid the policy unless willfully and knowingly made with an intent to deceive.'' It is true the application appears to be signed by Percy L. Wilbon, but it is also signed by the father, appellant, with the statement required because of the applicant being under 15 years of age. There is no testimony tending to show that the under 10-year-old insured answered the questions in the application, except in the statements in the certificate thereto appearing to have been signed by him, and, if he had done so, being a minor of such tender age, he could not be expected to know whether the representations were correct and true, and certainly could not be held in making any misrepresentations to have made them wrongfully and knowingly with an intent to deceive such as would have avoided the policy. All of said instructions, therefore, telling the jury that if they found that the insured or the beneficiary knew that the insured had had heart trouble preceding the application for insurance and did not disclose the fact to the insurer before the policy was issued, and if either the assured or the beneficiary answered ''No'' to the inquiry if the assured had ever had heart trouble and either of them knew that he had had heart trouble, and if they found that either the assured or the beneficiary stated to the agent of the insuring company in answer to a question asked that the assured had never had heart trouble, ''with the intent to deceive the company, etc.,'' they should find for the defendant, were incorrect and erroneous on that account and inherently wrong and necessarily call for a reversal of the case.

Since the beneficiary was not only required to consent to the application for insurance for his minor son, but to certify that the answers made to the questions in the application were complete and true in every particular, he was bound by such statements and representations to the same extent only, if they proved to be false,

as if he had made such representations upon an application for insurance upon his own life wrongfully and with an intent to deceive and not otherwise. The court therefore erred in giving each of the said instructions permitting the insurer to avoid liability on its policy if they found such misrepresentations had been knowingly made with the intent to deceive either by the insured or the beneficiary.

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

NORTON *v.* BURNETT.

Opinion delivered June 30, 1930.

Sheffield & Coates and *Lee & Moore,* for appellant.

A. M. Bradford and *W. G. Dinning,* for appellee.

MEHAFFY, J. The appellee, Evelyn Burnett, began this suit in the Phillips Circuit Court against appellant, E. F. Norton, for damages claimed to have been caused by the issuance and service of a search warrant. The appellee was engaged in going from house to house and taking orders for women's ready-to-wear apparel. On September 18, 1929, she went to the house of appellant to deliver some goods which had been purchased from her. After appellee had been at appellant's house, it was

reported to appellant that certain jewelry was missing. He inquired who had been in and around the house, and was advised that no one except appellee had been in the house. He ascertained all the facts he could, made an examination, and then called upon Mr. R. L. George, the constable of the township in which the town of Marvel, appellant's home, is located. George had been constable a number of years. Appellant informed George of the facts, and George suggested that they procure a search warrant. The next morning they called upon Walter Moore, a justice of the peace at Poplar Grove, near Marvel, and George informed Mr. Moore of their business and asked for a search warrant. Moore stated that he would not issue a search warrant, and informed the appellant that he knew appellee had not taken the jewelry. Appellee was at that time stopping at the home of Moore. George then called up the sheriff's office at Helena, and deputy sheriff Hicks came to Marvel with a blank affidavit and a blank search warrant, purporting to have been issued by the municipal judge at Helena. The appellant signed the affidavit and put in the name of appellee; the search warrant was filled out by the deputy sheriff, and the parties, appellant, George and Hicks, went to Moore's home, but the appellee was not in the house at the time. The deputy searched her traveling bag and some baggage. Appellee then came in, and Mrs. Moore told her that Hicks had a search warrant. Hicks then examined appellee's pocket book and car and asked Mrs. Moore to search her person, which she did. There were present Mr. and Mrs. Moore, the appellee and her sister, George and Hicks. The next day appellee went to Helena to consult with an attorney, and within a few days thereafter brought suit against appellant. There was a trial by jury, a verdict and judgment for $500 and, to reverse said judgment, this appeal is prosecuted.

