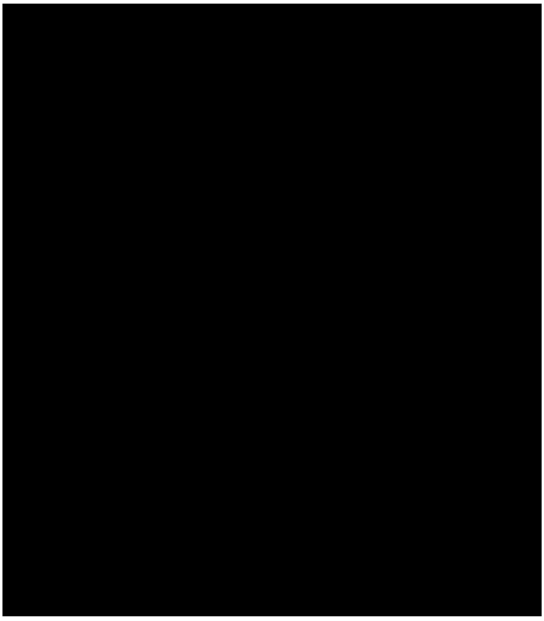

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MARSH *v.* STATE.

Opinion delivered January 26, 1931.

Trimble, Trimble & McCrary and *Chas. A. Walls,* for appellant.

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

KIRBY, J. This appeal is prosecuted from a judgment of conviction of appellant for murder in the second degree with a sentence of 8 years in the penitentiary upon an indictment charging him with murder in the first degree for the killing of one Roy Phillips.

The evidence on the part of the State showed that Roy Phillips and one Hartford Harris were on the 5th

day of August, 1930, walking to Beebe from Roy Phillips' home in Lonoke County. On the way Harris suggested that they cut across "these woods," saying that they might find a drink, that he had heard that Charlie Marsh had a loading place in the woods, and they might find something. As Harris and Phillips were walking through the woods in a northwesterly direction, a shot was fired which barely missed Harris. They turned and ran in the opposite direction and five or six more shots were fired. At the last shot Roy exclaimed: "Hart, I'm killed," ran about 30 steps and fell. Harris upon looking around saw appellant Marsh not 50 yards away with a gun in his hand. Harris stated the first two shots were fired rapidly, the others not so quickly, while they were running southeast side by side. When Phillips was hit, witness "angled in close to him," and he took two or three hard gasps and died where he fell. Witness looked back and saw Marsh coming, and said, "As I looked back and saw him, I squatted down by Roy and when I saw he was going to come on up there I raised up before he got there." Marsh came up within 5 or 6 steps. He had a gun which was pointed directly at witness and said: "Who is it?" Witness told him it was Roy Phillips. Marsh put his gun in his pocket and said: "Who done it?" Witness replied: "You are the only man I have seen." Marsh stood around a little bit, walked around to the other side and didn't come near Roy. Marsh stated that he was on the porch with his wife and Finis Bland and Emmett Hammond and heard the shots and came running over. Witness saw Marsh just as Roy fell. It was about 8 or 10 seconds until Marsh came up within 10 or 15 feet of him. Marsh had come from the northwest. Witness later found evidence of three stills in the woods. Witness said he was acquainted with Charlie Marsh and knew where he lived. He saw a still owned by Marsh in operation sometime in November or December of last year, but had not been around his premises since he was there in November or December squirrel

hunting, when Marsh gave him a drink of whiskey. He had not seen a still in operation by Marsh since then.

Appellant testified that he owned a farm of 163 acres in Butler Township, where he had lived since 1903 with the exception of a few months; said on the morning of the shooting, he went to Beebe with Will Marsh, leaving home around 9 or 10 o'clock and returning about 11:30 or a little later, discovered they had lost a sack of shorts, turned around and went back to find it. Coming back he drove his car into the shed, and he and Will Marsh had a cold dinner in the house. He watered some of the stock, and they went down to the lower place to look over the crop, and on the way stopped for a drink of water where the women were washing near the field. They were in the field for some little time, and, upon starting back, the women were leaving from the washing place, and he and Will stopped again and got a drink and started on towards the house. They were something like 300 yards from the house when the shooting and hollering began. Witness ran into the woods where the noises came from and saw Hartford Harris and Roy Phillips lying there and said: "Hartford, what is the matter?" He said "Somebody has killed Roy Phillips." I said: "Who in the world done it?" He said: "I don't know; I haven't seen any one." I said: "Where was he shot at?" and he showed me. Witness did not examine the body at all, couldn't see any breathing, and thought he was dead. Harris said: "Charlie, what will we do?" and I said: "I don't know; I'll go get my car and we'll take him home." He said: "How long will you be gone?" and I said: "Just as quick as I can make it." Witness ran out to the road coming out ahead of Will Marsh, to whom he shouted telling him what had happened. When he reached the house, his wife asked "what had happened" and he told her "that somebody had killed Roy Phillips." She told him not to take the body home yet, but "to get the law." He went on and picked up Luther Gartrell, a justice of the peace, who was teach-

ing in the schoolhouse, and some of the other neighbors near there, and they went to the place where the killing occurred. He said Mr. Gartrell asked Hartford Harris who did it, and Harris replied: "I don't know. I have no idea who did it." Witness denied having a pistol in his hand when he came up to where the boy was lying on the ground, and that he had stated that he was on the front porch of his home when the shooting occurred; explained that, when he had answered Stokes and the other witnesses who testified, he said he was on the front porch at the time of the shooting, that he understood them to be asking, not where he was, but where the others were, and told them that they were on the front porch. He denied that he had given Harris a drink in November last; said he was a member of the school board and had refused to hire Harris as a teacher because some of the parents objected to him, and that Harris was not on speaking terms on account of this and became offended with him when he told him that they had already employed a teacher for the summer.

Several witnesses testified that they had been upon or close by the road at the time when witness Harris and Phillips would have passed by, if they had come as Harris stated they had traveled, and did not see them.

No complaint is made of the instructions, but it is claimed that the court erred in allowing prejudicial remarks made by counsel assisting the prosecuting attorney in the opening of the case and in the closing argument, that incompetent testimony was introduced relative to the operation of the still by appellant in November before the shooting and the ownership of a still found on his premises after the killing in August.

No error was committed by the court in the admission of the testimony tending to prove the operation of the still by appellant, since it tended to show a motive for the shooting that resulted in the death of Roy Phillips. In *Stotts* v. *State,* 170 Ark. 188, 279 S. W. 364, it was said (quoting syllabus): "All evidence is admissible

which tends to prove the issue, and no facts are forbidden to be shown, except such as are incapable of affording any reasonable presumption or inference in elucidation of the matters involved in the issue."

In *Stone* v. *State,* 162 Ark. 154, 258 S. W. 116, the court recognized the general rule that evidence of a distinct offense is inadmissible to prove another offense, and the exceptions thereto are stated that such testimony was admissible when necessary to fix the intent of the accused or to prove the motive for the offense charged against him, notwithstanding its admission disclosed other offenses for which he might be subject to indictment. It was said there: "The exceptions to the general rule as to the admission of evidence of collateral crimes, when the evidence of the extraneous crime tends to identify the accused as the perpetrator of the crime charged, or to show the intent with which the defendant committed it, is as well settled as the general rule itself."

No error was committed in the statement of the case made by the special prosecuting attorney, nor in the closing argument complained of. The statement in the closing argument was made in reply to the argument that the appellant and his family had farmed a goodly number of acres of land well, which would indicate that he was not a bootlegger but a substantial citizen; the attorney saying that the defense had a right to introduce testimony showing whether the defendant's reputation was good or bad, and that the State was without right to attack his reputation unless this was done. Upon objection the court told the jury that a person's reputation is presumed good until proved otherwise; that in his opinion only the defense could bring his good reputation in issue, but that was not an issue in the case, and the court stated he only permitted the argument in answer to what had been said by the attorney for the defense; and that the jury are to be governed by the testimony and law in the case. *Lentz* v. *State,* 169 Ark. 31, 272 S. W. 847.

Neither was error committed in the argument that defendant was in possession of the land where the still and mash were found. The court, upon objection to the testimony, told the jury that the fact that the land was not fenced did not necessarily exclude the defendant's being in possession of it, the defendant having denied that he was in possession, but other witnesses testified that he used it as a pasture at the time of the killing, leaving it a question for the jury to decide.

If the statement of Hartford Harris, the only witness to the killing, was true, and the jury evidently believed it was, as they had the right to do, the appellant intentionally and wantonly fired at these boys crossing the wooded lands in front of his house without provocation or any necessity for protecting himself or his property at the time, unnecessarily killing the decedent, Roy Phillips, without justification or excuse. The evidence would have supported a verdict of conviction of the higher offense, and the case was submitted to the jury on correct instructions. After a careful examination of the record, it is found to be free from prejudicial error, and the judgment is accordingly affirmed.

ROBERTS *v.* OWEN.

Opinion delivered January 26, 1931.

Ingram & Moher, for appellant.

W. A. Leach, for appellee.

KIRBY, J., (after stating the facts). Appellant urges that the court erred in allowing the redemption under the terms of the five-year statute of limitations, (§§ 5642-44, C. & M. Digest), and in not holding the right of redemption barred in two years under the new statute, § 2, act 359 of 1925, which reads as follows:

"Hereafter all persons shall have the right to redeem from the sale for taxes of road, drainage, levee or other improvement districts at any time within two years from the date when such lands are sold by the commissioner making the sale and not thereafter; provided, that the provisions of this section shall not apply to property which shall have become delinquent or have been forfeited prior to the passage of this act." Although this act was in force when the foreclosure suit was brought on the 6th day of May, 1927, and conceding without deciding that it relates to sales of lands within special improvement districts in cities and towns, the majority is of opinion that it has no application here, since it is expressly declared in the act: "That the provisions of this section shall not apply to property which shall have become delinquent or have been forfeited prior to the passage of this act." The terms "delinquent" and "forfeited" have a well-defined meaning in our taxation statutes, §§ 5673 and 6695, C. & M. Digest; and it was evidently the intention of the Legislature to except from the provisions of this act, which limits the time for redeeming such property to two years, both lands that had become delinquent or had forfeited prior to the passage thereof, leaving the time of redemption 5 years as fixed by the statute in force at the time the lands became delinquent or were forfeited. The disjunctive conjunction "or" is used in its ordinary meaning and acceptation (Webster's New International Dic-

tionary, 1925 ed.; *Pappano Hirst Club* v. *Bryan,* 52 A. L. R. 51; 29 Cyc. 1502), and is not to be construed to mean "and" in arriving at the legislative intention. If it were not so, the Legislature would have excepted only forfeited lands from the provisions of the new statute.

The court therefore correctly held that the owners of the lots were entitled to redeem within five years from the time of the sale of the forfeited lands for the assessments due for the years before the passage of the new act; and, even if it be held that the new act repeals the old, so far as the time of redemption is concerned, since the sale was made for both taxes delinquent for the years before the passage of the last act and for the years that they were delinquent after the passage of the new act, if it be held to repeal the old act in redemption of the lands, the owners would still be required to pay the amount of all the taxes for which the lands were sold, because they were delinquent and subject to sale for the years both before and after the passage of the new act.

The decree is correct therefore if the owners are required to pay all the taxes for which the lands were sold in the redemption thereof; but it is not clear in that respect, and the cause is therefore remanded, with directions to modify the decree so as to clearly impose that requirement. It is so ordered.

AMERICAN SOUTHERN TRUST COMPANY *v.* VESTER.

Opinion delivered January 26, 1931.

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E. L. Holloway, for appellant.

F. G. Taylor and *C. T. Bloodworth,* for appellee.

KIRBY, J., (after stating the facts). The testimony shows that appellant was the owner of the note at the time of the filing of the petition in bankruptcy which was listed as already set out. The Bankruptcy Act provides: (§ 17, 1 Collier on Bankruptcy, 13 Ed., p. 591; and 11 U. S. C. A., § 351: "A discharge in bankruptcy shall release the bankrupt from all his provable debts, except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had actual knowledge or notice of the proceedings in bankruptcy." In *Steele* v. *Thalheimer,* 74 Ark. 516, 86 S. W. 305, this court held a discharge valid where the correct name of the creditor was given in the schedule, although his post-office was incorrectly given as Little Rock, when he in fact lived at Clinton and had received no notice of the bankruptcy proceedings on that account. Appellant claims he comes within the exception No. 3 in § 17 of the Bankruptcy Act providing the discharge shall not release the bankrupt from provable debts, except such as "(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had actual knowledge or notice of the proceedings in bankruptcy." Although the appellant company, the American Southern Trust Company, was not named as a creditor in the schedule, which did show correctly the name and address of the bank to which the note was given, that it had been transferred to the Southern Bank & Trust Co., Little Rock, Arkansas, and was then in the hands of E. L. Holloway, of Corning, Arkansas, for collection, notice was sent to all parties as listed. This was a sufficient compliance with the statute requiring the name of the creditor to be duly scheduled if known to the bankrupt, its purpose being that notice should be given to him of the bankruptcy pro-

ceedings. The debt was described as having been given the Bank of Success, "assigned to Southern Bank & Trust Company (note), Little Rock, Arkansas, (in the hands of E. L. Holloway, Corning, Arkansas, for collection) $610." Notice was given to all these parties and to appellant's attorney, who had the authority to collect the note, and had already demanded payment. This notice was given to the attorney and, the knowledge acquired while acting for the principal, the creditor, relating to a matter within the scope of his agency, and the agent is presumed to have communicated it to his principal, as it was his duty to do. The discharge would have been valid and effective to release the bankrupt from the payment of this note, had he scheduled it as "unknown." The name of the creditor, although incorrectly given, could easily have been ascertained from the whole description given, and the notice to appellant's attorney, having the note in his possession for collection, of the bankruptcy proceedings, whose duty it was to communicate it to his principal, was notice to his principal as effectually as though it had come directly to it. There is no allegation or intimation that the failure to give the name of the creditor correctly was intentional or fraudulent.

A careful consideration of the whole case discloses that the court did not err in holding that the discharge in bankruptcy was effectual to release appellee from the payment of the debt as scheduled, and the judgment is therefore affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* FINE.

Opinion delivered January 26, 1931.

Thomas B. Pryor and *Thomas B. Pryor, Jr.,* for appellant.

Starbird & Starbird, for appellee.

MEHAFFY, J. On the twenty-fifth day of January, 1930, appellee filed suit in the Crawford Circuit Court to recover damages alleged to have been caused by the negligence of the appellant.

Appellee delivered a carload of peaches to appellant on the 29th day of July, 1929, for shipment and delivery to White & Allen at Joplin, Mo. The peaches had been sold by appellee to White & Allen, f. o. b. Alma, Arkansas, and it was alleged, if they had been delivered in good condition, they would have been taken by White & Allen at the contract price. It was alleged, however, that appellant was negligent in that it did not properly refrigerate the peaches and did not carry them with due diligence, but delayed the shipment two days, and did not deliver the same in good condition, but delivered them in a bruised, mashed, specked, and rotten condition; that, by reason of the alleged negligence of the appellant, appellee was compelled to sell the peaches at a loss of $154.80, and he sues for this amount of damages.

There was a verdict and judgment for the amount sued for, and appellant filed motion for new trial, which was overruled, and this appeal is prosecuted to reverse said judgment.

At the request of appellee the court gave to the jury the following instruction No. 1: "You are instructed that a common carrier, in the absence of an expressed stipulation in the contract to the contrary, is responsible as insurer of goods received for shipment against all loss or damage, except such as is caused by the act of God or

the public enemy or from inherent defects or weaknesses in the commodity shipped; that when a shipment of perishable goods is received for transportation, it must exercise ordinary care in the adoption of such means of transportation in furnishing such equipment as will accomplish the purpose.''

This instruction was erroneous and should not have been given. In the first place, it tells the jury that the appellant is responsible as an insurer. This was not correct. The suit was based on negligence, and the burden was upon appellee to show by the evidence that the appellant was guilty of negligence causing the damage. In the next place, the instruction tells the jury that the carrier, when it receives a shipment of perishable goods for transportation, must exercise ordinary care in the adoption of such means of transportation, must furnish such equipment as will accomplish the purpose. This part of the instruction was erroneous because there is nothing either in the pleadings or the evidence tending to show that proper equipment was not furnished.

Instruction No. 3 should not have been given in the form it is, because it tells the jury it was the duty of the appellant to furnish a properly constructed refrigerator car, etc. There is no complaint about failure to furnish a properly constructed refrigerator car, and there is no evidence that a properly constructed car was not furnished.

Whether the carrier was negligent either in failure to properly ice the car or negligent in delaying the shipment are questions of fact to be determined by the jury from the evidence. We do not set out the evidence because the judgment will have to be reversed for the giving of the erroneous instructions above mentioned and the cause will have to be tried again.

This suit was based on the alleged negligence of the carrier.

In suits for damages due to negligence the shippers must prove the negligence in order to recover. *St. Louis-*

San Francisco R. Co. v. *H. Rouw Co.,* 174 Ark. 1, 294 S. W. 414; *American Ry. Exp. Co.* v. *H. Rouw Co.,* 174 Ark. 6, 294 S. W. 416; *H. Rouw Co.* v. *St. Louis-San Francisco R. Co.,* 172 Ark. 881, 290 S. W. 936; *Chicago R. I. & P. Ry. Co.* v. *Geo. E. Shelton Produce Co.,* 172 Ark. 1017, 291 S. W. 428; *H. Rouw Co.* v. *Amer. Ry. Express Co.,* 173 Ark. 84, 291 S. W. 1001; *Chicago R. I. & P. Ry. Co.* v. *Robinson & Co.,* 175 Ark. 35, 298 S. W. 873.

We said in the last case cited, in discussing an instruction very similar to instruction 1 in the instant case: "This instruction would permit a recovery without any negligence. And, since we hold that the action is based on negligence and negligence must be proved, we think that, instead of giving this instruction, the court should have instructed the jury that plaintiff would have to show that the injury or damage was the result of the negligence of the carrier." We also held in a more recent case that it was incumbent upon the shipper to show loss, damage, or injury due to the delay, or damage by carelessness or negligence of the company, and that the burden was upon the shipper to show that the damages were caused by the negligence of the carrier. *St. Louis-San Francisco Co.* v. *Burford,* 180 Ark. 562, 22 S. W. (2d) 378.

We deem it unnecessary to discuss the other questions that are discussed by counsel because the suit is based entirely upon the negligence of the carrier, and when the case is tried again the burden will be upon the shipper to show that the damage was caused by the negligence of the carrier, and this will be a question of fact for the jury.

For the error in giving the instructions above mentioned, the judgment is reversed, and the cause remanded for a new trial.

EDGEMAN *v.* STATE.

Opinion delivered January 26, 1931.

Brock & Williams, for appellant.

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

MEHAFFY, J. The appellant was indicted, tried, and convicted in the circuit court of Franklin County of the crime of seduction.

Hazel Maynard testified that she was eighteen years old, the daughter of W. R. Maynard, and lived in the Ozark district of Franklin County; that she had known George Edgeman for four or five years; that he began keeping company with her about four years ago, and ceased keeping company with her in September, 1929; that they were engaged to be married some time in 1928.

Witness' people objected to her keeping company with Edgeman. After they became engaged, witness submitted to have sexual intercourse with him. The first time was in March, 1929, and they had been engaged about three months. She would not have had intercourse with him if they had not been engaged to be married. She testified that she did not submit readily; that he begged her a good many times before she submitted. Has had intercourse with him at other times, the last time being in September, 1929. She became pregnant and now

has a child. It was four months old the 21st of October. They would meet at different places.

About a month after she found out she was pregnant, she told Edgeman, and he said he would not marry her because her folks would not let them stay married. Witness then told him they could be married for a while, and that would keep her from being disgraced, and he said he would.

After that he said he wouldn't marry no damn woman; he said he had three that way, and they'd be raising hell if he married her. He refused to marry witness.

Witness' folks did not want her to marry him. She begged him to marry her, and he would not do it.

A number of witnesses testified about the appellant and prosecuting witness being together on several occasions. Appellant, however, does not abstract this testimony.

The appellant George Edgeman, testified that he was engaged to marry Hazel Maynard, but said they never did because he never could get enough money; saw her two or three times each month; had intercourse with her and had never refused to marry her; that he tried to get her to marry him after the baby was born, but she told him he was one day too late. Her folks would not let him keep company with her; had to slip around to meet her. She told appellant that her folks would kill them if they married. Witness testified he had been willing to marry her all the time, and when arrested told Mr. Hayden he was ready to marry her any time. When they were first engaged they did not marry because he did not have any money and because she said her folks would kill them both.

Appellant was convicted and sentenced to one year in the penitentiary. He prosecutes this appeal to reverse said judgment.

Appellant concedes that the record does not show the saving of exceptions. His motion for a new trial alleges

that the verdict is contrary to the evidence, and that, subsequent to the verdict, the prosecuting witness had made the statement that George Edgeman had tried to get her to marry him and go away with him, but she said she was afraid her father would kill both of them, and she refused to marry, and that it was not George's fault. Two witnesses made affidavit that they heard prosecuting witness make the above statement. The prosecuting witness, however, testified that her folks objected, but that she would have married him but he refused to marry her. And the appellant himself testifies that the reason he did not marry the prosecuting witness was that he did not have the money, and that she said that her folks would kill them both. It appears therefore that the appellant himself testified that the prosecuting witness made the same statement to him that it is alleged she made to the persons whose affidavits were filed in support of the motion for a new trial. There is nothing in the newly discovered evidence that would have any bearing at all on the case except it might impeach the credibility of the prosecuting witness.

In discussing this question this court recently said: "It is finally insisted that error was committed in refusing to grant a new trial on account of newly discovered evidence. This evidence was to the effect that Miss Ashley had stated that she would get money from appellant before the trial. As this testimony tended only to impeach the credibility of the witness, the court committed no error in refusing to grant a new trial on that account." *Snetzer* v. *State,* 170 Ark. 175, 279 S. W. 9.

This court has often held that as a general rule newly discovered evidence that goes only to impeach the credibility of a witness is no ground for a new trial. *Morris* v. *State,* 145 Ark. 241, 224 S. W. 724.

It is earnestly contended by appellant that there is no evidence that Hazel Maynard was a single, unmarried person, and that this, being one of the charges in the indictment, must be supported by proof. Appellant calls

attention to a number of cases in support of this contention. The cases relied on by appellant do not, we think, decide the question involved here. It may, however, be conceded that the allegation in the indictment that Hazel Maynard was a single and unmarried female person must be proved.

There is some conflict in the authorities as to the character of proof required, some courts holding that, the prosecuting witness being the only person who could know positively whether she was married, it is necessary for her to testify that she is unmarried. Other courts hold that this fact or statement in the indictment may be proved by circumstantial evidence. This court has held that the fact that the prosecutrix was unmarried may be shown by circumstantial evidence. *Smedley* v. *State,* 130 Ark. 149, 197 S. W. 275. See *Cook* v. *State,* 102 Ark. 363, 144 S. W. 221; *Nichols* v. *State,* 92 Ark. 421, 122 S. W. 1003.

She testified that she was eighteen years old, that her child was about four months old, and that she had known appellant four or five years; that he began to go with her about four years ago and ceased keeping company with her in September, 1929. It appears from the undisputed evidence that she was only about fourteen, probably not that old, when appellant first began to go with her. It is also undisputed that she lived with her father, who was W. R. Maynard; that she was known as Hazel Maynard. Then she and appellant both testified that they were engaged to be married, and it is not disputed that there was a promise of marriage and that they had intercourse. The testimony is in conflict as to the reason they did not get married, but that is immaterial because the appellant himself says that it was because the prosecuting witness said her father would kill them if they did.

The appellant testified that something like two years before the trial he worked for the Maynards, and that he began to court the girl about a month before he started

working there. Appellant does not dispute the testimony of the prosecuting witness that he had known her four or five years. He lived in the same community and worked for her father. This evidence shows that they had known each other since the girl was thirteen or fourteen years old; that they were engaged to be married, and, according to appellant's testimony, the only reason they did not get married was because they did not have money enough, and the girl said her father would kill them.

Our statute provides: "Every male who shall have arrived at the full age of seventeen years, and every female who shall have arrived at the age of fourteen years, shall be capable in law of contracting marriage; if under these ages, their marriage is void." Crawford & Moses' Dig., § 7073.

If they had known each other five years, the girl was only thirteen, but if only four years she was only fourteen, and could not have married lawfully before that time. The appellant and prosecuting witness therefore both knew that she was an unmarried girl, and the circumstances and evidence above set out sufficiently support this allegation in the indictment.

"On a trial for the seduction of an unmarried woman, evidence which shows that the woman lived with her father and bore his name, that she had received the addresses of the defendant for more than three years, and that a marriage engagement existed between them when the crime was committed, *held* sufficient to warrant the jury in finding that the woman was unmarried." *State* v. *Waterman,* 75 Kan. 253, 88 Pac. 1074; *State of Iowa* v. *Heatherton,* 60 Iowa 175, 14 N. W. 230; *Morgan Lewis* v. *People,* 37 Mich. 518; *Bailey* v. *State,* 36 Tex. Cr. 540, 38 S. W. 185.

No objections were made to the instruction given by the court, and there is no evidence in the record that the prosecuting witness was under duress at the time she gave her testimony, and this was not made one of the grounds in appellant's motion for new trial.

There is ample evidence to support the verdict, and the judgment of the circuit court is therefore affirmed.

[redacted]

ABERNATHY *v.* HARRIS.

Opinion delivered January 26, 1931.

[redacted]

P. G. Matlock and *T. D. Wynne,* for appellant.

Brouse & Brouse, for appellee.

MCHANEY J. On December 28, 1927, there were delivered to C. C. Varnell two notes of $1,750 each, one due August 15, 1928, and the other January 1, 1929, and a real estate mortgage to secure same on lots 3, 4 and 5 in the northwest quarter of section 3, and lot 4 in the northeast quarter of section 4, township 6 south, range 15 west, purporting to have been signed and properly acknowledged by appellees, T. M. Harris and Lou Harris, his wife. This mortgage was filed for record January 14, 1928, and was recorded. Two days later, January 16, Varnell sold and assigned said notes, with the lien of said mortgage, to appellant for a valuable consideration. Thereafter, on June 23, 1928, appellees, T. M. and Lou Harris, executed a mortgage on the same and other lands

to appellee, the Grant County Bank, to secure an indebtedness due to it. A portion of the land covered by both mortgages constituted the homestead of the mortgagors. The notes held by appellant not having been paid when due, he instituted foreclosure proceedings to enforce payment, making the Grant County Bank a party. Mrs. Harris and the bank defended on the ground that she did not sign the mortgage, nor acknowledge same, and that, being on her homestead, it was void. The bank filed a cross-complaint against Harris, his wife, and appellant, claiming its mortgage was the first lien and asking a foreclosure. The court found that Mrs. Harris signed appellant's mortgage, but that she did not acknowledge same, and that it was invalid in so far as it affected the homestead of the grantors. The bank's mortgage was foreclosed and declared prior to appellant's mortgage on that part of the land covered by both mortgages constituting the homestead.

We think the court erred in so holding. The decided preponderance of the evidence supports the court's finding that Mrs. Harris signed the notes and mortgage held by appellant, and we think that the preponderance of the evidence shows that she properly acknowledged same over the telephone. While she denied that she signed appellant's mortgage, she is contradicted by her husband, by her own admissions and by a comparison of her admitted signature with that on said mortgage. The notary before whom the acknowledgment was taken testified that he had known Mrs. Harris well for 25 or 30 years, was familiar with her voice, and that on the morning of December 28, 1927, she called him on the telephone and told him her husband had "some papers for you to fix up, and you go ahead and fix them." Some time thereafter Mr. Harris called and wanted the deed acknowledged, which was done. He was very positive that it was Mrs. Harris to whom he had talked over the 'phone, that he knew her voice; that she called him "Bythum," saying, "Is that you, Bythum?" and that Mrs. Harris and a half

aunt of his were the only persons who called him by that name. Mrs. Harris denied this, but we think the notary's testimony is entitled to the more weight, in view of her interest and her denial of her signature to the deed. Acknowledgment taken over the telephone, under the circumstances in this case, is good. In *Wooten* v. *Farmers' & Merchants' Bank,* 158 Ark. 179, 249 S. W. 569, such an acknowledgment was held to be good. The mortgage on its face purports to convey the homestead right and to relinquish that of dower. The notary's certificate of acknowledgment is regular on its face and conforms to the statute. In the above cited case, we quoted from *Donahue* v. *Mills,* 41 Ark. 421, the following: "It is now the settled doctrine of this court, as laid down in the opinion by Chief Justice English, in *Meyer* v. *Gossett,* and we still think the only safe doctrine, that, whilst a wife may, against all the world, show that she never made any acknowledgment at all, and that the certificate is either a forgery or an entire fabrication of the officer, yet, if she has actually made some kind of acknowledgment before an officer qualified to take it, his certificate will be conclusive as to the terms of the acknowledgment, and the concomitant circumstances, in favor of all persons who, themselves innocent of fraud or of collusion to deceive or influence her, have taken the instrument on the face of the certificate. 38 Ark. 377." See also *Clifford* v. *Federal Bank & Trust Co.,* 179 Ark. 948, 19 S. W. (2d) 1026, where we held that, where there is an appearance before the officer and an acknowledgment of the instrument in some manner, the certificate of the officer is conclusive of every fact appearing in the certificate, and that evidence as to what transpired at the time the acknowledgment was taken and certified was inadmissible to impeach the certificate except for fraud or imposition in obtaining the acknowledgment where notice of the fraud or imposition is brought home to the grantee.

We are therefore of the opinion that appellant's mortgage was valid, and that the lien thereof is prior and

paramount to that of appellee, Grant County Bank, on the land described in appellant's mortgage. The decree will be accordingly reversed, and the cause remanded with directions to enter a decree of foreclosure in accordance with this opinion.

UNION CENTRAL LIFE INSURANCE CO. *v.* MENDENHALL.

Opinion delivered January 26, 1931.

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Hunter & Hunter and *D. K. Hawthorne,* for appellant.

Oliver & Oliver and *E. L. Holloway,* for appellee.

BUTLER, J., (after stating the facts). The original premium card was the best evidence, and there was no proper foundation laid for the introduction of a copy. It had no entries relating to any other policy or to any other business transaction; it was not affixed to any other record, but was a separate card which could be easily taken from the appellant's files and conveniently brought into the court, and no reason is given why this was not done. The court correctly held the photostatic copy inadmissible. That it was a photograph and less liable to imperfectly depict the original than a copy transcribed ordinarily would, does not alter the general rule. 10 R. C. L., p. 910, § 65. One of the copies offered in evidence was of a letter written from the office of the general agent for Arkansas at Little Rock to the assured and appellee bank, mailed to the latter and explaining the check for $10.52 inclosed. This letter advised that the policy had been canceled for failure to pay the premium due April 20, 1928, and that under the terms of the policy the earned dividend at the time of the cancellation was to be paid in cash to the assured, and, if the addressees did not want to continue the policy, to indorse and collect the check. The fact that the check was later indorsed by, and its proceeds paid to, the drawees made this letter highly important, but the copy was not identified. The witness only knew that a paper was in the files of appellant company in Cincinnati which purported to be a copy of a letter written by the State agent to the assured and the appellee bank; that agent was in Little Rock and there was no reason given why he had not been called upon to identify it. Also, there was no proof offered that the adversary party had been called upon to produce the original and had refused or failed to do so, or that the copy offered was a "carbon copy" of the original.

Another copy offered was of a letter written by appellant company's secretary, addressed to the assured at Rose Hill, Illinois, advising of the cancellation of the policy. Copies of other letters material to the defense of the appellant were offered and refused. All of these

as to identification and notice to the adversary for production are on the same footing as that first discussed. Therefore, the court properly refused to permit their introduction as identification and notice for the production of the originals was necessary to authorize the introduction of the copies. *Jones* v. *Robinson*, 11 Ark. 504; *Heard* v. *Farmers Bank*, 174 Ark. 194, 295 S. W. 38.

■ There were, however, two original documents taken from the files of the company and offered in evidence which were relevant to the issue and which were properly identified: the receipt for the premium of April 20, 1928, sent to the State agent for delivery to the assured on payment of the premium which was returned with the advice that the premium had not been paid, and the check for the dividend due on April 20, 1928, payable to the assured upon cancellation of the policy. These were competent and admissible under the showing made.

The witness Emerson testified that he had no supervision of the collection of premiums, but that the duty of issuing the receipts appertained to the department over which he had supervision, and that he supervised the entries relating to the cancellation of policies; that the receipt was issued and sent to the mailing room by his direction, and he had knowledge of its return. He likewise testified that the dividend check was issued by his direction, and that he was able to identify both the returned receipt and the paid check. This evidence was admitted by the court, but at the close of the testimony, after submitting the issue to the jury, the court on its own motion gave instruction No. 3. It will be noted that this instruction did not point out any particular testimony relating to the records of the company which the jury was told was incompetent, nor by any saving clause exclude any of Emerson's testimony from its inhibition, but in broad terms told the jury that "the testimony you have heard about the records of the company from their agent is excluded from your consideration because it is incompetent, and you owe it to the litigants to this lawsuit not to consider that testimony. You ought to treat

it as if you had never heard it.'' This sweeping declaration, whether intended or not to include the original receipt and canceled check and the testimony of the witness relating to them, might, and perhaps did, have that meaning to the jury. This was error and prejudicial to the rights of appellant.

■ Counsel for the appellant earnestly insist that the verdict of the jury is unsupported by any substantial evidence, and urge that the court erred in not directing a verdict in its favor and ask for a dismissal of the case here. In support of its contention, it points out certain circumstances in connection with the testimony of the witnesses for appellee, which it insists makes that testimony run counter to human experience and common observation, and in the very nature of things that it cannot be true. As this case must be reversed for the error above indicated, we deem it unnecessary to allude to the circumstances which it is claimed refute and make incredible appellee's testimony, or to comment upon the weight and sufficiency of the evidence considered in connection with attendant proved facts, as there may be additional evidence adduced by both the litigants in another trial.

■ The court erred in fixing the amount of attorney's fee without a hearing given on the motion for same and without hearing evidence tending to establish the proper amount. The judgment in its entirety would not have been reversed for this error alone, but only as to the attorney's fee.

For the error of the court below in its charge to the jury, the judgment is reversed, and the cause remanded for a new trial.

KIRBY, J., dissents.

WALSH *v.* EUBANKS.

Opinion delivered January 26, 1931.

[redacted]

Hardin & Barton, for appellant.

J. V. Walker and *Karl Greenhaw,* for appellee.

BUTLER, J. The appellee, Anton Eubanks, an employee of the appellants, Walsh & Thomas, a partnership, was severely injured in the collision of a truck in which he was riding with a Ford car at a curve in the highway between Brush Creek and Fayetteville in Washington County, Arkansas. The truck was driven by Robert Huckabee, who was also an employee of the appellant. To recover damages for this injury, suit was brought by the appellee against the appellant in the circuit court of said county. The complaint alleged in substance that the plaintiff and the truck driver were servants of the defendant, a partnership, and that, while in the performance of the master's business, he suffered the injuries complained of, which injuries were the direct and proximate result of the negligence of the truck driver. A demurrer was filed to the complaint, and on its being overruled the defendant answered denying the material allegations of the complaint and pleading as a further defense contributory negligence, assumption of risk, and invoking the fellow-servant doctrine. The case is here properly on appeal from a verdict and judgment for the plaintiff in the court below for $3,000.

There is but little, if any, conflict in the testimony of the witnesses, and the following state of facts may be

said to be established by the uncontradicted evidence. Walsh & Thomas were partners, and as such had a contract to build a structure composed of reinforced concrete, called in the testimony a "culvert," across Brush Creek on a highway leading from the town of Fayetteville. They had hired a number of employees for that purpose, and engaged in the construction of said culvert. Mr. Walsh, who had general supervision of the business of the partnership, found it necessary to be absent from this particular job for a short time and to take with him the foreman. One Worth James, an employee, was left in charge of the work and was told by Mr. Walsh that a carload of cement was expected at Fayetteville, and that when he was notified by the truck driver of its arrival to take some of the laborers and unload the car into a warehouse, from which it was to be transported by truck to the Brush Creek job to be used in making concrete for the culvert. John Huckabee was one of the employees of Walsh & Thomas. His duties were varied. He "made forms" into which the concrete mixture was poured; he operated the "concrete mixer" and drove the truck and was thought by the appellant to be a suitable person to "break in" a new truck. For some time before the accident he had been hauling material for use on the Brush Creek job, and on the day of the accident he brought a load of cement to the point of work where it was unloaded by Huckabee and the other employees. He notified James that the car of cement expected had arrived at Fayetteville. The appellee was another employee of the appellant, and both he and Huckabee were hired by Mr. Walsh. How long he had been working for the partnership or just what specific things he had been doing were not directly shown, but his duties appeared to have been any kind of common labor necessary for the carrying on of the work. He had driven the truck for a while when Huckabee was sick, but had been for some time previous to his injury engaged in work at and upon the construction of the culvert.

When Huckabee arrived with his load of cement and gave notice of the arrival of the car, James selected three men besides himself, one of whom was the appellee, and returned on the truck to Fayetteville. These four, with Huckabee, were to unload the cement from the car, and the latter was to then haul it to where it was to be used in the culvert. Two of the men got in and remained in the body of the truck; Huckabee, the driver, took his position at the wheel; the appellee sat on the driver's seat on the right-hand side, and James sat between the two. After the trip began, because of the lack of a windshield, James and the appellee drew their hats forward to protect their eyes and the appellee said to the driver, "Now, Huckabee, none of us are in a hurry—take your time." Just how far the truck had proceeded on its way is not clear, nor is it material, but at a point about three miles from the job as the truck was entering upon a curve in the highway a Ford car, approaching from the opposite direction, appeared on the curve. The testimony of those who were in the truck, except that of the driver, (and there is no serious conflict between the testimony given by him and that of the others) was that at this time the truck was being driven at a high rate of speed, estimated at between forty and fifty miles per hour, and was keeping the center of the highway so that, although the Ford was on its right and proper side of the road, to avoid coming in contact with it, it was necessary for the truck to be at once and sharply turned to the right. In making this turn the truck was in danger of running down the embankment, and, after turning to the right to escape this consequence, the driver turned back toward the left and into the highway. The result was that the front part of the Ford and the rear of the truck collided, the latter being overturned and the appellee and others riding therein seriously injured. The fault lay entirely with the truck driver, as it is the undisputed evidence that the driver of the Ford was driving at a moderate rate of speed and kept as far to the right as prudence allowed.

The sufficiency of the evidence to establish the negligence of the truck driver, the extent of appellee's injury and the amount of the verdict is not seriously questioned. The sole contention made here by the appellant is that the allegations of the complaint fail to state a cause of action in that it complained of an injury inflicted by a fellow-servant for whose negligent acts his master was not responsible; that, if this did not sufficiently appear from the complaint itself, the proved facts established that state of case. To support this view, counsel for the appellant have cited numerous decisions of this and other courts, while, to controvert this view, counsel for appellee have countered with an array of authority of equal dignity and support their interpretation of the cases cited with persuasive argument. However, the principle involved here which exempts the master for liability for an injury to a servant occasioned by the negligence of a fellow-servant has long been settled in this State, and is so clearly stated in our decisions which find support in the weight of authority, that as to it there can be, and is, no conflict of opinion. The reason for that rule and its definition finds no better expression than in the cases of *St. L. A. & T. Ry. Co.* v. *Triplett,* 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, and *Kenefick-Hammond Co.* v. *Rohr,* 77 Ark. 290, 91 S. W. 179.

The doctrine enunciated in those cases has been adopted and followed by this court in a number of decisions, and in the Triplett case is thus stated: "The true reason on which the rule is based, as shown by the great weight of authority, is that a person who voluntarily engages in the service of another presumably assumes all the risks ordinarily incident to that service, and fixes his compensation with a view to such risks. (Citing cases.)

"If this be the principle underlying the rule, it would seem that the question which forms a test in any case is one of risks. And that where one servant is shown to have been injured by another, the question is,

not whether the two servants were fellow-servants in any technical sense of the term, but whether the injury was within the risk ordinarily incident to the service undertaken. 'The negligence of a fellow-workman engaged upon a common work is commonly accounted among the risks undertaken, but is only a subordinate instance.' *Lawler* v. *Androscoggin R. Co.,* 16 Am. Rep. 498.