The appellant urges that the case should be reversed because the court refused to direct a verdict in his favor. He urges that the evidence is insufficient to support the

verdict. It is said that the only act on the part of Dr. Norton, the appellant, was that he signed a blank affidavit which did not include even the name of appellee, was not sworn to, and that he signed it at the request of the deputy sheriff. He did this, however, after he had been told by Mr. Moore, a justice of the peace, that he knew the appellee and knew she was not guilty, and gave the appellant the names of a number of witnesses who knew the appellee, and after Moore himself had refused to issue the search warrant, but it is said by appellant that there is no evidence which would indicate malice on the part of appellant, and he quotes from and relies on the case of *L. B. Price Mercantile Co.* v. *Cuilla,* 100 Ark. 316, as follows: "To maintain an action for malicious prosecution, it must appear that there was not probable cause for the prosecution, and also that the parties were actuated by malice in instituting the prosecution. There must be both want of probable cause and malice. If the law imputed malice from want of probable cause, then there would be no distinct requirement of malice, but want of probable cause would be the sole element necessary." But immediately following the paragraph quoted by appellant is the following: "It is often said the jury may infer malice from want of probable cause. They may do so under certain circumstances, but not in all cases. Malice is in no case a legal presumption from the want of probable cause, it being for the jury to find from the facts proved, where there was no probable cause, whether there was malice or not."

The court gave to the jury at appellant's request, the following instructions:

"No. 2. You are instructed that the question of the guilt or innocence of the plaintiff, Evelyn Burnett, of having stolen the jewelry mentioned in the complaint is not involved in this case. Although you may believe she is absolutely innocent, still, if the defendant had no malice against her in instigating the prosecution, your verdict will be for the defendant.

"No. 4. You are instructed that the burden of proof is upon the plaintiff to show that the defendant induced the prosecution in this case without probable cause and with malice toward the plaintiff; and if you find that there was probable cause, or that there was no malice your verdict will be for the defendant.

"No. 9. The jury are instructed that mere dislike or ill will toward any one by another does not constitute malice in the legal sense. There must be some act done by the defendant with intent to injure the plaintiff, and such act must be wrongful, and the defendant must have been actuated at the time by an improper and sinister motive, and the act complained of must have been committed by the defendant without probable cause, legal justification or excuse.

"No. 11. You are instructed that malice is in no case a legal presumption from the want of probable cause, it being for the jury to find from the facts proved where there was no probable cause whether there was malice or not; and before the plaintiff can recover in this case she must establish by a preponderance of the evidence the want of probable cause, and that the defendant was actuated by malice in the institution of the search warrant. If she fails to do either of these, then your verdict must be for the defendant."

It therefore appears that the jury were properly instructed at appellant's request as to malice. The facts are that, besides appellant's wife, there were two other women at his house at the time appellee was charged with taking the jewelry. Besides these persons, there was a negro there, although appellant's witnesses say he did not come into the house, but the undisputed proof shows that all these persons were present, that appellee was in the room alone but for a few moments, and that appellant was told by justice of the peace Moore, who refused to issue the warrant, that appellee would not steal anything from him or anybody else, and after he was in possession of all these facts he consented to the

deputy sheriff telephoning to Helena for a blank affidavit and blank search warrant, then signed the affidavit, obtained appellee's name, and inserted it in the affidavit and warrant.

In the next case referred to, that of *Dare* v. *Harper,* 101 Ark. 137, the court said the instructions were in direct conflict, and the correct instructions did not remedy the error and render it harmless.

In the next case referred to, *Kable* v. *Carey,* 135 Ark. 137, the court reversed the case because of an instruction which contained the following: "Malice, as used here, means any unlawful or improper motive, so that if you find from the evidence that the defendants prosecuted the plaintiff not in good faith and for the purpose of vindicating the law and punishing the crime, but on account of some improper or unlawful motive, then you are instructed that the plaintiff has made out a cause of action in this respect. Malice as here used may be inferred from the want of probable cause—that is to say, if the defendants prosecuted the plaintiff without any reasonable or probable cause therefor, you would be justified in concluding that they did it maliciously." The case was reversed because of the giving of the above instruction, but in the instant case they were repeatedly told that the appellee must prove malice.