" 'A fellow-servant,' says the court in *McAndrews* v. *Burns,* 39 N. J. L. 117, 'is any one who serves and is controlled by the same master. Common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to forsee, when accepting it, that through the carelessness of fellow-servants it may probably expose them to injury.' "

And in the case of *Kenefick-Hammond Co.* v. *Rohr, supra,* after quoting with approval the rule announced in *Ry. Co.* v. *Triplett, supra,* it is said: "Persons employed by the same master to accomplish one common object and so related in their labors performed in the service of the master as ordinarily to be exposed to injuries caused by each other's negligence are fellow-servants." Among the cases approving, illustrating and applying the rule are *Fones* v. *Phillips,* 39 Ark. 17, 43 Am. Rep. 264; *St. L. S. W. Ry. Co.* v. *Henson,* 61 Ark. 302, 32 S. W. 1079; *St. Louis I. M. & S. Ry. Co.* v. *Brown,* 67 Ark. 295, 54 S. W. 865; *Snellen* v. *Kansas City So. Ry. Co.,* 82 Ark. 334, 102 S. W. 193; *Texarkana Tel. Co.* v. *Pemberton,* 86 Ark. 329, 334, 11 S. W. 257; *St. L. I. M. & S. R. Co.* v. *Gaines,* 46 Ark. 455; *Graham* v. *Thrall,* 95 Ark. 560, 129 S. W. 532; *Hollingshead* v. *American Ry. Exp. Co.,* 143 Ark. 422, 220 S. W. 462; *Sun Oil Co.* v. *Hedge,* 173 Ark. 730, 293 S. W. 9.

These cases cite many others from other jurisdictions, and it appears that with slight variations the definition stated finds almost universal approval. While this is true, great difficulty arises in applying it to the infinite variety of circumstances which surround particular cases presented to the courts for adjudication.

This is strikingly illustrated in the case at bar where learned counsel for the respective litigants each cite to support their divergent views the same cases.

Here the appellee contends, first, that the negligence was that of a vice-principal, in that the driver of the truck was performing a nondelegable duty of the master and was therefore a vice-principal. It is very true that there are duties which the master owes the servant which he cannot delegate to a fellow-servant and by this means relieve himself from the negligence of the servant in the performance of that act, such as the furnishing of a safe place in which to work, or in the selection of one's fellow-servants, and the like; but we are unable to find any evidence which would indicate that any such duties were delegated to Huckabee. As we read this record he was simply an ordinary laborer in the employ of Walsh & Thomas and aside from his work the only duty he was called on to perform was to convey the information to the workers at the culvert of the arrival of the car of cement.

It is, secondly, insisted that appellee, while having a common master with Huckabee and in a general sense his fellow-servant, was not engaged in a common enterprise with him or in work having such connection with that performed by Huckabee as would include in the risk ordinarily incident to that work the negligence of the latter. Appellee insists that, as he was engaged in various duties at the culvert prior to his injury and Huckabee was at that time hauling by truck the material which he and others would afterward use by converting it into concrete, they were so removed in the performance of their duties from each other that there was and could have been no risk reasonably anticipated to the one through the negligence of the other, and therefore, in accepting the employment, appellee could not be held to the assumption of risk from the possible negligence of Huckabee. The fallacy of this argument appears when the entire testimony relating to the employment is considered.

Both employees were common laborers, and, while for some length of time before the injury appellee's duties were restricted to work at the culvert and that of Huckabee to transporting material from points away from the culvert to it, neither was employed solely for these purposes, but each was to and did perform such other common tasks as they were bidden and at whatever place necessary to carry into effect the common purpose for which they were employed and in which they were both engaged, namely, the construction of a culvert of reinforced concrete across a certain watercourse in Washington County. These facts bring the relationship of appellee and Huckabee within the meaning of the rule and constitute the latter a fellow-servant of the appellee whose negligence was one of the ordinary risks of the employment, and for which the master is not bound.

Under this view of the case the other questions raised become unimportant. The judgment of the court must therefore be reversed, and the case dismissed. It is so ordered.

METZGER *v.* MANN.

Opinion delivered February 2, 1931.

R. W. Robins, for petitioner.

Donham & Fulk, for respondent.

HART, C. J. J. A. Metzger filed in this court an application for a writ of prohibition against Richard M. Mann, Judge of the Second Division of the Circuit Court of Pulaski County, Arkansas, to prohibit said circuit court from assuming jurisdiction in a suit brought against the petitioner by the People's Trust Company.

The record shows that the People's Trust Company brought suit in said circuit court against Walter M. Terry, Teresa Terry, and John A. Metzger to recover $3,000 and the accrued interest thereon, alleged to be due on a promissory note dated April 2, 1930, and due ninety days after date. The suit was filed, and summons issued on September 27, 1930. The summons was issued to the sheriff of Faulkner County, commanding him to summons Walter M. Terry, Teresa Terry, and John A. Metzger, to answer a complaint filed against them in said circuit court by People's Trust Company. On the 27th day of September, 1930, Walter M. Terry and Teresa Terry filed in said circuit court a waiver of summons and general entry of their appearance in said action. On the 10th day of October, 1930, John A. Metzger appeared for the purpose of filing a motion to quash service of summons against him. In said motion he alleged that Walter M. Terry and Teresa Terry are and have been for more than one year residents of the State of Oklahoma, and that neither one of them has been in the State of Arkansas at any time during the past year. He alleged further that neither of said defendants were in Pulaski County, Arkansas, at the date of the institution of the suit, and that they have not been here at any time since. The motion to quash service was duly verified by John A. Metzger. The circuit court overruled said motion, and J. A. Metzger saved his exceptions thereto.

Richard M. Mann, as judge of the Second Division of the Circuit Court of Pulaski County, Arkansas, entered his appearance to the application of said John A. Metz-

ger for a writ of prohibition herein. According to the allegations of the complaint in the circuit court, both the Terrys and John A. Metzger were jointly liable on the promissory note sued on, and the action was a transitory one. Under § 1178 of Crawford & Moses' Digest, service cannot be had in a transitory action on a defendant in a county other than that of his residence except where there is service in the county where the action is instituted on a co-defendant who is jointly liable. *Lingo* v. *Swicord,* 150 Ark. 384, 234 S. W. 264.

Under the section of the Digest above referred to, actions of this sort may be brought in any county in which the defendant or one of several defendants resides or is summoned. Under the plain terms of the statute, Metzger, who, the record shows, is a resident of Faulkner County, could not be sued on the promissory note in question in Pulaski County unless the record also shows that Walter M. Terry and Teresa Terry resided or were summoned in Pulaski County. The record not only does not contain an affirmative showing that Walter M. Terry or Teresa Terry resided or were summoned in Pulaski County, but it contains a distinct averment that they were residents of the State of Oklahoma at the time of the institution of the suit, and that they were not in Arkansas at the time they entered their appearance to the action, and have not been in the State of Arkansas for more than one year last past. The right of Metzger to be sued in his own county is given by statute, and cannot be taken away except by bringing him within one of the exceptions to the statute. The fact that the Terrys may have entered their general appearance to the action and submitted themselves to the jurisdiction of the court would not affect the right of Metzger to assert his right under the statute. *Chamberlain* v. *Carroll* (Tex.), 59 S. W. 624; *Lasater* v. *Waits,* 95 Tex. 553, 68 S. W. 498; and *Jacobson* v. *Hosmer,* 76 Mich. 234, 42 N. W. 1110.

The right of a defendant to be sued in the county of his residence in the absence of statutory exceptions has

been recognized by this court. *Wernimont* v. *State,* 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; *Seelbinder* v. *Witherspoon,* 124 Ark. 331, 187 S. W. 325; *Hoyt* v. *Ross,* 144 Ark. 473, 222 S. W. 705; *Lingo* v. *Swicord,* 150 Ark. 384, 234 S. W. 264.

But, it is insisted that, even if the construction we have placed upon the statute is correct, a writ of prohibition would not lie, but that appeal is the proper remedy. We do not agree with this contention. It is true that this court has held that a writ of prohibition should not be granted unless the inferior tribunal has clearly exceeded its authority, and the party applying for it has no other protection against the wrong that shall be done him by such usurpation. It is also well settled that where no adequate remedy can be had in the court where the original suit is pending and the record in the case shows that the court is about to exercise judicial power over persons who have never been served with process and over whom no service of process can be legally had, prohibition is the proper remedy. *Order of Railway Conductors of America* v. *Bandy,* 177 Ark. 694, 8 S. W. (2d) 148; and *Merchants' & Planters' Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. (2d) 121.

Tested by this rule, it will be seen that the record shows that the Terrys were not residents of the State of Arkansas and were not summoned in Pulaski County, Arkansas, in the case in the circuit court. Metzger was a resident of Faulkner County, and no legal service could be had on him because he absolutely refused to enter his appearance to the action, and neither of his co-defendants resided in Pulaski County where the action was instituted nor were they summoned in that county. Metzger, under these circumstances, did not have an adequate remedy at law. If he had appealed to this court from a judgment of the circuit court refusing to quash the summons against him, according to the rule of practice established in this court from the beginning, he must, upon a remand of the case to the circuit court, be considered as having entered his general appearance to the action in like man-

ner as if he had been duly and legally served with process to appear at the term in which the case is returned. *Gilbreath* v. *Kuykendall,* 1 Ark. 50; *Murphy* v. *Williams,* 1 Ark. 376; *Beal-Doyle Dry Goods Company* v. *Odd Fellows Building Company,* 109 Ark. 77, 158 S. W. 955; and *Order of Railway Conductors of America* v. *Bandy,* 177 Ark. 694, 8 S. W. (2d) 448.

It is true that the waiver of the service of summons by the Terrys and their general entry of appearance to the action in the Pulaski Circuit Court gave the court jurisdiction over them, but this did not preclude Metzger, their codefendant, from asserting his right to be sued in the county of his residence, in the absence of statutory exceptions. *Devereaux* v. *Rowe* (Tex. Civ. App.) 293 S. W. 217.

It follows from the view we have expressed that Metzger had no adequate remedy, and that the writ of prohibition should be granted. It is so ordered.

SHIELDS *v.* SHIELDS.

Opinion delivered February 2, 1931.

Mark P. Olney, for appellant.

Minor Pipkin, for appellee.

SMITH, J. M. M. Shields, who died on or about January 1, 1928, was survived by his widow, but no children, and by a brother and three sisters. The widow waived the right to administer on the estate, and letters were issued to C. R. Shields, the brother of the intestate. An inventory was made of the personal property, which

consisted principally of promissory notes payable to the order of the intestate, the total value of the personal property being about $20,000.

The administrator filed a first settlement of his administration on February 15, 1929, and a final settlement on the 17th of August of the same year. The estate was solvent, and owed only a few small debts, which had been paid.

The final settlement showed that under date of July, 1929, the administrator had assigned to the widow, as part of her dower, 29 notes of the value of $2,103.92, and that he had sold the widow certain bank stock owned by her husband, the intestate, for $2,651.33, and for which amount he had taken the widow's notes. These notes he charged to her as a part of her dower. The administrator's final settlement undertook to state the balance due the widow as dower after the sums paid her on that account had been credited to him and charged to her. Both these settlements were duly approved by the probate court.

Thereafter, on March 10, 1930, the widow filed a complaint in the chancery court, to which the administrator and heirs were made parties, in which she prayed that dower be assigned her in the personal estate of her deceased husband. She had previously filed a complaint in the chancery court for the assignment of her dower in the real estate, and dower therein had been assigned.

There was no allegation of fraud in the administrator's settlements, and the court made no finding that there had been any fraud on the part of the administrator, but the court did find that, owing to the conversion of much of the personal property into cash, dower could not be assigned in kind, and the court proceeded to assign the dower in the personal property and money, and from that decree is this appeal.

We think, under the facts of this case, that the chancery court should not have attempted to assign the dower in the personal property.

The chancery court had already assigned the dower in the real estate, without being asked to assign dower in the personalty. The administrator had, under the directions of the probate court, begun somewhat informally to assign the dower in the personalty.

The statute (§ 3547, C. & M. Digest), provides that, if dower be not assigned to the widow within one year after the death of her husband, or within three months after demand made therefor, she may file a petition in the probate court praying the allotment of dower, and the probate court is given the jurisdiction to assign it.

We held in the case of *Johnson* v. *Johnson,* 84 Ark. 307, 105 S. W. 869, that this statutory remedy did not oust the jurisdiction of equity to assign dower, and we held in the case of *Beal-Burrow Dry Goods Co.* v. *Kessinger,* 132 Ark. 132, 200 S. W. 1002, that the chancery courts have concurrent jurisdiction to assign dower in personalty. The jurisdiction of the probate and the chancery courts in the assignment of dower in both real estate and personalty is therefore concurrent, and the case before us is one where the jurisdiction of the chancery court was invoked to assign dower in the real estate, but not in the personal estate, whereas the administrator had made a partial assignment of dower, which action he had reported to the probate court. The money given and paid the widow by the administrator constituted a partial assignment of dower, and the probate court approved the report thereof. This was an assumption of jurisdiction by the probate court to assign dower in the personalty, and after jurisdiction had been assumed by the probate court for this purpose the chancery court should not have interfered, as the jurisdiction of the two courts was concurrent, and the jurisdiction of the probate court had first been invoked in regard to the personalty. *Phillips* v. *Phillips,* 143 Ark. 240, 220 S. W. 52; *State* v. *Devers,* 34 Ark. 188.

The decree of the chancery court will therefore be reversed, and the cause remanded with directions to dis-

miss the complaint, and remit the parties to their remedies in the probate court.

AMERICAN BENEFIT LIFE INSURANCE ASSOCIATION *v.* ARMSTRONG.

Opinion delivered February 2, 1931.

Frank Berry, for appellant.

W. B. Scott, for appellee.

SMITH, J. Irenner Armstrong made application to a soliciting agent of the appellant insurance association for a policy of insurance, in which she was named as beneficiary, upon the life of Katie Young, her mother. The policy issued, and insured died, and liability under the policy was denied upon the ground that the issuance of the policy had been procured by the false answers of the applicant for the insurance concerning the health of her mother. The falsity of certain answers is admitted, but the applicant testified that her answers to all questions asked her were truthful, and that the answers as written were not read to her, and that she did not read them, as she was unable to read, and that while her name was signed to the application she had only "touched the pen," as she was unable to write.

The issue thus presented was submitted to the jury under instructions conforming to the law as announced

in the case of *Mutual Aid Union* v. *Blacknall,* 129 Ark. 450, 196 S. W. 792, to the effect that, where the agent of the insurer makes out the application incorrectly, notwithstanding the applicant has stated all the facts correctly, the errors will be chargeable to the insurer and not to the insured.

But the court also gave, over the objection and exception of the defendant insurance association, an instruction reading as follows:

"There is some proof here, gentlemen of the jury, that this application was never shown to the insured, Katie Young, at all. You are told, that the agent has a right, if he wanted to, not to take the application to the insured at all, although his company may have required him to do that thing. Nevertheless, if he failed to do it, and sent it in as if he had shown it to the insured, that would be a deception on his part of his own company, and the company couldn't come here now and complain of it. They would be bound by the action of the agent; and, if you find from the proof in this case that the application was never presented to the insured at all, and that she never answered any question in the application, and none was ever asked her at all, then there could be no false answers on her part, and, consequently, there could be no fraud. The agent may have disobeyed instructions he had from his principal insurance company, but nevertheless he was agent of the company, and the company would be bound by his conduct, and his failure to give it to the insurance company could not be used against her for the simple reason she never was called upon to act in regard to the application in any way whatever."

This instruction virtually directed a verdict for the plaintiff, as it was undisputed that the application was made by the plaintiff beneficiary and ostensibly signed by her, and not the insured, and that the insured, herself, did not make the application, and made none of the answers alleged to be false, and the instruction says, if this is true, there could be no fraud.

It must be remembered that the plaintiff beneficiary made the application for this policy, and paid the premium thereon, and that it was issued upon her application. If she had no authority to make this application, the policy would be void on that account. This is a very elementary principle, not only in the law of insurance, but in the law of agency generally, and, if she had this authority, it would be immaterial that her principal, the insured, "never was called upon to act in regard to the application in any way whatever," for the reason that the principal had acted through her agent.

It is not the law that one, even though a daughter, may apply for insurance upon the life of another, her mother, and make false answers and obtain the insurance, whereas, if truthful answers had been given, the policy would not have been issued, and still recover upon the policy so obtained because the mother, the insured, was not a party to the deception.

We must therefore hold the instruction to be erroneous, and for the error indicated the judgment will be reversed, and the cause remanded for a new trial.

ENGLAND LOAN COMPANY *v.* CAMPBELL.

Opinion delivered February 2, 1931.

Buzbee, Pugh & Harrison, for appellant.

Trieber & Lasley, for Campbell; *W. P. Strait,* for Laster, appellees.

SMITH, J. J. H. Laster died intestate in Pulaski County on July 15, 1923. At the time of his death he owned a large plantation, some personal property, and some city property, and he owed a large amount of money. He was survived by his widow and six adult children and one grandson, a minor, the only child of a deceased daughter.

On August 11, 1923, the England Loan Company, an Arkansas corporation, and Charles E. Laster, the eldest

son, were appointed administrators, and qualified by giving bond, conditioned as required by law, in the sum of $100,000, with the New Amsterdam Casualty Company of New York as surety.

The inventory showed personal property of the value of about $10,000, and the indebtedness against the estate amounted to $167,008.09, of which $31,330 evidenced by unsecured notes and about $6,000 evidenced by open accounts, were probated against the estate. The balance of the indebtedness was secured by mortgages on the plantation.

The loan company and C. E. Laster acted as joint administrators until the death of Laster January 16, 1926, and thereafter the loan company acted as sole administrator until October, 1926, when an order was made by the probate court removing the loan company as administrator and ordering it to make a final settlement of the administration.

At the time of the death of J. H. Laster there was an ungathered crop, in which many tenants were interested, and who themselves owed their landlord various sums of money. The affairs of the estate were in such condition that it was thought advisable to continue the operations in which the intestate had been engaged, but it was realized that the administrator did not have this authority, and that it could not be conferred upon them by the probate court in the manner desired. A plan was therefore devised, whereby the administrators were constituted trustees to continue the intestate's business. This trust agreement was signed by the widow and all the adult heirs except Mrs. Grace Laster Graupner. No one signed for the minor grandson. This agreement provided that the trustees should have all the powers vested in them as administrators, and, in addition, should have plenary power to continue the intestate's business at the risk of the parties executing the trust agreement. Power was given to sell, rent, lease, pledge, mortgage, or hypothecate any and all of the property, real and personal,

for such prices and upon such terms as the trustees thought best and "to continue to operate, at the risk of the trust estate, and not at the risk of said trustees, any agricultural, industrial, or business enterprise which they may receive as a part of said estate." The powers granted were broad enough to authorize all of the subsequent operations of the trustees which they conducted so far as the parties to the trust agreement were concerned.

Under the powers thus conferred the trustees continued the farming operations just as the deceased had done in his lifetime, and very large sums of money were thus lost.

On October 13, 1924, the administrators filed their first settlement covering the period of their administration to July 1, 1924, and this settlement was later approved by the probate court. A second settlement was filed covering the period from July 1, 1924, to December 31, 1924, and this settlement was also approved. After the order removing the loan company as administrator had been made, a final settlement was filed by the loan company, but this was never acted upon or approved.

On October 20, 1926, C. M. Connor was appointed administrator in succession after the removal of the loan company as administrator. Connor took charge of all the personal assets and made an inventory thereof, but he made no attempt whatever to ascertain the balance due by the loan company to the estate, and made no effort to enforce its payment. On June 20, 1927, Connor filed a final settlement of his administration, in which he reported "that, by proper order of this court and the Pulaski Chancery Court, Charles R. Case has been appointed as receiver of said estate on the petition of all the heirs of said estate, and that the receiver is ready to take charge of all the assets of said estate and to give his receipt therefor to the administrator." The heirs had, by a mortgage on their equity of redemption in the plantation, secured money with which to pay all the demands

which had been probated against the estate. It being shown that all the debts which had been probated had been paid, the probate court directed Connor to turn over all the assets in his hands to the receiver, and, upon this being done, the administrator was discharged without having required the loan company to settle its administration and pay over to him the amount it owed the estate.

The third settlement filed by the loan company as administrator upon its removal appears to have been lost without having been acted upon or approved, and no action designed to compel a settlement was taken until July 19, 1929, when Roy D. Campbell was appointed administrator in succession. On September 6, 1929, Campbell filed a petition in the probate court, alleging the facts herein recited, and that the loan company and C. E. Laster had failed to make final settlement of their administration of the estate of J. H. Laster, and it was prayed that citation issue against the administrators and the surety on their bond requiring them to make settlement.

Citation issued, and separate responses and demurrers were filed by the loan company and its trustee in bankruptcy, by the executrix of the estate of C. E. Laster, and by the surety on the administrators' bond, which raised the issue hereinafter discussed.

The demurrers to the petition of Campbell as administrator in succession were overruled in the probate court, and a hearing was had, which resulted in a finding by the probate court that the original administrators of the Laster estate were indebted to it in the sum of $127,713.98, which, with interest, amounted to $166,399.57, and it was ordered that this sum be paid over to Campbell as administrator in succession. An appeal was duly prosecuted to the circuit court, where the judgment was rendered from which this appeal comes.

There was a stipulation of counsel in the court below reciting as true the following facts: C. E. Laster died

January 12, 1926, and his wife qualified as executrix January 19, 1926, and no claim was made or presented to her or to the probate court for allowance against his estate except this proceeding.

The England Loan Company was adjudged a bankrupt in November, 1926. A trustee in bankruptcy was appointed, and the bankrupt was discharged and the trustee in bankruptcy was discharged, and no claim was ever filed in that proceeding by any representative of the estate of J. H. Laster, or by any of his heirs, based upon the loan company's connection with the estate of J. H. Laster, either as administrator or trustee.

The circuit court held that any claim or demand against the estate of C. E. Laster was barred by the statute of nonclaim, but the discharge of the loan company did not bar the prosecution of this suit against it, and the court charged the loan company as administrator with the following items:

(a)	Cash shown by inventory	$ 1,052.43
(b)	Cash on hand, second settlement	517.42
(c)	One-half of amount shown by inventory to be due decedent by his tenants at his death	623.48
(d)	Balance of proceeds of $80,000 mortgage on land	38,600.00
(e)	Proceeds of sale of lots 7 and 8, block 247, Little Rock, less mortgage on said property at the time of sale	2,500.00
	These items aggregate	$43,293.33

And it was ordered that this sum bear interest from October 19, 1926, until paid at six per cent. From this order and judgment the administrator and its surety have appealed, and the administrator in succession has prosecuted a cross-appeal.

It is conceded that a very large loss was sustained by the trustees in their operation of the Laster plantation, but it may also be said that there is not even a suspicion

of any fraud on the part of the loan company or C. E. Laster, acting either as administrators or as trustees. They undertook, as trustees, to operate the plantation, and they did this only because they were without authority to do so as administrators.

It is first very earnestly insisted that the present administrator in succession is without authority to sue his predecessor for an accounting, for the reason that an intervening administration has been had, and that administrator has made final settlement of his administration and has been discharged.

In the case of *Beckett* v. *Whittington,* 92 Ark. 230, 122 S. W. 633, it was held that, where the probate court confirms the final settlement of the administrator and closes the administration, it is a conclusive finding that all the assets of the estate have been reported and administered, and that all matters of the accounting have been fully and finally made, and that the jurisdiction of the probate court over the estate is at an end. Other cases there cited were to the same effect, but this Beckett case gives the reasons for the rule stated. These are that the probate courts are superior courts, and that the orders of these courts are judgments and are final and conclusive, like the judgments of other superior courts; that the final settlement is the last accounting of the assets of the estate, and, in conjunction with the prior settlements, presents the issues that are to be determined by the probate court when it renders its judgment thereon, these issues being in conjunction with the previous settlements, "all assets of the estate have been duly reported and accounted for; that all the assets of the estate have been duly administered. And when the probate court confirms the final settlement and closes the administration, it finds that all the assets have been reported and administered, and that all matters of the accounting have been fully and finally made, and that the jurisdiction of the probate court over the estate is at an end. And such judgment is conclusive of these findings."

It was there further said that "if, through fraud, accident or mistake, any property of said estate has not been actually reported, accounted for or actually administered, a chancery court has jurisdiction to investigate such charge and to set aside such judgment confirming the final settlement closing the administration. When that is done, the chancery court will remand the administration, if deemed necessary to the probate court to be proceeded with. (Citing cases). But, until such judgment confirming the final settlement is set aside by the chancery court, the probate court has no further jurisdiction over the estate. And it cannot, therefore, after confirmation of the final settlement and the judgment closing the administration, appoint an administrator in succession, unless the same shall be set aside by the chancery court. Under such circumstances the order of the probate court appointing an administrator in succession would be a nullity."

The probate practice is well-defined, and has long been settled, and we do not intend to impair the authority of this and other cases to the same effect. But, when the facts herein stated are recalled, it appears that the rule of practice which we have quoted and here reaffirmed has no application. There has never been any final settlement by the original administrators, to become a final judgment of a superior court of record.

The loan company did file a final settlement, but it was never acted upon or approved by the probate court, and there was therefore no order or judgment of the probate court to become final. It is true that Connor, as administrator in succession, did file a final settlement of his administration, and that this settlement was approved and he was discharged as administrator, but it is also true that Connor did not require his predecessor to account to him, as he should have done, and that his settlement covered only the assets which had actually come into his hands, and he referred not at all to the assets which should have been accounted for to him by the loan

company in its final settlement, but were not. *Beckett* v. *Whittington, supra,* does not apply, because the final settlement of Connor, in conjunction with the previous settlements of the loan company, did not present the issue whether all the assets of the estate had been fully reported and accounted for. It could not have done so, for the last settlement of the loan company had not then been, nor has it yet been, approved.

It follows, therefore, that, so far as the loan company and C. E. Laster are concerned, the settlement of their administration is just where it was when Connor was appointed, because he did not require them to account to him, as he should have done. That duty on the part of the administrator in succession remained undischarged until the institution of this proceeding, and we think §§ 44 and 45, C. & M. Digest, afford full authority for this proceeding. These sections read as follows:

"Section 44. The preceding executor or administrator shall account for and turn over to such executor or administrator in succession all money and property administered or unadministered remaining in his hands and not before accounted for; and it shall be the duty of the executor or administrator in succession to compel his predecessor in office, or, if he be dead, his personal representative, to account for and pay over all money and property administered or unadministered remaining in the hands of his predecessor in office, and for this purpose he may cause such former executor or administrator, or his personal representative, to be notified to appear in the probate court and make settlement.

"Section 45. If the sum found due upon settlement is not paid, the executor or administrator in succession shall sue the former executor or administrator and his bondsmen therefor, or any of them, or if such former executor or administrator be dead, he may sue his personal representatives and bondsmen, or any of them, and shall recover the full sum due, with interest and costs."

Campbell is now undertaking to compel his predecessors to make settlement of their account, and that is the sole purpose of the proceeding. Connor should have done this, but his failure to do so did not and does not deprive the probate court of its jurisdiction to compel the original administrators to settle, and the court has proceeded in the manner provided by law to accomplish that result. The statutes quoted as construed in the case of *Wilson* v. *Hinton,* 63 Ark. 145, 38 S. W. 338, not only give Campbell, as administrator in succession, authority to require the loan company to make settlement of its administration, but requires him also to compel C. E. Laster's personal representative to make settlement of his administration.

We think the court properly held that the discharge of the loan company in bankruptcy did not absolve its liability to the Laster estate, for the reason that the bankruptcy act specifically provides that a discharge does not release a bankrupt from a liability "created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." Section 35, title 11, United States Code Annotated.

An administrator acts in a fiduciary capacity, and, while no fraud or embezzlement is charged, the failure to account and pay over to his successor is a defalcation of an officer acting in a trust capacity within the meaning of the statutes quoted. It was so expressly held in the case of *Morris* v. *Covey,* 104 Ark. 226, 148 S. W. 257.

We are of the opinion that the court was in error in holding that the cause of action against the estate of C. E. Laster was barred by the statute of nonclaim. In the case of *Statham* v. *Brooke,* 140 Ark. 107, 215 S. W. 739, it was held that an administrator in succession must proceed in the probate court against the former executor or administrator for a settlement or accounting, and must obtain an order to pay over the sum found due to him before he can sue the bondsmen of the former executor or administrator, and that it is the failure to pay over to the administrator in succession which constitutes a breach

of the executor's or administrator's bond and fixes liability on the bondsmen. A number of cases to this effect are cited in the Statham case, *supra*. Until the institution of this proceeding there had been no final settlement of the account of C. E. Laster as administrator. There was no ascertained demand which could be presented to his administrator, and, therefore, the statute of nonclaim did not apply.

We have said that the circuit court, on the appeal from the order of the probate court, found that the administrators were indebted to the estate in the sum of $43,293.33, and that an appeal and a cross-appeal have been prosecuted from that judgment.

This opinion would be almost interminable if we were to discuss the numerous items which the administrator in succession seeks to charge against his predecessors, but we find it unnecessary to do so, for the reason that practically all these items relate to the management of the Laster estate by the trustees.

As we have said, the trust agreement was entered into for the reason that the administrators did not have authority to continue Mr. Laster's business as the parties desired and as was subsequently done, and the business was conducted by the trustees, and not by the administrators. The circuit court recognized this fact and, therefore, charged the administrators with only such money as it found they had received as administrators and for which they had not accounted.

Items (a) and (b) are of this class and we think were properly charged against the administrators. Item (c) relates to accounts of the tenants and is a part of the business of which the trustees took charge and we think, therefore, should not be charged against the administrators. We think item (d) is a proper charge. Under the orders and direction of the probate court the administrators borrowed $80,000 for the purpose of paying a mortgage on the lands and the probated demands. The mortgage with interest was paid, but the balance,

amounting to $38,600, was not used for the purpose for which it was borrowed, and the probated unsecured demands were not paid, as it was intended they should be, and the administrators turned the money over to themselves as trustees and used it for purposes connected with the trust. This action was unauthorized, and the administrators should therefore be charged with this item. We think item (e) is not a proper charge. The facts in regard to this item are as follows. The intestate owned two lots, upon which there was a mortgage for $5,000. The administrators negotiated a sale of the lots for $7,500, of which amount the purchasers paid $500 as earnest money. The administrators were under the impression that the lots had to be sold for cash, and, anticipating that the sale would be completed, they reported a sale for cash, which report of sale was approved by the probate court. The purchaser made no payment in addition to the $500, but forfeited this payment and later reconveyed the lot to the administrators. Still later the mortgage was foreclosed, and the lots sold for $5,000, which was, of course, $2,500 less than the amount for which the administrators had reported they had sold them. We do not think it equitable to require the administrators to sustain this loss; in fact, there was no loss. The administrators made a report which was incorrect, in that, the sale was not for cash, but no loss was sustained on this account, and there was no bad faith in the transaction. On the contrary, $500 was gained. Item (e) is therefore disallowed.

Upon the cross-appeal we do not allow any of the items claimed, for the reason that they relate to the administration of the trust by the trustees as such.

After striking out items (c) and (e), amounting to $3,123.48, the balance with which the administrators should be charged is $40,169.85.

The circuit court ordered the defendant administrators to pay over to the administrator in succession the sum found to be due, and this ordinarily would be the

proper order to make in regard to the sum with which we find the administrators should be charged, but we do not make that order for the following reasons. Mrs. Graupner, the daughter who did not sign the trust agreement, is the only person interested in the sum to be recovered from the administrators and their surety. This fact appears from the stipulation of counsel. All the other heirs, except the minor grandson, joined in the execution of the trust agreement, and thereby authorized the trustees to conduct, at their risk, the business in which the trustees lost much money. The three items which we have charged to the original administrators also went into the trust business, and this was done without the consent of Mrs. Graupner or the grandson, and we find nothing in their conduct to estop them from insisting that the administrator in succession be allowed to recover. It further appears, however, that the guardian of the grandchild has, under the authority of the probate court, made a full and what appears to be a fair, settlement of any interest he may have in the sum recovered, so that, of all the heirs, Mrs. Graupner alone is interested in the sum sought to be recovered against the original administrators.

We see no reason, therefore, why the administrators should be required to pay over a sum which no one would have the right to claim and appropriate, and as Mrs. Graupner is one of seven heirs, it is ordered that there be paid over to the administrator in succession only one-seventh of the amount for which the original administrators are herein held liable. As thus modified the judgment of the court below is affirmed, and the cause will be remanded to the circuit court with directions to certify it to the probate court, for enforcement.

HART, C. J., dissents.

MEHAFFY and MCHANEY, JJ., disqualified and non-participating.

HART, C. J., (dissenting). As I understand the majority opinion, it was necessary to appoint an adminis-

trator in succession before a suit could be maintained against a former administrator for waste or conversion of the assets of the estate in favor of one of the distributees of the estate. This is made manifest by the concluding part of the opinion which holds that Mrs. Graupner, one of the distributees, alone was entitled to recover her share of the proceeds recovered. This was because the debts had been paid by the former administrator, and none of the other distributees had any right to the proceeds except the minor, and he had been settled with.

Under the common law, the extent of the power and authority, as well as the duty of an administrator *de bonis non,* was simply to collect and administer such property and effects of the deceased, not administered by the former representative, as remained *in specie,* and were capable of being ascertained and identified as the specific property or estate represented by him. Hence, it has been held that an administrator *de bonis non* cannot maintain a suit at law, or a bill in chancery, against a former executor or administrator, or his representatives, for effects of the estate wasted or converted by him, though such suit or bill may be brought by creditors, distributees, or legatees. *Finn* v. *Hempstead, Admr.,* 24 Ark. 111; *State* v. *Rottaken,* 34 Ark. 144; *Ludlow* v. *Flournoy,* 34 Ark. 451; *Williams* v. *Cubage,* 36 Ark. 307; and *Stewart* v. *Smiley,* 46 Ark. 373.

This rule of the common law has been changed by statute, and an administrator *de bonis non* or in succession is empowered to call a former administrator to a settlement of his accounts to recover from him for waste and conversion, as well as the assets remaining *in specie* in his hands; and this I understand to be the effect of the decision in *Wilson* v. *Hinton,* 63 Ark. 145, 38 S. W. 338. I do not understand that case to hold that the statute giving an administrator *de bonis non* the right to maintain an action for waste or conversion took away the rights of distributees or legatees to maintain the action where there were no assets unadministered, and all that

remained to be done was to recover a fund alleged to be converted by the original administrator and to pay it to the distributees. If the majority opinion had held that, while the probate records show that there was no real necessity for the appointment of an administrator *de bonis non,* through the adjudication of the probate court, the necessity by making the appointment is conclusive here because this is a collateral attack, as held in *Stewart* v. *Smiley,* 46 Ark. 373, and *Lambert* v. *Tucker,* 83 Ark. 416, 104 S. W. 131, I would have concurred in the result.

It seems to me that it is fairly inferable from *Beckett* v. *Whittington,* 92 Ark. 230, 122 S. W. 633, that the only object of the statute under consideration was to enlarge the powers of the administrator *de bonis non* or in succession, and that it does not and did not intend to take away the right of distributees or legatees to sue an administrator for waste or conversion where no rights of creditors are involved; and no necessity existed for the appointment of such administrator.

This court has uniformly held that where a fund has been recovered in any court from the original executor or administrator, it shall be paid to the administrator *de bonis non* as assets of the estate to be accounted for in due course of administration; and in such cases where there would be necessity for the appointment of an administrator in succession, he would have authority to sue for waste or conversion by the administrator in chief.

But where, as here, it can be ascertained from the records of the probate court that the fund is ready for distribution, there is no need for further administration, and the fund may be recovered by the party entitled to it, and it may be distributed in the court where recovered, unincumbered by the costs and delay of administration in the probate court.

SUNLIGHT PRODUCE COMPANY *v.* STATE.

Opinion delivered February 2, 1931.

Shouse & Rowland, for appellant.

Jack Holt and *V. D. Willis,* for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Boone County against appellant by the prosecuting attorney of the 14th Judicial Circuit in the name of the State of Arkansas, for the benefit of said county, to recover the penalty prescribed by § 1832 of C. & M. Digest for appellant's failure to file with the Secretary of State a copy of its charter or articles of incorporation as prescribed in § 1826 of C. & M. Digest.

It was alleged in the complaint that appellant, a foreign corporation, had engaged in intrastate business in Boone County in violation of said statutes.

Appellant filed an answer admitting it was a foreign corporation, but denying that it had engaged in intrastate business in said county.

The cause was submitted to a jury, and at the conclusion of the testimony the court instructed a verdict against appellant for the minimum penalty after which judgment was rendered for $1,000, from which is this appeal.

The sole question presented by the appeal for determination is whether the undisputed testimony reflects that appellant was engaged in any intrastate business in

Boone County, Arkansas. It has been ruled by this court that a foreign corporation comes within the purview of the statutes referred to in case they do any intrastate business, so far as that character of business is concerned, even though also engaged in interstate commerce or business. *Western Union Tel. Co.* v. *State,* 82 Ark. 309, 101 S. W. 748, 12 Ann. Cas. 82. A foreign corporation cannot avoid or circumvent the statutes by engaging in interstate business along with local or intrastate business. In other words, the courts will not permit a foreign corporation to camouflage an intrastate business with interstate business so as to evade or avoid the penalty imposed by the statutes for doing an intrastate business without complying with the law.

Adverting to the issue of whether appellant was engaged partly in intrastate business, we think the manner in which it conducted its business at Bellefonte and at Harrison reflects that it was doing in large part a local or intrastate business. At Bellefonte it rented a house, put out a sign "Sunlight Produce Company," employed a manager who was assisted a part of the time by a field agent, both of whom drew a salary for purchasing milk and produce of various kinds for shipment to its headquarters or domicile in Neosho, Missouri. The milk and produce were paid for by checks signed, Sunlight Produce Company, by its field agent or manager drawn on its bank in Neosho. The products purchased by it were sometimes shipped in original packages immediately after purchase, but were generally stored in the building rented by it and shipped two or three times a week by truck or rail to its place of business at Neosho. When the branch house of appellant was established at Bellefonte, appellant entered into a contract with its manager, W. B. Hawkins, to buy poultry, eggs and cream for it. A part of the time the manager was paid a commission on his purchases for his services, but relative to the purchase of cream the basis of pay was changed to that of the number of tests he should make of the cream. The

more tests he made the more he received for his services. At Harrison the business of appellant was conducted by Lee Wallis as manager at an established place. The business consisted of buying poultry, eggs and cream which were stored in the place of business, and when a sufficient quantity was accumulated same was shipped by truck or rail to appellant's place of business in Neosho. The manager received a salary for his services, and when he bought the products he paid the owner in a check drawn by himself on appellant's Neosho bank to which he signed appellant's name by him as manager.

We do not think the business conducted by appellant in this State constituted interstate commerce. If such business were exclusively interstate, it must be upon the theory that the products were bought to be shipped out of the State and not for sale in the State. Every other ear-mark indicates that the business as conducted was intrastate. Appellant did the business in a rented house in this State with a sign thereon indicating what its business was. It was conducted part of the time by the manager who was paid a salary and other times was paid a commission dependent upon the quantity he bought and upon the tests he should make of the product. The products purchased were paid for in this State; the checks in payment thereof were drawn, signed and delivered in this State at the time the products were received from the vendors. The goods were stored in a rented house and shipped out at a later date than when purchased. We do not think that all of these ear-marks indicating that the business was local and intrastate can be converted into an exclusively interstate transaction by the mere fact that at a later date the goods purchased would be shipped to the purchaser at its headquarters in another State.

Appellant cites a number of cases, among them the case of *W. T. Raleigh Medical Co.* v. *Rose,* 133 Ark. 505, 202 S. W. 849, to the effect that the statute does not apply to foreign corporations engaged in interstate com-

merce and ruling that in the particular cases cited the facts reflected that the corporations were engaged strictly in interstate commerce. None of these cases have the ear-marks the instant case has tending to show that the business conducted was a local or intrastate business. We do not think the cases cited applicable to the instant case.

No error appearing, the judgment is affirmed.

Mr. Justice KIRBY dissents.

DONAGHEY *v.* REMMEL & MCCARROLL.

Opinion delivered February 2, 1931.

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

Fred A. Isgrig and *Elmer Schoggen,* for appellee.

HUMPHREYS, J. Appellees brought this suit in the circuit court of Pulaski County, Third Division, against

appellant to recover a commission of $7,500 for procuring a loan of $200,000 for appellant with which to construct a loft building on certain real estate on the southeast corner of Markham and Main Streets in the city of Little Rock; and $1,200 as anticipated commissions on fire insurance to cover said building for a term of ten years. The claim for the recovery of said commissions is based upon a written loan contract of date February 7, 1927, a written application of same date and accompanying letter for a loan of $275,000, a letter of date February 15, 1927, a letter of date March 1, 1927, and a letter of date March 3, 1927. The instruments of writing referred to are as follows:

"LOAN CONTRACT.

"Remmel & McCarroll,
"Little Rock, Ark.

"I hereby agree to make through you, in name of Massachusetts Mutual Life Ins. Co., Springfield, Mass. whom you represent, a loan of two hundred and seventy-five thousand ($275,000) dollars for a term of ten years, principal payable 5% amt. loan annually beginning at end of fourth year. It is further understood that interest on the loan herein accepted shall commence with the date of the check or draft sent in settlement or on account of loan, to bear interest at the rate of 5½ per cent. per annum, payable semi-annually, to be secured by a first mortgage on real estate hereinafter described, principal and interest to be payable at such place and in such manner as the lender may direct. The real estate upon which I desire this mortgage loan is as follows, to-wit:

"West half of lots, one, two and three in block two, city of Little Rock, Ark., more particularly described as follows: Beginning at a point at the northwest corner of said block, running south one hundred and fifty feet on Main Street, thence east sixty-nine feet, thence north one hundred and fifty feet, thence east sixty-nine feet to the place of beginning, with the following exceptions: 30 feet on East Markham Street by 70 feet on Main

Street, which is included in a 99-year lease, a copy of which is herewith attached. See attached plat of ground, Pulaski County, State of Arkansas.

"In addition to the interest above agreed upon, I agree to pay you as a commission for negotiating the loan the sum of $10,000 (ten thousand dollars).

"I further agree to pay all expenses for abstract of title to the property offered as security in my application; also the fee for recording the mortgage and each and every instrument necessary to clear the title of all incumbrances and perfect title in me. I also agree to pay for a photograph of the premises and an attorney's fee for examination of the title.

"I hereby agree to pay such actual expenses as you have incurred in the negotiation of the loan and examination of the property and title, if I do not obtain said loan, by reason of defects in the title or by reason of my being unable to remove all incumbrances from said property, and if you or any one whom you may designate shall notify me of your acceptance of said loan and I am unable or refuse to complete said loan, then I agree to pay the above commission and all expenses you or the assignee of this contract may have incurred, for such refusal or inability to complete said loan.

"I hereby authorize you to pay off all liens and incumbrances of whatsoever kind now on my property above described, and if the loan hereby applied for should not be sufficient to pay off all prior liens, I agree to pay the deficiency within ten days after being notified of same.

"I agree to insure, with fully paid policies, the buildings on said premises, in the sum of at least $275,000 with loss, if any, payable to the lender as his interest may appear, all new and renewal policies to be placed by Remmel & McCarroll, in companies acceptable to them.

"In event proceeds of loan are to be paid out before building is completed or as work on building progresses, I agree to furnish the usual surety bond protecting lender

against all mechanics or other statutory liens, said bond to be placed by Remmel & McCarroll in companies acceptable to them.

"In witness whereof I have hereunto set my hand this 7th day of February, 1927.

"[Signed] George W. Donaghey.

"State of Arkansas, County of

"Subscribed and sworn to before me, a notary public, in and for said county and State this 7th day of February, A. D. 1927.

"[Signed] Robbie L. Wood, Notary Public [Seal]

"My commission expires October 21, 1930."

"APPLICATION.

"Massachusetts Mutual Life Insurance Company,
"Springfield, Mass.

Business and Apartment Property

"Gentlemen: Application is hereby made for a loan of $275,000 for ten years at 5½ per cent. per annum, payable semi-annually, on the following described real estate in the city of Little Rock, County of Pulaski, State of Arkansas:

"West half of lots one, two and three in block two, city of Little Rock, more particularly described as follows: Beginning at a point at the northwest corner of said block, running south one hundred and fifty feet on Main Street, thence east sixty-nine feet, thence north one hundred and fifty feet, thence east sixty-nine feet to the place of beginning, with the following exceptions: 30 feet on East Markham Street by 70 feet on Main Street, which is included in a 99-year lease, a copy of which is herewith attached. See attached plat of ground. And the following statements and answers to questions are made as an inducement to you for the approval of this application. * * *

"The subscriber agrees to furnish at his own expense a complete and satisfactory abstract of title to the premises, or a title policy, at the option of the said company, and to pay all charges for recording all deeds, and

all other instruments required by the company, and if this application is approved and the loan completed, the abstract or title policy shall remain in the custody of the said company until the said loan is fully paid; and it is further understood and agreed that all loan papers shall be on such forms as may be required by said company. And it is agreed that said company shall not be required to make any settlement of the loan or any advance on account thereof unless the title to the premises shall be satisfactory to it at the time such settlement or advance is requested. The company may at its convenience make settlement of this loan by its check drawn upon New York, Boston or Chicago; and it is further understood that interest on the loan herein applied for shall commence with the date of the check sent in settlement.

"Dated this 7th day of February, 1927.

"[Signed] George W. Donaghey, Applicant."

"ACCOMPANYING LETTER.

"Little Rock, Arkansas, February 7, 1927.

"Messrs. Remmel & McCarroll, Agents,
"Mass. Mutual Life Ins. Co. of Springfield, Mass.,
"1308 Donaghey Building, Little Rock, Arkansas.

"Gentlemen: I am herewith filing with you, attached to this letter, an application on the regular form of said company for a loan of $275,000 on the property at the southeast corner of Markham and Main Streets, Little Rock, Arkansas, all of which is more particularly described in said application; the loan to be made, at five and one-half per cent. per annum interest, payable semi-annually, with a commission to be paid for said loan in the amount of ten thousand dollars; the time of the loan to be ten years with the principal payments of five per cent. per annum to commence at the end of the fourth year from the time the loan is made.

"I am also attaching to said application properly filled out one of your loan contract forms stipulating the terms and conditions of the loan together with the amount of commission to be paid you with other formal

stipulations therein noted; and it is distinctly agreed between us and is made a part of this loan contract with the Massachusetts Life Insurance Company application that, if an agreement be not effected within thirty days from this date by the Massachusetts Mutual Life Insurance Company to make this loan and advance the installments as the building progresses, then, in that event, this application and the loan contract shall be void and of no effect.

"Very truly yours,

GWD-GW "[Signed] George W. Donaghey."

"LETTER.

"Springfield, Massachusetts, February 15, 1927.

"Mr. Theo. W. Pinson, Manager,

"907 Republic Bank Building, Dallas, Texas.

"Dear sir: This is to advise you that the application of George W. Donaghey, *et al.*, for a loan of $275,000 to cover property in Little Rock, Arkansas, will be approved for a loan of $200,000 only, subject to satisfactory title, plat of survey showing the building to be within the lot lines and with the understanding that the new building on the premises is to be completed and paid for free from mechanics' lien claims in accordance with the plans, specifications and representations made to us at a cost of not less than $400,000.

"We are of the opinion that such an approval will be all that we can possibly loan on this property considering that the building is to cover also the lot which is held by the applicant under a ninety-nine-year lease. We shall probably require an assignment of the lease to us at the time of the closing of the loan.

"If such an approval will be satisfactory you may forward the abstract of title and plat of survey for examination.

"Yours truly,

"[Signed] O. E. Fifield,

"Superintendent of Loans."

"LETTER.

"Little Rock, Arkansas, March 1, 1927.

"Messrs. Remmel & McCarroll,

"1308 Donaghey Building, Little Rock, Arkansas.

"Gentlemen: With reference to the loan from the Massachusetts Mutual Life Insurance Company, I wish to say while I shall need, at least $25,000 more money than the amount named in Mr. Fifield's letter, yet I shall accept the $200,000 therein named, trusting that upon completion of the building if I should then need an additional $25,000, the company will, if it thinks I am entitled to it, lend me said additional $25,000, this, however, to be left entirely to the judgment of the company at the time. This acceptance is conditioned upon the securing of a permit from the city of Little Rock for the construction of the building at the location named and the approval of the plans by the lessor of that part of the land subject to the 99-year lease. I contemplated no trouble respecting these matters.

"It is agreed that I am to pay $7,500 commission on the $200,000 loan herein named, and that all other conditions named in my application of the 7th day of February, 1927, are to remain the same. I shall prepare and forward plat of ground and abstract of title as quickly as this can be made up.

"Very truly yours,

"[Signed] George W. Donaghey."

"LETTER.

"Dallas, Texas, March 3, 1927.

"Remmel & McCarroll,

"Donaghey Building, Little Rock, Arkansas.

"Gentlemen: I am pleased to receive your letter from Governor Donaghey accepting the commitment of $200,000. You state that, since the loan is approved with the understanding that the improvements cost not less than $400,000, it would appear that we are not recognizing any value whatever for the ground.

"You have evidently overlooked the fact that the choicest portion of this ground is a leasehold, and a substantial part of the building is on the leasehold, and, as you know, we are not inclined to lend liberally on leaseholds. I think that if you took the value of the ground apart from the leasehold, and the value of the building which is not on the leasehold, you would see that we are making a rather large loan under the circumstances, I am very glad, however, that Governor Donaghey was able to accept a loan of this amount, and I trust that there will be no trouble which might arise from the building cost falling below the minimum.

"When you receive the abstract and plat of survey I would be very glad if you will forward them direct to Mr. Fifield.

"With kindest regard, I am,

"Yours very truly,

"[Signed] Theo W. Pinson, Manager."

Appellee filed an answer interposing the following defenses to the alleged cause of action, to-wit:

First: That the instruments in writing did not constitute a complete or consummated contract for the procurement of a loan in the amount of $200,000 because the letter of date March 1, 1927, contained conditions which were never accepted by the Massachusetts Mutual Life Insurance Company relative to procuring a permit from the city of Little Rock to construct the building, and procure the approval of the plans for the building by the lessor of that part of the land subject to the ninety-nine-year lease.

Second: That the instruments in writing did not constitute the entire contract, but were executed and delivered upon an oral condition that no commission would be charged unless the money was actually paid to and received by appellant from the Massachusetts Mutual Life Insurance Company.

Third: That the alleged contract set forth in the complaint of appellees was mutually abandoned after March first, 1927.

The cause was submitted for trial upon the pleadings, testimony and instructions of the court which resulted in a verdict and consequent judgment for $7,500 for commissions on loan with interest at six per cent. from May 1, 1927, and $743.60 for commissions on fire insurance, from which is this appeal.

The first contention of appellant for a reversal of the judgment is that no mutual binding agreement was entered into between the Massachusetts Mutual Life Insurance Company and appellant for making the loan. The argument in support of this contention is that the written instruments do not constitute a complete contract, because there was no acceptance by the Massachusetts Mutual Life Insurance Company of the conditions in appellant's letter of date March 1, 1927, relative to his procurement of a permit from the city of Little Rock to construct the building and the procurement of the approval of the plans for the building by the lessor of the property covered by the lease. No duty was imposed by the letter upon the Massachusetts Mutual Life Insurance Company to procure the permit or approval. That duty rested solely upon appellant, just as the duty to furnish the abstract rested upon him. An acceptance of those conditions on the part of the Massachusetts Mutual Life Insurance Company was necessarily implied, for the parties knew the building could not be constructed without the procurement of both. The acceptance of the Massachusetts Mutual Life Insurance Company of those conditions being implied, it was not necessary for it to formally accept the conditions in order to complete the contract. The writings and necessary implications therefrom constituted a complete and enforceable contract. As the written instruments constituted a complete contract, the court correctly refused to peremptorily instruct a verdict for appellant, and also correctly refused to give instruction number 6 requested by appellant submitting the issue to the jury of whether the contract was complete. It was the duty of the court, and not the jury,

to determine whether the writings within themselves constituted a complete and enforceable contract.

Appellant's next contention for a reversal of the judgment is that the court erred in refusing to give his requested instruction number 7 to the effect that he would not be liable for a commission unless the loan was actually made and the money actually paid to him. Appellant testified that when the loan contract was signed and delivered it was upon the sole and only condition that he would not be required to pay a commission unless the loan was actually made and the money actually paid by the Massachusetts Mutual Life Insurance Company to him. This testimony was inadmissible because it was in conflict with the following written paragraph of the written contract, to-wit:

"If I am unable or refuse to complete said loan, then I agree to pay the above commission and all expenses you or the assignees of this contract may have incurred, for such refusal or inability to complete said loan."

As the requested instruction was based upon incompetent testimony, it was properly refused by the court.

Appellant's next contention for a reversal of the judgment is that the court erred in excluding two letters, one from appellant to John F. Boyle, lessor of the leased lot, and the other the answer he received thereto. These letters related to the construction of a building on the leased lot. The letters were properly excluded as they antedated the contract for the loan, and had no reference thereto.

Appellant's next and last contention for a reversal of the judgment is the refusal of the court to permit appellant to introduce letters passing between him and Mr. Pinson and the appellees, from January 27, 1928, to April 8, 1928, relative to the building of a hotel on said property. Appellant pleaded as one of the defenses, and testified in support thereof, that the loan under his application of February 7, 1927, and all transactions pertaining

thereto, were mutually abandoned by all parties concerned after March, 1927. The letters referred to above were offered in evidence in support of appellant's testimony relative to the mutual abandonment of all transactions relative to the loan under his application of February 7, 1927. The majority of the court is of the opinion that the letters referred to, and excluded by the court, being between appellant and Theo. W. Pinson concerning a different character of building upon the same property, tended to show that there had been an abandonment of all negotiations relative to the original loan, and that, had they been admitted in evidence, they would have corroborated the testimony of appellant to that effect. Mr. Justice BUTLER and the writer do not concur in this view, but are of the opinion that the letters were inadmissible because they concerned a different and wholly independent transaction.

On account of the error indicated in excluding the letters referred to, the judgment is reversed, and the cause is remanded for a new trial.

VEACH *v.* MERCHANT.

Opinion delivered February 2, 1931.

Rice & Dickson, for appellant.

W. O. Young, for appellee.

KIRBY, J. J. F. Merchant and Allie Merchant brought this suit in the chancery court for an alleged

balance of purchase money claimed to be due from A. C. Veach, trustee, and for the enforcement of a vendor's lien therefor against the northwest quarter southwest quarter, section 1, township 18 north, range 31 west, Benton County.

It was alleged that they had conveyed the lands to A. C. Veach as trustee for the Oklahoma Park Association for a consideration of $2,000; that only $1,425 was paid in cash and the balance of $575 was to be paid in 30 days; that the deed was delivered, but the deferred payment had never been paid. They alleged that defendants were nonresidents; asked that the amount due should be adjudged and a lien fixed against the land for the collection of the balance of the purchase money.

Appellant filed a general demurrer to the complaint and suggested the death of J. F. Merchant since the filing of the suit, and that no cause of action had been stated against him by Allie Merchant. Without waiving his demurrer, he answered admitting the purchase of the land on the 20th day of July, 1926, for $2,000, $1,160 of which was paid in cash, and that the balance was to be paid out of proceeds of the sale of 22 lots in block 5, according to the plat of the 40-acre tract containing the block, the sales to be made by plaintiff or his agent, B. F. Alley, and the deeds to be executed by defendant, appellant; that he had been at all times since ready and willing to execute the deeds to the said purchasers of the said 22 lots in block 5, and allow appellees to keep the full amount of the purchase price in the sums for which the lots were sold; that five of the lots were sold by the plaintiff or his agent, and deeds executed therefor and the proceeds of the sales were paid over to plaintiff and accepted by him under the terms of the agreement. The answer denied that plaintiff had a lien on the lands for any of the alleged balance of the purchase money; alleged that the purchase money was paid in full, and that a warranty deed had been executed by the grantor conveying same with acknowledgment of the payment in full of the

purchase price. The answer offered to convey all the unsold portions of block 5 in the 40-acre tract to the plaintiff or any one designated by them.

It appears from the testimony that the contract of sale was made with $100 paid as earnest money, and the deed was put in the bank in escrow to be delivered upon the payment of the balance of the $2,000 consideration. $1,160 was paid in cash, and the deed delivered to the appellant by the escrow bank. Deeds for the lots in block 5 were executed in blank and left with the bank to be filled in with the names of the purchasers thereof by the agent of plaintiff, who agreed to make the sales, and the money derived therefrom to be delivered to the plaintiff. Five of the lots were sold and the deeds made accordingly, the $175 realized therefrom being placed to the credit of Mr. Merchant, the grantor in the deed.

The cashier of the bank testified that, after the deed had been put in the bank in escrow, the grantor returned the same day and directed him to deliver the deed, which recited full payment of the purchase money to appellant, which was done. $1,170 in cash was paid, and the proceeds of the sale of five of the lots, $175, placed to the credit of the grantor in the bank, $1,345 in money. The cashier understood that the balance of the unpaid money was to be paid by the sale of the lots, five of which were in fact sold and the money put to the credit of the grantor. He did not understand that there was any specified time for the sale of the lots and said Mr. Alley agreed to sell the lots in the block reserved and turn the purchase money over to the grantor. He also testified that he was administrator of Mr. Merchant's estate, and prior to his death he had given all his property and holdings to his wife, Allie Merchant; that he made no claim of any interest in the balance alleged to be due for the estate.

Mrs. Merchant testified that her husband died on April 15; that there was about $1,160 or $1,175 paid in cash of the consideration and some lots sold; that she supposed that Mr. Alley was to sell the lots for appel-

lant, but did know that there was no note given for any amount of the purchase money. She stated she was not present when the sale of the lands was made, and had got her understanding of it from her husband and Mr. Butler, the cashier.

Alley testified that he had suggested the sale of the 40-acre tract of land and had introduced Mr. Veach to the owner; that $100 was paid down to bind the bargain; that he knew of no written agreement of sale between the parties. The deed was placed in escrow to be delivered upon the payment of the $2,000 according to the original contract; that he had heard of a second contract about 22 lots in one block of the tract of land platted to be sold and the proceeds turned over to the grantor; that Mr. Merchant told him that if he would agree to sell the lots, he would make the trade; that he did agree with Mr. Merchant to sell the lots, and thought it could be done in 30 days and the trade was made. The deeds to the 22 lots were executed in blank and left at the bank with the cashier, Mr. Butler, to insert the names of the purchasers of the lots, and he was further instructed to place the money derived therefrom to the credit of Mr. Merchant; said that Mr. Merchant was to accept the purchase money for the 40 acres, the proceeds from the sale of the 22 lots and the $1,160 or whatever amount was paid down, and said to him, "I want you to sell these lots;" that he later secured an extension of 30 days for the sale of the lots, and that Mr. Veach had paid him nothing whatever, as he was representing Mr. Merchant only in the sale of the lots.

The court rendered a decree against appellant for the alleged balance of the purchase money due, and from such decree this appeal is prosecuted.

The appellant insists that the decree is contrary to the great preponderance of the testimony, and the contention must be sustained.

The facts, as stated by the witnesses who knew of the transaction, are virtually undisputed. Mrs. Mer-

chant, who was the owner of any claim for purchase money, if any had been due for the conveyance of the lands, knew nothing about the transaction of her own knowledge, and the deed, first placed in escrow and later delivered to appellant by direction of the grantor, J. F. Merchant, recited the full consideration paid. The three witnesses, who knew of the transaction, stated that the agreement required the payment of the certain amount of cash that had been received and the proceeds of the sale of the lots in the particular block of land, which were to be turned over by the agent appointed by Merchant to make the sale, the deeds to said lots being executed in blank and left with the cashier of the bank to fill in the names of the purchasers thereof, and the money deposited to the credit of the grantor.

Appellee insists that the testimony of the witnesses relative to the transaction was incompetent, because of the death of the grantor before the trial of the case, but his administrator was not a party to the suit, and such objection cannot be sustained. *Nolen* v. *Hardin,* 43 Ark. 317, 51 Am. Rep. 563; *Stanley* v. *Wilkerson,* 63 Ark. 556, 39 S. W. 1043; *Blackburn* v. *Thompson,* 127 Ark. 438, 193 S. W. 74.

The court erred therefore in the decree rendered, and at most could only have required the conveyance of the lots remaining unsold in the block of lands, the proceeds of the sale of which were agreed to be turned over in payment of part of the purchase money, which appellant offered to convey. The decree is accordingly reversed, and the cause remanded with directions to dismiss the complaint for want of equity upon the conveyance of the remainder of the lots agreed to be conveyed in settlement of the balance of the purchase money. It is so ordered.

EVANS *v.* CHEATHAM.

Opinion delivered February 2, 1931.

[redacted]

J. B. Milham, for appellant.

W. D. Swaim and *A. F. Auer,* for appellee.

MEHAFFY, J. Appellants, Charles Appleton and Cordie Appleton, his wife, were the owners of lots 17 and 18 in block 39, Mineral Heights Addition to the town of Mineral Springs, Arkansas. The Appletons had been indebted to appellee, B. D. Cheatham, since 1924, the indebtedness being secured by chattel mortgage. Only a small amount of this indebtedness had been paid when in 1928 a renewal note was given, and to secure the payment of this renewal note, the amount of which was approximately $640, the Appletons executed and delivered to appellee Cheatham a mortgage on the above described lots. Cheatham delivered this mortgage to Appleton, who agreed to take it to the clerk's office, have it recorded, and pay the expenses for having it recorded. However, after the execution of the mortgage, the Appletons executed a mortgage to the Georgia State Loan Association and had it put on the record before Cheatham's mortgage was recorded.

When the note of the Appletons to Cheatham became due, it was not paid, and Cheatham brought suit in the Howard Chancery Court to foreclose his mortgage.

After suit was brought, it was agreed between the Appletons and Cheatham that the Appletons would give

Cheatham a quitclaim deed to the two lots covered by his mortgage, subject to the mortgage to the Georgia State Loan Association, for approximately $900. The Appletons claim that the lots were worth about $1,800.

On the same day that this quitclaim deed was made and delivered to Cheatham, the Appletons executed a deed of trust to the appellant, C. N. Evans. These conveyances were executed in the city of Hot Springs on the second day of December. Cheatham mailed his quitclaim deed to the clerk of Howard County, and it was recorded on the fourth day of December. Appleton did not deliver the deed of trust to Evans, but immediately took it to the clerk's office in Howard County, and had it put on record ahead of the quitclaim deed to Cheatham. This suit was brought by Cheatham to have the deed of trust to Evans canceled, alleging that it was a fraudulent conveyance and a cloud on his title.

The Appletons and Evans filed answer, denying that there was any fraud, and alleging that they were indebted to C. N. Evans in the sum of $500 and to Evans' mother in the sum of $200, and that this deed of trust was given to secure this indebtedness.

The appellant, Evans, is a brother of Mrs. Cordie Appleton, and it was claimed that they owed her brother $500 and her mother $200.

At the time of the execution of the quitclaim deed Appleton told Cheatham that there were no mortgages or liens on the property or no indebtedness except $800 which they owed the Georgia State Loan Association and an insurance bill due of $24 and two back payments to the loan association of $26. This evidence is undisputed.

Appleton testified, however, that he told Cheatham he was going to secure his brother-in-law, Evans, but that he was going to pay this off. This is denied by Cheatham.

The Appletons do not undertake to show by the evidence what they owed Mrs. Appleton's mother the $200 for. Appleton and Evans, however, testify that

when they lived in Hot Springs Evans had a small grocery store and turned it over to Appleton, and Appleton operated it, agreeing to pay Evans for it sometime, but they don't say when. They testify also that they estimated the value of the groceries to be about $500. This deal for the grocery store, if made at all, was made sometime before the quitclaim deed, and there is no reason given why they had not given note and mortgage to Evans before this.

The indebtedness to the Georgia State Loan Association, together with the debt due Cheatham, was probably as much or more than the lots could have been sold for at the time.

The contention of appellants is that Cheatham gave up his security, delivered his mortgage and papers to Appleton, and agreed to take a quitclaim deed subject not only to the Georgia State Loan Association, but subject also to the deed of trust to Evans. In other words, that, when he had the security and a suit to foreclose was pending, and no defense to it, and the property of sufficient value to pay Cheatham's debt and the debt of the loan association, without any reason he gave this up, dismissed his suit, and accepted a quitclaim deed subject to the indebtedness of both the loan association and the Appletons.

There is some conflict in the evidence, but it would serve no useful purpose to set it out at length.

The chancellor found in favor of the appellee and entered a decree canceling the mortgage from the Appletons to Evans, and this appeal is prosecuted to reverse the decree of the chancellor.

Appellants cite and rely on the case of *Hempstead* v. *Johnson,* 18 Ark. 123. It is true the court said in that case the circumstances of mere suspicion leading to no certain result would not be sufficient to establish fraud, but it was also said in that case that neither the law court nor the chancery court insisted upon positive and express proof of fraud; that courts of equity would

grant relief upon the ground of fraud established by presumptive evidence.

They next call attention to the case of *Davis* v. *Jones,* 67 Ark. 122, 53 S. W. 301. The chancery court in that case, however, found that the transaction was free from fraud, either actual or constructive, and the finding of the chancellor was affirmed by the Supreme Court.

The appellants call attention to a number of other cases which we do not deem it necessary to discuss. These questions have been discussed and determined by this court so often that we do not deem it necessary to refer to all of them or discuss them.

If the deed of trust in this case was not set aside, there is no question but what it would hinder, delay, and defeat Cheatham in the collection of his debt. Our statute provides that every conveyance made or contrived with the intent to hinder, delay, or defraud creditors or other persons, shall be void. Section 4874, C. & M. Digest.

"While the general rule is that a fraudulent intent on the part of the grantor is necessary to bring conveyances within the terms of the statutes, it is well settled that fraud may arise as an inference of law, and that, when a conveyance is made under such circumstances that the result must necessarily be to hinder and delay creditors, it will be presumed that such was the intent of the transferor in making it." 12 R. C. L. 537.

As to whether the deed of trust in the instant case was fraudulent is a question of fact, and the finding of the chancellor is conclusive here unless contrary to the preponderance of the testimony. *Mente & Co., Inc.,* v. *Westbrook,* 181 Ark. 96, 24 S. W. (2d) 976; *Pattison Orchard Co.* v. *S. W. Ark. Utilities Corp.,* 179 Ark. 1029, 18 S. W. (2d) 1028; *Sternberg* v. *Blaine,* 179 Ark. 448, 17 S. W. (2d) 286; *Cain* v. *Mitchell,* 179 Ark. 556, 17 S. W. (2d) 282.

There is no other disputed question in the case. It is undisputed that the Appletons owed Cheatham; that the debt was secured by mortgage; that suit had already

been brought for the purpose of foreclosing the mortgage; that there was an indebtedness of $800 or $900 to the Georgia State Loan Association; that the property was insufficient to pay appellee after the payment of the Georgia State Loan Association if Evans' mortgage is valid. In fact there is no dispute in the evidence except as to whether the conveyance to Evans was fraudulent.

The chancellor found that this conveyance was fraudulent, and his finding is not against the preponderance of the evidence. The decree is therefore affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* FOWLER.

Opinion delivered February 2, 1931.

R. E. Wiley and *Richard M. Ryan,* for appellant.

Oscar Barnett, for Pruitt, and *John L. McClellan* and *Verne McMillen,* for Fowler *et al.,* appellees.

MEHAFFY, J. Appellees George W. Fowler and Westchester Fire Insurance Company instituted this action in the Hot Spring Circuit Court against appellant, Missouri Pacific Railroad Company, to recover damages for the alleged setting out of fire which destroyed appellee's property.

The appellee, George W. Fowler, was the owner of a dwelling house in Barnett's Suburban Addition to the city of Malvern. The value of the house was alleged to be $762.09. The appellee alleged that the fire originated from sparks from a locomotive engine operated by appellant on its track a short distance from said house.

The appellee, Westchester Fire Insurance Co., on January 20, 1928, issued its policy of fire insurance whereby it agreed to indemnify appellee Fowler against loss or damage by fire for a period of one year.

The fire occurred on November 23, 1928. On the 13th day of July, 1929, the Westchester Fire Insurance Company paid George W. Fowler the sum of $380 in settle-

ment of its liability under its policy, and Fowler assigned and transferred to the Westchester Fire Insurance Company his claim against the Missouri Pacific Railroad Company in the sum of $380.

The appellant, on January 20, 1930, filed answer denying all the material allegations in the complaint, and alleged that the house burned by the negligence of plaintiff in not protecting it from fire hazards, and in not keeping the premises clear of fire hazards, and in not looking at and inspecting said building, and keeping same in a safe state from fire hazards, and in the condition in which the property was being kept. Appellant also alleged that Fowler and his agents and servants were negligent in not extinguishing the fire after discovering same, and in not using ordinary care in extinguishing same; and alleges that this was contributory negligence which barred appellees' right to recover.

Appellees, on the 22d day of July, 1930, filed a demurrer to paragraph 2 of the answer in which it was stated that the allegations in reference to contributory negligence in said paragraph do not allege facts constituting a legal defense, and that said paragraph attempts to plead as a defense to this action the contributory negligence of the plaintiff which is not a bar to plaintiff's right, and which is no defense to the allegations of the complaint. The court sustained the demurrer, and appellant excepted.

On the 7th day of April, 1930, appellee, Adam Pruitt, filed an intervention asking for damages against appellant in the sum of $382.09, alleging that Fowler had settled with the insurance company and made the assignment to the company without authority. He also asked damages in the sum of $350 for destruction of household goods and personal property which was in the house at the time it was destroyed by fire.

Appellees, George W. Fowler and Westchester Fire Insurance Company, filed motion to dismiss intervention

of Pruitt, and the court granted said motion in part, to which order the intervener excepted.

On the same day the appellant filed motion for continuance. Thereafter on April 8, 1930, plaintiff was permitted to withdraw his motion to strike intervention, and the defendant was given until next term of court to file another and supplemental answer to the intervention, and the cause was continued on motion of defendant and set for trial July 22, 1930.

On April 8, 1930, appellant filed answer to Pruitt's intervention, denying the allegations in said intervention and pleading negligence of intervener and the owner. The Westchester Fire Insurance Company introduced the certificate of the Insurance Commissioner and the State Fire Marshal showing that it was a corporation under the laws of the State of New York and duly authorized to do business in Arkansas. George W. Fowler owned the dwelling house which burned, and Adam Pruitt was living in the house at the time. At the time of the fire there was insurance on the building, but Fowler had no interest in the household goods which were in the dwelling. These belonged to Pruitt, the intervener.

The insurance company had paid Fowler $380, and Fowler had executed an assignment to the Westchester Fire Insurance Company. The railroad was about 40 steps from the house that was burned.

Appellee Fowler, the owner of the house, was not at the fire, and did not know how the fire originated.

Appellee Pruitt, who lived in the house, worked for the owner and did not pay any rent on the house. The house was burned in November, 1928, and the owner wrote to the appellant about January 4, 1929.

Adam Pruitt, the intervener, who lived in the house at the time it was destroyed by fire, said the house was about 30 or 35 steps from appellant's tracks. When the fire caught, Pruitt and his wife had not gone to bed. When he discovered a light shining in the yard, he went out of the house and looked, and there was a blaze on the

top of the house on the southeast corner. The wind was high, and shingles were old and dry. Witness knocked a window out and got some of his things out of the house. The house was totally destroyed. This witness testified that they did not have any fire in the house that night; that it was not cold that night. He and his wife were sitting in the hall, and there was no fire in the hall. There had not been any fire in the heating stove but had been a fire in the kitchen earlier in the night. The freight train passed about 20 or 25 minutes before he discovered the fire. There was not any fire between the house and the railroad track, and the wind was blowing in the direction of the house. Witness lost nearly all of his household goods. The fire damage was $460. The fire caught somewhere between nine and eleven o'clock P. M. witness thought.

Other witnesses testified that the fire was discovered about 30 minutes after the train passed.

Witnesses for appellant testified that the engines that passed the house which was destroyed that night were equipped with wire netting spark arresters; that the spark arresters were in good condition, and that sparks could not have been thrown from the engines on to the house and set it afire.

The freight train which passed the place a short while before the fire was discovered, the train dispatcher said, left Malvern at 11:18 and had 66 cars in the train pretty heavily loaded.

A number of witnesses testified that there was no fire between the house and the railroad track; that the spark arrester was in good condition; that it could not throw live sparks the distance from the track to the house; and the engineer and fireman operating the train testified that it was not throwing sparks.

There was a verdict and judgment for Fowler and the Westchester Fire Insurance Company for $650 and a verdict and judgment in favor of Adam Pruitt for

$250. Motion for a new trial was filed, overruled, and exceptions saved, and the case is here on appeal.

The question whether appellant was negligent in the operation of its train is not involved. If the evidence is sufficient to warrant the jury in finding that the fire that destroyed the property was caused by sparks from a locomotive, the defendant would be liable.

"All railroads which are now or may be hereafter built and operated either in whole or in part in this State shall be responsible for all damages to persons or property under such regulations as may be prescribed by the General Assembly." Section 12, art. 17, Constitution of Arkansas.

The statute provides that when fire from a locomotive destroys property, the defendant cannot plead or prove that it was not the result of negligence or carelessness. It is only necessary under the statute to show that the fire which resulted in the injury originated or was caused by the operation of the railroad. Section 8569, C. & M. Digest.

The house owned by Fowler, which was destroyed by fire, was 40 or 50 steps from the railroad track. Somewhere near eleven o'clock in the nighttime a freight train of 66 cars passed this house where Pruitt lived, heavily loaded and the fire was discovered on the roof of the building next to the railroad track about 20 or 30 minutes after the freight train passed. The engine pulling the freight train was a coal burner. There was a strong wind blowing from the railroad tracks in the direction of the house. There was no fire in the building and had not been that day except the fire in the kitchen, which had been out some time. Pruitt and his wife had not gone to bed, and they discovered the fire on the roof as stated, shortly after the freight train passed.

It is earnestly contended by the appellant that there is no evidence that the fire which destroyed the dwelling house and household goods was caused by the negligence of the appellant. Of course, it is immaterial whether the

appellant was guilty of negligence or not. But appellant argues that there is not a single witness who even comes close to testifying that the fire originated from sparks thrown from appellant's locomotive. It is true that no witness testified that the engine was throwing sparks. The evidence, however, is undisputed that the heavily loaded freight train passed on the track near the house, and that shortly thereafter a portion of the roof on the side of the house next to the railroad was discovered to be on fire, and there was no other way, according to the evidence, in which this fire could have originated.

Appellant correctly contends that the burden was upon the appellees to show by some fact or circumstance that the fire originated from the locomotive.

Appellant calls attention to and relies on *Blanton* v. *Mo. Pac. Rd. Co.*, 182 Ark. 543, 31 S. W. (2d) 947. In that case we said: "When the evidence established the fact that a train has passed and shortly thereafter a fire was discovered burning nearby, it is sufficient to justify a finding that the train put out the fire, but it does not justify the court in telling the jury that there is a presumption that it did. The jury are to find from the evidence, direct and circumstantial, whether the railroad company set out the fire."

"We have steadily adhered to the rule that, 'in the absence of direct and positive testimony as to the origin of the fire which consumes inflammable property situated near a railroad track soon after the passing of a locomotive, the inference might be drawn that the fire originated from sparks from the passing locomotive.'" *Reeves* v. *St. Louis-San Francisco R. Co.*, 171 Ark. 1176, 287 S. W. 166; *Chicago, R. I. & P. Ry. Co.* v. *National Fire Ins. Co.*, 151 Ark. 218, 235 S. W. 1006; *St. Louis-San Francisco R. Co.* v. *Dodd*, 59 Ark. 317, 27 S. W. 227.

When passing on the sufficiency of the evidence to support the verdict, we must give the evidence which tends to support the verdict its highest probative value.

When fire is discovered shortly after a train has passed, and the proof does not establish some other origin of the fire, the jury is justified in finding that the fire originated from sparks from the engine. *Helena Southwestern Ry. Co.* v. *Coolidge,* 169 Ark. 552, 275 S. W. 896; *Chicago, R. I. & P. Ry. Co.* v. *Cobbs,* 151 Ark. 207, 235 S. W. 995.

The evidence in this case was sufficient to justify the jury in reaching the conclusion that the fire originated from the locomotive.

It is next contended by appellant that the court erred in sustaining the demurrer of appellees to the second paragraph of appellant's answer as to the plea of contributory negligence.

Appellant cites and relies on *Clark* v. *St. L. I. M. & S. R. Co.,* 132 Ark. 257, 201 S. W. 111. In that case this court said that the instruction on contributory negligence was proper, but the court said in that case: "For the destruction of, or injury to, property caused by such omissions on the part of servants and employees of railway companies, such companies would be liable, provided such omissions constituted negligence upon the part of such employees, but in that case the companies would be liable, not under the statute, but under their common law liability for injury and the consequent damage caused by their negligence."

In that case the negligence charged against the railroad company was that its servants and employees carelessly and negligently kindled the fire on the right-of-way and negligently allowed it to spread and burn and consume plaintiff's property. The railroad company contended that the plaintiff had an agent to look after his mill, and that he knew of the fire burning near the mill, and knew, or should have known, that the mill was exposed to destruction by fire, and that he failed to use ordinary care to prevent same.

There is no question of negligence in the instant case. In the last case referred to the court also said, speaking

of the act making railroad companies liable for fires originating from its locomotives: "Yet, when construed as a whole, it shows that the intention of the Legislature to make the railway company liable absolutely in damages for injury to or destruction of property caused by such extraordinary hazards as the operation of a locomotive engine, machinery, trains, cars, or other things, when used or operated upon the railroad, or by any of their servants or employees in the operation of such machinery upon the railroad tracks, or by the positive affirmative act of the servants or employees of railway companies in the operation of the railroad."

As stated in the case relied on by appellant, the statute makes the railroad company absolutely liable for the destruction of property caused by the operation of its locomotive. Moreover, the plea of contributory negligence did not state any facts constituting the negligence of the appellee, but mere conclusions. The answer to the intervention had the same plea of contributory negligence, and no demurrer was filed to it.

If the fire originated, as contended by appellees, from sparks from the engine, we are unable to see how any act of the appellees could in any way contribute to setting out the fire.

It is true appellant also claims that appellees were guilty of contributory negligence in their failure to prevent the destruction of the property after the fire was discovered, but the evidence not only does not show this, but it shows there was no contributory negligence.

At the time the fire originated, the roof of the house was dry and evidently caught very easily, but, when appellee, Pruitt, discovered it, he could not extinguish it, and the evidence shows that he saved all of his property that he could save.

The rule stated in Elliott on Railroad, vol. 3, 775, is as follows: "Where there are statutes in force imposing an absolute liability upon a railway company for fires set by its locomotives, the question of the owner's con-

tributory negligence is generally held to be immaterial and to have no effect on his right to recover. We do not believe, however, that such a strict rule, even where there is an absolute statutory liability, is entirely just. There may be cases where, after the property is set on fire by the railway company, the owner could by slight effort save the property from destruction, and in such cases it seems to us that it would be unjust to compel a railway company to pay an owner damages notwithstanding an absolute statutory liability."

There is in this case, however, no question of contributory negligence, and the undisputed proof shows that the property owner did what he could after he discovered the fire.

In one of the cases cited by Elliott on Railroads it is said: " 'We are at a loss to see how the doctrine of contributory negligence can be invoked as a defense where there is no law requiring precautionary action on the part of the party damaged, and no question of negligence on the part of the corporation can be made or adjudicated.' Of course, if a party should knowingly or purposely place his property in a situation where sparks from a passing engine would be likely to ignite and burn it, he could not recover in case of its destruction; but such an act would scarcely come within the definition of contributory negligence." *Union Pac. D. & G. Ry. Co.* v. *Williams,* 3 Colo. App. 526, 34 Pac. 731.

If the owner of property should stand by and wilfully or purposely permit his property to be destroyed by a fire set out by a locomotive, he could not recover, but, as stated by the Colorado court, this would scarcely come within the definition of contributory negligence. Of course, the property owner's conduct could be such that it would be his fault altogether that it was destroyed, but it would not be contributory negligence. Contributory negligence means negligence on the part of the injured party which contributes to the injury caused by the negligence of the other party. In this case it is wholly imma-

terial whether the railroad company was guilty of negligence or not. If it set out the fire, it is liable for damage done by the fire.

It is next contended by the appellant that the court erred in permitting the owner to testify as to the value of the personal property destroyed. Any person, owner of personal property, may testify as to its value. Witnesses testifying to the value of property merely give their opinion. There was no error in permitting the owner to testify as to the value of his property.

It is next contended that the case should be reversed because the court permitted Pruitt to testify to a conversation and an offer to compromise. It is contended that this testimony was highly prejudicial; that the section foreman was not an officer or agent of the company, and had no right to make any offer of settlement or to bind the railroad company in any manner. It is contended that the effect of this testimony was to tell the jury that the appellant had admitted liability. We do not agree with appellant in this contention.