The appellant urges that instruction No. 1 given at request of appellee was misleading and improperly worded and urges the same objection to instruction No. 2 given at request of appellee. These instructions correctly stated the law, but if appellant had thought they were improperly worded he should have made specific objection; unless an instruction is inherently wrong, a general objection is insufficient.

He next complains at the court's refusal to give instruction No. 6 requested by him. This instruction deals with probable cause, and the jury were fully and correctly instructed as to want of probable cause.

In the case of *Hardin* v. *Hight,* 106 Ark. 190, the court said, in a case very similar to this: "The question was very fairly submitted to the jury upon proper instructions and their decision is conclusive upon the point that there was lack of probable cause for the institution of the proceeding. A search warrant is one of the agencies provided by law for the detection and punishment of crime and for the recovery of stolen property. Our Constitution guarantees the right to the people of the State to be secure in their persons, houses, papers and effects against unreasonable search. * * * Certainly, the putting in motion of such an agency maliciously and without probable cause is as much calculated to injure the feelings and reputation of the person against whom it is directed as if the further direction for his arrest in case the property sought should be found in his possession were contained therein."

In *Williams* v. *Orblitt,* 131 Ark. 408, this court said: "Upon the subject of malice, it may be said that, while there was no affirmative showing of malice, its existence may be inferred if there was a lack of probable cause. These questions should have been submitted to the jury, and for the error of the court in not so doing the judgment is reversed, and the cause remanded for a new trial."

The question of lack of probable cause and the question of malice were both submitted to the jury under proper instructions and the jury found against appellant. The question here is whether there was any substantial evidence to sustain the verdict. We do not pass on the credibility of the witnesses nor the weight to be given to their testimony. There was ample evidence to submit these questions to the jury, and the jury's finding is conclusive here.

The judgment is affirmed.

SCOTT *v.* STATE.

Opinion delivered June 30, 1930.

[redacted]

Nat Hughes, Roy Dunn and *Hardin & Barton,* for appellant.

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

McHANEY, J. This appeal comes from a judgment of conviction of appellant on an indictment charging embezzlement of trust funds, the property of D. B. Castleberry, in the sum of $769.49, alleged to have been embezzled on December 31, 1925, but which was not discovered until September 17, 1929.

Appellant was circuit clerk of Logan County from January 1, 1921, to December 31, 1924. He was succeeded in office by the late Ernest Ervin, who died before the expiration of his term. In 1921, an old gentleman by the name of Dr. Fountain died testate. His will named Mr. Castleberry as executor, and made this provision relative to his property: "I direct my said executor to sell all my personal property of every kind and the homestead in which I now live and draw all the money I have in the Citizens' Bank at Booneville, Arkansas, or any other place, put it all together and deposit in the circuit clerk's office in the city of Booneville, Arkansas, there to be loaned out by the said circuit clerk to the best advantage. Provided further that said clerk draw from said fund each year a sufficient sum to keep my family's graves cleaned and cared for and whatever part he might think was right for me to pay in cleaning and caring for the entire graveyard."

The executor complied with this provision of the will by depositing said sum of money with appellant as circuit clerk on April 27, 1921. It is charged that he embezzled this money. The indictment was returned January 22, 1930.

Appellant demurred to the indictment on the ground that it showed on its face that it was barred by the statute of limitations, but the court overruled the demurrer. This is the first assignment of error argued, and, if it be well taken, it becomes unnecessary to discuss other assignments.