The witness, U. G. Heath, testified that he was the section foreman at Malvern, and had been employed in that capacity for five years; that he went down to Pruitt's next morning after the fire; that it was his duty to report fires along his section; and that he measured to the railroad track from the nearest point of the house; that he does not remember anything that was in his report, but he knows he made it because it was his duty to do so. He denied all the statements made by Pruitt with reference to the conversation, but Pruitt's statement does not tend to prove any offer of compromise, and, of course, would not be objectionable as evidence of an offer of compromise. There is no claim on the part of Pruitt that the section foreman offered him anything, and we do not think the evidence of Pruitt was prejudicial.

It is next contended by appellant that the court erred in permitting Mary Pruitt, the wife of Adam Pruitt, to testify in the case. When Mary Pruitt was offered as a

witness, objection was made because she was the wife of Adam Pruitt, one of the parties to the suit, and the court stated she might testify as to Fowler, but stated that, being the wife of Adam Pruitt, her testimony could not be considered only as it would relate to the claim of the plaintiff, George Fowler. Certainly, the appellant could not deprive the plaintiff of the use of a witness because the witness happened to be related to the intervener. Her testimony was incompetent for or against Pruitt.

It is next contended that it was error to permit witness Hardy Hill to testify as to the replacement value of a new house. This testimony was competent, not as showing that the house was of the value that a new house would cost, but was one of the means of proving the value, and it was evidently not understood by the party or the jury as establishing the cost of a new house as the value of the old one. The evidence showed that the house had been built five or six years, and, of course, nobody believed that it was of the same value that it would cost to build a new house, and the value fixed by the jury was very much less than the evidence of Hill showed a new house would cost.

Appellant argues that instruction one, given at the request of the appellee, was erroneous because it told the jury railroad companies were liable for damages to property caused by fire from the operation of locomotives, regardless of whether said fire was the result of negligence on the part of the company or not. There is no question of negligence involved in this case. If the railroad company set out the fire by the operation of its locomotive, it is liable whether it was guilty of any negligence or not. Another objection appellant urges to the instruction is that it left out the defense of contributory negligence. What we have already said answers this objection.

Appellant's objection to instruction No. 2 is that there is no evidence that the fire was caused by defendant's locomotive.

Appellant objects to instruction No. 3, given at the request of appellee, and urges that it was an instruction on the weight of evidence. In this instruction the court simply told the jury that the setting out of the fire might be proved by circumstantial evidence if they believed from all the facts and circumstances that the fire was set out by sparks, etc., and told them in this instruction that they did not have to prove this by an eyewitness. This was a correct instruction. If it had to be proved by an eyewitness, then one could not recover for the destruction of his property unless some person saw the fire originate.

To support its contention with reference to this instruction, appellant cites and relies on *Blanton* v. *Mo. Pac. R. Co.*, 182 Ark. 543, 31 S. W. (2d) 947. We held in that case that it was sufficient to show that the train passed and shortly thereafter a fire was discovered burning nearby, but we held that it was improper for the court to tell the jury that there was a presumption that the fire was set out by the railroad company.

In the instant case the court did not tell the jury there was any presumption, but told the jury that the setting out of the fire might be proved by circumstantial evidence.

It is next contended that the court erred in refusing to give appellant's instruction No. 7a. This instruction was on the question of contributory negligence, and there is no evidence upon which to base this instruction.

The same is true with reference to instruction No. 8a. It in effect told the jury that appellees could not recover if they were guilty of contributory negligence. There is no evidence in the record justifying an instruction on contributory negligence. The evidence in the case shows on the part of appellees that the freight train of 66 cars, heavily loaded, passed the house shortly before the fire was discovered, and that the wind was blowing from the railroad tracks toward the house.

Appellant's witnesses testified that the engine was equipped with a wire netting spark arrester in good condition, and that it could not throw out sparks and set fire to the house. These were questions of fact properly submitted to the jury, and the verdict of the jury, where there is any substantial evidence to sustain it, cannot be disturbed by this court.

The judgment of the circuit court is affirmed.

SMITH *v.* STATE.

Opinion delivered February 2, 1931.

J. D. Benson, for appellant.

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

McHaney, J. Appellant was convicted on a charge of manufacturing liquor and sentenced to one year in the penitentiary. For a reversal of the judgment and sentence against him he urges the following assignments of error:

1. That the court erred in permitting the State's witness Jacobs to testify that appellant had testified in the examining trial that he had bought the liquor (home brew) and did not make it. Conceding that it was erroneous, it was harmless, as appellant so testified himself in the circuit court. We fail to see where appellant was prejudiced by the testimony of witness Jacobs.

2. That the court erred in refusing to permit his witness, Dr. Higgins, to testify that he had prescribed home brew for appellant's wife. No error was committed in so ruling. Appellant's defense was that he bought the home brew and did not manufacture it, and we are unable to see how the fact that Dr. Higgins had prescribed it for appellant's wife would throw any light on his guilt or innocence of the charge.

3. That the court erred in permitting the prosecuting attorney to ask appellant's witness Burns, on cross-examination, about the number of times he had been arrested, and about the raiding of his father's house by the officers. There was no error in this regard as the prosecuting attorney had the right to ask the witness about these matters on cross-examination as they tend to test his credibility as a witness. *Wilson* v. *State,* 177 Ark. 885, 7 S. W. (2d) 969.

4. That the court erred in refusing to permit appellant to prove that witnesses for the State had caused him to be arrested by Federal authorities on the same charge, and that a prosecution was then pending against him in the Federal court. This offered evidence was inadmissible. The circuit court had jurisdiction of appellant, and the fact that a case was pending against him in the Federal court for the same offense did not tend to show or prove his innocence of the charge, but rather that other prosecuting officials believed in his guilt. Both

jurisdictions may try, convict and punish for the same offense. *Kyser and Lackey* v. *State,* 178 Ark. 1167, 13 S. W. (2d) 603.

5. Finally, that the verdict is not supported by the evidence. It is undisputed that the officers found 10 or 12 gallons of home brew in appellant's house, that it was about ready to bottle, that about 60 quart bottles were found freshly washed, ready to receive the brew, that a number of bottle caps and a capping machine were also at hand. When appellant was arrested, he admitted that he made the brew for his sick wife. He now says that he bought it, and produced some witnesses who say they were present and saw him buy it. The jury did not believe appellant and his witnesses. The above evidence was amply sufficient to support the verdict, and this court does not pass on the weight of the evidence nor the credibility of the witnesses. Affirmed.

SISK *v.* BECKER ROOFING COMPANY.

Opinion delivered February 2, 1931.

M. R. Perry, for appellant.

H. B. Stubblefield and *W. R. Morrow,* for appellee.

MCHANEY, J. The only question presented for our determination by this appeal is whether an action pending in the chancery court may be set for trial and tried by the court before the expiration of 90 days, after issues joined, on the application of either party, with notice to

opposing counsel. Section 1, Acts 1929, p. 67 provides: "Actions prosecuted by equitable proceedings shall stand for trial on any day that the court meets in regular or adjourned session, where the issues have been joined for ninety days, but where they had not been so joined, though by the provisions of §§ 1208 and 1209 they should have been, the party in default, as to time, shall not be entitled to demand a trial; provided, however, that in all actions now pending or hereafter brought, upon application of any party, after issues joined, the court or chancellor in vacation may, on notice to opposing counsel or guardians *ad litem,* set the action for trial, or if the court finds that the proof has then been completed it may try the action on any earlier date."

The proviso in the above section authorizes the very thing that was done in this case. The court found that the issues were joined, and, on application of appellees, with notice to counsel for appellants, set the case for trial within 90 days. We must indulge the conclusive presumption that the evidence heard justified the court in all orders made, as the evidence is not brought into the record by bill of exceptions or otherwise. The act under consideration was passed for the purpose of eliminating delay, and making it possible for either party to get a trial without waiting 90 days after issue joined. This will be readily seen to be one of the purposes of the act by reading the emergency clause, § 3.

Affirmed.

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

Opinion delivered February 2, 1931.

Rice & Rice, for appellant.

BUTLER, J. This case is here on appeal from a decree of the Benton Chancery Court denying appellant's petition for an injunction restraining the county treasurer from transferring funds of Special School District No. 50 to the Gentry Special School District. The appellee has not favored us with a brief, and the record presented by the appellant presents the following state of case:

The county school board of Benton County on petition made an order consolidating appellant school district with Gentry Special School District in March, 1929. From that order an appeal was prayed and granted, the affidavit for which was filed with the clerk of the circuit court on the 23d day of March, 1929, but the transcript of the proceedings before the board was not filed until the 4th day of November following. It appears that on the 18th day of September the circuit court made an order dismissing the defendant's petition seeking to consolidate and change the boundary lines of Special School District No. 50 and Gentry Special School District, and afterward, to-wit, on the 21st day of March, 1930, made and entered a judgment dismissing the appeal taken from the order of the county board aforesaid. From the recitals of that judgment it appears that a motion to dismiss the appeal taken from the order of said county board was filed, to which the appellant here made answer. The cause was submitted to the court upon the transcript from the county board of education filed November 4, 1929, the motion of the petitioners to dismiss the appeal, appellant's answer to said motion, the petitioner's reply thereto, together with exhibits to said reply, and the

judgment of this court rendered September 18, 1929, and the court found as follows: "The court finds that the judgment of the county board of education of Benton County, Arkansas, in this cause was rendered by said board on the 9th day of March, 1929, and that appellants on said date filed their affidavit and prayer for an appeal, and on the 4th day of November, 1929, filed the transcript from said board with the clerk of this court, which was more than six months from the time the appeal was allowed by said board until the transcript was lodged in this court.

"It is, therefore, considered, ordered and adjudged by the court that the appeal herein be and the same is by the court dismissed, and the clerk of this court is ordered to certify this judgment to the county board of education of Benton County, Arkansas.

"Appellants except to the order and judgment of the court, and pray an appeal to the Supreme Court of Arkansas, which appeal is by the court granted."

The only other order presented by the record here that was made by the said court was the order adjourning until March 22, 1930. On the 8th day of April, 1930, appellant filed its complaint in the chancery court alleging that it was a special rural school district in Benton County, and that the appellee, as treasurer of said county, held funds belonging to plaintiff district, and that he was soon to receive other funds from the collector belonging to said district; that he had unlawfully transferred a part of the funds to the Gentry Special School District and was about to transfer and turn over to said Gentry Special School District the taxes which were in course of collection; that, unless the appellee was restrained from making this transfer, it would suffer an irreparable injury for which it had no adequate remedy at law, and prayed for a restraining order and for an accounting.

The chancellor, upon a hearing, dismissed the appellant's bill and denied the relief prayed. This order of the court was correct. The judgment of the circuit court

made on the 21st day of April, 1930, dismissed the appellant's appeal from the order of the county board of education, which, until set aside or reversed, left the order of the school board dissolving the appellant district and consolidating it with the Gentry Special School District in full force and effect, and therefore the treasurer was properly proceeding in making the transfer about which complaint is made. Appellant's remedy was by appeal from the judgment of the circuit court of April 21, 1930, which he could not abandon as was done, and invoke the aid of a court of equity. The injunctive relief of a court of equity cannot be invoked when there is an adequate remedy at law is so well settled that the mere statement of the rule is sufficient.

The decree is affirmed.

BELL *v.* RICE.

Opinion delivered February 9, 1931.

Huddleston & Hughes, for appellant.

Wm. F. Kirsch, for appellee.

PER CURIAM. This is an appeal from a mortgage foreclosure decree rendered in vacation by agreement of the parties on the 12th day of June, 1930.

On the 8th day of December, 1930, a certified copy of the decree was filed with the clerk of this court, which

was four days before the time for appeal expired, and at the same time, a writ of certiorari was issued by the clerk of this court to the clerk of the chancery court to bring up the remainder of the record. The clerk of the chancery court by affidavit stated that on the 5th day of October, 1930, which was five days after the transcript had been ordered by counsel for appellant, he prepared a complete transcript of all the proceedings in the case in the chancery court and tendered the same to the attorney for appellant upon the payment of the legal costs in the sum of $50. Attorney for appellant refused to pay, and a few days before December 8, 1930, asked for a certified copy of the decree in the case, which was made and delivered to him. The record does not show that a summons was asked for or issued when the appeal was taken before the clerk of this court, until the 24th day of January, 1931, which was after appellee had filed a motion to dismiss the appeal and appeared in this court for no other purpose.

If counsel for appellant thought that the clerk of the chancery court was negligent in the performance of his duty in preparing a transcript of the record in the case, he had an appropriate remedy by mandamus in this court. In re *Barstow*, 54 Ark. 551, 16 S. W. 574.

The case of *Reynolds* v. *Union Bank & Trust Co.*, 182 Ark. 495, 30 S. W. (2d) 218, has no application. There the court held that, under the terms of the special act under consideration, the stenographer was accountable only to the chancery court which appointed him and had no direct duty whatever to prepare and authenticate the transcript to be filed in this court. There, as here, the clerk of the chancery court was under the statutory duty to prepare and authenticate the transcript on appeal. The stenographer of the chancery court was at all times amenable to the orders of the chancellor just as a stenographer of a circuit court is at all times amenable to its order in transcribing his notes in order that the bill of exceptions may be presented to the court within the

time allowed by it. In neither case is the stenographer required by statute to perform any duties for this court.

In the present case, under the facts stated, we are of the opinion that no proper diligence on the part of the appellant has been shown in perfecting the transcript on appeal; and that, under the circumstances shown by the record, the appellee was not summoned within a reasonable time. *Birmingham* v. *Rice*, 90 Ark. 306, 118 S. W. 1017, and cases cited; *Foreman* v. *Dickinson*, 177 Ark. 121, 6 S. W. (2d) 829. Therefore, the appeal will be dismissed.

CANNON *v.* MAY.

Opinion delivered February 9, 1931.

E. F. McFaddin, for appellant.

John P. Vesey, for appellee.

HART, C. J. It is conceded by counsel for the parties that the single question raised by this appeal is the validity of act 150 of the Acts of 1929, placing the county treasurer and county and probate clerk of Hempstead County, Arkansas, on a salary basis. Acts of 1929, vol. 1, p. 764.

That part of § 1 relating to the issue raised by the appeal provides that the county and probate clerk of Hempstead County, Arkansas, shall receive as full compensation for his services as county and probate clerk the sum of $3,600, and the sum of $1,500 for a deputy, said sums to be paid in equal monthly installments. The county court upheld the act, and allowed Frank May and his deputy the salaries provided in the act. Curtis Cannon, a taxpayer, was allowed to intervene and appeal to the circuit court. There again the validity of the act was upheld, and the claims of the county and probate clerk and his deputy were allowed as provided by statute. The case is here on appeal.

Amendment No. 12 to our Constitution reads as follows: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

In the construction of this amendment, this court has held that act No. 367 of the Acts of 1929, fixing the compensation of the sheriff of Crawford County and the duty of the county clerk of such county on a basis entirely different from that of other sheriffs and county clerks in the State is within the constitutional provision against special legislation. *Smalley* v. *Bushmaier,* 181 Ark. 874, 31 S. W. (2d) 292. This holding was reaffirmed in the later unreported case of *Smalley* v. *Bushmaier,* 181 Ark. 1147, 31 S. W. (2d) 293.

It is conceded that, if the ruling in these cases is adhered to, the act is unconstitutional, and the judgment must be reversed; but it is insisted that the holding in these cases is wrong and should be overruled. We cannot agree with counsel in this contention. The act in question is purely local, and its application is confined to Hempstead County. It fixes the salary of the county and probate clerk of that county and has no reference to the salary of the county and probate clerk of any other county.

Prior to the adoption of the amendment in question, this court held that the act of February 20, 1893, fixing the salaries of the officers of Sebastian County was not in violation of the Constitution of 1874, article 5, § 25, providing that in all cases where a general law can be made applicable, no special law shall be enacted, since the Legislature is the judge of the necessity and propriety of the special law as applicable to any particular subject. *Powell* v. *Durden,* 61 Ark. 21, 31 S. W. 740. The court expressly stated that the act was a special one, and based its opinion on the doctrine that the Legislature was the judge of the necessity and propriety of a special law, as applicable to any subject, rather than a general law. Although there was no extended argument of the question, the court in that case recognized that a salary act for the officers of a single county was a special act. If it had deemed that a salary act was a general one, the court would doubtless have said so, as it did in the later case of *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844, where it was said that statutes establishing or abolishing separate courts relate to the administration of justice and are not local or special in their operation. A Missouri case was cited in support of the ruling. The Supreme Court of Missouri based its holding on the principle that the judicial system of the State was a whole, and that acts dealing with the courts have been usually held general, although not applicable to every court of like nature in the State. The ruling proceeds upon the doctrine that the judicial department of the State is a "composite unit." *Greene County* v. *Lydy,* 263 Mo. 77, 172 S. W. 376, Ann Cas. 1917C, p. 274. In this connection, it may be stated that the Supreme Court of the State of Missouri in a well-considered case has held that a statute fixing the fees or compensation of officers of a single county is a question in its nature local and a law regulating such compensation cannot be properly regarded as a law of a general nature but is a local or special act. *Henderson* v. *Koenig,* 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659.

The Supreme Court of New York has held that an act relating to the fees of the sheriff of a single county is a local act. *Gasken* v. *Meeks,* 42 N. Y. 186. To the same effect see *Cricket* v. *State,* 18 Ohio St. 9; *Gibbs* v. *Morgan,* 39 N. J. Eq. 126; and *Commonwealth* v. *McMichael,* 8 Pa. Dist. 157.

The reason for the rule and the rule itself is clearly stated in *Ferguson* v. *Ross,* 126 N. Y. 459, 27 N. E. 954. Judge Andrews said:

"It seems impossible to fix any definite rule by which to solve the question whether a law is local or general, and it has been found expedient to leave the matter, to a considerable extent, open, to be determined upon the special circumstances of each case. There are, however, certain general principles to be deduced from the decisions. One of these is that a statute may be public and still local, and therefore within the purview of this provision of the constitution. In accordance with this view, it has been held that acts constituting or defining the jurisdiction of local courts, amending charters of municipal corporations, regulating the appointment and election of local officers in a particular city, providing for the laying out of streets or highways or the construction of bridges in a specified locality, and for local taxation to pay the expense of the work, regulating the fees of officers in a particular county or the expenses of judicial sales therein, although public acts, are nevertheless local and to be valid the subject of the enactment must be expressed in the title. [Citing authorities.]"

"Another rule evolved by the discussion of the subject is that an act embracing within its scope all the cities of the State, or all things of a certain class, is a general and not a local act, although by reason of some limitation, based on population or other condition, only a particular city or the inhabitants of a single locality can in the actual situation receive its benefits. In re *N. Y. Elevated R. R.,* 70 N. Y. 328; In re *Church,* 95 N. Y. 2."

The act under consideration applies to only one county in the State, excluding all other counties from its consideration, and is clearly a local or special act, under the principles of law above announced.

It is claimed that this holding will render invalid a number of salary acts of a similar character passed by the Legislature of 1929. Considerations of that sort cannot affect a judicial determination of a question of law. Our duty is to construe the Constitution as it is written. As we have already seen, the Supreme Court of this State has defined a salary act for the officers of a single county to be a local or special act before the adoption of the amendment under consideration. The legal presumption is that the framers of the amendment had in mind that the court had already held that a salary act for the officers of a single county was a local or special act. A prior construction of a State Constitution will be regarded, in the absence of any evidence of different intent, as adopted by re-enactment of the same language in a revision of the Constitution. *Sanders* v. *St. Louis & New Orleans Anchor Line,* 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390. This is in application of that established doctrine of constitutional construction that when a later Constitution or an amendment adopts a provision of an earlier one that has received judicial construction, it is deemed to be adopted as thus construed. *State* v. *DeLorenzo,* 81 N. J. L. 613, 79 Atl. 539, Ann. Cas. 1912D, 329; *Morgan* v. *Dudley,* 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Cooley, Const. Lim. 8 Ed., vol. 1, p. 136, 12 C. J., p. 717; and 6 R. C. L., p. 54.

We again call attention to the fact that this decision does not impair the decision in *State* v. *Crawford,* 35 Ark. 236, where it was held that a statute settling the accounts between the State and certain parties is a general and not a special act, but the reason was that the State is sovereign and in the settlement of the account acted for all the people in the State.

Again, we do not wish to be understood as impairing the force of cases like *Ark-Ash Lumber Co.* v. *Pride & Fairley,* 162 Ark. 235, 258 S. W. 335; *McLaughlin* v. *Ford,* 168 Ark. 1108, 273 S. W. 707; and *Farelly Lake Levee District* v. *Hudson,* 169 Ark. 33, 273 S. W. 711. On the other hand, we think the rule there announced fully sustains the view herein expressed that the act under consideration is a local or special one because, according to its terms, it only applies to a single county in the State and could not apply to any other county or counties.

We again call attention to the case of *Harwood* v. *Wentworth,* 162 U. S. 547, 16 S. Ct. 890, cited in *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617, where it was held that counties may be properly classified for the purpose of fixing the salaries of county officers according to population, wealth and other things, which are calculated to furnish a reasonable basis for the classification, so that as nearly as possible, the officers would be compensated according to the amount of work done.

The result of our views is that the act under consideration is unconstitutional; and it follows that the judgment of the circuit court must be reversed, and the cause will be remanded with directions to the circuit court to certify its judgment in accordance with the opinion herein expressed down to the county court for its guidance in the premises.

SMITH, J., (dissenting). In my opinion, the decisions of this court in the cases of *Smalley* v. *Bushmaier,* 181 Ark. 874, 31 S. W. (2d) 292, and 181 Ark. 1147, 31 S. W. (2d) 293, are erroneous, and the error thereof is demonstrated in the majority opinion in the instant case. These Smalley cases are, in fact, a single case, although there were separate opinions. They were companion cases involving the identical question, and the opinions in both were handed down on the same day, and in the last case it was merely held that the opinion in that case was controlled by the opinion in the former. The holding of those cases has been enlarged in the instant case, and a conclusion reached which they do not require.

The Local Bill Amendment, the correct number of which appears to be No. 12 (Applegate's Constitution of Arkansas Annotated, p. 231), is not to be construed as if it stood alone. It can be correctly construed only when read in connection with the Constitution of which it has become a part. In the case of *Hodges* v. *Dawdy,* 104 Ark. 583, 149 S. W. 656, in construing the effect of the adoption of another amendment, we said: "The amendment being the last expression of the popular will in shaping the organic law of the State, all provisions of the Constitution which are necessarily repugnant thereto must, of course, yield, and all others remain in force. It is simply fitted into the existing Constitution, the same as any other amendment, displacing only such provisions as are found to be inconsistent with it. Like any other new enactment, it is a 'fresh drop added to the yielding mass of the prior law, to be mingled by interpretation with it.' *State* v. *Sewell,* 45 Ark. 387. In the construction of its terms, and in the determination of its scope and effect, the courts should follow settled rules of interpretation."

Amendment No. 12 should therefore be read and construed in connection with the whole Constitution of which it has become a part, and, when so read and construed, certain conditions must be taken into consideration. It has always been the law that the General Assembly, and that agency alone, could fix the compensation of county officers, and this might be done by fixing fees for particular services to be paid them, or allowing a salary for all services. The power to do either existed, and has never been questioned.

In the case of *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45, we said: "The power to fix the salaries and fees of all officers in the State, and the number of their clerks and employees and their salaries, is a function, which, within the limits of the Constitution, is lodged in the supreme law-making power of the State—the Legislature. (Citing cases.) The General Assembly cannot delegate this legislative power to any individual, officer, or board." This language was employed in a case involving

the salaries of the officers of Pulaski County, and that county alone.

The General Assembly would have had this power unless the Constitution had denied it. But this authority was not only not denied, but was expressly conferred by § 4 of article 16, of the Constitution, which reads as follows: "The General Assembly shall fix the salaries and fees of all officers in the State, and no greater salary or fee than that fixed by law shall be paid to any officer, employee or other person, or at any rate other than par value; and the number and salaries of the clerks and employees of the different departments of the State shall be fixed by law."

Express authority is here conferred to fix both salaries and fees, and compensation to an officer may therefore be provided by either a salary or fees.

Certainly, this section of the Constitution has not been repealed by amendment No. 12, and the authority to fix the compensation of all officers in the State imports authority to fix the compensation of a particular officer or officers in certain counties, as distinguished from officers in other counties, and it cannot be true that this authority may be exercised in a particular county only by the enactment of legislation applicable to all counties.

There is a wide difference in the population and wealth of the different counties of the State, with consequent difference in the extent of the services to be performed by similar officers in the different counties. An adequate compensation for one county might be inadequate in another, and this condition was taken into account in the section of the Constitution quoted, which left to the General Assembly the authority to fix the compensation of all officers.

In the opinion on rehearing in the case of *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617, we said that: "Reasonable classification can always be made under a general law." And in that opinion we further said: "In the application of this rule in *LeMaire* v. *Henderson,* 174 Ark. 936, 298 S. W. 327, the court sustained a statute

classifying school districts in certain counties, and held that in classifying school districts the Legislature may consider the density of population, the wealth of the county, the system of roads, and the topography of the country with reference to whether it is hilly or not." And I think the statement may be added that, in fixing the compensation of county officers, the Legislature may consider the amount of service the officer whose compensation is fixed by law will be required to perform.

In this opinion in the case of *Webb* v. *Adams, supra,* on rehearing, we further said: "In this connection we do not wish to be understood as impairing in the least the force of the decisions in *State* v. *Crawford,* 35 Ark. 236, which holds that a statute settling accounts between the State and certain parties is a general and not a special act; and in *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844, holding that statutes establishing or abolishing separate courts relate to the administration of justice and are not either local or special in their operation. This is in recognition of that principle of State sovereignty under which the State, through its Legislature, may protect its own interest, and by virtue of it the Legislature may treat every subject of sovereignty as within a class by itself, and bills of that kind are usually held to be general and not local or special laws. There are cases where the State, by its Legislature, commits the discharge of its sovereign political functions to agencies selected by it for that purpose, and such acts have usually been held to be general acts.

"Neither do we wish to impair the force of cases like *Harwood* v. *Wentworth,* 162 U. S. 547, 16 S. Ct. 890, where Congress by legislation fixed the salaries of county officers of the territory of Arizona and thereby displaced the system of fees and allowances; and the act was held to be a general one, and not a local or special law. The court said that the act was general in its operation, and applied to all counties in the territory. The counties were classified for the purpose of fixing the salaries of the county officers according to population, wealth, and

other things, which were calculated to furnish a reasonable basis for the classification, so that, as nearly as practical, the officers would be compensated according to the amount of work done."

I am therefore of the opinion that act No. 150 of the Acts of 1929, vol. 1, p. 764, herein held unconstitutional, is neither local nor special, within the meaning of amendment No. 12. It is an administrative measure, of a kind of which we have innumerable examples in the published acts of all the sessions of the General Assembly since the adoption of amendment No. 12.

In the exercise of its functions as a sovereign the State has, and must have, power to enact administrative legislation, even though such legislation operates only in a particular locality or upon a single individual.

The act upheld in the case of *Urquhart* v. *State,* 180 Ark. 937, 23 S. W. (2d) 963, is an example of such legislation. That case was one in which an act was construed which made provision for the settlement of a controversy arising between the State and one of its citizens out of the purchase of a convict farm. The act was attacked as a special act and therefore void under amendment No. 12. But, in upholding the act, we said: "Act 120 is neither a local nor special act within the meaning of this amendment. It is an exercise of the State's sovereignty in settling a controversy with one of its citizens, and such acts are neither local nor special. *State* v. *Crawford,* 35 Ark. 237. See also other cases cited in the opinion on rehearing in the case of *Webb* v. *Adams, ante* p. 713."

The majority recognize the right of the General Assembly to fix fees and salaries, but say it must be done in accordance with some basis of classification. I have attempted to show that this was not true as to salary acts, but, if so, it appears to me that, when this concession is made, as it must be, their argument falls. Is not the Hempstead County act a classification act? When the General Assembly has the power to act, it is not required to recite the reasons inducing its action, and should we not assume that the General Assembly was

made aware of the population and wealth of Hempstead County and the amount of labor required of its county clerk in fixing his salary, and had fixed his salary accordingly? Must the General Assembly, after ascertaining these facts as to a particular county, postpone legislation as to that county until it has also ascertained these facts as to all other counties? And, if it be ascertained that the compensation of a particular officer which can be fixed only by the General Assembly is either excessive or inadequate, is appropriate legislation to correct the inequality to be declared invalid unless the legislation correcting the inequality relates to all other counties in which no such conditions are found to exist?

The majority cite the case of *Powell* v. *Durden,* 61 Ark. 21, 31 S. W. 740, but I think it gives no support to their position. That case recognized the validity of a salary act applicable to Sebastian County alone. It was there insisted that the officers of that county should be paid fees, and not a salary, "for the reason that a general law providing for the pay of such officers has almost from time immemorial proved itself applicable to the subject, and that therefore the special act is in violation of the 25th section, article 5, of the Constitution."

Section 25 of article 5, of the Constitution provides that "In all cases where a general law can be made applicable no special law shall be enacted; nor shall the operation of any general law be suspended by the Legislature for the benefit of any particular individual, corporation or association; nor where the courts have jurisdiction to grant the powers or the privileges or the relief asked for."

The point there involved was whether the General Assembly might, in view of this section of the Constitution, pass a law which applied only to a particular county, and the point decided was that the Legislature was the judge of the necessity or propriety of a special law as applicable to any subject, rather than a general law, and the act was upheld as valid on that theory.

Certainly, an act, even though it relates to salaries, which applies to a single county, or to any part of the State less than the whole, is not a general act, and I do not so contend. What I do contend is that a salary act, even though applicable to only one county, is not a local or special act, within the meaning of amendment No. 12, because an act of that kind is administrative in its nature, and is expressly authorized by section 4, of article 16, of the Constitution, and that section of the Constitution was unaffected by the adoption of amendment No. 12.

The act held invalid in the *Smalley* v. *Bushmaier* cases was one allowing the sheriff of Crawford County a fee of seventy-five cents per day for feeding prisoners, whereas other sheriffs of the State are allowed a dollar per day for similar services. Section 6211, C. & M. Digest. That act did not fix the salary of the sheriff of that county, but did fix the fee for the particular service, different from that of other sheriffs for the same service, thereby destroying uniformity in fees for the same service throughout the State. Charging one fee in one county for a particular service, and a less or greater fee in another for the same service, is a different proposition from that of fixing different salaries for all services in different counties. Section 4 of article 16 of the Constitution confers authority on the General Assembly to fix the salaries and fees of all officers of the State, and may contemplate that the same fees shall be charged for the same service throughout the State (which I do not concede), but, certainly, does not contemplate that all similar officers of different counties placed upon a salary shall be paid the same salary.

Act 150 of the Acts of 1929, herein held unconstitutional, fixes first the salary of the county treasurer of Hempstead County, and also that of the county and probate clerk of that county and his deputy. But it does not affect the fees to be charged in that county which the county clerk is required to collect, for by section 1-A of the act it is provided that "All fees now provided by law

shall be collected by the county clerk of Hempstead County, Arkansas, and paid into the general revenue fund of Hempstead County." This means, of course, that the same fees shall be collected there as are collected in other counties throughout the State, and in this respect the Hempstead County act is distinguishable from the Crawford County act, held invalid in the Smalley cases.

The Hempstead County act does nothing more than fix the salary of two county officers, and I think the Legislature has this power, and that the act is valid and not in conflict with amendment No. 12.

I therefore most respectfully dissent; and I am authorized to say that Mr. Justice McHaney concurs in the views here expressed.

Chapman & Dewey Lumber Company *v.* Bryan.

Opinion delivered February 9, 1931.

Joe C. Barrett and *Dudley & Dudley,* for appellant.

Harrison, Smith & Taylor and *C. T. Carpenter,* for appellee.

Smith, J. Appellant, a Missouri corporation, operates a large sawmill at Marked Tree in this State. Appellee, while employed at the mill, sustained a personal

injury, and this suit was brought to recover damages to compensate his injury. The sawmill is located in Poinsett County, but the suit was brought in Crittenden County. Appellant is not engaged in business in the latter county, and was not in business there when this suit was brought.

An answer was filed May 31, 1927, in which the negligence of the defendant company was denied, and the defenses of assumption of risk and contributory negligence were set up. The opinion of this court had been handed down (November 2, 1925) in the case of *Power Manufacturing Co.* v. *Saunders,* 169 Ark. 748, 276 S. W. 599, at the time the answer was filed, but the appeal therefrom to the Supreme Court of the United States had not then been decided. In this Power Manufacturing Company case we construed § 1829, C. & M. Digest, which provides that service of summons upon a foreign corporation doing business in this State "shall be sufficient service to give jurisdiction over such corporation to any of the courts of this State, whether the service was had upon said agent within the county where the suit is brought or is pending or not." We upheld the statute on the theory that venue is a question of procedure, which the State may determine, and the authority existed under this statute, as we construed it, to prosecute the present action in the circuit court of Crittenden County, where the suit was brought, although the defendant corporation was not engaged in business in that county.

But, on May 31, 1927, which was the very day the answer had been filed in this case, the Supreme Court of the United States reversed the decision of this court (*Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490, 47 S. Ct. 678), holding that the statute was unreasonable and arbitrary and in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States, as applied to foreign corporations doing business in the State.

Thereafter, on November 25, 1927, which was the first day of the following term of the Crittenden Circuit

Court, the appellant company filed a motion, in which it asked permission to withdraw the answer previously filed and to dismiss the cause for want of jurisdiction. This motion was heard and denied and an exception was duly saved. It appears, however, that the appellant had not, prior to filing this motion, questioned the jurisdiction of the Crittenden Circuit Court, and the answer was a general appearance denying liability, without questioning the jurisdiction of the Crittenden Circuit Court.

It is not now questioned that the appearance of the appellant company might have been entered, although the court was without jurisdiction, nor is it questioned that such appearance was entered. The insistence is that the appearance was entered only because, under the law as this court had declared it, the Crittenden Circuit Court had jurisdiction of the cause of action, and that holding had not been reversed by the Supreme Court of the United States at the time the answer was filed. But the appellant company had the same right, notwithstanding our decision, to question the jurisdiction that the Power Manufacturing Company had, yet it did not do so.

It is familiar law that one may submit to a jurisdiction which could not otherwise be acquired, and that one does submit who, without questioning the jurisdiction, enters an appearance, and it has been many times decided by this court that any action on the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance, and an appearance cannot be more completely entered than by filing an answer, and this, as we have said, the appellant company did without raising any question as to the jurisdiction of the court. This rule was announced in the early case of *Murphy* v. *Williams,* 1 Ark. 376, and has since been followed; indeed, the rule appears to be universal. *Foohs* v. *Bilby,* 95 Ark. 302, 129 S. W. 1104; *Harris* v. *Smith,* 133 Ark. 250, 202 S. W. 244; *Sager* v. *Jung & Sons Co.,* 143 Ark. 506, 220 S. W. 801; *Payne* v. *Stockton,* 147 Ark. 598, 229 S. W. 44; *J. C.*

Engleman, Inc., v. *Briscoe*, 172 Ark. 1088, 291 S. W. 795; *Fidelity Mut. Life Ins. Co.* v. *Price*, 180 Ark. 214, 20 S. W. (2d) 874.

Appellee lost one finger and sustained an injury to another, and recovered a judgment, which is not complained of as being excessive, and this appeal has been prosecuted to reverse that judgment. It is insisted, for the reversal of this judgment, that the testimony is not legally sufficient to sustain it, and that error was committed in giving certain instructions.

The testimony tending to sustain the verdict may be briefly summarized as follows: Appellant company operates a mill at Marked Tree, where logs are first sawed into boards, which are then run through a trimmer and there trimmed into standard lengths. The trimmer is 16 feet in length, and has 6 saws, mounted in an east and west line. The first saw is at the east end, and the remaining five saws are mounted in a straight line 8, 10, 12, 14 and 16 feet, respectively, west of the first, and, according to their distance from the first saw, are called the 8-foot saw, the 10-foot saw, and so on. Each of these saws is mounted on a separate mandrel, has a separate pulley, and is driven by a separate belt, but all of the six saws are driven by the same power shaft, called the line shaft. The line shaft is eight feet south of the saws, and each belt extends back around the common line shaft. These saws are in the north end of a table, and there are slits in the table through which these saws are raised and the appropriate one used to trim the boards into the length desired. The trimmer saws are operated by an employee called the trimmer sawyer, or trimmer, who occupies an elevated position just south of the trimmer table, from which he can observe the boards as they move across the table towards the saws and determine just what part of each board shall be cut off. If the board will make one 14 feet long he pulls the lever of the 14-foot saw, and so, likewise, with the appropriate saws to make other lengths. This work requires experience and judgment, and the

trimmer had authority over the other employees assisting him, of whom appellee was one.

A deep trough runs east and west along the north edge of the trimmer table and by the trimmer saws. The sawdust from the trimmer and the ends of boards cut by it fall into this trough and are carried off by an endless chain which runs in it. This trough is about six feet deep, that is, about six feet below the level of the saws.

Appellee's general duty was to "load the trimmer," that is, to keep on hand a supply of boards to be trimmed. The belt which operated the 14-foot saw came off, and appellee was ordered by the trimmer sawyer to replace it. He had previously been given the general instruction to obey the orders of the trimmer sawyer. This belt which appellee was ordered to replace was not only old and worn, but, where its ends met, a piece had been torn off, and, instead of replacing it with a piece of belting, this place had been laced over and the ends of the thongs of the lacing used in splicing the belt hung loose. This fact was unknown to appellee, and could have been discovered only by inspection, and would have been unobservable while the belt was in motion. There was some question whether appellee had, himself assisted in lacing this belt, but he denied having done so, although he admitted having assisted in lacing another belt, but it was not shown that unused ends of thongs were allowed to remain on the belt which appellee had assisted in lacing. When appellee was ordered to replace the belt which had come off, it was necessary for him to get down into the trough which has been described, and, while in it, to brace himself against the sides thereof as best he could, as no other means had been provided for reaching the belts. Another witness, an expert sawyer and millwright, describing the position which appellee assumed to obey the trimmer's order to replace the belt, said, "That is the awkwardest position I was ever in."

It was a rule of the company not to stop the trimmers to replace a belt, so that all the other saws were in

motion while appellee was replacing the belt for the 14-foot saw. In the execution of the trimmer's orders, appellee left his table, where he was loading the trimmer, got into the trough, and seized the belt and pulled it forward to the pulley, and, as he pulled the belt around, it started to move on the pulley. As soon as contact was made between belt and pulley, the saw and the belt began to revolve, but, in order to get the belt properly on the pulley, it was necessary for appellee to push against the belt until it had slipped to its proper position on the pulley. The belt and pulley were each eight inches wide, and, of course, occupied that much of the space between the 14-foot and the 16-foot saws, and, as these saws were only two feet apart, there was a clear space of only 16 inches. Appellee testified that when the belt started, his fingers were caught in the ends of the thongs when that portion of the belt came around, and that his hand was jerked against the 16-foot saw, which produced the injury complained of.

We think the facts thus summarized made a case for the jury, and the questions of the master's negligence, on the one hand, and those of assumption of risk and contributory negligence, on the other, were submitted to the jury in numerous instructions given at the request of the respective parties and on the court's own motion. These instructions conformed to the law as it has been declared in many cases by this court, and no useful purpose would be served by reviewing them.

Appellee's testimony was to the effect that he did not know the defective condition of the belt, and therefore did not know and appreciate the danger of attempting to restore it to its place, and the jury was warranted in finding that the appellee was injured while obeying the order of his superior, and that the danger was not so patent that appellee, in the exercise of ordinary care for his own protection, in the performance of his duties in the usual and ordinary manner, would necessarily have discovered the defects and have known and appreciated the danger arising therefrom.

There appears to be no error in the record, and the judgment must be affirmed, and it is so ordered.

JAMES B. BERRY'S SONS COMPANY *v.* PRESNALL.

Opinion delivered February 9, 1931.

Walter J. Terry and *Randolph P. Hamby,* for appellant.

Bush & Bush, for appellee.

HUMPHREYS, J. Appellee brought this suit against appellant in the circuit court of Nevada County to recover damages in the sum of $3,000 for personal injuries received through the alleged negligence of appellant in failing to furnish a safe place to work and to furnish a sufficient number of men to do the work assigned to him.

Appellant filed an answer denying the allegations of negligence and interposing the defenses of contributory negligence, assumption of the risk by appellee, and a written release of all claims and demands by appellee against appellant on account of the injury received.