It is conceded that the action is barred but for the provisions of act 202, Acts 1923, p. 176, which amends § 2886, C. & M. Digest, so as to read as follows: "No person shall be prosecuted, tried and punished for any other felony unless an indictment be found within three years after the commission of the offense; provided, that in cases of embezzlement of funds by an administrator, guardian or curator the limitation shall not begin to run until an accounting has been had and such administrator, guardian or curator has been ordered by a court of competent jurisdiction to pay over the funds and in other cases of embezzlement of trust funds the limitation shall not begin to run until the defalcation is discovered." The proviso in the above act is the change made in the old statute. The case was tried on the theory that the last clause in the proviso was applicable; and, since the actual discovery of the defalcation was not made until within the period of three years, the statute did not begin to run until that time, and the cause of action was not barred. Appellant contends that the fund was not a trust fund within the meaning of the statute, and that appellant was a mere gratuitous bailee of the fund and not a trustee. Certainly he was not a trustee of an express trust. *United States Fidelity & Guaranty Co.* v. *Smith,* 103 Ark. 145; *Arnold* v. *Stephens,* 173 Ark. 205. But whether the funds were trust funds, whether appellant was a trustee or bailee, we are of the opinion that

the statute of limitations began to run January 1, 1925, when his successor took office, and that the cause of action was barred three years thereafter. The will provided that the fund be deposited in the "circuit clerk's office in the city of Booneville, Arkansas." Appellant happened to be the circuit clerk at the time. It was not to be deposited with appellant as an individual, but with the circuit clerk. He held the fund as clerk, and when he went out of office, it immediately became his duty to account to and settle with his successor in office as clerk. If he failed to do so, it became immediately discoverable that he had not done so, and any person interested could have known the facts by simply inquiring of the clerk. Incumbents in the clerk's office come and go, but the office of circuit clerk, like Tennyson's brook, goes on forever. Apparently, no person made inquiry until after the death of Mr. Ervin, and then not until September 1, 1929, more than four years after appellant had ceased to be the clerk. Suppose no inquiry had been made for ten or even twenty years, could it reasonably be contended that the statute did not begin to run until inquiry was made? We think not.

The judgment will be reversed, and the cause remanded with directions to sustain the demurrer, as the indictment shows on its face it is barred.

STEWART *v.* CALIFORNIA GRAPE JUICE CORPORATION.

Opinion delivered July 14, 1930.

Curtis E. Garner, for appellant.

Isaac Riff and *Sam M. Wassell,* for appellee.

SMITH, J. This is an appeal from an order of the Pulaski Circuit Court setting aside a judgment which appellant has recovered against appellees, the order being made some months after the expiration of the term at which the judgment was rendered. It was alleged in the complaint upon which the order was made that the judgment had been rendered without service of process, and that a valid defense existed against the cause of action sued upon.

It was answered, on the other hand, that the cause of action sued on was meritorious, and no valid defense existed, and that before the rendition of the judgment appellee (the judgment defendant) had actual knowledge of the pendency of the suit and had in fact been served with process.

The original complaints alleged that appellee was a foreign corporation, doing business in this State, and that service had been properly had by delivering a copy of the summons to the Auditor of State, and that the summons so served had been sent and delivered by registered mail at appellee's home office by the Auditor of State. It was also insisted that service of summons was had on Ed Skinner as agent for service of appellee, Skinner being the agent with whom the contract was negotiated upon which the cause of action was based.

In this respect the instant case is unlike that of the *Order of Railway Conductors of America* v. *Bandy,* 177 Ark. 694. In that case there was an entire absence of service, and it was apparent, from the face of the record,

that no service could be acquired. It affirmatively appeared in that case that the defendant insurance order had not domesticated itself, and there was no attempt to acquire jurisdiction by seizing any of its property in this State. We therefore held that, as no jurisdiction had been acquired, or could be, a writ of prohibition should be awarded, and the writ was granted.

Here it was alleged that the foreign corporation had been doing business of an intrastate character in this State, and that its agent who negotiated the contract out of which the litigation arose had been served as such. *Fort Smith Lumber Co.* v. *Shackleford,* 115 Ark. 272.

A *prima facie* case was therefore made that service had been secured on the corporation before the rendition of the judgment. It is not to be assumed that the trial court rendered judgment upon the mere showing that the defendant was apprised of the nature and pendency of the suit, and no such allegation is made. That should not have been done, and there is nothing in the record to indicate that it was done.