The cause was submitted upon the pleadings, the testimony adduced by the respective parties and instructions of the court, which resulted in a verdict and consequent judgment against appellant for $1,750, from which is this appeal.

Appellant first contends for a reversal of the judgment because, if the facts are given their greatest probative value, they fail to establish liability. The facts, when given their strongest probative value, are as follows: Appellee was employed by appellant to roll metal drums containing asphalt, weighing 320 to 450 pounds, for a distance of fifty or sixty feet over a runway from an elevation to a shed where the drums were cleaned and loaded in cars for shipment. The runway ran down a slight decline over one-half of the way from the elevation to the shed, then across a small ditch and up a slighter incline to the shed. The ditch had been cut to take care of the waste asphalt from appellant's factory nearby. It was a rule or custom of appellant to take the waste asphalt away once a week, but at the time of appellee's injury it had not been removed for three or four weeks, and was six to twelve inches deep and spread over parts of the ground near the runway. The waste asphalt was soft and sticky. Occasionally a drum of asphalt would get away from an employee rolling it down the decline and slip off the runway into the soft or sticky asphalt. After sinking into the asphalt it was difficult to remove it and get it back on the runway. Sometimes the employee would get the drum back on the runway alone, and at other times he would call in the assistance of other employees. Appellee had been engaged in rolling these drums for about thirty days before his injury on the morning of March 26, 1929. A short time before his injury, and while getting one of the drums ready to roll down the decline, J. W. Smith, the superintendent, came along. Appellee said to Mr. Smith: "This is too heavy for one man to handle." Smith said: "That's all right; get it up there." Appellee said, "Well, what if one of them gets away and rolls off the runway into the asphalt?" Smith said, "Get it out." About an hour and a half after Smith left a drum of asphalt being handled by appellee ran off the runway and stuck in the asphalt some six or eight inches deep. Appellee tried to push it out

and felt a little pain in his stomach and walked off, remarking that he would have to get somebody else to help him get it out. He turned around and got another drum and rolled it under the shed, and when he started to turn it up on its head he fell against the drum in a ruptured and unconscious condition. He was removed in that condition to the hospital. His injury consisted of a double hernia from which he suffered intensely and from which he will continue to suffer unless he submits to an operation. It is practically certain that appellee received his injury in attempting to lift the first drum out of the muck and not when he fell against the second drum which he was attempting to head up. An operation for hernia is a major and a dangerous operation and for that reason appellee refused to submit to same. Immediately after reaching the hospital, appellee was requested to and did sign the following release:

"RELEASE

"Received from James B. Berry's Sons Company of Illinois this 26th day of March, 1929, the sum of one and no-100 dollars and other valuable considerations, in full compromise, payment, satisfaction and discharge of all claims and demands which I have against said company, its employees or agents, for or on account of any and all damages, injury, expenses or loss of whatsoever kind which I have sustained by me in person, right or property, by or through said company, its employees or agents, by reason of strain due to lifting asphalt drum, or for any matter or thing whatsoever growing out of same. I was born on the 30th day of March, 1890, and am 39 years of age.

"(Signed) C. A. Presnall.

"Witness: A. B. Dickey, Charles I. Gerhart.

"Approved: J. W. Smith, for Jas. B. Berry's Sons Company."

Witness for appellant testified that: "Other valuable considerations" in the release had relation to its obligation or agreement to pay all expenses incident to appel-

lee's recovery and to pay one-half wages during such time as he was recovering.

Appellee admitted that the signature to the release was genuine, but stated that he had no recollection of signing it and knew nothing of it or its contents.

Appellant paid the hospital and doctor bills, and, after paying appellee one-half of his wages for a time, demanded that he have an operation for double hernia. Upon his refusal to do so, it refused to pay him except such days as he worked, and upon his refusal to accept pay just the days he was able to work and after he brought this suit, the foreman discharged him.

Appellee was thirty-nine years of age, was earning $4.50 a day, and suffered painful and permanent injury, which could only be relieved by a dangerous operation.

Appellant argues in support of its first contention that, under the facts detailed above, appellee assumed the risk as a matter of law. The rule of law applicable to facts in nature and effect similar to the facts in the instant case was announced by this court in the case of *Woodley Petroleum Co.* v. *Willis,* 172 Ark. 676, 290 S. W. 953, in language as follows:

"Generally, the question of whether an employee assumes the risk of an injury is one for the jury, and is always so where a servant is acting in obedience to the instructions of a superior, unless he knows and appreciates the danger incident to obeying the order or unless the danger incident to obeying the order of his superior is so obvious and patent that a reasonably prudent person would refuse to obey the order."

The rule thus announced was approved and applied in the recent case of *Owosso Manufacturing Co.* v. *Drennan,* 182 Ark. 389, 31 S. W. (2d) 762. It is true that appellee knew the weight of the drums, that in rolling them they might slip off the runway and stick in the waste asphalt negligently allowed to accumulate by appellant, and that it was hard to remove the drums out of the waste asphalt; but it cannot be said as a matter of law that he appreciated the danger of attempting to lift the drum he

was rolling out of the asphalt. It is discernible from his testimony that he thought the work assigned him was more than a one man's job, and he went to the extent of raising the question with the superintendent, who, in substance, assured him that one man could handle the drums and remove them from the asphalt in safety, should they slip off the runway. To have put his judgment up against the superintendent's would have brought about his immediate discharge. The danger was not so obvious that a reasonably prudent man would refuse to obey the order of his superior, and for this reason we think the question of whether appellee assumed the risk was one for the jury.

Appellant next contends for a reversal of the judgment on the alleged ground that the court submitted the issues of negligence and the assumption of risk under erroneous declarations of law. After a very careful reading of the instructions submitting these issues, we find no error in them. We also think these issues were fairly submitted in the instructions given, and that the court properly refused to give such instructions as appellant asked touching these issues.

Appellant next contends for a reversal of the judgment because the court refused to submit the issues of whether it was released from liability on account of the writing signed by appellee and set out above. Appellant requested the submission of that issue to the jury in the following language:

"The court instructs the jury that if you find from the evidence that, after the plaintiff was injured, he and the defendant entered into a contract fully releasing the defendant from all damages resulting from such accident, in consideration of which the defendant agreed to pay all expenses incident to his recovery and to pay him one-half wages during such time as he was recovering, and if you find that the defendant has performed and stands ready to perform all the terms of said release contract, then your verdict will be for the defendant."

The court correctly refused to give the instruction for several reasons, the main one being that appellant failed to introduce any evidence to the effect that he paid appellee one-half his wages during the entire time he was unable to do constant physical labor. The undisputed testimony is that it refused to pay him one-half time after he refused to submit to an operation, and that at the time he refused to submit to an operation he had not entirely recovered.

Appellant's next and last contention for a reversal of the judgment is that the court refused to give its requested instruction number 8, in words as follows:

"The court instructs the jury that it was the duty of the plaintiff to reduce or minimize the injury and damages sustained by him; and if you find from the evidence that his injury produced hernia and that the only certain and known cure for hernia is an operation and that said operation is not attended with any serious danger nor excessive pain, and that his physicians advised such operation, and the defendant offered to stand all expenses incident to such operation and to pay the plaintiff one-half of his regular wages during the time he lost in submitting to such operation and during his convalescence from such operation, then it was the duty of the plaintiff to submit to such operation, and he is not entitled to any damages for his continued suffering or for his continued earning capacity."

The cases cited by appellant in support of this instruction are to the effect that one must submit to an operation in order to minimize his damages provided the operation is not a dangerous one. The converse of the rule is, of course, true. If the operation is dangerous, one is not required to submit to it in order to minimize damages sustained by him through the negligence of an employer. In the instant case the operation suggested was a dangerous one.

No error appearing, the judgment is affirmed.

KIRBY and MCHANEY, JJ., dissent.

HAIL DRY GOODS COMPANY *v.* DOWELL.

Opinion delivered February 9, 1931.

Cole & Poindexter, for appellant.

Fred M. Pickens, for appellee.

HUMPHREYS, J. The referee in bankruptcy of the partnership of Dowell Brothers Mercantile Company, composed of Foster B. Dowell, Taylor G. Dowell and E. V. Holt, who had been and were engaged in business at Tuckerman, brought suit for the benefit of creditors in the circuit court of Jackson County against appellees on the 2d day of March, 1929, to foreclose a deed of trust executed by them upon their homestead on the 27th day of February, 1927, as additional security to secure the partnership indebtedness of Dowell Brothers Mercantile Company.

Appellees filed an answer admitting the execution of the deed of trust but alleging its invalidity for failure of consideration.

The cause was submitted upon the pleadings and testimony, resulting in a decree canceling the deed of trust and adjudging the costs against appellant, from which is this appeal.

The facts reflected by the record are, in substance, as follows: Foster B. Dowell, one of the appellees, had been sole manager of the partnership business of the Dowell Brothers Mercantile Company at Tuckerman. The partnership had done an extensive credit business

upon which it could not realize sufficient cash to pay the creditors and continue the business. Upon advice of attorneys a letter was written and mailed to the creditors on February 8, 1927, informing them of its predicament and offering to make them an assignment of all its assets and a deed of trust as additional security of certain incumbered real estate, and lots 5 and 6, block 2, Dowell and Hall's First Addition to the town of Tuckerman, which lots constituted the home of appellees, provided they would allow the business to be operated by a trustee until January 1, 1928, in an effort to collect the outstanding accounts and notes and convert the other assets into money for the payment of the partnership indebtedness. Pursuant to the letter or notice, appellees executed the deed of trust, including their homestead, to W. P. Davis, trustee, on the 28th day of February, 1927, and on the same day a collateral agreement or assignment conveying all the assets of the partnership to W. P. Davis, trustee, for the purposes aforesaid. The collateral agreement was referred to in the deed of trust. The instruments were executed with the understanding that said business should be continued by the trustee until the first day of January, 1928. Full power and authority was given the trustee in the agreement to conduct the business, to collect the accounts and notes and to apply the receipts, after deducting necessary expenses, to the liquidation *pro rata* of the debts of the partnership, and, in case the amount realized by that time was insufficient to pay the debts, then to sell the real estate described in the deed of trust and apply the proceeds to the further payment of said indebtedness. On March 8, 1927, another letter was written to the creditors informing them of the execution of the instruments and that the trustee was in possession of the stock of goods and other assets of the partnership and operating the business under the terms of the agreement or assignment. After operating the business about sixty days, a committee of the creditors requested the trustee to close the store and institute bankruptcy proceedings. All of the assets of the part-

nership and real estate described in the deed of trust, except the homestead of appellees, were sold and administered in the bankruptcy proceedings. There being insufficient assets to pay the partnership indebtedness, appellants brought this suit to foreclose the deed of trust upon appellees' homestead.

According to the facts detailed above, it is apparent that the only consideration moving to appellees for the execution of the deed of trust on their homestead was that the business might be carried on until January 1, 1928, thereby giving Foster B. Dowell a chance through the trustee to collect and pay off the indebtedness of his partnership in order to avoid bankruptcy proceedings. The very purpose for which the deed of trust was executed was defeated by throwing the business into bankruptcy. The only consideration for the deed of trust failed, and the court properly declared a cancellation thereof.

The trial court also correctly adjudged the costs against appellant, as the only purpose of the suit was to enforce a lien against appellees' homestead which was void on account of a failure of consideration.

No error appearing, the decree is affirmed.

WHEELER *v.* ELLIS.

Opinion delivered February 9, 1931.

[redacted]

J. H. Lookadoo, for appellant.

Buzbee, Pugh & Harrison, for appellee.

MEHAFFY, J. This suit was instituted by appellant against appellees, who are road contractors in Clark County, Arkansas, and appellant was employed by them to dump the trucks as they would come up to the place where gravel was to be unloaded. On the 4th day of December, 1929, one of the employees of appellee drove his truck up to where appellant was, for appellant to dump the gravel. They were using dump trucks, and, as appellant started to unload, he released the catch or hook of the bed of the truck. The hook hung. Appellant did not know it was out of order and gave a jerk to release it and the hook slipped, upsetting a load of gravel and a large rock on the load came down, hit his thumb, and crushed the bone.

Appellant alleged that the appellees were negligent in not having the catch or hook that released the load of gravel in proper shape, that this was the cause of injury to appellant; and that he had suffered great pain and loss of time.

Defendant answered denying the allegations in plaintiff's complaint and alleging that, if plaintiff was injured, it was due to his own negligence or the risk assumed by him, or the negligence of a fellow-servant.

The appellant testified that he was working for the appellees, dumping gravel and keeping time for the gravel haulers, and that in the afternoon of December 4, he dumped the last load of gravel brought by Frank Smith, an employee of appellees. As he started to release the hydraulic brake that would release the load of gravel, the catch hung at the back and did not release. He saw something had to be done to unlatch it or it would throw the truck down the dump about 15 feet. He knocked the latch with his hand, and when he did a big rock came down from the load of gravel and mashed his thumb.

The manager for Ellis & Lewis was there and saw the whole performance. Witness examined the latch on the truck and found that the rod that went to release the latch was bent, and that was what caused the catch to improperly function; does not know when the rod was bent. This was the first time it failed to properly function. Witness thought that whoever loaded it bent the rod. It had been releasing all the time up to this trip. He does not know how it was bent; a rock could have bent it.

At the close of this testimony the court directed a verdict for the appellees, and judgment was entered accordingly. The appeal is prosecuted to reverse said judgment.

Appellant cites and relies on the case of *Gaster* v. *Hicks,* 181 Ark. 299, 25 S. W. (2d) 760. In this case the court refused to give the following instruction: "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 proved in this case."

This court held that it was not error to refuse to give the above instruction because the negligence complained of and proved was not the negligence of a fellow-servant, but of the master himself. We also said, 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 fly-wheel, then the instruction would have been proper, but the negligence, if any, was 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.

The court also said in the above case: "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. * * * The mechanic did not testify."

The facts in the instant case are very different. In this case there is no evidence of negligence of the master, and the appellant himself testifies that at the time he dumped the load, which was brought just before the time of his injury, there was no defect and nothing about the rod that prevented it releasing properly. There was therefore no defect that the master could have known about. It is true the appellant testified that the manager was right there and saw the performance, but he does not say that the manager gave him any directions or that the manager had an opportunity to say or do anything. The manager, like the appellant, of course thought that there was no defect, and the appellant, when he undertook to release the load, did not know what the cause was or whether there was any defect.

This suit is based on the negligence of the master, and, in order that the injured party may recover, he must show some act of negligence of the master that caused the injury complained of.

Negligence in this sense means the violation of some duty that the master owed to the servant, and, to entitle the servant to recover, he must show that the conduct of the master was negligent or that he violated some duty which he owed to the injured servant. Nothing of the kind is shown in this case.

It is true that the servant has a right to assume that the master has performed his duty, but it is also true that, unless the evidence shows to the contrary, the master is presumed to have performed his duty, and, as this court has repeatedly said, "no presumption of negligence arises from the mere happening of the accident which caused the injury." *Bryant Lumber Co.* v. *Stastney,* 87 Ark. 321, 112 S. W. 740.

It is contended by appellant that, if the master had tried, he could and would have known that the latch was not in safe condition. How could the master have known this? The appellant himself says that it was in safe

condition when he dumped the last load, and there is no possible way in which the master could have known about any defect.

This court has said: "The action, like all others brought by the servant against his master for personal injuries sustained in the course of his employment, is based on actual negligence in the defendant, or in those who represent it. * * * The presumption is that the master has done his duty by furnishing safe and suitable appliances for the performance of his work. And when this is overcome by positive proof that the appliances were defective, the plaintiff is met by a further presumption that the master had no notice of the defect and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the machinery; but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises." *St. Louis, I. M. & S. R. Co.* v. *Gaines,* 46 Ark. 555; *Graysonia-Nashville Lumber Co.* v. *Whitesell,* 100 Ark. 422, 140 S. W. 592; *Kansas City So. Ry. Co.* v. *Cook,* 100 Ark. 467, 140 S. W. 579.

In an action by a servant based on the negligence of the master, the servant, in order to recover, must show some act of negligence on the part of the master and that that negligence caused the injury complained of.

In this case there is no negligence on the part of the master shown, and it was therefore the duty of the circuit court to direct a verdict for the plaintiff. The judgment is affirmed.

LONG *v.* ELLIS.

Opinion delivered February 9, 1931.

J. H. Lookadoo, for appellant.

Buzbee, Pugh & Harrison, for appellee.

KIRBY, J. This appeal comes from a directed verdict against appellant in an action for damages for personal injuries suffered while operating a grader machine on the construction of a road, which appellees were building for the State under contract.

The facts, stated briefly, are that appellees were engaged in the construction of Highway No. 8, between Amity and Arkadelphia in Clark County. Appellant was in their employ operating a grading machine which was drawn by a caterpillar tractor. He was an experienced operator of both tractor and grader, having been engaged in such work for several years prior to the injury. The tractor was operated by a man by the name of House, and was a practically new machine, having only been purchased from the factory for three or four months. Appellant and House were engaged in the work without supervision of any one else and would come from Amity in the morning to where the tractor and grader had been left the night before at the conclusion of the work and operate the machines during the day on the highway, returning to Amity in the evening. At the time of the injury, they were making a "U" turn on the road which was about 36 feet wide. In turning the grader around in the highway appellant used the crank appliance which is similar to the steering wheel on an automobile. The operator of the tractor pulling the grader in making the turn had to shift to a lower gear. While he was shifting the gear for turning the tractor and as appellant was moving the steering wheel of the

grader to cause it to turn, the clutch of the tractor stuck or "grabbed," causing an abrupt jumping movement of the grader throwing appellant's hand off the wheel and striking it against some of the machinery mashing his finger.

The negligence complained of was that the clutch of the tractor was defective, and that appellees had not exercised ordinary care to discover the defect and remedy the same. It was the duty of the operator of the grader and the tractor to keep their machines in running order or operating condition so far as minor repairs and adjustments were concerned, reporting only such conditions as they were unable to repair to the foreman, who would have a mechanic from Little Rock sent down to service the tractor. The operator of the tractor said he noticed the clutch was grabbing for a day or two before the injury occurred, but had not taken time to fix it. "Ordinarily when the clutch would get loose the operator would tighten it." He said that it had not been grabbing so badly and causing the tractor to jump so much the two days before the injury as it did at the time it occurred. They continued their operations after the injury, and had no more trouble with the tractor that day, but they did not have to make any complete turns. Nothing was said to the appellees or the foreman in charge by either appellant or House about anything being wrong with the tractor, and on the evening of the day that the injury occurred appellant and House on their own motion fixed the clutch, repairing the machine themselves. They put in some washers and lining that the factory had furnished with the machine, after which it worked all right. The plaintiff continued to work after the doctor had treated his finger, although the doctor said he should rest. Appellees needed his services in operating the grader and, he said, threatened to discharge him unless he continued to work when he could. The injury was very painful and finally because of the continuation of work became infected and caused him much pain and suffering.

The court directed a verdict in favor of appellees, and from the judgment thereon the appeal is prosecuted.

Appellant's right to recover was dependent upon whether appellees were negligent in failing to provide him with a reasonably safe machine for operation in doing the work required. He had the right to rely upon the assumption that the master had performed his duty in exercising ordinary care to furnish him a safe tool or appliance with which to do the work in the absence of any knowledge on his part to the contrary. *Asher* v. *Byrnes,* 101 Ark. 197, 141 S. W. 1176.

In *Bryant Lumber Co.* v. *Stastney,* 87 Ark. 324, 112 S. W. 740, the court said: "No presumption of negligence arises from the mere happening of the accident which caused the injury in such actions as these between the master and servant, but the master is required to exercise ordinary care in discovering defects and repairing them and in discovering dangers and obviating them."

The undisputed testimony shows that appellant and House, the operator of the tractor drawing the grader, whose duty it was to make such minor repairs or adjustments thereon as he could make, did adjust the clutch on the evening after the injury occurred in the afternoon by putting in a small bolt and some washers, and also that no report of any defective condition in the tractor or need of repair thereof had been made to appellees, the contractors, by whom both appellant and House were employed in operating the machines in a common undertaking for the grading of the road and were fellow-servants in such work. There is an intimation in the testimony that a member of the appellee firm had operated the tractor a day or two before appellant was injured and might have burnt out the machinery and injured the clutch, but there was no testimony showing appellees had notice that there was such defective condition. The action is founded on the alleged negligence of the master in failing to exercise ordinary care to fur-

nish the servant with a safe tool or machine with which to do the work, the presumption being that the master has done his duty in the furnishing of such appliance; but when this presumption is overcome by proof that the appliances were defective, there is a further presumption that the master was without notice or not negligently ignorant of it, and the showing that the injury resulted from a defect in the machine, without evidence that the injury occurred because the master did not exercise proper care in furnishing the machine or having the repairs made thereon after notice, is not sufficient to establish a *prima facie* case or to support a recovery. *Wheeler* v. *Ellis & Lewis, ante* p. 133.

Since there is no substantial testimony showing negligence on the part of the master, the appellant was not entitled to recover, and the court did not err in directing the verdict accordingly. The judgment is affirmed.

NEW YORK LIFE INSURANCE COMPANY *v.* MCGEE.

Opinion delivered February 9, 1931.

Mann & McCulloch and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Smith & Fitzsimmons, for appellee.

MCHANEY, J. Appellee held a policy of life insurance in appellant company, one clause of which insured him to the extent of $50 per month against total and permanent disability. He became totally and per-

manently disabled, demanded payment for three months (proofs being made), which was refused, and this suit followed to collect $150 for the three months' disability. Appellant defended on the ground that false and fraudulent answers were made to questions in his application for insurance concerning the physicians he had consulted, the diseases with which he had been afflicted, and the condition of his health. The answer was filed April 7, 1930, and the case continued and set down for trial at a special term of court for May 12, 1930, at appellant's request. On said latter date, after both sides had announced ready for trial and while the jury was being impaneled, counsel for appellant filed what they called an "amendment to answer, motion to make Cleo B. McGee a party defendant and to transfer to equity," in which it was alleged that, by reason of the matters set out in its answer, the policy sued on is void, that it was entitled to have same canceled, and that it had no adequate remedy at law; that Cleo B. McGee is named beneficiary in the policy, claims an interest therein, and should be made a party defendant. It prayed that she be made a party, that the cause be transferred to equity, the policy canceled and surrendered to it. The court overruled said motion. The cause proceeded to trial resulting in a verdict and judgment for appellee.

The only question presented for our determination is the alleged error of the court in refusing to transfer the cause to equity. We think the trial court correctly overruled the motion. It was in the discretion of the court to permit it to be filed, coming, as it did, after issue joined and the case postponed and set specially at appellant's request, and after it had announced ready for trial and the jury being struck. Therefore, no error was committed in overruling its motion under these circumstances, even though it might, under other circumstances, have been meritorious. Overlooking, however, the tardiness of its presentation, we are of the opinion that appellant had a complete and adequate remedy at law, and that the case is ruled by the decision of this court in *Bassett* v. *Mutual Benefit Health & Accident Assn.*, 178

Ark. 906, 12 S. W. (2d) 893, where we held that, conceding, but not deciding, the chancery court had jurisdiction, upon allegations of fraud in its procurement, to cancel the policy after the death of the insured, "it must also be said that the jurisdiction to grant relief by cancellation was not exclusive, as the circuit court, upon proof of fraud invalidating the policy, could, by refusing to permit a recovery on the policy, have granted, in effect, the same relief. The circuit court certainly had jurisdiction to determine whether the policy was void for the reason that its reinstatement had been procured by fraud, and its jurisdiction was first invoked, and for this reason, if for no other, the cause should have been re-transferred to the circuit court." See also cases cited in that case. So here the circuit court, whose jurisdiction was first invoked where issue was joined without objection, had jurisdiction to determine the question of fraudulent procurement of the policy, and, conceding without deciding that chancery had jurisdiction after liability had accrued under the policy, such jurisdiction was not exclusive.

Affirmed.

GILLEYLEN *v.* SCHOOLFIELD.

Opinion delivered February 9, 1931.

J. O. Livesay and *Jones & Jones,* for appellant.

Jas. D. Head and *Shaver, Shaver & Williams,* for appellee.

McHaney, J. In 1924 A. B. Schoolfield and Walter E. Gray purchased from others a dry goods business in the town of Foreman, which they operated as partners until 1925, when the business was incorporated under the name of Gray & Company, with a paid up capital of $5,500, having three stockholders, the two above mentioned with Mrs. M. S. Gray, mother of Walter E. Gray, as the third stockholder. Mrs. Gray, although seventy years of age at the time, was elected president, A. B. Schoolfield, vice president and bookkeeper, and Walter E. Gray, secretary and treasurer. The business was thereafter operated as a corporation until March 1, 1929, when it was adjudicated a voluntary bankrupt. The stockholders constituted the board of directors, and the records show only three formal meetings of either stockholders or directors. W. E. Gray acted as his mother's agent in all matters concerning this business, and she gave it none of her active attention. Mrs. Schoolfield, the appellee, was a sales lady in the store, but upon the death of her husband, July 28, 1927, she became the bookkeeper and thereafter acted as such with the advice, assistance and counsel of W. E. Gray. On December 31, 1926, the books showed a net profit of $739.80 for the year 1926,

which Mr. Schoolfield and Mr. Gray divided, the individual account of each being credited with $369.80. Mr. Schoolfield was drawing a salary of $1,250 per year, and on December 31, 1927, his account was credited with a full year's salary, although he had died on July 28 preceding. At the same time, December 31, 1927, the books again showed a net profit, and Mr. Gray and Mrs. Schoolfield decided to divide a portion thereof, and she credited his account and hers with $604 each. All credits above mentioned as well as any hereafter mentioned were made with the knowledge, consent and at the direction of Walter E. Gray, acting for himself and his mother. All the above amounts of credits to the Schoolfield accounts were withdrawn by Mrs. Schoolfield in merchandise and cash and proper charges made. At the time of Mr. Schoolfield's death, the company was indebted to Mrs. Schoolfield on a note in the sum of $5,259.27. In the fall of 1927, this note was reduced by payments from collections from the business to $1,159.27, and carried into 1928 as bills payable on the company's books and paid that year.

This suit was brought by the trustee in bankruptcy to collect from appellee the amount credited to her account as a division of profits for the years 1926 and 1927, for the unearned salary of Mr. Schoolfield after his death, and for another item or two, hereinafter discussed, in which it is alleged that the company was insolvent and the payments made to her were in fraud of the rights of creditors. The court dismissed appellant's bill for want of equity, and the matter is here by appeal.

It is conceded that a corporation cannot lawfully declare and pay dividends to its stockholders when it is insolvent. The division of the profits above referred to amount to a payment of dividends; and, if the corporation was insolvent at the time, such payments would work a fraud on existing creditors. We do not think the record in this case shows Gray & Company to be insolvent when these dividends were credited nor when the salary of Mr. Schoolfield was credited for the whole year of 1927, although dead since July. In 14A C. J. 881,

it is said: that "the most commonly accepted definition of 'insolvency,' as applied to corporations, is inability to pay debts as they mature in the usual course of business, either from available assets or from any honest use of credit." And on page 883 it is said: "In determining whether a corporation is insolvent, liability to its stockholders on its capital stock is not to be taken into consideration." Or, as said in *Radcliff* v. *Clendenin,* 232 Fed. 61: "The sufficiency of its assets and its ability to pay its stockholders the par value of their stock in addition to the payment of the debts of the corporation are irrelevant to the issue of insolvency."

Eliminating therefore the capital stock from the liabilities, the assets of the corporation were largely in excess of the liabilities, either as of December 31, 1926, or 1927. But appellant says included in the assets were the face value of all the notes and accounts, and that it is well known that such notes and accounts are largely of little or no value. There is no showing in the record that any particular note or account due the company was not collectible, and we cannot take judicial notice that they were not. Moreover, the undisputed proof is that only such notes and accounts were included in the assets as were regarded as good. Furthermore, early in 1928, the company was able, by pledging its notes and accounts to the bank, to borrow a sufficient sum of money to pay all creditors in full. It is argued by appellant that the books of the company did not correctly reflect the amount of its debts; that its note to appellee for $5,259.27, above mentioned, did not correctly appear in her account. It did not appear in her account at all, but in bills payable account. As above stated, the amount of this note was reduced, in the fall of 1927 to $1,159.27 and was paid in full in 1928. On December 31, 1927, the bills payable account correctly reflected the balance due on said note. The true condition of the company was reflected by the books, and on February 14, 1928, the annual statement required by law was filed with the county clerk, which was

notice to all persons of the condition of the company. Creditors in bankruptcy, represented by appellant as trustee, are all subsequent to this time, and it is difficult to see what right they have to complain of the matters above mentioned without proof of an actual intent to defraud future creditors. There is no presumption to defraud future creditors by a voluntary conveyance, and such a conveyance is not *per se* fraudulent. *Lee Hardware Co.* v. *Johnson,* 132 Ark. 462, 201 S. W. 289; *Jenkins* v. *Smith,* 170 Ark. 806, 281 S. W. 377; *Home Life & Accident Ins. Co.* v. *Schichtl,* 172 Ark. 31, 287 S. W. 769.

There remains only one matter to discuss, and that is the sale by appellee to Mrs. Gray of the $2,000 stock in Gray & Company owned by the estate of A. B. Schoolfield. The sale was handled in this manner: Appellee desired to sell the stock of her late husband, so in December, 1927, W. E. Gray, acting for his mother, purchased same at par for his mother. (Another strong circumstance indicating the company was solvent at that time.) Appellee loaned Mrs. Gray the money to purchase this stock and took a note from her, secured by a mortgage on real estate. She credited Mrs. Gray's account on the books of the company with the amount of money loaned, and the company used the money in its business. Appellee then withdrew from time to time in merchandise and cash the amount to Mrs. Gray's credit with the knowledge and consent of W. E. Gray and with the approval of Mrs. Gray. We see no fraud in this. Mrs. Gray was not indebted to the company. She had a credit balance on its books of $2,000 which she had the right to withdraw herself, or to permit another so to do, and her account to be charged therewith.

We find no error, and the decree is accordingly affirmed.

FRANKLIN COUNTY BOARD OF EDUCATION *v.* RILEY.

Opinion delivered February 9, 1931.

[redacted]

Lee G. King and *A. N. Hill*, for appellant.

G. C. Carter, for appellee.

BUTLER, J. There were two petitions presented to the board of education of Franklin County and filed before said board on the same date. One was a petition under act No. 156 of the Acts of 1927, praying for an order consolidating Grand Prairie Special School District No. 29 with Branch Special School District No. 13, and the other for the annexation of said District No. 29 with Charleston Special School District No. 9. There were forty-seven qualified electors in said District No. 29 and the petition for the annexation of said district to the Charleston District bore the signature of twenty-four of these electors. To that petition was attached a written request signed by the board of directors of the Charleston District assenting to the annexation and joining in the request of the petition that the order be made. The other petition for the consolidation of District No. 29 with the

Branch Special School District was signed by a majority of the qualified electors in the territory affected.

On a hearing of the two petitions, the county board denied the petition for the consolidation, and granted that for the annexation of District No. 29 with the Charleston District. From this action by the county board an appeal was prosecuted to the circuit court, which court, upon hearing the case, overruled the order of the county board of education and entered an order consolidating Branch Special School District and District No. 29.

It appears that the judgment of the circuit court was based on the theory that the petition for the annexation was not signed by a majority of the qualified electors because the name of W. E. Flannegin was improperly on the list of petitioners asking for the annexation, and that his name should be stricken therefrom, and that when this was done the petition did not contain a majority of the qualified electors. The appellees here insist that the action of the circuit court in striking from the petition the name of W. E. Flannegin was justified, and that, even though his name had not been striken from the petition, the judgment of the circuit court was correct in overruling the action of the county board of education because the petition for annexation, although containing a majority of the qualified electors of School District No. 29, did not contain a majority of the electors of said District No. 29 and Charleston Special School District, and therefore did not contain a majority of the qualified electors in the territory affected. The latter position taken by the appellees cannot be maintained because the petition for annexation was in compliance with the requirements of § 8949 of Crawford & Moses' Digest, which provides, "The county board shall annex contiguous territory to single school districts under the provisions of this act when a majority of the legal voters of said territory and the board of directors of said single district shall ask by petition that the same shall be done."

In this case on the petition for annexation to the Charleston District a majority of the qualified electors in the territory to be annexed was all that was required, because the directors of the district to which it was to be annexed joined in the petition. Act No. 156 of the Acts of 1927 is not in conflict with the foregoing section and was intended to be, and is, cumulative to that section of the Digest. *Manley* v. *Moon,* 177 Ark. 263, 6 S. W. (2d) 281.

W. E. Flannegin signed the petition for the consolidation of District No. 29 with the Branch Special School District, and afterward, and before any petitions were filed with the county board, also signed a petition for the annexation of his district with the Charleston District. He gave as a reason for this action the frequent importunity of those circulating the petition for the consolidation with the Branch Special School District with the statement by them that there would not be any order made annexing District No. 29 to the Charleston District, and he had as well sign for the consolidation with the Branch District; that he preferred to be annexed to the Charleston District, but was induced to believe this could not be done, and therefore signed the petition for the consolidation. However, the question of Flannegin's signing the petition for consolidation with the Branch District was not raised before the county board, so far as we can determine from the record, and not until the case was heard on appeal before the circuit court. Then, too, Flannegin had signed the Charleston petition before either was filed, and thus impliedly revoked his signature to the Branch petition. Under these circumstances the board was justified in counting Flannegin's name on the petition for annexation, and the circuit court erred in striking his name therefrom.

The question presented has no similarity to that considered in the case of *Elkins* v. *Union Consolidated School District,* 181 Ark. 253, 25 S. W. (2d) 443, and what was there said has no application here. As the petition for annexation with the name of W. E. Flannegin thereon

contained a majority of the qualified electors of District No. 29 with the directors of the Charleston District joining in the prayer of the petition, the county board had jurisdiction, and, as there is no showing made of any abuse by the board in the exercise of its discretion, its order must be upheld.

It follows that the judgment of the trial court is reversed, and the cause remanded with directions to affirm the order of the county board of education.

ÆTNA CASUALTY & SURETY COMPANY *v.* SENGEL.

Opinion delivered February 9, 1931.

Powell, Smead & Knox, for appellant.

Mahony, Yocum & Saye, for appellee.

BUTLER, J. The appellant company insured the appellee against loss by burglary of property in appellee's safe in its place of business. While the policy was in force, burglars entered appellee's place of business and feloniously abstracted from said safe a sum of money. The appellant denied liability under the terms of its policy, and this suit was then instituted and the case submitted to the trial court on the policy of insurance and an agreed statement of facts.

The facts necessary for an understanding of the issues and such as are relevant to the question presented are as follows: the safe insured was not a burglar-proof safe and was not so stated in the policy, but was a fireproof safe. It had two doors—the outer door was provided with a combination lock and immediately inside the outer door was a small compartment or chest closed by a door of thin steel and provided with a lock which was manipulated by a key. This inner chest was used as a receptacle for the cash on hand. At the close of the day's business both the door to the small inside chest and the outer door were closed and securely fastened. During the night burglars entered the appellee's place of business and secured entrance into the safe through the outer door by manipulating the combination thereof so that it was opened without force or violence. Entrance was gained to the inner compartment by use of force upon the inner door by some tool directly upon the exterior of same, of which there were visible marks upon the exterior of such inner door, and the cash within the chest was abstracted.

Under insuring clause No. 1 of the policy, the appellee was indemnified for loss by burglary of property designated in "condition R" within the safe, inside or outside of any chest, caused by the abstraction of such property while the safe was closed and locked "after entry into such safe or vault has been effected by force and violence by the use of tools, explosives, electricity, gas, or other chemicals directly upon the exterior thereof, of which force and violence there shall be visible marks."

The property designated in "condition R," subdivision (a) thereof, was money and securities "in safe No. 1 inside or outside of any chest." By "condition B" the appellant provided that it should not be liable in paragraph No. 7 "for loss of property from within any safe containing a chest unless *both* the safe and chest have been entered in the manner specified in insuring clause No. 1, unless insurance is specifically provided in subdivision (a) or (c) of "condition R," and by paragraph No. 9 of said "condition B," "for any loss effected by opening any safe or vault insured hereunder by the use of any key or by the manipulation of any lock."

The question for our determination is, did the entry by violence of the door of the inner chest render the appellant company liable under the terms of its policy, although the outer door was opened without the application of any force, but by the manipulation of the combination lock?

In numerous cases under provisions insuring against the felonious abstraction of property from safes where the entry into them was effected by the extraneous forcible use of tools or explosives, it is held that such policies cover loss where entry was made into the inner chambers by such means, even though the outer safe was not so entered. These cases are collected in the note in vol. 41 A. L. R. at page 857, and to the same effect is the holding in a case decided by the Supreme Court of Utah, January 5, 1929, *Schubach* v. *American Surety Co. etc.*, 273 Pac. 974. But in the case of *Blank* v. *National Surety Co.*, 181 Iowa 648, 165 N. W. 46, L. R. A. 1918B, 562, a contrary rule was announced. In that case it was held that the loss was not covered where the burglary was effected by working the combination of the outer door and breaking into the inner door.

We have examined the various cases noted in 41 A. L. R., *supra*, and those cited in 181 Iowa, *supra*, to support the rule there announced, and can find no essential dissimilarity in the insurance clauses in the

policies considered in those cases. The arrangement and verbiage in some are different from those in others, but, in our opinion, the clauses, taken as a whole and giving to them a common sense interpretation, have essentially the same meaning; to protect the insured from loss from a forcible felonious entry, where marks of such are visible upon any of the doors through which entry from the outside was necessary to reach the property insured.

In *Blank* v. *National Surety Co., supra,* the court cites in support of the conclusion there reached the case of *First National Bank* v. *Maryland Casualty Co.,* 162 Cal. 61, 121 Pac. 321, Ann. Cas. 1936, 1170; *Maryland Casualty Co.* v. *Ballard County Bank,* 134 Ky. 354, 120 S. W. 301; and *Brill* v. *Metropolitan Surety Co.,* 113 N. Y. Supp. 476. These cases do not support the broad statement of the Iowa court. In the case of *First National Bank* v. *Maryland Casualty Co., supra,* there was a burglar-proof chest inside the outer safe, and the policy provided that force must be used against both. The proof was that tools were used only upon one, while the combination lock was worked on the other. *Maryland Casualty Co.* v. *Ballard County Bank, supra,* was a case where an officer of the bank was held up by burglars and forced to open the vault and the safe within the vault was opened by working the combination lock. The court held that the force used upon the officer to compel him to open the safe was not the force contemplated by the policy. The point decided in the case of *Brill* v. *Metropolitan Surety Co., supra,* was that the evidence failed to show "visible" marks of force, but that the reasonable inference was that the outer door was opened by the working of the combination and the inner door by a key.

Typical of those cases holding that liability is established where entrance is made by force upon the inner door, although the outer door was not forcibly entered, is the case of *Moskovitz* v. *Travelers' Indemnity Co.,* decided by the Supreme Court of Minnesota and reported in 144 Minn. 98, 174 N. W. 616. The insurance was against

loss by "entry into such safe or vault by actual force and violence, of which force and violence there shall be visible marks made upon such safe or vault by tools, etc." By another clause in the policy liability was excluded though there was an entry and burglary "unless all vault, safe and chest doors are properly closed and locked by a combination or time lock at the time of the loss or damage; nor if the entry is effected by opening the door of any vault, safe or chest by the use of a key or the manipulation of any lock." The plaintiff sustained a loss by burglary from his safe. There was no actual force used in effecting an entry through the outer door, but the court held that "liability arises when there is an entry by actual force through the inner door by tools of which there are visible marks, though entrance through the outer door is effected by the manipulation of a lock and no marks of force are upon it."

One of the latest cases is that of *Schubach* v. *American Surety Co., supra.* The safe in that case had an outside door and an inner door, referred to as a fire-proof door, and in the interior of the safe was a small chest. This chest was made of steel and had a single door which closed with a spring lock which was operated by the use of a key, the two exterior doors being opened by the manipulation of combination locks with which they were fastened. No force was used upon the outer doors which in any way enabled the burglars to gain admission to the safe. The question was whether the door of the chest was opened by force, and the court held that a reasonable construction of the terms of the policy was that if such was the case the indemnity should extend to and protect the insured against loss resulting from forcibly gaining entrance into the inner chest. The language of the insurance clause of the policy was, "for all loss by burglary occasioned by the abstraction of any such property from the interior of any safe or vault described in the schedule * * * by any person or persons making felonious entry into such safe or vault by actual force and violence,

of which force and violence there shall be visible marks made upon such safe or vault by tools, etc."

In the case at bar the appellant relies upon the case of *Blank* v. *National Surety Co., supra,* and the case of *Frankel* v. *Massachusetts Bonding & Ins. Co.,* decided by the Kansas City Court of Appeals and reported in 177 S. W. 775, the latter case being cited as a case directly in point. In that case entry was made through the outer doors without the use of force. Within the safe was a receptacle closed by a small iron or steel door which was found to have been broken open and visible marks appeared of the force exerted. The insuring clause of the policy under which liability was asserted is not quoted, but the statement is made that the burglarious entry insured against was "by the use of tools or explosives applied directly to the outside thereof," the court holding that this was a limitation of liability for a loss occasioned by burglary committed by making an entry into the safe by the use of tools or explosives applied directly to the outside of the safe and excluded liability where the outside door was opened by the manipulation of a combination and the inner door closing the cash box was opened by force.

In none of the cases to which we have been referred was the insuring clause construed in connection with any subsequent explanatory or limiting paragraph; but in the instant case there is a subsequent paragraph which explains and limits the liability under the insuring clause. It is argued that the words "exterior thereof" in the insuring clause under review means that the force must have been exerted solely against the outside door, but these words must be considered in connection with the provisions of "condition R" and of the description of the safe contained in the policy. From these it is apparent that defendant was fully apprized of the nature of the safe, the uses for which it was intended, and where the property insured would be deposited. It knew of the inner chest, and it is fairly inferable that the defendant

had knowledge that valuables would be placed therein. The contract was to protect the plaintiff against burglary accomplished by force and violence, and by the seventh paragraph of "condition B," which must be considered in connection with the insuring clause, the insurer exempts itself from liability "for loss of property from within any safe containing a chest unless *both* the safe and chest have been entered in the manner specified in insuring clause 1, unless insurance is specifically provided in subdivision (a) of "condition R."

Insurance is specifically provided in that subdivision, and when therefore the property insured is in the safe, "inside or outside of the chest," it is not necessary that both be entered by force by the use of tools directly upon the exterior thereof, and if not both, then which? The policy does not say that it must be the outside door or that it must be the inner door. Hence it is obvious that all that would be necessary to bring the loss within the terms of the policy is that the force be exercised upon either door. This construction, we think, is warranted by the plain provisions of the policy. But, if doubtful, it must be construed in favor of the insured and in aid of his right to recover.

The rule is familiar that the clauses of an insurance policy must be read together, and, whatever may be the construction of a particular clause standing alone, it must be read in connection with subsequent clauses which limit or extend the insurer's liability, and, where the policy is susceptible of two different interpretations, that most favorable to the insured must be adopted. Applying these rules to the construction of the insuring clause here in question, as explained in subsequent paragraphs of the policy, we hold that the entry by force of the inner door is sufficient under the policy to affix liability, although the outer door was opened without the use of any force. As is said in *Moskovitz* v. *Travelers' Indemnity Co., supra*: "It was not difficult to write a policy making a forcible entry through the outside door attended by visible marks a prerequisite to liability. If the insur-

ance company intended to offer the plaintiff such a policy, it could have made its meaning sufficiently clear by the use of a few apt words, and, wishing its liability thus limited, it should have done so."

It is lastly argued that, irrespective of the construction placed upon the insuring clause, there is no liability because of paragraph No. 9 of "condition B," which provides, "The company shall not be liable for any loss effected by opening any safe * * * by the use of any key or by the manipulation of any lock." In view of the preceding provisions of the policy, it is difficult to know just what was in the mind of the insurer when it wrote this paragraph. This was not pleaded as a defense to the plaintiff's complaint, nor is it such. Whatever might have been the purpose of the insurer, it cannot be given the effect suggested, for the reason that to do so would conflict with the liability of the insurer fixed by the preceding provisions, and it could mean only that where the entry was not effected by violence there would be no liability. We can think of only two ways by which entry might have been effected; one, by force, and the other by the use of keys or by manipulation of locks, and where the latter method was employed there would necessarily be no force, and, hence, no recovery. Paragraph No. 9 of "condition B" merely emphasizes the condition that there must be a forcible entry to affix liability.

The judgment of the trial court is in all things correct, and it is therefore affirmed.

KIRBY, J., dissents.

UNION TRUST COMPANY *v.* MADIGAN.

Opinion delivered February 9, 1931.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

Lee Miles and *Donham & Fulk,* for appellee.

BUTLER, J. Mrs. Theresa O. Donohue died testate in 1909, leaving surviving as her only descendants Edward Donohue, a son now forty-eight years old, Annie L. Kleine, a daughter who died at the age of fifty-two in the year 1928, intestate, and two grandchildren, Lennon Sminck and his sister, Mrs. Bernadine S. Madigan, appellee here. Mrs. Kleine left one child surviving who is now Mrs. Maie K. Ayres. Mrs. Donohue left a considerable estate disposed of under the terms of a will, which, omitting formal parts, is as follows:

"1. I desire that all my just debts and funeral expenses, including the sum of $100, which I hereby give and bequeath to Father Enright for saying Mass for the repose of my soul, be paid out of any estate which I may die seized and possessed.

"2. I devise and bequeath to my sisters, Katie Lennon of Kingston County, Dublin, Ireland, and Elizabeth Lennon of London, England, each, the sum of $100, to be paid to them by my executor hereinafter appointed.

"3. I devise and bequeath to Mother Superior Antoine of the Convent of the Sisters of Mercy, of Little Rock, Arkansas, the sum of $200. I further devise and bequeath to my daughter, Annie E. Kleine of the city of Little Rock, the sum of $1,000; to my grandson Lennon Sminck, the sum of $1,000; and to my granddaughter Bernadine Sminck the sum of $1,000; for the last three bequests of $1,000 each, I desire that my executor assign certificate of deposits held by me, in payment of same.

"4. I devise and bequeath to my daughter, Annie L. Kleine: The east 47 feet of lot 7, block 84 in the city of Little Rock, Arkansas, being on the northwest corner of 5th and Louisiana streets, in said city. I also devise and bequeath to my said daughter, Annie L. Kleine, the home in which I now live, being lot 9, and the north half of lot 8, block 196, in the city of Little Rock, Arkansas, conditioned, however, that this bequest of my home to my said daughter is that my son, Edward Donohue, shall have one room in the house on said premises for his home as long as he shall live, conditioned further that the bequest to Annie L. Kleine, as mentioned in this item is that the said Annie L. Kleine shall pay the improvement tax as is now levied or that may be levied for the improvement of Louisiana Street upon all of lot 7, block 84, Little Rock, Arkansas, also the improvement tax for the pavement of Center Street upon all of lots 7, 8, 9, 10, block 196, Little Rock, Arkansas.

"5. I devise and bequeath to my grandson, Lennon Sminck, lot 7 and the south half of lot 8, block 196, Little Rock, Arkansas, and devise and bequeath to my granddaughter, Bernadine Sminck, lot 10, block 196, Little Rock, Arkansas. The said Lennon Sminck and the said Bernadine Sminck each to hold the said property bequeathed to them in this item, for and during their natural lives, that they use and enjoy the income from said property during their life, but not to dispose of or incumber same, and should either die without issue, then the same to go to the survivor, but at their death, if they should have issue, they and each of them, may devise and bequeath as they think advisable.

"6. I give to my grandson, Lennon Sminck, and to my granddaughter, Bernadine Sminck, to be held by them in common during their natural lives, the west 50 feet of the east 90 feet of lot 7, block 84, Little Rock, Arkansas, being the 50 feet immediately west of the property bequeathed to my daughter, Annie L. Kleine, it is my desire, and a part of this gift, that they use and enjoy the in-

come of said property during their life, but not to dispose of or incumber the same, except that they may incumber same only for the purposes of building thereon or improving the buildings there now on, and, should either die without issue, then to go to the survivor, but at their death, if they should have issue, they may devise and bequeath as they may think advisable.

"7. I devise and bequeath to my grandson, Lennon Sminck, and to my granddaughter Bernadine Sminck, lots 4, 5, 6, block 195, Little Rock, Arkansas, also lots 3, 4, block 91, Little Rock, Arkansas, to be held by them in common, and, should either die without issue, then the same to go to the survivor.

"8. I devise and bequeath to Annie L. Kleine as trustee, for my son Edward Donohue, to be held by her as trustee, during his natural life, the west 56½ feet of lot 7, block 84, Little Rock, Arkansas, being all of said lot not hereinbefore bequeathed, the said trustee to collect the income from said property using the proceeds for the benefit of the said Edward Donohue, during his natural life, and at his death, the said trusteeship shall cease and the said property shall descend to my grandchildren, Mary Kleine, Lennon Sminck and Bernadine Sminck.

"9. I devise and bequeath to my daughter, Annie L. Kleine, to be held by her, one-half for herself and one-half as trustee for Edward Donohue, my two lots on Broadway Street, being lots 3, 4, block 196, Little Rock, Arkansas, the said one-half interest bequeathed to her as trustee for Edward Donohue and the income from said one-half interest to be used by her for the benefit of said Edward Donohue, and at the death of the said Edward Donohue his interest in said property shall descend and become the property of said Annie L. Kleine.

"10. I hereby constitute and appoint my daughter, Annie L. Kleine, the executor of this my last will and testament and request the probate court to appoint her as such, and that she be allowed to serve without giving

bond. At this time I owe no debts, and I ask my said daughter, Annie L. Kleine, to render such service as she can in carrying out the provisions of this my last will and testament."

I. This litigation is for the specific performance of a contract for the sale and purchase of the property mentioned in paragraph No. 6 of the above will, and involves its construction. The appellee, plaintiff in the court below, insists that she and her brother, Lennon Sminck, who has conveyed to her his interest by warranty deed, took an estate in fee simple by the terms of the will, while the appellant contends that the estate devised amounted only to a life estate, with a contingent remainder in the heirs of the testator as should then be in being, at the termination of the particular estate.

The paramount principle in the construction of wills is that the general intention of the testator, if not in contravention of public policy or some rule of law, shall govern. The rules by which such intent may be discovered are stated in a general way in *Covenhoven* v. *Shuler,* 2 Paige, Ch. 130, 21 Am. Dec. 73, quoted with approval in the case of *Cox* v. *Britt,* 22 Ark. 570. "That intent must be ascertained from the whole will taken together; and no part thereof to which meaning and operation can be given, consistent with the general intention of the testator, shall be rejected. Where the words of one part of a will are capable of a two-fold construction, that should be adopted which is most consistent with the intention of the testator, as ascertained by other provisions in the will. And where the intention of the testator is incorrectly expressed, the court will effectuate it by supplying the proper words."

Where the language used by the testator is doubtful in its meaning, rules of construction are invoked to enable the courts to arrive at the intention, and, in case of ambiguous provisions, certain presumptions must be indulged.

(1) It may be said, first, that the intention of the testator to dispose of his entire estate will be presumed, unless the language of the will shows to the contrary. *Gregory* v. *Welch,* 90 Ark. 152, 118 S. W. 404; *Booe* v. *Vinson,* 104 Ark. 495, 149 S. W. 524; *Barlow* v. *Cain,* 146 Ark. 160, 225 S. W. 228; *Pletner* v. *So. Lumber Co.,* 173 Ark. 277, 292 S. W. 370; *Lockhart* v. *Lyons,* 174 Ark. 703, 297 S. W. 1018. This presumption, though not controlling, must always be taken into account when the language employed is so ambiguous as to require construction. *Brock* v. *Turner,* 147 Ark. 421, 227 S. W. 597.

It is also a well-settled rule of construction that wills are liberally construed, and every legitimate conclusion is indulged in order to reach a just and equitable result. Words and sentences are to be considered and construed so as to reach the real purpose and intention of the testator. *Cockrill* v. *Armstrong,* 31 Ark. 580. The law favors the early vesting of estates (*Gregory* v. *Welsh, supra; Horrocks* v. *Basham,* 139 Ark. 116, 213 S. W. 372), and in cases of doubt the construction should be in favor of the first taker because it is against the policy of the law to tie up property, and also he is presumed to be the favorite of the testator. 28 R. C. L. (Wills) 191.

Courts, in arriving at the true meaning and intent of the testator, incline against any construction of the will which would double portions to the partial exclusion of others equally meritorious. 28 R. C. L. Wills, § 195; *Johnson* v. *McDowell,* 154 Iowa 38, 134 N. W. 419, 38 L. R. A. (N. S.) 589.

(2) In construing wills, the general rule is that a gift for life without a limitation over passes a fee in real estate and an absolute interest in personalty, even though words denoting a life estate was intended were used. However, a clear gift to one for life, without a limitation over, is held not enlarged to a fee by such omission, unless a declared purpose is shown to dispose of all the testator's estate by will instead of creating an intestacy as to the remainder. Thompson on Construction of Wills,

§ 428, p. 551, *Byrne* v. *Weller,* 61 Ark. 366, 33 S. W. 421. In Schouler on Wills, vol. 2, p. 1015, the reason for the rule is thus stated: "Where the construction of a will is doubtful, the law leans in favor of the primary rather than the secondary intent and in favor of the first rather than the second taker as the principal object of the testator's bounty, as the first taker in a will is presumed to be the favorite of the testator, and the will should be so construed as to make his gift effective if possible, and the presumption may be relied on to support the claim that a gift is absolute rather than a life estate where there is no gift over. However the inclination to give to the first donee an estate of inheritance will yield to a clearly expressed intention to the contrary."

The will under consideration in *Byrne* v. *Weller, supra,* made provision that, after the payment of the testator's funeral expenses, etc., he gave and bequeathed to his wife his entire property and effects of every character and kind, both real and personal, during her natural life, to use and enjoy the rents and profits arising therefrom. In the following paragraph the testator provided that certain parcels of land should at the death of his wife be by her given to such of the living children of a brother and sister as the wife in the exercise of her judgment might deem best, and as to another parcel provided that, after the death of the wife, it should descend jointly to certain named beneficiaries, and, in the event that the beneficiaries named should die before the wife, that she should dispose of that parcel in the same manner as the first. In the fifth and last clause the remainder of the testator's goods, chattels and effects of every character and kind, both real and personal, were disposed of as follows: "I will and bequeath to my beloved wife, Julia A. Maddox, to dispose of as she may choose and desire at her death." Except as to the particular parcels of land mentioned in the specific devises, the court held that the wife took an estate in fee simple.

In *Hysmith* v. *Patton,* 72 Ark. 296, 80 S. W. 151, the language of the first item of the will construed in that case was as follows: "I hereby will and devise to my beloved wife, Jane, forty acres of land, the homestead upon which I now reside * * *, in Woodruff County, Arkansas; also, all of my personal property I may have at my death, and to hold the same in her own right during her natural life or widowhood," etc. The construction placed on this language was that the widow took a fee in the homestead devised and not a life estate.

II. It will be seen that the particular paragraph to be construed in this case is a single involved and ambiguous sentence in which the purpose of the testator is not plainly discernible, and therefore, in order to discover her intention, the aforesaid rules of construction must be invoked. Taking the whole will together, it is apparent that all those are remembered who have any claim upon her affection or who were the objects of her care; the personal property is disposed of by specific bequests, and there is an evident attempt to make a just and equitable division of the remainder of the estate between and among her descendants. Considering these circumstances and that the intention to dispose of the entire estate will be presumed unless the language of the will shows to the contrary, and remembering that the testator did not insert a residuary clause, her intention becomes obvious, and, as is said in *Hayward* v. *Rowe,* (Mass. 1905), 76 N. E. 286, cited by appellee: "There being no residuary clause, an inference cannot be safely drawn that the (testator's) intention was otherwise than to make a full testamentary disposition of her property."

It will next be observed that nowhere in the will is there any language indicative of an intent to reserve the fee in the property devised in paragraphs No. 5 and No. 6 which shall revert to the donor's estate. No remainder is suggested or its disposition provided for, and if, indeed, a particular estate for life had been given by "certain and express words," yet, as the testator was

attempting to dispose of all her property by will, the particular estate and the remainder would merge into the fee in the first taker when it appears there was no gift over to another.

However, from a careful analysis and fair construction of the language of paragraph No. 6, it is clear that no life estate only is created by certain and express words, but rather the implication is that no such intent was in the mind of the testator. There was no express devise to the donees of an estate for life. The expression is, "I give to my grandson, Lennon Sminck, and to my granddaughter, Bernadine Sminck, to be held by them in common during their natural lives," which is quite a different statement to one limiting by express words the nature of the estate. It is one which prescribes not the character or extent of the estate conveyed, but the manner in which it should be held. That the estate conveyed was for life only is negatived by the right of survivorship contained in the expression: "Should either die without issue, then to go to the survivor"; for under this provision, if either died, the estate of the other would be enlarged so as to become the owner of the entire estate in fee.

Something more than a mere life estate is also implied by the power given of disposition by devise in the manner deemed advisable by the devisees. This power could arise only in the event that the devisees should die without issue, so that, had issue been born to them or to either of them, there would be no power to devise, and, the condition for the power being the failure of issue, it must have been in the mind of the testator that the fee passed to the devisees, which, in the natural course of events, would descend to their children. If the construction is as contended for by the appellant—that a life estate only was devised—then the issue surviving would be deprived of a material portion of the estate, while that of others no more meritorious than these would be augmented. This is a construction to which courts are not inclined,

and which would do violence to the rule that wills should be construed liberally and every legitimate inference of the testator's intent be indulged, so that a just and equitable result might follow.

There are certain expressions used by the testator which it is suggested support the construction that a life estate only was intended, namely, the expressions of the desire that the devisees use and enjoy the income of the property during their lives, but not to dispose of or incumber the same except for certain purposes. These statements express no wish as to what they shall have or what disposition they may make or not make with respect to others, but merely as to how they should use what had already been given them—a desire that the property should be used with that frugal care which doubtless the testator herself had exercised. This language, considered in connection with that which goes before and that which follows, is but the expression of a hope and does not amount to an affirmative command which the devisees are bound to obey. *Fullenwider* v. *Watson,* 113 Ind. 18, 49 A. L. R. 5 and note; *Ib.* 22 and note; *Wallace* v. *Wallace,* 179 Ark. 30, 13 S. W. (2d) 810.

It is unnecessary to consider the evidence relating to the mental capacity of Edward Donohue for his deed could add nothing to the strength of Mrs. Madigan's title. She obtained the fee by virtue of the devise, and since her co-tenant has conveyed to her his interest, she is the owner of the entire estate and the deed offered by her conveys a good title which the appellant is bound to accept.

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

KIRBY, J., dissents.

SMITH *v.* WHEAT.

Opinion delivered February 16, 1931.

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[redacted]

[redacted]

[redacted]

[redacted]

Bridges, McGaughey & Bridges, for appellant.

HART, C. J., (after stating the facts). It is the settled rule in equity in this State that conveyances to members of the household and to near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; and, when they are voluntary, they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors. *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913; *Davis* v. *Cramer,* 133 Ark. 244, 202 S. W. 239; *Barham* v. *Federal Reserve Bank,* 176 Ark. 1082, 5 S. W. (2d) 318; and *American Company of Arkansas* v. *Wheeler,* 181 Ark. 444, 26 S. W. (2d) 115.

In this connection, it may be stated that these cases call for the application of that rule of evidence that where parties have it in their power to explain suspicious circumstances connected with a transaction, the court trying the case may regard their failure to do so as a proper subject for comment and regard their failure to produce evidence within their power as a circumstance against them. *Miller* v. *Jones,* 32 Ark. 337; *Burke* v. *Napoleon Hill Cotton Co.,* 134 Ark. 580, 202 S. W. 827; *Gallup* v. *St. Louis I. M. & So. Ry. Co.,* 140 Ark. 347, 215 S. W. 586; and *Ramey* v. *Fletcher,* 176 Ark. 196, 2 S. W. (2d) 84.

This is in application of Lord Mansfield's maxim that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." *Kirby* v. *Tallmadge,* 160 U. S. 379, 16 S. Ct. 349.

When the circumstances under which a transfer of property by a debtor are suspicious, the failure of the parties to testify or to produce available explanatory or rebutting evidence is a badge of fraud. 27 C. J. 494.

The rule also applies where the circumstances attending the transaction are suspicious, and the parties fail to produce any explanation of the suspicions attending the transfer by testifying or giving some explanatory evidence. *Griggs* v. *Crane's Trustee,* 179 Ky. 48, 200 S. W. 317.

In the present case the evidence shows that Fuller was financially embarrassed when the deed in question was made on the 16th day of October, 1928, to his brother-in-law, G. B. Wheat, and that Fuller filed a voluntary petition in bankruptcy on the first of November, 1928. Fuller testified that he did not know that he was insolvent on the 16th day of October, 1928, and that Wheat did not know anything about his financial condition. In this respect, he is corroborated by Wheat, but they are contradicted by the attendant circumstances. According to their own testimony, Wheat came down there about the first of September, 1928, and went to work for Fuller, closing out his barber shop business in Pine Bluff. He advanced $500 in cash to Fuller without making any inquiry whatever about his solvency. He does not give any satisfactory account about where he got the money. According to his testimony, he went from his own home in Pine Bluff to Shreveport and carried the money in his pocket. He had never kept it in the bank, although he carried a small account in the bank from his barber shop business in Pine Bluff. Neither Fuller nor Wheat had any recollections whatever as to the kind of money which the $500 consisted of. Fuller testified in a general way that he used it in purchasing lumber stock for his firm, but he does not give any detailed or satisfactory account of the transaction. It will be remembered that Fuller testified in the bankruptcy proceeding that the consideration for the deed was an old debt which he owed Wheat. In his testimony in the present case, the old

debt passes out and a new consideration in cash is given. In this connection it may be stated that according to his own testimony, Wheat advanced the $500 a month before the deed was executed without any request for the payment of his old debt. Fuller testified that Wheat had been trying for some time, while he lived at Pine Bluff to purchase the four lots in question, but that he had refused to sell them to him. Later on in his testimony he stated that for some time he had had the lots in question in the hands of an agent, and that his agent had been unable to sell them. This he gave as the reason for selling them at a low price to his brother-in-law. When all the attendant circumstances are considered, we are of the opinion that a preponderance of the evidence shows that there was no consideration passed between Wheat and Fuller when the property in question was conveyed by Fuller to Wheat and that the transaction should be treated as a voluntary conveyance. The evidence in the record shows that Fuller was insolvent at the time, and the case calls for the application of the rule of law in this respect above set out.

Therefore, the decree will be reversed, and the cause remanded with directions to the chancery court to set aside the conveyance of the property in question from Fuller to Wheat as fraudulent, and for such further relief as appellant may be entitled to in equity which is not inconsistent with this opinion. It is so ordered.

BARTON-MANSFIELD COMPANY *v.* WELLS.

Opinion delivered February 16, 1931.

Caraway, Baker & Gautney, for appellant.

L. B. Poindexter, for appellee Wells, and *J. R. Crocker* and *G. M. Gibson,* for other appellees.

SMITH, J. Ponder Hillhouse, a building contractor, entered into an oral contract with F. S. Wells to build for the latter a bungalow for the agreed sum of $4,300. The contract contemplated a "turn-key" job. Hillhouse was to furnish all labor and material, but it was known that his means were insufficient to comply with his contract unless advances were made to him as the work progressed. Hillhouse commenced work, and Wells made advances amounting to $2,850, when he found himself unable to make further advances or to obtain the necessary credit to make the advances. There then existed two mortgages on the land upon which the house was being constructed, one to the Federal Land Bank of St. Louis for $4,000, and another, a second mortgage, to the People's Bank of Imboden for a smaller amount.

It was estimated that $1,510 would be required to complete the building, and Hillhouse, with the consent of Wells, made application to the Imboden Bank for an additional loan of that amount, the proceeds of the loan to be paid out as the work progressed. The bank agreed to make the loan, and made it with the understanding that Hillhouse should complete the building, and, when he had done so, should file a mechanic's lien against the building and would assign the lien to the bank for its protection. As an inducement to the bank to make the loan, the representation was made that Hillhouse had taken out, or would take out, builder's insurance. Wells had previously taken out insurance on the building, but there

was such delay in its construction that this policy had expired before the building was completed.

Pursuant to this agreement, Hillhouse made application to the local agent of a fire insurance company for a $4,000 policy, which was later issued to him. This policy recites that the insurer "does insure F. S. Wells for the term of sixty days" against loss by fire, and in the loss payable clause this provision was written: "Any loss under this policy that may be proved due the assured shall be payable to the assured and Ponder Hillhouse, Smithville, Arkansas, subject nevertheless to all the terms and conditions of this policy." It was testified, both by Wells and the officers of the bank, that Hillhouse agreed that the bank would be protected by a policy of insurance, and that the loan would not have been made but for this agreement.

After negotiating this loan, Hillhouse resumed work on the building, but did not complete it, although the bank advanced him the full amount of the loan, less $230.52. On December 30, 1928, while the contract of fire insurance was in force, the building burned before it had been completed. The contention is made that Hillhouse had then been paid the amount that would have been due him had the building been completed, but, whether this is true or not, it is very clearly shown that the payments which had been made to Hillhouse exceeded the proportionate part of the building cost up to the date of the fire; in other words, Hillhouse had been paid more than the value of the work done and material furnished according to the building contract.

After the fire Hillhouse refused to permit Wells to examine the insurance policy, nor would the local agent furnish that information, but it is not contended that any change had been made in the policy as issued.

Negotiations were entered into between the bank and Wells, on the one hand, and Hillhouse, on the other, to settle the controversy which arose out of the facts stated, and the proposition was made to Wells that he rebuild the house out of the proceeds of the insurance policy.

The offer to permit this to be done was made at the trial, and is renewed in the brief.

Wells proposed that Hillhouse start from the ground, or at the bottom of the basement, and rebuild everything new, but Hillhouse refused to do this, insisting that he could use the foundation and certain walls by patching them, and when Wells declined to agree to this the proposition was dropped and does not appear to have ever been renewed, and the officer of the bank having the matter in charge for the bank testified that Hillhouse stated that he could not rebuild, and that he wanted Wells to collect the insurance.

It does not appear that Hillhouse made any effort to collect the insurance, and the adjustment of the loss was made by Wells, although Hillhouse kept the policy of insurance in his possession until February 23, 1929, at which time he assigned his interest therein to Barton-Mansfield Company, which company furnished him about $800 worth of material, for which he had not paid. It was thereafter impossible for Hillhouse to rebuild, as he was clearly insolvent.

Hillhouse was killed in an automobile accident on July 4, 1929, and W. B. Rudy qualified as administrator of his estate, and on October 19, 1929, Wells brought this suit to collect the insurance policy. This suit was brought against the insurance company, the Federal Land Bank, the People's Bank of Imboden, the administrator of Hillhouse, and the Barton-Mansfield Company, it being alleged that all these parties claimed some interest in the insurance, and it was prayed that the rights of all parties therein be decreed.

The insurance company filed an answer admitting its liability on the policy, and, upon paying the amount thereof into court, it was discharged. Numerous pleadings were filed by the various parties, which we find it unnecessary to review. A large amount of testimony was taken, and upon the final submission of the cause the court held that Hillhouse had no interest in the proceeds of the policy, and that the interventions of the Bar-

ton-Mansfield Company and of the administrator should be dismissed as being without equity, and this appeal is from that decree.

Upon the final submission of the cause, it was prayed by the Barton-Mansfield Company that the policy be reformed to conform to the intent of the parties, and made to show that its intent was to protect the interests of the deceased contractor Hillhouse, inasmuch as his liability for the failure to erect the building as required by his contract had not been discharged by his death, and the premium upon the policy had been paid by Hillhouse.

The court denied this relief, and we think properly so. If there was a mistake in the issuance of the policy, it was not mutual. The agent for the insurance company testified that the policy issued conformed to the application for it. Wells, and not Hillhouse, was named as the assured, and we think the fair and correct interpretation of the loss payable clause, which is copied above, was to make the loss payable to Wells and to Hillhouse as his interest might appear at the time of the fire. We are also of the opinion that Hillhouse had no interest in the building at the time of the loss by fire. It is true his obligation to erect the dwelling, for which he had been paid, had not been legally discharged, but as appears from what has been said, this obligation had been repudiated. Hillhouse died on the 4th of July after the occurrence of the fire on December 30, 1928, without evidencing any intent to rebuild, but, on the contrary, the testimony shows that he had no such intention. Hillhouse was admittedly insolvent, and his estate was of a value so small that the probate court made an order vesting the whole thereof in the widow under the statute, and no complaint is made of that action. Before the final submission of the cause the widow of Hillhouse was made a party, but no pleadings were filed on her behalf.

The undisputed fact that Hillhouse paid the premium on the insurance policy is of no controlling importance, for the reason that the testimony clearly shows that his agreement to take the insurance was a part of the con-

sideration which induced the Imboden bank to make the loan to him, and the decree of the court refusing to reform the policy must be affirmed, for the reason that relief of this character is granted only in cases of mutual mistake or the mistake of one party, coupled with the fraud of the other, the proof thereof being clear, unequivocal and decisive, and we are of the opinion that the testimony is not of that character. *Nicholson* v. *Hayes,* 166 Ark. 112, 265 S. W. 640; *Fagan* v. *Graves,* 173 Ark. 842, 293 S. W. 712; *American Alliance Ins. Co.* v. *Paul,* 173 Ark. 960, 294 S. W. 58; *Loden* v. *Paris Auto Co.,* 174 Ark. 720, 296 S. W. 78. It may also be said that it would be inequitable to grant the relief prayed.

The testimony shows that Hillhouse has been paid for all the work he did and for all the material furnished, and he is now dead and cannot rebuild the house, and would not have done so had he lived, and as his estate is insolvent and has been vested in his widow, no liability for the breach of the contract can be enforced. He has been paid once, and it would be inequitable to again pay his estate, or his creditor, the Barton-Mansfield Company.

It is true the Barton-Mansfield Company has not been paid for its material, but that company acquired, by the assignment of the policy to it by Hillhouse, no greater interest therein than Hillhouse himself had. Hillhouse was paid money which he might and should have used in paying his bill to the Barton-Mansfield Company, but he did not do so, and the building was destroyed by fire before any claim for a lien had been filed.

Before the opportunity had been afforded Wells to inspect the policy, he assigned his interest therein to the People's Bank of Imboden, and that bank contracted with the Federal Land Bank that the proceeds of the policy should be paid the Federal Land Bank, and its first lien on the land should be reduced to that extent.

The decree of the chancery court conformed to this agreement, and, as it appears to be in accordance with the equities of the case, it is affirmed.

LAKE *v.* WILSON.

Opinion delivered January 12, 1931.

Powell, Smead & Knox, for appellant.

R. E. Wiley, for appellee.

MEHAFFY, J. Some time in the early part of the year 1925, F. C. Nickel employed John Bruce Cox, a lawyer at El Dorado, Arkansas, to collect from John Dashko a commission alleged to have been earned by said Nickel on a $250,000 oil and gas lease sale. He agreed to pay said John Bruce Cox twenty-five per cent. of the amount recovered. After spending some time in an effort to adjust the matter without suit and failing to do so, Cox, with the consent of Nickel, employed J. R. Wilson, another lawyer at El Dorado, Arkansas, to assist him in the case.

Suit was brought in the Union Chancery Court for Nickel against Dashko, and both Wilson and Cox took part in the preparation and trial of the case. While the trial was in progress, Dashko was asked where the money received by him for the lease was deposited. Objection was made to this question but the court held that the witness must answer the question. Dashko, through his attorneys, then offered, instead of answering the question, to execute a bond to satisfy any judgment that might be rendered against him. This was agreed to, and a bond was executed by Dashko with P. G. Lake as surety. This bond was filed and approved. The trial court rendered judgment in favor of Nickel against Dashko for $500.

The judgment of the trial court was unsatisfactory to Nickel and to his attorneys, and it was decided that the case should be appealed to the Supreme Court. The attorneys, however, thought that the fee originally agreed on between Cox and Nickel, twenty-five per cent., was too small, and after a conference a new contract was entered into as follows:

"El Dorado, Arkansas,
"October 27, 1926.

"Messrs. Jno. Bruce Cox
and J. R. Wilson,
"Attorneys at Law,
"El Dorado, Arkansas.

"Gentlemen: Pursuant to our conversation on May 13, 1926, in your office, in which I agreed to give you a fee of $5,000 provided you win the $12,500 judgment asked for in the case against John Dashko in the Supreme Court, I now desire to confirm that agreement by this letter, and will say that if you win judgment in the sum of $12,500, I will pay you $5,000 out of the proceeds of said judgment, and, in the event the judgment is cut down in any sum below that, then the fee will be *pro rata*. This is a new contract, and supplants the old contract which was made on a basis of 25 per cent. of the recovery, and our rights will be determined by this contract, without any regard to that contract.

"Witness my hand, this the 27th day of October, 1926.

(Signed) "F. C. Nickel."

This new contract was accepted by the attorneys and the appeal was perfected. The Supreme Court reversed the decree of the trial court and remanded the cause with directions to enter a decree in favor of Nickel for $12,500 and also against the sureties on the bond given for the performance of the judgment.

On the 7th day of November, 1927, J. R. Wilson filed suit in the Union Chancery Court against F. C. Nickel, John Dashko, P. G. Lake, John Bruce Cox, H. P. Smead, trustee, H. P. Smead, R. C. Knox and Lamar Smead, doing business under the firm name of Powell, Smead & Knox. The parties named were named as defendants and garnishees.

In the complaint filed by Wilson, the employment of John Bruce Cox by Nickel and the employment of Wilson thereafter with the consent of Nickel are alleged, and the

appellee alleged also in this complaint that under the terms of the contract he was entitled to 20 per cent. of the recovery, J. B. Cox was entitled to 20 per cent., and that Nickel was entitled to 60 per cent. of the judgment, less $118.76 that Wilson had paid for printing abstract and brief. He also alleged that J. B. Cox was indebted to him in the sum of $1,014.17 with interest at 8 per cent., evidenced by promissory note, and that said Cox was also indebted to him on open account in the sum of $515.10 with 6 per cent. interest. It was alleged that these amounts represented the balance due Wilson by J. B. Cox on office rent. It was also alleged that J. B. Cox was insolvent, and Wilson asked that the interest of J. B. Cox in and to the fee due from Nickel be impounded and subjected to the payment of the items herein claimed, and that he was entitled to have the same impounded by equitable garnishment.

The prayer of Wilson was that the rights of F. C. Nickel, J. R. Wilson and J. B. Cox in and to the judgment against John Dashko and P. G. Lake be declared and fixed by the court, and for judgment for plaintiff and for judgment against the said J. B. Cox for the sums mentioned, and that the interest of the said J. B. Cox as declared by the court be impounded and subjected to the payment of the judgment as equitable garnishment. He also asked that his pleading be treated as an equitable garnishment against P. G. Lake, F. C. Nickel, John Dashko, H. P. Smead, trustee, and H. P. Smead, R. C. Knox and Lamar Smead, doing business under the firm name of Powell, Smead & Knox, attorneys, and asked that summons be issued against the parties named directing them to answer and show cause why the plaintiff should not recover the sums asked for in his complaint, and why the funds therein referred to should not be subjected to the payment of the claim of the plaintiff, and that summons issue against the said J. B. Cox directing him to answer and show cause, if any he can, why personal judgment should not be rendered against him in

the sum claimed by plaintiff herein, and why his interest in the judgment above mentioned should not be subjected to the payment of said plaintiff. He also asked for a restraining order and that the parties named be restrained from disbursing any part of the funds that might be found due said J. B. Cox and plaintiff and directing the same to be paid into the registry of the court and delivered to plaintiff upon final judgment as to such sums as plaintiff may be found entitled to recover, and that the defendant, J. B. Cox, be treated as a defendant, and that a judgment *in personam* be rendered against said J. B. Cox in accordance with the prayer and allegations herein, etc.

On the third day of December, 1927, the appellee, J. R. Wilson, filed in the case of F. C. Nickel against J. Dashko a petition to enforce his attorney's lien. In that petition he alleged that he had theretofore on the 7th day of November, 1927, filed in the above-styled cause a petition for judgment on the mandate and further alleged in his petition for lien that by virtue of his contract with Nickel he is entitled to the sum of $2,500 with interest; that said contract was made about the 13th day of May, 1926, and that the same was in writing; that the substance of said contract was that the petitioner was to have a fee of $2,500 or one-half of $5,000; that the mandate showed that the appeal was won and judgment directed to be entered for $12,500 against Dashko. He then described the work he did in preparing and trying the case, and that Nickel has refused to pay his fee. He also stated that petitioner had been notified by Nickel to take no further steps in the case, and he made sufficient allegations in his petition for a lien to entitle him to a lien.

The record shows that Mr. Nickel wrote Mr. Wilson a letter dated November 20, 1927, asking Wilson to take no further steps and telling Mr. Wilson that he desired Mr. Cox to be in exclusive control of the matter. Mr. Wilson testified, however, that he did not receive this

letter before Tuesday the 22d, and that, on Monday the 21st before this letter had been received, the judgment in the case of Nickel against Dashko had been paid to J. B. Cox, one of the attorneys, and the judgment had been satisfied on the record.

There is a great mass of evidence, but the rights of the parties must be determined by the contract, and only such evidence will be copied or referred to as appears necessary to an understanding of the rights of the parties under the contract.

Appellee first contends that one purpose of our lien statute is to protect attorneys against collusive settlement, and that that purpose is specially applicable in this case. Appellants argue at length that Mr. Wilson devoted a great deal of time and labor and some money in the preparation and trial of the case. We deem it unnecessary to set out this evidence, but it is sufficient to say that the proof is abundant that Mr. Wilson spent a great deal of time and labor, the result of which was a favorable judgment for his client. The evidence as to the time and labor given to the performance of his duties and as to the money expended for printing briefs is undisputed.

Appellee argues that our lien statute will protect him and cannot be avoided by the principles argued by appellants, and he says that Cox and Wilson were not jointly employed by Nickel, but that Cox was consulted and employed and a fee of twenty-five per cent. promised him; that contract was between Nickel and Cox and, of course, was not joint. We agree with appellee in this statement. The first contract of employment was between Nickel and Cox. Wilson was not a party to it and knew nothing about it. Thereafter Cox employed Wilson, or, as they put it in the evidence, told Wilson he would cut him into the case. If it had ended there, Wilson would simply have been in the employ of Cox, but Wilson was introdued to Nickel, and Nickel consented for him to associate himself with Cox and to assist in the case. Nothing further was said about fee until after the case had been tried

in the lower court. However, after Wilson came into the case with the consent of Nickel, he would have had under the original contract a lien for his fee. That contract was not joint.

But the contract entered into on the 27th day of October 1926, was a joint contract and shows on its face that it was the result of a conversation of May 13, 1926. That contract did not provide for giving Wilson $2,500 and Cox $2,500, but it expressly stated that Nickel had agreed to give them a fee of $5,000, provided they secured a judgment for $12,500. As between Nickel on one hand and Cox and Wilson on the other, the contract is plain and unambiguous, and it expressly states: "This is a new contract and supplants the old contract which was made on a basis of twenty-five per cent. of the recovery and our rights will be determined by this contract without regard to that contract." The contract containing the above quoted clause was accepted by the attorneys, Cox and Wilson. Moreover, the suit filed by the appellee in this case is based on that contract. The contract is a joint contract, and unquestionably under that contract Cox and Wilson would have a lien for their services, a lien on the judgment or funds that they recovered. The judgment had already been paid before the lien was filed.

Payment of a debt to one of the joint obligees in a contract is sufficient payment, and in this State the payment may be made to an attorney of record. The lien created by statute can exist only when there is a debt, and if there has been the payment of the debt there could not be any lien.

"A lien is discharged by a proper and sufficient payment of the debt or obligation which it secures." 37 C. J. 339.

It will be conceded that, if a payment to Cox was a sufficient payment by the debtor, then Wilson could have no lien. A lien is merely security for the payment of a debt. A lien is a claim which one person has upon the property of another as security for some debt or which

is a right to claim satisfaction of the debt out of the property, and, if there is no debt, of course there can be no claim which one person might have on the property of another. A lien is simply a security given by law to secure the payment of money, and the lien given by statute to an attorney is as much security as a mortgage, but the lien given by statute, like the lien created by mortgage, is for the purpose of securing a debt, and, if the debt has been discharged, there is no longer a lien. Therefore, if Cox, as one of the joint obligees, had the right to collect the judgment and had the right to enter satisfaction on the record, the doing of this by him discharged the lien.

Payment of a debt may be made only to a creditor, of course, or to his assignee, and payment to any other person would not, of course, extinguish the debt, but where two persons are joint creditors, as Cox and Wilson were here, payment may ordinarily be made to either of them. 48 C. J. 590.

The payment of a debt to a creditor, no matter by whom effected, is an extinguishment of the demand.