On the contrary, service had been apparently had on the person designated for that purpose. There was an allegation that the defendant corporation was doing business in the State, and, if this was true, and the corporation had not, in fact, designated an agent upon whom service of process might be had, then service could have been had upon the Auditor of State under § 1 of the Acts of 1927, page 707, and the return of the sheriff shows that such service was had. The statute referred to makes it the duty of the Auditor of State, "immediately upon receiving any such summons, or other process, to transmit the same to the foreign corporation so sued, by registered mail, at its home office, or other place where service of process upon such foreign corporation may be had." At the trial from which this appeal comes the showing was made that the copy of the summons served upon the Auditor of State was sent by registered letter to the above corporation at its office in St. Louis, and there

delivered, and the usual registry receipt returned. The defendant corporation therefore not only had actual knowledge of the pendency of the suit, but knew the *prima facie* showing, which could and probably would be made, and which was later made, that summons had been served in the manner provided by law, to-wit, upon the Auditor of State under the allegation that the corporation had been doing business in this State.

We do not pass upon the sufficiency of the testimony to sustain the service in either manner stated, for the reason that appellee admits that it was advised of the pendency of the action and knew that a *prima facie* showing of service would be made, but, thinking the service insufficient, ignored it, and it is not contended that the information was not obtained in ample time for appellee to have made defense, had it been thought necessary to do so.

Appellee's president denied the receipt of the registered letter from the Auditor of State, but admitted the receipt of a letter from the attorney for appellant, enclosing a copy of the summons, before the rendition of the judgment. However, the testimony clearly establishes the receipt of the registered letter.

In the case of *State* v. *Hill,* 50 Ark. 458, 8 S. W. 401, COCKRILL, C. J., said: "One who is aggrieved by a judgment rendered in his absence must show, not only that he was not summoned, but also that he did not know of the proceeding in time to make defense, in order to get relief in equity," and upon the authority of this case it has since been consistently held by this court that, if one knows he has been sued upon a cause of action in ample time to interpose his defense, yet fails and refuses so to do, he will not be permitted to reopen the case to interpose a defense which he could and should have made before the judgment was rendered. The reason for the rule is that if one wishes to invoke the jurisdiction of the court at all, he should do so seasonably, and not wait until the court had pronounced a judgment which would not have

been rendered had the showing been made that no service had in fact been obtained. *Woods* v. *Quarles,* 178 Ark. 1158, 13 S. W. (2d) 617; *Karnes* v. *Ramey,* 172 Ark. 125, 287 S. W. 743; *First Nat. Bank of Manchester* v. *Turner,* 169 Ark. 393, 275 S. W. 703; *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575; *Fore* v. *Chenault,* 168 Ark. 747; *C. A. Blanton Co.* v. *First Nat. Bank,* 175 Ark. 1107; *Lambie* v. *W. T. Rawleigh Co.,* 178 Ark. 1030; *Moore* v. *Price,* 101 Ark. 142.

The case of *Hunton* v. *Euper,* 63 Ark. 323, 38 S. W. 517, was a proceeding under subdivision 7 of § 4197, Sandels & Hill's Digest (now § 6290, Crawford & Moses' Digest) which provides that a judgment may be vacated by the court in which it was rendered after the expiration of the term at which it was rendered. "Seventh: For unavoidable casualty or misfortune preventing the party from appearing or defending," and it was there held that the rendition of a judgment without service of process was an unavoidable casualty or misfortune within the meaning of this statute, and the judgment was vacated for want of service, but it was not shown in that case that the judgment defendant had actual knowledge of the suit.

Here it is shown that the judgment defendant was apprised of the pendency of this suit in ample time to have made the defense which it now seeks to interpose, but it did not do so, and, having suffered judgment to go by default, it will not now be permitted to make the defense which could and should have been made before the judgment was rendered.

The judgment of the circuit court setting aside the default judgment will be reversed, and the cause will be remanded with directions to vacate the judgment here appealed from, thus leaving the default judgment in full force and effect.

KIRBY, J., dissents.