"The proposition that a debt, as between the debtor and creditor, can only be discharged by the payment by the debtor, or his agent, is a palpable solecism; for we are clear that the payment of a debt, no matter by whom effected, can be nothing more or less than its extinguishment as a demand, notwithstanding the concession, which we think proper to make, *i. e.*, that the payment of a debt by a stranger to the debtor might not and would not possibly create and constitute the original debtor a debtor to the volunteer." *Owens* v. *Chandler*, 16 Ark. 650.

A contract with two or more persons for the payment to them of a sum of money is a joint contract with all, and all the payees have a joint interest, and no one of the obligees in a joint contract can sue alone for his proportion. The joint promisees in a joint contract must all, if alive, join in the action. They cannot sue separately. Page on Contracts, vol. 4, § 2079; *Rainey* v. *Smizer*, 28

Mo. 310; *Thielman* v. *Goodnight,* 17 Mo. App. 429; *Slaughter* v. *Davenport,* 151 Mo. 26, 51 S. W. 471; *Henry* v. *Mt. Pleasant Township,* 70 Mo. 500; 21 R. C. L. 30; Thornton on Attorneys at Law, § 561.

In August, 1876, the county court of Conway County employed two lawyers to get the lands belonging to the railway company in Conway County properly assessed and listed for taxation. Under the contract the lawyers were to receive a fee of ten per cent. upon the amount of taxes that should be realized. A compromise was agreed to by which the railway company was to pay and did pay $8,506.94. This amount was paid to one of the lawyers. Of the sum collected the attorney accounted for $6,060.55 and died insolvent. He should have accounted for $7,656.25. The county sued the railway company for the balance. The court said: "We make no doubt that the company in paying the mortgage to Reid acted in perfect good faith. The only interest it could have had in the matter was to discharge the lien or claim for taxes. It was natural to suppose that the attorney who had obtained the judgment was the proper party to whom payment should be made. Ordinarily an attorney is authorized by virtue of his retainer to collect the judgment and execute in the name of his client a proper acquittance therefor." *Conway County* v. *L. R. & Ft. S. Ry. Co.,* 39 Ark. 50.

In the last above case Reid and Henry, two attorneys, were employed and were to be paid a fee of ten per cent. of the amount recovered, not five per cent., to Reid and five per cent. to Henry, but ten per cent. to Reid and Henry. Reid collected the money and entered satisfaction on the record, just as Cox did in this case.

Cox and Wilson, having entered into a joint contract, had the right to collect the judgment and enter satisfaction on the record, and since it was a joint contract either Cox or Wilson had this right, and the debtor had a right to pay it to either of them. Mr. Wilson could have collected the money or Mr. Cox could have collected it. Not

only is this a joint contract, but the appellee, Mr. Wilson, wrote the contract. According to his testimony, he had in mind at the time that he was to receive $2,500 and Mr. Cox $2,500. However this may be, when he dictated the contract he made a joint contract, employing both Wilson and Cox, and expressly canceled the former contract which was not joint. And the appellee so wrote the contract that it is plain and unambiguous, and oral testimony is not admissible to contradict its terms.

Appellee states that the appellants rely chiefly on the case of *Henry* v. *Mt. Pleasant Township,* 70 Mo. 500, and says that appellants have quoted largely from that opinion but did not quote the last few lines. The last few lines which were not quoted by appellants are as follows: "The cases to which we have been cited as establishing the doctrine that when one is liable to two or more on a joint contract, and settles with either for his part of the claim, the remaining promisee may sue without joining the other, on the ground that such a settlement is to be regarded as a severance of the cause of action do not apply to the case as made in plaintiff's petition. The settlement and payment made to Bassett was not a part but the whole amount of the claim, and satisfied the obligation not only as to Bassett but also as to plaintiff."

The same thing is true in the case at bar. The payment to Cox was not of a part but of the whole amount of the claim, and the payment of the whole to one of the joint obligees satisfies the obligation, not only as to the one receiving the money, but also as to the other joint obligee. The payment of the whole amount to Cox satisfied the obligation as to Cox and as to Wilson also.

Appellee next calls attention to the rule as stated in 33 C. J. 874. The rule referred to is as follows: "Ordinarily in an action brought upon a debt due to those engaged in a joint adventure, all of the members thereof must be joined as parties plaintiff; but it has been held that if some of the joint adventurers refuse to join in the action because of their complicity with the defendant

who had misappropriated the funds of the business the others may sue at law for their proportionate shares of the money misappropriated without joining their involved associates."

The paragraph immediately preceding the paragraph cited by appellee in 33 C. J. 874 reads as follows: "Where joint adventurers do work for a third person who pays either one of them, the payment is a discharge of the obligation as to both or all."

No such case as that exists here. Immediately following the above quotation is: "Where a debt due to two or more joint adventurers has been partially discharged by the payment to one of them of his share of the debt, his associate or associates may sue for the remainder without joining him as a plaintiff."

If Cox had been paid his portion of the judgment only, the judgment debtor could then have been sued by Wilson, who could recover his share or proportion, but the undisputed proof is that the entire amount was paid to Cox, and Cox accounted to Nickel for only one-third of the fee. Unquestionably either Cox or Wilson had the right to collect the entire fee, and if this had been done by either of them and the one collecting the amount had not accounted to Nickel for any portion of it, the other would have no cause of action against Nickel.

Appellee next calls attention to *Schwartzman* v. *Pine Rubber Co.,* 189 App. Div. 749, 179 N. Y. S. 284. In that case the court said the obligation was joint and continuing; said that the names of the parties appearing in the instrument as covenantees create in them a legal interest according to which, if no higher interest appear in some of them, all must be made parties plaintiff. The court in that case also held that the debtor might name this, and that if he elected to pay one his portion the other could maintain a cause of action, but if the entire debt was paid to one of the joint obligees the debtor was discharged.

In the case of *Lansing* v. *Bliss,* 86 Hun 205, 39 N. Y. S. 310, the court held that where a person was liable to two or more on a joint contract and settled with one of them his part of the claim, this did not discharge the liability to the others.

Appellee cites and relies on the case of *Lawson* v. *Mo. & Kan. Telephone Co.,* 178 Mo. App. 124, 164 S. W. 138. There was no joint contract involved in that case, but the contract of employment was very similar to the original contract in this case. Lawson employed and associated other lawyers with him just as Cox was originally employed in this case and associated Wilson with him with the consent of the client. There was no joint contract in the Lawson case, but the court held that the payment to one of the attorneys was a satisfaction except as to the lien of a lawyer who was not a joint obligee with the other attorneys.

When a client retains a firm, he is presumed to be entitled to the united exertions of all the partners. * * * If attorneys who are co-partners accept a retainer, the contract is joint, continuing to the termination of the suit. Demand on one is also constructively a demand on both, and renders both liable. Weeks on Attorneys at Law, 498; Thornton on Attorneys at Law, vol. 1, 324.

The contract with Cox and Wilson was a joint contract, and the duties and liabilities of each of them was the same as if they had been partners. When a firm of attorneys is employed, or any two or more attorneys employed under a joint contract, the act of any one of the lawyers so employed is binding on all, and either has the right to collect the entire fee. Of course, if either Cox or Wilson collected the entire fee and did not account to the client for it, the one so collecting the fee would be liable to the other party for his portion of the fee. Since either of the attorneys had the right to collect the entire fee and thereby relieve the client of all obligations to the other attorney, when Cox collected the entire fee in this case, he became liable, or would have been liable, to

Wilson for Wilson's portion of the fee, but the client would not have been liable; but the undisputed proof shows that Cox accounted to Nickel for one-third of the $5,000. Nickel, by accepting this, agreed to a severance, and thereby became liable to Wilson for the amount of the fee that he received from Cox. Of course, if this was not all the fee to which Wilson was entitled, Cox would have been liable for the difference between what he paid and the amount of Wilson's fee. In other words, if Wilson was entitled to one-half of the $5,000, when Cox collected it, he would have been liable to Wilson for $2,500. Having accounted to Nickel for a portion of this, and Nickel having accepted it, Nickel became liable to Wilson for the amount he received, one-third of the $5,000.

It is contended by appellee that there was never any authority given Cox making him Wilson's agent. As we have already said, the contract was a joint contract, and under that contract either attorney was bound by the acts of the other attorney. The difference between this case and the cases relied on by appellee is that in this case there was a joint contract, and the relation was the same as if Cox and Wilson had been members of a law firm or partners, and the cases relied on by appellee are cases where there was no joint contract, and where neither attorney had a right to collect the fee of the other. An attorney's lien may always be discharged by payment of the fee or debt to any one authorized to collect it. It does not appear from the evidence just when Cox accounted to Nickel for Wilson's part of the fee. It does appear, however, that Cox claimed that Wilson was entitled to only one-third of the $5,000 fee, and that this is the amount for which he accounted to Nickel.

It is unnecessary for us to determine whether Wilson was entitled to one-half of the fee or one-third of it because under the facts in this case Nickel would only be liable for the amount that he received because Cox had authority to collect the whole fee.

Wilson, having performed the services, and the undisputed proof shows that Nickel received from Cox one-third of the $5,000 which unquestionably belonged to Wilson, became liable to Wilson for this amount. Dashko paid the entire judgment to the proper party, and, having done this, he was not liable to Mr. Wilson. If Dashko had paid the judgment to Nickel without paying the attorney's fee, he would have been liable for the attorneys' fees, and the attorneys would have had a lien on the funds in his hands to secure the payment of the fee. But, since Dashko paid the entire judgment to one of the attorneys who had a joint contract for fee, he is not liable to either Nickel or Wilson, or any one else. Dashko had given a bond to pay the judgment that Nickel might recover against him in the suit of Nickel v. Dashko, but the condition in that bond was as follows: "If the defendant, John Dashko, shall fully pay and satisfy any judgment that shall be finally adjudged against him in this action, then this bond shall be void, otherwise to remain in full force and effect." The bond was signed by Dashko and P. G. Lake, surety. In this bond they bound themselves to fully pay and satisfy any judgment that might be rendered against Dashko. A judgment was rendered against Dashko in that action, and it was fully paid and satisfied by paying the money to J. B. Cox, one of the attorneys. When this judgment was paid to Cox, there was no longer any liability against either Dashko or Lake. The judgment against them in this case is erroneous. J. R. Wilson is entitled to recover against F. C. Nickel one-third of the $5,000 with interest from the date the judgment was paid to Cox at the rate of six per cent. per annum, till paid. He is also entitled to a judgment against F. C. Nickel for $118.76 with interest at the rate of six per cent. per annum from December 3, 1927.

It is next contended by appellee that there should have been a judgment against Cox, and that the finding of the chancery court in Cox's favor should be reversed.

The case against Cox was dismissed by Wilson with prejudice. A dismissal with prejudice is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff. *Union Indemnity Co.* v. *Benton County Lumber Co.,* 179 Ark. 752, 18 S. W. (2d) 327.

The suit of *Wilson* v. *Cox,* having been dismissed with prejudice, cannot be litigated again.

"The test of determining a plea of *res judicata* is not alone whether the matters presented in a subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily within the issues and might have been litigated in the former suit." *Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. (2d) 610; *Gosnell Special School District No. 6* v. *Baggett,* 172 Ark. 681, 290 S. W. 577; *Cole Furniture Co.* v. *Jackson,* 174 Ark. 527, 295 S. W. 970; *Prewett* v. *Waterworks Improvement Dist. No. 1,* 176 Ark. 1166, 5 S. W. (2d) 735.

"The rule has been often announced in this court that the judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which could have been interposed in the former suit." *Morris & Co.* v. *Alexander,* 180 Ark. 735, 22 S. W. (2d) 558.

Since the suit against Cox was dismissed with prejudice, the decree of the chancery court on cross-appeal will be affirmed. The decree in favor of Wilson is modified and affirmed against F. C. Nickel in favor of J. R. Wilson for $1,666.66 2/3 attorney's fee and $118.76 for expenses with interest as stated above, and the judgment against Dashko and Lake is reversed, and the case against them dismissed. It is so ordered.

MEHAFFY, J., (supplemental opinion). This case was decided by this court on January 12, 1931. We held there that Wilson was entitled to recover against F. C. Nickel one-third of the $5,000 with interest and also the

sum of $118.76 and judgment was entered modifying the judgment of the lower court in favor of Wilson against Nickel.

Wilson had recovered a judgment in the court below against Nickel for $2,500 attorney's fee, and $118.76 for expenses.

Since the decision and the denying of the petition for rehearing, our attention has been called to the fact that F. C. Nickel did not prosecute an appeal to this court from the judgment of the lower court awarding J. R. Wilson a judgment against him, F. C. Nickel, for the $2,500 attorney's fee and the $118.76 expenses.

Since Nickel did not prosecute an appeal, the judgment here modifying the judgment of the lower court and rendering judgment against Nickel in this court was erroneous and that part of the opinion of January 12, 1931, is recalled and set aside and the judgment of the lower court in favor of Wilson and against Nickel of course is not affected by the judgment in this court, because Nickel did not appeal.

It follows, of course, that the judgment here, awarding one-half the cost of appeal against Nickel, is also erroneous and it is hereby set aside, and the cost is adjudged against the appellee, J. R. Wilson.

MISSOURI PACIFIC RAILROAD COMPANY *v.* SANDIFUR.

Opinion delivered November 10, 1930.

R. E. Wiley and *E. W. Moorhead,* for appellant.

Walter L. Brown and *Gus W. Jones,* for appellee.

BUTLER, J. W. N. Sandifur, appellee, brought this action in the Union County Circuit Court for damages to his automobile and injury to himself caused by the operation of a train on appellant company's line of railroad at a street crossing in the city of El Dorado. From a verdict and judgment in favor of the appellee the appellant has appealed, and here asks for a reversal on the ground that the evidence is not legally sufficient to support the verdict and because of alleged error of the court in giving instruction No. 5 requested by the appellee. This instruction will be set out later in this opinion.

It is insisted by the appellant that there is no conflict in the evidence as to any failure on its part to perform its duty toward the public or the appellee, and that it was appellee's own contributory negligence which was the proximate cause of the accident. We however are of the opinion that there is a sharp conflict in the testimony with regard to both of these propositions, and in

order to reverse the case this court must invade the province of the jury.

At the point of the accident the main line of appellant's railway, and a number of its side tracks, cross the street in El Dorado. On one of these side tracks and about eight feet to the west of the main line and from fifteen to twenty-five feet north of the street there were two cars standing which had been placed there by the appellant company. Some of the witnesses described these cars as oil tank cars and others as box-cars. Just preceding the accident the appellee was traveling from the west to the east in an automobile, and, as he reached the crossing and was driving upon the main line track, his automobile was struck by a train consisting of a locomotive and four coaches which was being backed from north of the street down to and upon the crossing. At this crossing, because of the number of tracks and the number of cars that were from time to time left thereon and because of the amount of traffic along the street, the appellant company maintained a flagman whose duty it was to warn the traveling public of approaching trains. On the train in question there were five employees of the appellant company; the fireman, who was on the left or west of the cab of the locomotive as it was being backed to the south, and the engineer and three other employees who were on the right or east side of the train standing on the steps of the coaches on said east side, except of course the engineer. There were two employees on the last coach from the locomotive, one on the steps at the east side at the south end of the car and one on the steps on the same side of the car at the north end. All of these employees testified that the bell was ringing at the time the train was approaching the crossing, and that it continued to ring up until the time of the accident. The fireman did not testify that he was keeping a lookout, but the engineer and the three other employees testified that they were, and one, the switchman further from the locomotive and nearer the street, stated that the flagman was

standing in the middle of the street at the crossing with his signal raised in warning of the approaching train, and that, while the bell was ringing and the flagman standing at his proper place making the signals of warning, the appellee suddenly appeared and proceeded to drive in front of the moving train in spite of the efforts of appellant's employees to prevent him.

Another employee of the appellant company who was repairing a box-car on a side track west of the main line south of the street and only a short distance from the crossing corroborated the testimony of the train crew in every particular. This testimony was also corroborated in part by two persons not in the employ of the appellant company who were sitting on the edge of the sidewalk some 375 feet west of the scene of the accident. These two witnesses testified that they saw the flagman on the street with his signboard and another witness, one Justice, also testified that he saw the flagman waving his stop signal. This testimony, if undisputed, would be sufficient to warrant the contention of the appellant that its employees were not negligent, but that the injury to appellee was the result of his lack of ordinary care for his own safety. But this testimony is disputed, the appellee testifying that he was traveling along the street toward the east at about twelve miles an hour; that, as he approached the tracks, he looked both to the north and south and saw no moving train and continued to drive on his way looking in both directions until he got to a point where his vision to the north was obscured by the two cars standing on the side track north of the street and west of the railroad; that appellant generally had a flagman to stop traffic when trains were passing, and that such flagman was not at the crossing; that he was listening for signals and heard no whistle sounded or bell rung and assumed that the way was clear, and that his first intimation that the cars were being backed along the line was when they came from behind the two cars standing on the side track; that he immediately applied his brakes

and turned his car to the right in an effort to avoid the collision.

At this time a witness was about 100 feet to the west of the crossing walking on the street toward the east and in full view of the situation. This witness testified that he saw the train hit the appellee's car, but did not see the train or hear it until it came from behind the two cars standing on the side track; that he saw no flagman in the street and that he would have seen him had he been there; that he did not hear a whistle sounded or bell rung.

Another witness testified that he was about 225 feet away and saw the accident; that the cars on the side track obstructed the view of one going east, and that he did not see the train until it came back out into the street and did not hear any whistle blow or bell ring at the time; that he did not see any flagman in the street or any one on the back end of the coach.

Still another witness who was guarding some city prisoners and was on the same side of the railroad as the appellee and about 120 feet away testified that he heard no bell ring or whistle blow and did not see any flagman in the street at the time of the collision, or any one standing at the back end of the coach, and further stated that he thought he would have seen them if they had been there.

We think this testimony is in conflict with that testimony introduced on the part of the appellant, and, as the jury has accepted the statement of the appellee and his witnesses as true, so must we, and in determining the sufficiency of such testimony we must give to it its strongest probative value. Tested by this rule, we are of the opinion that it was sufficient to support the verdict. Our conclusion is supported by a number of decisions of this court. *Mo. Pac. Ry. Co.* v. *Robertson,* 169 Ark. 957, 278 S. W. 357; *St. L. S. F. R. Co.* v. *Haynes,* 177 Ark. 104, 5 S. W. (2d) 737; *St. L. S. F. R. Co.* v. *Horn,* 168 Ark. 191, 269 S. W. 576; *C. R. I. & P. Ry. Co.* v. *French,* 181 Ark. 777, 25 S. W. (2d) 1071.

Instruction No. 5, the giving of which is here assigned as error, is as follows: "The court instructs you that where an automobile is struck upon a public crossing in this State by cars operated over the crossing by a railroad that the law presumes negligence upon the part of the railroad, and in this case, should you find that the plaintiff, while driving a car on Hillsboro Street in the city of El Dorado, Arkansas, was struck by cars moved over such street by the defendant, the law presumes that the resulting damage from such collision was due to negligence upon the part of the defendant. The defendant to avoid liability may show by preponderance of the evidence that the striking of such automobile was not the result of negligence upon the part of the railroad or that the plaintiff himself was guilty of negligence equal to or greater degree than that of the defendant."

The appellant insists that the use of the word "preponderance" in the above instruction is error and to support this contention cites the case of *St. Louis, etc. Ry. Co.* v. *Cole,* 181 Ark. 780, 27 S. W. (2d) 992. We do not think the case cited supports appellant's view. In that case the court was not passing upon the correctness of the rule given the jury by which it might reach its conclusion, but upon the sufficiency of the evidence to support the conclusion reached. The rule complained of has been many times given by courts, and was expressly approved in the case of *Mo. Pac. Ry. Co.* v. *Robertson, supra.* Therefore, in the case at bar we are of the opinion that there was no error in instruction No. 5, *supra.*

It is insisted that the verdict is excessive. Appellee's car was entirely demolished, and he was dragged forty-five or fifty feet down the track and rescued from the wreckage by members of the train crew. His ear was cut, his right side injured, and he was confined to his home for about a week. In seven weeks he attempted to go to work, but was unable to do so. It was about five or six months before he was able to return to work when he found that he could not do the work he had been doing

on account of his nervous condition. He still suffers pain from his side and his right shoulder, and there is still a knot below the right shoulder which is sensitive. Appellee was a carpenter making $4 a day at the time of his injury, but he is not now able to work upon a building on account of his nervous condition. The automobile which was destroyed was worth from $175 to $200. The total verdict for injury to himself and damage to his car was the sum of $1,500. Appellee's loss of time and the value of his automobile, as figured by the appellant, is $872, leaving a balance of $628 allowed for his pain and suffering. We are unable to say that the injury was slight as is insisted by the appellant, or that the suffering and physical condition of the appellee resulting from the injury is inconsequential. Appellee was faced with imminent death as he was rolled down the track in his wrecked automobile, and the shock to his organism must have been most profound. Just what its consequences may be it is difficult to anticipate or determine. It is reasonable to assume that appellee's suffering and the shock to his nervous system must have been considerable, and we do not believe that the damages awarded were so excessive as to warrant this court in reducing the same.

The judgment is affirmed.

KIRBY, J., dissents.

McHANEY *v.* BROWN.

Opinion delivered February 2, 1931.

[redacted]

Coulter & Coulter, for appellant.

J. S. Brooks and *L. H. Southmayd,* for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted that the redelivery bond was not in the form prescribed by the statute and that therefore no summary judgment could be rendered against the sureties on it. Reliance is placed upon the case of *Martin* v. *Tennison,* 56 Ark. 291, 19 S. W. 922. In that case, the defendant in an attachment suit executed a bond with T. J. Martin as surety, conditioned that the surety would satisfy the judgment of the circuit court to the extent of the value of the cotton involved in the case.

The court held that it was not conditioned to perform the judgment appealed from, as required by statute; and, because it did not conform to the requirements of the statute, it could not be enforced in the manner provided for summary judgments in such cases. We do not think the principle announced in that case applies here. In this case, the delivery bond provided that the defendant, M. L. Simmons, shall perform the judgment of the court in the case. It was executed in conformity with § 8649 of Crawford & Moses' Digest, which provides that the defendant may cause a bond to be executed to the plaintiff by one or more sureties in double the value of the property to the effect that the defendant shall perform the judgment of the court in the action. Thus, it will be seen that the bond was executed in exact conformity with the language of the statute, and it is in all essential respects a statutory bond for the redelivery of the property to the defendant in the replevin suit. The statute does not require any set form of words for the redelivery bond, and all that is necessary is that it shall in all essential respects comply with the terms of the statute which authorizes its execution. *O'Brien* v. *Alford,* 114 Ark. 257, 169 S. W. 774.

The statute requires the bond to be executed in double the value of the property, and it is insisted that this provision of the statute was not complied with, because the complaint and affidavit in the replevin suit allege the value of the drilling rig to be $3,000, the bond was only executed for that sum instead of in double the value of the property. The amount required by the statute to be named in the bond is not one of the terms or conditions to be performed by those signing the bond. It is written in the bond merely for the purpose of limiting the amount for which they are liable. If an amount greater than that provided by the statute had been written in the bond, it might be well said that different terms or conditions than those prescribed by the statute had been inserted in the bond, and that this rendered it in-

effectual as a statutory bond upon which summary judgment might be rendered. Such, however, is not the case where a smaller amount is named in the bond. As we have already seen, the statute provides that the bond shall be conditioned that the defendant shall perform the judgment of the court in the action. Thus, it will be seen that a redelivery bond in a replevin suit is not in the strict sense a substitute for the property released in pursuance thereof, nor has the surety on the redelivery bond the option to return the property. The condition of the bond is that the surety shall perform the judgment of the court in the action. It will be readily seen that in many cases the property, as in the case of automobiles, might be rendered valueless or at least materially diminished in value by the constant use of it from the time of the execution of the redelivery bond until the trial of the case. We think that the conditions of the redelivery bond in the present case in all essential respects complied with the statute, and that it was a statutory bond upon which summary judgment might be rendered against the sureties on the bond.

Again, it is insisted that the summary judgment should not have been rendered because one of the sureties testified that, soon after the redelivery bond was executed, the sureties offered to return the drilling rig to the plaintiff, and that the latter told them to let the drilling rig remain on the lease where it was because he was on a deal to sell or lease it to the defendant Simmons there. This, they contend, was a virtual acceptance of the return of the property to the plaintiff Brown. This testimony was not competent in the present suit. The original foreclosure decree in which Brown and Simmons were parties and which was rendered after the execution of the redelivery bond contains an express finding by the chancery court that the return of the rig by the defendant Simmons was not a legal and sufficient tender. A decree was entered of record in accordance with the finding of the chancellor. The most that could

be said of the decree in this respect is that it was erroneous. No appeal was perfected from this decree, and it is conclusive of the rights of the parties on the return of the drilling rig. This question could not thereafter be litigated in the motion for a summary judgment against the sureties on the redelivery bond.

Again, it is contended that the court erred in fixing the relative amounts to be allowed to the plaintiff Brown and J. S. Brooks, his attorney. We need not consider this question. Both Brown and Brooks are parties to this proceeding, and neither of them have appealed from the decree of the chancery court. Thus it will be seen that appellants are protected from any further litigation in the matter by satisfying the decree of the chancery court in this proceeding.

Therefore, the decree will be affirmed.

MISSISSIPPI RIVER FUEL CORPORATION *v.* MORRIS.

Opinion delivered February 9, 1931.

H. L. Ponder and *John L. Bledsoe,* for appellant.

Richardson & Richardson, for appellee.

MEHAFFY, J. This action was instituted by Harlen Morris, appellee, against the Mississippi River Fuel Corporation to recover damages caused by the alleged negligence of the appellants. Appellee alleged that he was in the employ of the appellant at the time of the injury, engaged in leveling and grading the grounds immediately around the office and plant of appellant, and that he was acting under the direction and control of appellants and its agents and employees.

The grader used in leveling and grading the grounds was a metal grader with a metal handle protruding to the rear from the center. The grader was pulled by two mules or horses. In the loading of the grader, an extra team was used, which, after the grader was loaded, was unhitched or released and moved to the side, thereby permitting the grader to be pulled forward to where it was unloaded. The appellee was handling this extra team, and he alleged that, after he unhitched the extra team from the grader and stepped aside to permit the grader to be pulled forward, the driver of the team pulling the grader, without notice or warning to appellee, negligently and carelessly began whipping the team which was hitched to the grader, causing the team to suddenly and quickly turn around, and causing the handle of the grader to strike him about his legs, inflicting painful and severe injury to his legs. He alleged that prior to the injury he was an able-bodied young man, earning $3 a day and that as a result of his injury he was rendered incapable of following his usual occupation; that his injuries were permanent; that he was required to spend large sums of money for treatment; and that he suffered severe pain and would continue to suffer throughout his life, and asked for damages in the sum of $3,000.

Appellant filed a demurrer, which was overruled, and then filed an answer in which it denied all the material

allegations in appellee's complaint, and pleaded contributory negligence as a defense. Appellant in its answer also alleged that appellee was in the employ of Morrison & Taylor, independent contractors, and that these contractors had full charge of the work.

Harlen Morris, appellee, testified that he was working at the gas plant belonging to appellant at Biggers, Arkansas, in November, 1929, under an employee named Edwards, and was at the time driving what they called the "snatch team." The team belonged to Roy Morrison, who paid appellee his wages and who employed him. He was told by Morrison to do what appellant's foreman told him to do. He was at work there in the spring and went back in the fall and had been there about a month and a half before he was injured. There were about fifteen teams working at the time. Appellee was handling the extra team, the one that was hooked on to pull until the grader was filled. It is heavy to pull when filling and required an extra team.

When the team got up on the bank, the extra team was unhitched, and the regular team took the loaded grader on to where it was emptied. There was a handle extending back from the back end of the grader, about six feet long, and, when the grader is loaded, this handle sticks out parallel with the ground about eighteen inches high.

Mr. Edwards was the foreman, but appellee was working under Mr. Bush. Edwards was a foreman under Mr. Bush. Bush had told appellee how to use the extra team. Bush was foreman on the job, and worked for the Mississippi River Fuel Corporation. Appellee stepped around to the left after releasing the extra team, and the iron bar came around and hit him on the leg. When he would unhook the extra team from the grader, he would step back after it passed and hook on to another grader. After he would unhook the team, the man driving the team hooked to the grader should have gone straight ahead for about 40 feet, and the appellee would hook on to another grader.

At the time appellee was injured, Frank Wilson, who was working for the Mississippi River Fuel Corporation, was driving the team hitched to the grader that injured appellee. Appellee said that Wilson was careless and not paying attention to what he was doing, and, after appellee had unhooked the team and stepped to one side, Wilson was beating his team, jerking them around and slashing them, and appellee did not see it until the bar hit him and knocked him down. The team turned to the right, nearly all the way around, and the grader turned with them. The wheel went into a ditch and threw the whole weight on appellee. The safe way for Wilson to have done was to go out past appellee and then turn off, but he turned right at appellee. Wilson and the other drivers had been driving straight ahead and turning after they passed him.

After the injury appellee was carried to Biggers and next day to Hoxie and treated by a physician. He was confined to his bed for two months. His knee cap was knocked off and the joint burst. It still swells and turns black and jumps out of place. He cannot walk over three or four blocks without sitting down, and has been unable to do any work since the injury except hauling with a team. Before the injury he weighed 192 pounds and now weighs 160. He gets $1 a day for driving a team, and the jolting of the wagon hurts him and causes his leg to continue to swell. He used crutches for about three months. He is 22 years old and married, but has no children.

At the time of the injury, he was driving one of the teams of Mr. Morrison. Mr. Morrison paid appellee, but the Mississippi River Fuel Corporation paid Mr. Morrison. None of his checks came from the Mississippi River Fuel Corporation.

Frank Wilson was driving a team that belonged to Mr. Morrison. Witness did not see Frank Wilson whipping and jerking his team. Witness was behind him at the time. He saw him as he was falling over; did not

see Wilson slashing the team before he was hit, but did afterwards.

When appellee went to work, Mr. Morrison told him to do what Mr. Bush said to do. After witness cut loose from this grader, he stepped aside to the place he was in the habit of stepping to; had never been hurt before, and no teams had ever turned around at that particular place before.

Burl Bushong testified that he was working for appellant; that Mr. Edwards was the foreman, and he was between 50 and 100 feet from Morris when he got hurt; saw Frank Wilson driving in, and saw Morris unhook his grader, and about that time Frank Wilson began fighting and jerking his team, and the team wheeled clear around and turned the scraper suddenly around, and the bar struck Morris on the leg, and he went down.

Wilson was working under the directions of Mr. Edwards, the foreman for the appellant. Edwards directed them what to do and when to do it. Wilson should have waited until the man driving the snatch team unhooked and got out of the way, and, after the snatch team was unhooked and the driver stepped to one side, Wilson should have pulled ahead past the snatch team and turned out. He wheeled right around and turned right there. It was customary to pull straight ahead past the snatch team and pull out. Witness was employed by Dr. Taylor, who was a partner of Morrison's, and Morrison was on the job with several teams.

Dr. Morrell testified as to the injury and the extent of it. He said the injury was likely to be permanent; his bill was $142 to date, and appellee is still under his treatment, and will need medical treatment for a long time.

Homer Parrish also testified about appellee's injuries and about his health before the injury. Counsel agreed that under the American Mortality Tables appellee had a life expectancy of 41.53 years, and that he was 22 years of age at the time.

Frank Wilson, who was driving the team at the time appellee was injured, testified that he was driving a team hitched to the wheel scraper; they were filling low places around the gas plant, and leveling up the grounds. Witness had been at work there for two or three days. Mr. Edwards had supervision of how the dirt was placed. When the grader was loaded, witness would drive up and turn to the right; that appellee, when he cut loose, stepped out to the left. It was a bad place to turn out, and witness drove up even with appellee and turned to the right. It was rough going out, and there was a little hole that the wheel dropped into, and made the handle wobble out and strike him. He walked between appellee and witness' team. Appellee was driving a snatch team; would unhook and pull out to the side when scraper was loaded. At the time appellee was hurt, witness could not say what he was doing. Witness was driving a pair of mules, and does not think he was whipping them at the time. He drove them as he usually did, and they did not wheel around quickly on account of beating, jerking, or slashing them. The long iron handle was sticking out behind, and, if appellee had been paying any attention to his business, he could have seen it.

Morrison hired witness, and told him that Mr. Edwards would tell him what to do, and Edwards told him where to get the dirt and where to put it. Morrison never told witness where to get the dirt or where to put it, and he never heard Morrison telling a man what to do or how to do the work; Edwards did that. Was turned about half around when he hit Morris.

Chrisley Smith testified that he was working at the gas plant driving a team at the time Morris was injured; did not see him at the time he was injured; does not know which way Morris was looking, but, if he had been looking at the scraper, he could have seen everything and got out of the way.

C. A. Edwards testified that he was working for the appellant, and that it was his duty to look after the teams

and dirt, and to see that it was put where they wanted it. He had nothing to do with hiring the men who drove the teams or discharging them or paying them. He had to see that the dirt was put at the right places and give instructions to Morrison and the other men. Morrison hired the men that worked for him and paid them, and the appellant hired Morrison and paid him. This witness described also how the men performed their work, and said that Morris was supposed to cut out and stay to one side until the wheeler passed. Witness instructed Morris to unhook and cut out and stay there until the team pulling the wheeler cut out. It was his duty to pull to one side, get to a place of safety, and remain there until the wheeler team turned out. There was nothing to obstruct Morris' view, if he was looking, and it was his duty to look out for his safety, and he had been instructed to do so. Morris seemed to be awkward with his team, and not familiar with handling a team. Morrison hired Wilson, but witness told him where to work, and also told Morris what to do.

Charles Parrish testified that he was working for appellant at the time appellee was injured, and was present at the time of the injury; saw Morris detach his team from the scraper Wilson was driving, and Wilson then drove ahead just a little ways and turned to the right. This was the ordinary thing to do. Wilson did what he was supposed to do. Morris, after he detached his team, stepped to one side unthoughtedly and got hit; did not see Wilson whip his team. He did not jerk or slash it, did not rush it up any. Wilson did not do anything that was negligent that witness saw; drove his team in the ordinary way; has occasionally seen him jerk and abuse his team. At the time of the injury Wilson turned out at the proper place. Morris was not standing in his usual place.

J. R. Morrison was present, but did not notice Frank Wilson rushing up, slashing, or whipping his team; did not see any team whipped or jerked around there; did

not see Wilson's team turn around quickly. Witness was working for appellant at $7 a day for team and man. Does not know whether Wilson's team turned out at the usual place or not; just saw Morris fall.

Burl Bushong was recalled and testified that, if Wilson had pulled straight up in the usual way, the accident would not have happened; saw Wilson fighting his team when he was loading the scraper.

The jury returned a verdict for $1,500, and judgment was entered for this amount. Motion for a new trial was filed and overruled, and this appeal is prosecuted to reverse the judgment of the circuit court.

The appellant insists that there can be no recovery because appellee was employed at the time of the injury by Morrison & Taylor, and that they (Morrison & Taylor) were independent contractors.

"The vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor." 14 R. C. L. 67; *W. H. Moore Lumber Co.* v. *Starrett,* 170 Ark. 92, 279 S. W. 4.

In the case above mentioned, this court said: "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work." Thompson on Negligence, vol. 1, p. 570; *J. W. Wheeler Co.* v. *Fitzpatrick,* 135 Ark. 117, 205 S. W. 302; *St. Louis I. M. & S. R. Co.* v. *Gillihan,* 77 Ark. 551, 92 S. W. 793.

Many other cases have been decided by this court involving the questions of master and servant and independent contractors, and all of them hold in effect that an independent contractor is one who renders service in the course of an occupation representing the will of his

employer only as to result of his work, and not as to the means by which it is accomplished, and it is generally held that the decisive question is, had the employer or the contractor the right to control the conduct of the person doing the work. If one contracts to do a certain work for another, being responsible for the result only, and performing the work in such manner and by such means as the contractor may decide, in other words, if he has control and management of the work, and is only responsible for the result, he is an independent contractor, the vital test being the right to control.

The witnesses, including appellee, testify that, while they were hired and paid by Morrison or Taylor, they were told by whoever hired them to do what the Mississippi River Fuel Corporation foreman told them to do.

The appellee testified that the team he was driving belonged to Morrison; that Morrison employed him and paid him wages, but that Morrison told him when he employed him to go ahead and do what the Mississippi River Fuel Corporation and its foreman told him to do. All the witnesses testified that they were under the direction and control of the foreman of appellant. There is no evidence in the record indicating that Morrison was an independent contractor, or that he had any control of the employees, and Morrison himself testified that he hired his team to the Mississippi River Fuel Corporation; that he got $7 a day for team and man. He told the men when they reported to work to get the teams hooked up and get to work, and it is undisputed by Morrison that he told the persons who drove his teams to do what the foreman of the appellant told them to do.

Edwards, the representative of the appellant, testified that his duties were to look after the teams and to see that the dirt was put where he wanted it. When asked if Morrison had anything to do with the work done, Edwards answered, "I was the man that did that."

The undisputed evidence shows therefore that the appellant was in control of the work and laborers, and

that Morrison had nothing to do with it. He had no contract with the appellant except to hire to it a team and driver for $7 a day.

Appellant, however, contends that the testimony on the part of the witnesses shows that plaintiff was employed by Morrison and was not a servant of the Mississippi River Fuel Corporation, and that it therefore is not liable to him for the injury he received.

The liability of a master for injury caused by the negligence of a servant depends upon whether the master had the right and it was his duty to control the servant. Whoever has the right to control the actions of another must answer for the wrongs done by the persons he has a right to control.

This court said: "Ward's right to direct and control the acts of Hawkins (the convict) is the important circumstance. The facts of the arrangement whereby he obtained that right are wholly unimportant. This is consonant to the general rule governing the relations between master and servant and the liability of the master for the acts of the servant, * * * the ultimate test being the right or duty to control." *St. L. I. M. & S. R. Co.* v. *Boyle,* 83 Ark. 302, 103 S. W. 744; *Taylor* v. *Ark. Light & Power Co.,* 173 Ark. 868, 293 S. W. 1007.

It is next contended by appellant that the appellee assumed the risk. When one enters the employ of another he assumes all the usual risks and hazards ordinarily incident to the employment, and the master is not liable for injury resulting to the servant if the injury to the servant was caused by one of the ordinary or usual risks or hazards of the employment; but the servant does not assume the risk of the negligence of the master for whom he works or any of its servants. *Aluminum Co. of North America* v. *Ramsey,* 89 Ark. 522, 117 S. W. 568; *Southwest Power Co.* v. *Price,* 180 Ark. 567, 22 S. W. (2) 373; *Chicago R. I. & P. Ry. Co.* v. *Allison,* 171 Ark. 983, 287 S. W. 197; *Western Coal & Mining Co.* v. *Burns,* 168 Ark. 976, 272 S. W. 357; *Chicago R. I. & P. Ry. Co.* v.

Daniel, 169 Ark. 23, 273 S. W. 15; *St. Louis Southwestern R. Co.* v. *Martin,* 165 Ark. 30, 262 S. W. 982.

In this case the appellee testified that another employee of the appellant slashed and whipped his team and caused them to turn suddenly and hit appellee's leg. He was corroborated by another witness. In other words, the evidence on the part of the appellee showed that the injury was caused by the negligence and wrongful conduct of a fellow-servant, and this risk of course was not assumed.

Appellant's objection to instruction No. 1, given at the request of the appellee, is based on the ground that the question of fellow-servant has no application in this case. It is contended that the appellee was not in the service of the appellant. We have already seen that appellee and Wilson were in the service of the appellant; they were fellow-servants, because the appellant had the right and the duty to control the acts of both of them.

It is next contended by appellant that there can be no recovery because appellee's own negligence contributed to the injury. The evidence on the part of the appellee tends to show that he acted in the usual way by unhitching his team and getting to one side, and there would have been no danger if Wilson had driven his team on in the usual way. Both these questions, however, that is, the question of the negligence of Wilson and the contributory negligence of appellee, were questions for the jury, and the jury decided these questions against the appellant.

The appellant bases its argument on the claim that appellee was employed by the partnership, and not by the corporation. If appellee had been in the employ of the partnership, the fellow-servant's doctrine would not apply, but we have already seen that both appellee and Wilson were in the employ of the corporation.

Objection is made to instruction No 3, but the court correctly stated to the jury in that instruction that in determining in whose employment the plaintiff was and

the other workmen, they should determine under whose orders and instructions they were working at the time, and that, if they were working under the orders and directions and instructions of the defendant, Mississippi River Fuel Corporation, and its authorized agents and employees, they would be servants of the defendant, although their wages were paid by other parties. This is a correct declaration of the law. The test is the right to control, and this was properly submitted to the jury.

We find no error, and the judgment is affirmed.

MULLINS *v.* RITCHIE GROCER COMPANY.

Opinion delivered February 16, 1931.

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

Taylor Roberts and *Mahony, Yocum & Saye,* for appellee.

HART, C. J., (after stating the facts). The principal question involved upon the appeal is whether or not under proof of the facts stated, the court should have submitted the case to the jury. In case-notes to 17 A. L. R. 621, and 29 A. L. R. 470, the general rule is stated that, in order to hold an employer liable for injuries by an automobile while being driven by or for a salesman or collector, the relation of master and servant must exist, and the servant must, at the time, have been acting within the scope of his employment in performing an act for the master's benefit. Among the cases from various courts of last resort, which are cited as sustaining the rule, is that of *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6. To the same effect, see *Potts* v. *Pardee,* 220 N. Y. 431, 116 N. E. 78, 8 A. L. R. 785; *Rose* v. *Balfe,* 223 N. Y. 481, 119 N. E. 842, Ann. Cas. 1918D, 238; and *Guthrie* v. *Holmes,* 272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123.

In a case-note to 42 A. L. R. at page 919, it is stated that proof that the automobile causing the damage belonged to the defendant, and was being operated at the time of the injury by an employee of the defendant, creates a reasonable presumption that the driver was acting within the scope of his employment or in the course of his master's business. This presumption, however, is one of fact, and may be defeated or overcome by testimony tending to contradict it. Our own court adopted this rule in the case of *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6. In this connection, it may be stated that the phrase "in the course or scope of his employment or authority," when used relative to the duties of the servant or employee, in cases of this sort, means

while engaged in the service of his master or while about his master's business.

The doctrine is settled in this State that, if the automobile causing the accident belongs to the defendant and is being operated at the time of the accident by one of the regular employees of the defendant, there is a reasonable inference that at such time he was acting within the scope of his employment and in the furtherance of his master's business. The inference or presumption of fact, however, may be rebutted or overcome by evidence adduced by the defendant during the trial. Where the evidence on this point is contradictory, the question is one for the jury. Where the facts are undisputed and uncontradicted, it becomes a question for the court. *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, L. R. A. 1918D, 115; *Bizzell* v. *Hamiter,* 168 Ark. 476, 270 S. W. 602; and *Hunter* v. *First State Bank of Morrilton,* 181 Ark. 907, 28 S. W. (2d) 712.

It is earnestly insisted that the doctrine established in the Hunter case warranted the court in directing a verdict for appellee; and that, in the application of it to the facts of the present case, the judgment must be upheld. We do not think so. We adhere to the rule laid down in the Hunter case, and in support of it cite *Tinker* v. *Hirst,* 162 La. 209, 110 So. 324, where it was held that the employer of a driver, operating a truck on week days, is not liable for the negligence of an employee while using the truck on Sunday for his own purposes, without the knowledge or consent of his employer. The reason is that the wrongful act must be the act of the defendant and the injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant's act. So, it is settled, at least in this State, that where it appears that the employee was not acting within the course of his employment, no liability attaches to the employer because there is no reasonable connection between the employer and the act of his employee which caused the damage.

The rule of the liability of the master for the wrongful act of his servant rests upon the doctrine of agency. Therefore, the universal test of the master's liability is whether there was authority, express or implied, for doing the act. If it be done in the course of and within the scope of the employment, the master will be liable for the act, if negligent. It is equally well settled that a master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. *Marrier* v. *St. Paul, M. & M. Ry. Co.,* 3 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793.

In the Hunter case, the undisputed evidence showed that the employee did not have general control over the automobile at all times, but was only allowed to keep it over night on special occasions. He not only was not allowed to use it on Sunday, but the terms of his employment did not require him to do so. Here the facts are essentially different. Lewis, a salesman and collector for the Ritchie Grocer Company, was furnished an automobile by the company to use in the furtherance of his master's business. He was in the general employ of the master and was allowed the exclusive use and control of the automobile. The accident happened on a week day; and, under the authorities above cited, this made a *prima facie* case in favor of appellant upon proof of negligence. The negligence of Lewis was proved and, in fact, was conceded by counsel for appellee. The *prima facie* case made by proof of the facts stated was not overcome merely by proof that Lewis, by the terms of his employment, was not required to work on Saturday. Such evidence was a circumstance only tending to show that he was not acting in the course of his employment at the

time the accident occurred. Neither can it be said that the fact that the accident occurred at eleven o'clock, which was after usual business hours, *overcomes* or defeats the *prima facie* case made by appellant. It is a matter of common knowledge that servants in the discharge of their duties often are delayed or prevented from completing their work during usual business hours. In the present case, the fact that the order blanks of the company were in the car was a circumstance, however slight, it might be deemed by the jury, tending to show that Lewis was in the furtherance of the business of the company at the time the accident occurred. See *Duckworth* v. *Stephens,* 181 Ark. 161, 30 S. W. (2d) 840.

The excluded proof also tended to establish that fact. It will be remembered that appellant offered to show by witness that he helped John Lewis to repair his automobile between five and six o'clock in the afternoon near Gregory City, and that, while doing so, Lewis told him he was trying to collect some accounts or bills for the Ritchie Grocer Company. It is true that it is well settled that the fact of agency cannot be established by the declarations of the agent, but this was not the purpose of the testimony. The fact of agency had already been established by evidence which was not attempted to be contradicted. The offered evidence was for the purpose of showing that Lewis was acting in the furtherance of his master's business or in the course of his employment as traveling salesman in a place where his duty called him, and the evidence was competent for that purpose. Hence the court erred in excluding it and erred in taking the case from the jury by directing a verdict for appellee. For these errors, the judgment must be reversed, and the cause will be remanded for a new trial.

OPINION ON REHEARING.

Opinion delivered March 16, 1931.

HART, C. J. We adhere to our ruling that the defendant's ownership of the car, coupled with proof that the driver at the time of the accident was in the regular

employment of the defendant as salesman and had general charge of the car, raises a presumption that he was acting within the scope of his authority. In this connection it may be stated that there is a distinction between presumptions of law and presumptions of fact, which is clearly and fully stated in Wigmore on Evidence, vol. 5 (2d ed.) § 2491. To illustrate, we have a statute making railroads responsible for all damages to persons and property done or caused by the running of trains, and proof of the injury under the statute makes a *prima facie* case for the plaintiff. It is a presumption of law based upon public policy as declared by the Legislature. The presumption thus raised by law does not of itself possess probative weight. Hence, when evidence is introduced rebutting the presumption, it may be overcome, and where the evidence of the basic facts is undisputed, the legal presumption will disappear, and no longer exist.

The presumption with which we are dealing in the present case is not a legal presumption, but is an inference or presumption of fact. Its existence is called into being by proof introduced on the subject and not by any statute dealing with the question. This being so, the opposing evidence must be weighed by the jury for the reason that under art. 7, § 23, of our Constitution, the jury is the judge of the facts proved. The rule is stated in 6 Labatt on Master and Servant, (2d ed.) § 2281A, as follows:

"A servant may be presumed *prima facie* to have been acting in the course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged tort was committed, it was being used under conditions resembling those which normally attended its use in connection with the master's business."

In the present case, the evidence showed that the negligence of the driver of the automobile was the proximate cause of the accident, and the undisputed evidence showed that the driver was regularly employed by the

defendant and was intrusted with the use and care of the automobile.

The declaration of the driver on the afternoon before the injury was made on a week day, at a time and place where his duties called him. His statement tended to show that he was acting in the course of his employment, and was admissible to show that he was acting within the real and apparent scope of his authority; and not for the purpose of establishing his agency, which had already been established by undisputed evidence. It was admissible as tending to show that he was acting within the course of his employment as if he had sold goods or collected accounts on that day and his employer had claimed that he was not acting within the course of his employment.

Therefore, the petition for rehearing will be denied.

CLARK *v.* HAGAN.

Opinion delivered February 16, 1931.

J. H. Lookadoo and *McMillan & McMillan,* for appellant.

McElhannon & Callaway, for appellee.

SMITH, J. R. E. Hagan purchased from the United States Hoffman Machinery Company, a clothes pressing machine, for $535. A cash payment was made, and the balance was evidenced by notes, in which the title was reserved until this balance was paid. All deferred installments of payments evidenced by these notes then due had been paid when Hagan sold the machine to M. H. Corzine and P. B. Honea for $260, of which $70 was paid in cash, and the balance of $190 was evidenced by a note payable to Hagan's order, in which note title was reserved by Hagan until the full purchase price had been paid. As a part of the purchase price, Corzine and Honea also agreed to pay the balance of purchase money due by Hagan to the machine company.

Corzine appears to have acquired the interest of Honea in some manner not explained, and thereafter to have sold the machine to Tom G. Clark, who, in turn, sold it to Clarence Evans and Noble Welch. Payments were made to Hagan by some one—the record is not clear by whom—until a balance of only $67.50 was due him upon the note given by Corzine and Honea.

While Clark was operating the pressing business, in connection with which the press was used, he paid the machinery company the balance of the purchase money due it by Hagan, the check reciting that it was "payment in full on machine bought by Majestic Cleaners," the name under which Hagan had operated the pressing business.

The balance of purchase money due Hagan remaining unpaid, he brought suit in replevin to recover the possession of the machine, making Clark, Evans and Welch parties defendant.

Upon a trial before a jury the following verdict was returned: "We, the jury, find for the plaintiff the possession of the press sued for, and find the balance due thereon to be $67.50," and upon this verdict a judgment was rendered that plaintiff recover possession of the machine, or its value in the sum of $67.50, and this appeal has been prosecuted to review that judgment.

The defendants asked instructions, which were refused, to the following effect: First, that if the machine company sold the last maturing notes retaining title to Clark, and he had not been repaid, the plaintiff could not recover possession of the machine from Clark. This instruction was properly refused. If it were of any importance that Clark, who had acquired Hagan's title in the manner stated, had purchased Hagan's notes from the machinery company—which we do not decide—it may be answered that the testimony shows a payment, and not a purchase, of this debt. Clark did not testify in the case, and there was no attempt to show that he was unaware of the agreement of his predecessors in title to pay this debt and that its assumption was a part of the purchase price. On the contrary, so far as the testimony speaks on this question at all, the inference is that Clark assumed the obligation of completing the payments to the machinery company, and had discharged that obligation.

Another instruction, which was refused, was to the effect that, if Clark had paid this balance of purchase money for his own benefit, he acquired such an equitable title in the machine that the plaintiff could not recover its possession from him. It may be assumed, even in the absence of testimony to that effect, that Clark completed the payments for his own benefit, but that benefit was to discharge the reservation of title by the machinery company, as the title of the company was, of course, unaffected by the sale of the machine by its vendee, and, as we have said, there was no testimony that he made the payments for any other purpose.

The question of law in the case is, whether Hagan had such title that he could sell and in the sale reserve that title to himself, inasmuch as his vendor had previously reserved the title. We answer this question by saying that he had.

In the case of *Clinton* v. *Ross,* 108 Ark. 442, 159 S. W. 1103, it was said: "In conditional sales of personal

property where the title is retained by the vendor until the purchase price is paid, the vendee acquires an interest that he can sell or mortgage without the consent of the vendor, but the vendor's right to recover the property if the purchase price is not paid is not prejudiced by such sale or mortgage. (Citing cases)." The following cases are to the same effect: *Haynes* v. *Gwinn,* 137 Ark. 392, 209 S. W. 67; *Estes* v. *Lamb & Co.,* 149 Ark. 375, 233 S. W. 99; *Fairbanks, Morse & Co.* v. *Parker,* 167 Ark. 658, 269 S. W. 42; *Loden* v. *Paris Auto Co.,* 174 Ark. 723, 296 S. W. 78.

In making this sale Hagan did not displace the reservation of title by his vendor, but he made the sale subject to that reservation. Hagan's sale, therefore, was subject to the reservation of title by his vendor, and so also was the sale by his vendee subject to the reservation of title in the sale by him.

Moreover, when this suit was brought the balance of purchase money originally due by Hagan had been paid to the machinery company and the retention of title by his vendor had been paid and cancelled.

We conclude, therefore, that the sales recited made subsequent to the sale by Hagan to Corzine and Honea were made subject to the reservation of title by Hagan, and that he has the right to recover the machine if the balance of purchase money due him is not paid, as the judgment provides may be done.

It follows therefore that the judgment must be affirmed, and it is so ordered.

FELS *v.* EZELL.

Opinion delivered February 16, 1931.

Rowell & Alexander, for appellant.

Danaher & Danaher, for appellee.

SMITH, J. Appellants, who are the widow and the heirs at law of William Fels, brought suit against C. S. McNew and others for a mandatory injunction to require them to remove a certain building which they had erected upon certain lots in the city of Pine Bluff purchased by their ancestor from R. F. Ezell and conveyed to their ancestor by Ezell in a warranty deed containing the usual covenants of warranty.

An answer was filed by the defendants, in which they admitted plaintiff's ownership of the lots described as having been purchased by William Fels from R. F. Ezell, but denied that the building was located on any of those lots and alleging their ownership of the land on which the house stood.

It is apparent, from this brief statement, that the issue was presented as to the boundary line between the Fels lot and the land owned by defendants, it being alleged by the plaintiffs that the house was on the Fels lots, while the truth of that statement was denied by the defendants. With this issue raised, appellants, the plaintiffs below, filed an amendment to their complaint praying that the administrator and heirs of Ezell, he being dead, be made parties defendant and be required to defend the title to the lot which their ancestor had conveyed to the ancestor of appellants.

A motion was made to strike the amended complaint for the following reasons: (1) That the alleged causes of action do not affect all the parties to the action; and (2) that the alleged causes of action do not belong in the classification of actions which § 1076, C. & M. Digest, permits to be joined. This motion was sustained and the administrator and heirs of Ezell dismissed as parties to the suit, and this appeal has been prosecuted to reverse that decision.

No question is made as to the right of the plaintiffs to bring this suit to compel the removal of the building, instead of an action of ejectment to recover the possession of the land on which the building stands, as might have been done. The insistence is that Ezell's heirs are not proper parties.

We think they are, for the reason that appellants must first show that the house erected by the original defendants, McNew and others, is, in fact, located on the land purchased by their ancestor from Ezell. They allege no other title, and failing to prove this their cause of action would fail. But the complaint alleges this to be a fact, and the jurisdiction is to be determined by the allegations of the pleadings, and, if it be true, as the complaint alleges, that the original defendants have erected a building, under a claim of right so to do, on land sold Fels by Ezell, then there has been an actual eviction and a consequent breach of the warranty contained in the deed from Ezell to Fels. *Jones* v. *Franklin,* 30 Ark. 631; *Quinn* v. *Lee Wilson Co.,* 137 Ark. 69, 207 S. W. 211.

This being alleged, and such is the effect of the pleadings, it accords with the recognized practice for the administrator and heirs of the vendor to be notified that they may defend the title warranted, otherwise the heirs of the warrantor would not be concluded by the decree of eviction, while, by notifying them of the pendency of the suit and making them parties, they will be concluded on the issue of failure of title, if it be finally adjudged

that appellant's title has failed to a portion, or all, of the lots conveyed to their ancestor by Ezell.

The case of *Carpenter* v. *Carpenter,* 88 Ark. 169, 113 S. W. 1032, was one in which a judgment had been rendered for the recovery of land against a covenantee in possession, which was rendered after notice to the covenantor of the pendency of the suit, and it was there held that, after notice of the pendency of the suit, the judgment was conclusive of the existence of a paramount title in another, and constituted an eviction, entitling the covenantee to maintain an action on the covenant.

In reaching that conclusion it was there said: "In the case of *Collier* v. *Cowger,* 52 Ark. 322 [12 S. W. 702, 6 L. R. A. 107], the court held that a judgment against a covenantee in possession upon the foreclosure of a lien created prior to the covenant, rendered after notice to the warrantor to appear and defend, is conclusive of the existence of an outstanding paramount incumbrance, and cited in support of the opinion the case of *Boyd* v. *Whitfield,* 19 Ark. 447. In the latter case the covenantor had notice of the pendency of the suit in ample time to afford him an opportunity to be made a defendant, but there was no formal notice by the covenantee demanding him to defend the action. These cases are conclusive of the propositions of law involved in this case. They have been followed by the courts of this State for many years, and have become the settled law."

Under the issues stated, it was therefore a proper practice for the appellants, when the title of their ancestor was attacked, to notify the administrator and heirs of his covenantor to defend the title warranted, and to make them parties for that purpose, to the end that they might defend the title in the suit in which it was attacked.

The heirs of Ezell cannot be required to defend this suit, but, having been notified of its existence and made parties to it, they will be concluded as to the existence of a paramount outstanding title in another to the extent of the eviction as evidenced by the final decree in the case.

The amended complaint, whereby the administrator and heirs of Ezell are made parties, will relieve appellants of the necessity of proving, when they sue for a breach of warranty, if they finally do so, that there was an eviction, and that it occurred under a paramount title. This practice, as was said in the Carpenter case, *supra,* has been followed by the courts of this State for many years, and has become settled law.

We are of the opinion, therefore, that the court erred in striking the amended complaint from the files, and that decree will be reversed, and it is ordered that the amended complaint be reinstated.

FREE *v.* HARRIS.

Opinion delivered February 16, 1931.

E. W. Brockman, for appellant.

R. W. Wilson, for appellee.

HUMPHREYS, J. This is the second appeal in this case. Reference is made to the case of *Free* v. *Harris,* 181 Ark. 645, 27 S. W. (2d) 510, for a general statement of the facts. Additional facts necessary to a determination of the questions arising on this appeal will be set out below.

On the first appeal, the decree of the trial court setting aside the sale of the land and allowing appellee to redeem was reversed and the cause was remanded with

directions to confirm the sale on the payment of the amount of the bid with interest. After the remand of the case issue was joined between the parties as to the ownership of the 1929 rents and the time appellant should be charged with interest on his bid of $7,000 at the foreclosure sale.

Appellant claimed all the crop rents for the year 1929, and appellee seven-twelfths thereof. Appellee claimed interest on the bid from July 31, 1929, the date of the foreclosure sale, to June 18, 1930, the date of the payment of the purchase money and the approval of the commissioner's deed conveying said land to appellant.

Their respective claims were submitted to the court upon the pleadings filed by each and the testimony adduced in support thereof, which resulted in a decree in favor of appellee for seven-twelfths of the 1929 rents, amounting to $638.04, and the balance thereof, or five-twelfths, to appellant, amounting to $455.75, from which decree appellant has duly prosecuted an appeal to this court; also a decree allowing appellee interest on appellant's bid of $7,000 up to October 21, 1929, and denying her claim for interest up to June 18, 1930, from which decree she has duly prosecuted an appeal to this court.

After appellant bid the land in at the foreclosure sale, he filed an intervening petition on September 5, 1929, claiming the crop rents for 1929 as purchaser at said sale. At that time the court had not confirmed the sale. The court entered a preliminary order impounding the rents, and the total amount of rents due for the year 1929 was later determined to be $1,093.79.

On October 21, 1929, all interested parties appeared in court, and appellant offered to pay the purchase money upon a confirmation of his purchase at the foreclosure sale. Upon a hearing the court set the sale aside, and appellant prosecuted an appeal to this court which resulted in a reversal and remand of the cause with directions to confirm the sale upon the payment of the bid with interest as stated above. Appellee remained in possession of the premises until the confirmation of the sale

upon remand of the cause, but appellant had use of the place for farming purposes during the year 1930.

The court correctly prorated the crop rents on the land for the year 1929 under the rule announced in the case of *Deming Investment Co.* v. *Bank of Judsonia,* 170 Ark. 65, 278 S. W. 634, and reaffirmed in the case of *Purvis* v. *Elder,* 175 Ark. 781, 1 S. W. (2d) 36.

Appellant executed his note with interest at the rate of ten per cent. for the amount of his bid at the foreclosure sale. It is true that on the 21st day of October, 1929, he offered to pay the purchase money into court upon the confirmation of the sale, but the court set the sale aside, and he did not deposit the money in court but retained same. He has had the use of the purchase money himself, and, since he accepted rent from and after the date of his purchase for the year 1929 and has had the cropping use of the place during the year 1930, he necessarily must pay the interest on his bid to the date of the confirmation of his sale and the approval of the commissioner's deed which was on June 18, 1930. It would not be equitable for him to collect the rents and refuse to pay interest on his bid.

The decree is therefore affirmed relative to the division of the rents, and is reversed relative to the allowance of interest and remanded with directions to render a decree in favor of appellee for interest on the bid up to June 18, 1930.

SMITH *v.* FARMERS' & MERCHANTS' BANK.

Opinion delivered February 16, 1931.

Dyer & Dyer, for appellant.

Wm. U. McCabe, for appellee.

KIRBY, J., (after stating the facts). The note, for payment of which the guaranty contract was alleged to have been executed, was due according to its terms 60 days after its date of January 6, 1920, long before the execution of the alleged guaranty contract on November 24, 1920. The liability of the guarantor was unconditional and absolute at the time of the execution of the guaranty contract, the principal debtors having failed to pay the note or obligation at maturity, for the payment of which the guaranty contract was made, and a cause of action accrued against the guarantor upon the execution thereof. *Bank of Morrilton* v. *Skipper-Tucker Co.,* 165 Ark. 49, 263 S. W. 54; *First National Bank of Helena* v. *Solomon,* 170 Ark. 555, 280 S. W. 659.

Summons was not issued against appellant in the suit brought August 5, 1927, until August 3, 1929, and, even if the payment of the interest had the effect to make a new date for the beginning of the statute of limitations to run, November 1, 1923, there had elapsed between that date of such payment and the issuance of the summons more than 5 years and 9 months. The action was not commenced against appellant, of course, until the issuance of the summons. *Jernigan* v. *Pfeifer,* 177 Ark. 145, 5 S. W. (2d) 941; *Clemmons* v. *Davis,* 163 Ark. 452, 260 S. W. 402; *Hollum* v. *Dickerman,* 47 Ark. 120, 14 S. W. 477. There was no proof, however, showing that the partial payment or the payment of interest credited on the note was made by appellant or any one for him. The evidence shows only that it was made by E. Taylor, a stranger to the whole transaction, so far as the record discloses, and it could not operate therefore to arrest

the running of the statute of limitations and form a new period from which the statute should be computed, so far as the liability of appellant was concerned. Even if such payment was made out of the proceeds of the sale of the mortgaged property, alleged to have been delivered to appellant, it could not operate as a voluntary payment which would form a new period from which the statute of limitations should run under the circumstances of this case. *Taylor* v. *White,* 182 Ark. 433, 31 S. W. (2d) 745.

The undisputed testimony shows that appellant did not leave the State until in the fall of 1921, more than 10 months after the cause of action against him accrued; the bank, appellee, having cashed his last check upon its presentation by appellant on October 6, 1921, as stated by Morris, its cashier. His testimony is undisputed that he had enough money in the banks, appellee and another bank in the county, to more than pay all his obligations, and enough money in appellee bank to purchase a farm in Missouri, which the cashier of appellee bank was trying to sell him prior to his removal from the State, knowing at the time that he contemplated such removal. His testimony is also undisputed that he asked Mr. Eatman, the cashier of the bank, what should be done with the team of mules that had been mortgaged to the bank, and which he had in his possession, having attempted to sell them for the bank and received an offer of $190, which the bank declined to accept, and was told by Mr. Eatman to put them in a certain pasture, which was done. His leaving the State was openly done and publicly known, and his intention to leave was also known to the officers of the appellee bank before his departure. He was not an absconding debtor within the meaning of the statute of limitations. Section 6974, Crawford & Moses' Digest; *Rock Island Plow Co.* v. *Masterson,* 96 Ark. 447, 132 S. W. 216; *Keith* v. *Hiner,* 63 Ark. 244, 38 S. W. 13.

According to the principles announced, it follows that the court erred in holding the claim of appellee not barred by the statute of limitations, the undisputed tes-

timony showing such to be the case. The judgment is reversed, and the cause will be dismissed. It is so ordered.

TEDFORD *v.* VAULX.

Opinion delivered February 16, 1931.

John D. Shackleford, for appellant.

Eric M. Ross, Galbraith Gould and *Rowell & Alexander,* for appellee.

MEHAFFY, J. W. L. Tedford, the appellant, instituted this action in the Jefferson Chancery Court to restrain the appellees from assessing, levying and collecting taxes on lands described in exhibit A to appellant's complaint. The appellant alleged that he purchased the lands described from the State of Arkansas on the 28th day of June, 1929, under act 129 of the Acts of the General Assembly approved March 13, 1929. It is alleged that appellants complied with the requirements of said act and obtained a deed from the State. It was further alleged that the lands were not certified by the State Land Commissioner back to the county clerk of Jefferson County until on or after December 2, 1929; that the taxing authorities extended against said lands an assess-

ment value in 1929 for payment of taxes in 1930 without authority of law and without right to do so; that the assessments were made by the assessor and extended on the tax books by the county clerk, and the assessments so made were turned over to the tax collector of said county for the purpose of collecting taxes in 1930; that he was attempting to collect said taxes, and, unless restrained, would return said property as delinquent without right and contrary to act 172 of the Acts of 1929.

The appellees filed answer denying each of the allegations of the complaint except their purpose to collect the taxes and alleged their right to assess and collect the taxes.

An amendment was filed making S. A. Cochran party plaintiff.

The case was tried in the chancery court on the agreement and stipulation that appellants purchased the property in question from the State of Arkansas on the 28th day of June, 1929, under act 129 of the Acts of the General Assembly of 1929; that these lands were as set out in the transcript, pages 14 and 15. Further, that the deeds executed by the State were filed for record on the 9th day of July, 1929, in the circuit clerk's office of Jefferson County; that the assessment records for Jefferson County were not closed by the tax assessor until the 19th of August, 1929; that the board of equalization was in session after the deeds were filed for record; that the lands described in the deeds were not certified back to the county clerk from the State Land Commissioner until the 3rd day of December, 1929; also that the assessment placed against the property for 1929 was made without appellant's consent or knowledge, and that the assessment was on the tax books and in the hands of the collector for the purpose of collecting taxes in 1930 for 1929.

The court entered a decree dismissing the complaint for want of equity, and the case is here on appeal.

The appellant contends first that the land would not be subject to taxation in 1929 under the old system un-

less it had reached the county clerk before the 2d day of December, which it is contended would be necessary in order to make 30 days before the commencement of the assessment of taxes for 1930. It is the contention of the appellant that the lands were not subject to taxation because the Land Commissioner did not certify the sale back to the clerk within time.

Appellants claim to have purchased the land under act 129 of the General Assembly of 1929, and this fact is not disputed. The lands were purchased under this act on the 28th day of June, 1929. On that date a deed was executed and delivered to the purchaser, and said deed filed for record on the 9th day of July, 1929.

All property in this State is subject to taxation except that specifically exempt from taxation by the Constitution. Section 5, art. 16, of the Constitution.

Section 6 of art. 16 reads as follows: "All laws exempting property from taxation other than as provided in this Constitution shall be void."

It therefore appears that the law-making power itself could not exempt the property from taxation unless it came within the exception mentioned in the Constitution.

Of course, while the property belonged to the State of Arkansas, it was not subject to taxation, and appellant contends that it did not become subject to taxation until the Land Commissioner had certified the list to the clerk of the county where the land was situated. To support this contention, they cite and rely on § 9925 of C. & M. Digest.

We do not agree with appellants in this contention. The lands became subject to taxation when the deed was executed and delivered to appellants. They, at that time, became the owners, and the land became subject to taxation.

This court said: "The lands were fully paid for by Wilson M. Belcher and certificates were therefore issued to him and from that date, they became subject to taxation unless otherwise exempt without regard to the issue of the patents of the State therefor." *Belcher* v. *Harr*, 94

Ark. 221, 126 S. W. 714; *Witherspoon* v. *Duncan,* 21 Ark. 240; *Driver* v. *Friedham,* 43 Ark. 203; *Smith* v. *Hollos,* 46 Ark. 17; *Burcham* v. *Terry,* 55 Ark. 398, 18 S. W. 458; Ex parte *Gaines,* 56 Ark. 227, 19 S. W. 602; see note to *C. H. Copp* v. *State of West Va.,* 35 L. R. A. (N. S.) 669; Cooley on Taxation, vol. 2, 1327.

When appellants received their deeds in June, 1929, the lands immediately became subject to taxation.

Appellant contends that the deed made to them by the State and placed on record was not official information upon which the county clerk had a right to list the lands, and that the statute, having provided the means by which the information is to be conveyed from the State Land Office to the county clerk, it is exclusive, and it is urged that until the county clerk receives the certificate from the State Land Office he is without authority to list the lands.

Act 172 of the Acts of 1929 expressly provides in § 15 that whenever the assessor shall discover that any property has been omitted for any cause from the assessment roll, if it be before the collector closes his books, it should be his duty to make an assessment and file same with the clerk. The assessor is not required to get his information from the land office, but if he discovers that property has not been assessed it is his duty under this act to make the assessment and report the same to the county clerk.

Section 17 of act 172 makes it the duty of the assessor to make personal inspection and examination of persons, property, or records. This property, as we have already said, became subject to taxation in June, 1929. The assessor had until the third Monday in August to file his report with the county clerk.

It appears from the record in this case that the appellants acquired title to this land, and that it was assessed for taxation while the equalization board was still in session, and application might have been made to the board for adjustment if the assessment was excessive.

Section 25 of act 172 provides that the board shall meet annually on the third Monday in August. That was about two months after these lands became subject to taxation.

Section 30 of act 172 provides that any property owner may, by petition or letter, apply to the equalization board for the adjustment of the assessment of his own property or that of another person as assessed by the county assessor, provided all applications shall be made to the board on or before the first Saturday next preceding the third Monday in September. This section also provides that any property owner may appeal from the action of the board, and such appeals must be filed on or before the second Monday in October.

The decree of the chancery court is affirmed.

SHEPHERD *v.* LITTLE ROCK.

Opinion delivered February 16, 1931.

Troy W. Lewis and *W. R. Donham,* for appellant.

Linwood L. Brickhouse, for appellee.

MEHAFFY, J. The appellants are residents of the city of Little Rock, and are engaged in the general practice of law in said city. They failed to pay the city privilege tax imposed by ordinances 2568, 2594 and 2670. Warrants were issued for the arrest of appellants, and appellants thereupon filed their complaint in the chancery court attacking the constitutionality of said ordinances and a temporary restraining order was issued.

Appellees filed answer denying the allegations of the complaint, and upon final hearing, the following stipulations were introduced in evidence:

"It is expressly stipulated and agreed that the oral testimony of witnesses in this action may be taken in open court, before the Honorable Frank H. Dodge, Chancellor, and reported in shorthand by S. H. Atkinson, the official stenographer of said court, which testimony, together with the exhibits thereto, may be transcribed and certified by the said official stenographer of said court, submitted to the chancellor for examination and approval within six months of the date of the decree herein, and, when so approved by the chancellor, filed as depositions and as a part of the record in this action."

"It is also agreed that exceptions are saved to the admission of any and all testimony that any party hereto may consider incompetent, irrelevant or immaterial, whether objection thereto is raised by such party or not, or exception specifically noted of record."

"It is also agreed that all of the plaintiffs herein named have been arrested under warrants issued by the city of Little Rock pursuant to the provisions of ordinances numbered 2568 and 2670; that, unless enjoined, the city will continue the prosecution of the said plaintiffs in the Little Rock Municipal Court."

"It is further agreed that all the plaintiffs herein named are citizens and residents of the city of Little Rock, Arkansas, and engaged in the general practice of law in said city."

H. A. Knowlton testified that he is city clerk and custodian of the records of the city; had before him the record of ordinance No. 2568, which is recorded in the ordinance record No. 27 at pages numbered 166 to 169, inclusive. This ordinance was passed June 23, 1919, and, so far as witness knows, has never been repealed.

It was here agreed that ordinance No. 2568, No. 2594 and No. 2670 be considered in evidence. Witness had nothing to do with the collection of money under these ordinances, but knows that the money is placed in the general revenue fund of this city and used for various purposes.

James Lawson testified that he is the city collector and has been for 19 years; was city collector when the ordinances were passed. Witness makes collections under these ordinances and collects from all attorneys practicing in the city; collects from those attorneys in the trust departments in banks, who file suits in the court. Witness knows J. B. Webster, who is a trust officer in the American Exchange Bank and has collected privilege taxes from him but does not know whether he has this year; collects from all attorneys engaged in the practice to the best of his knowledge and belief. Witness reported those delinquent; all that were delinquent for the last or first part of this year for the full year; they became delinquent on the first of January for the year 1930; does not remember how many he reported; not very many, not more than 25. Warrants were issued, and witness

gave instructions to order them in; instructed the inspectors to order all in who had not paid their license. Witness did not say to issue warrants; that was not under his authority. Under the ordinance payments may be in two installments.

Upon final hearing the chancery court held the ordinances valid, dissolved the temporary restraining order, dismissed the complaint for want of equity, and the case is here on appeal. The correctness of the decision of the trial court depends upon whether or not the ordinances mentioned are valid.

Appellants first contend that the ordinances are violative of § 23 of article 5 of the State Constitution. That section reads as follows: "No law shall be revised, amended or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revised, amended, extended or conferred shall be re-enacted and published at length."

Appellants cite and rely on two cases which they say show that ordinance 2670 is violative of the requirements of the above section of the Constitution, and that the ordinance is therefore void.

The first case relied on is *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41. The court in that case had under consideration an act of the Legislature, and in answer to the contention that the act was unconstitutional because it violated the provisions of article 5, § 23, of the Constitution, the section here involved, the court, among other things, said: "The framers of the Constitution meant only to lay a restraint upon the Legislature where the bill was presented in such form that the members could not determine what its provisions were from an inspection of it. Here no confusion would result to the Legislature in the premises. Both statutes were passed at the same session of the Legislature, but it is apparent from reading them that act 18 and act 153 are original statutes in form, and complete in themselves. The two statutes are separate and distinct legislative

enactments, and each had its appointed sphere of action. No alteration, change or repeal of the one would affect the other. We are of the opinion that an act complete in itself, and which would not mislead the members of the Legislature is not within the evils to be remedied by the provisions of the Constitution, and cannot be held to be prohibited by it without violating its plain intent."

Ordinance 2670 we think is an act complete in itself and that it would not mislead anybody. The title of the ordinance is: "An ordinance prescribing and fixing the licenses for the carrying on of certain businesses, professions and occupations, defining and classifying the same and prescribing the amount thereof, fixing the time when such licenses shall be paid, the penalty for nonpayment, and for other purposes."

Section 1 of this ordinance provides that the license fee shall be paid before the businesses or professions are carried on in the city. This section further provides that every person, firm, corporation, or individual engaged in the business, profession, or occupation enumerated shall pay for and take out such license and pay therefor such sums as are herein provided, to-wit: "*ATTORNEYS*—Each person, or, where a partnership, each member of the firm * * * $25."

It is contended, however, by the appellants that it is necessary to refer to other ordinances because ordinance 2670 is silent on the question of the various amounts to be assessed, and that the decision of this court in *State Highway Commission* v. *Otis & Co.*, 182 Ark. 242, 31 S. W. (2d) 427, decided September 30, 1930, supports the contention of appellants that ordinance 2670 is violative of the above section of the Constitution. The court in that case said: "The grounds upon which the constitutionality of the act is here attacked are the same as those which were considered and determined by the court in the case of *Grable* v. *Blackwood, supra.*"

The court also said: "The constitutional provision applies where the act is strictly amendatory or revision-

ary in its character. Its prohibition was intended to prevent the amendment or revision of an act by its additions or other alterations which, without the presence of the original act, are confusing or unintelligent. * * * A full, clear and comprehensive statement of the principles of law relating to such provisions of a Constitution was made in *People* v. *Banks,* 67 N. Y. 568. In an elaborate opinion prepared by Mr. Justice ALLEN, it was said: 'It is not necessary, in order to avoid a conflict with this article of the Constitution, to re-enact general laws whenever it is necessary to resort to them to carry into effect a special statute. Such cases are not within the letter or spirit of the Constitution, or the mischief intended to be remedied. By such a reference the general statute is not incorporated into or made a part of the special statute.' * * * There is no evil of this or of any nature to be apprehended by the mere reference to other acts and statutes for the forms of process and procedure, for giving effect to a statute otherwise perfect and complete.''

It is urged that the ordinance is imperfect, in that it refers to another ordinance to establish the sum or tax to be paid. Certainly there could be no evil in this manner of passing the ordinance. There could be no confusion about it. It expressly refers to the ordinance which fixes the tax, and that can be as easily ascertained as it could be if the ordinance occupied several pages and one would have to read through the several pages to find out the amount of tax fixed. Here the ordinance expressly states with reference to certain taxes that they shall pay the same licenses as provided in ordinance 2636, passed December 8, 1919. All one would be required to do to find out what the fee was would be to turn to this ordinance, and, if one could find ordinance 2670, he could as easily find ordinance 2636. The ordinance under consideration also provides that the licenses shall be collected, but at periods and in the manner provided by ordinance 2568, passed June 3, 1919, and further pro-

vides that all administrative provisions of 2568 shall be applicable to this ordinance. *Watkins* v. *Eureka Springs,* 49 Ark. 131, 4 S. W. 384; *Common School District* v. *Oak Grove Special School District,* 102 Ark. 411, 144 S. W. 224; *State* v. *McKinley,* 120 Ark. 165, 179 S. W. 181; and *Farris* v. *Wright,* 158 Ark. 519, 250 S. W. 889.

Constitutional provisions are construed in the same manner as statutes.

"The rules of construction applicable to statutes ordinarily apply with equal force to Constitutions or amendments thereof, though some courts hold to even more restricted rules in the construction of provisions of the organic law." * * * The court therefore should constantly keep in mind the object sought to be accomplished by its adoption and the evil, if any, sought to be remedied." *Carter* v. *Cain,* 179 Ark. 79, 14 S. W. (2d) 250; Cooley's Constitutional Limitations, vol. 1, p. 124; 12 C. J. 700.

We are of the opinion that neither the letter nor the spirit of the constitutional provision above is violated by the ordinance. The ordinance does not undertake to revise or amend the provisions of another ordinance, or extend or confer the other ordinance by reference to its title only.

As a general rule, constitutional provisions, like the one under consideration, are intended to prohibit the Legislature or law-making power of the State from enacting laws contrary to the provision of the Constitution, and have no application to municipal ordinances.

"These constitutional provisions, which ordinarily refer to the title and subject of every act, bill, or law, are usually found in the parts of the Constitutions which relate to the legislative departments of the State, and for this reason, as well as because of their terms, are ordinarily applicable only to statutory enactments of the Legislature. They have no application to municipal ordinances." 25 R. C. L. 839.

Constitutional provisions such as the one under consideration, apply only to State legislation and not to municipal ordinances. 19 R. C. L. 815; In re *Haskell,* 112 Cal. 412, 44 Pac. 725, 39 L. R. A. 527.

The constitutional provision now under consideration is in that part of our Constitution which relates to the legislative department of State. The first section provides that the legislative powers of this State shall be vested in a General Assembly which shall consist of the Senate and the House of Representatives. This is the same article in which is found § 23 that it is claimed the ordinance violated.

This article, which says that the powers to make laws or legislative powers are vested in the General Assembly, discusses laws and the manner in which they shall be enacted, and § 23 herein involved is a part of the article which discusses the manner in which laws may be enacted by the Legislature, and it has no reference to municipal ordinances. It does not mention municipal ordinances. If it had been the intention of the framers of the Constitution to include municipal ordinances in this section, we think they would have so stated. In fact, in other sections of the Constitution municipalities are mentioned.

Section 1 of article 16 of the Constitution provides that neither the State, city, county, town, or other municipality shall lend its credit or issue any interest bearing evidences of indebtedness. In § 4, article 12, of the Constitution, municipal corporations are mentioned, and it is provided that they shall not pass any law contrary to the laws of the State nor levy a tax in excess of the amount named, etc.

Constitutions, as we have held many times, are construed like statutes, and the purpose in construction is to ascertain the intention of the people who adopt it. In order to do this, we do not take one section alone and consider it as if that were the whole Constitution, but we consider all sections that have any bearing on or relation to the one under consideration.

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

When this is done, we think it clearly appears that this provision of the Constitution has no application to municipal ordinances.

Under these rules, in construing the section of the Constitution involved we must consider the whole article, and it is plain that the makers of the Constitution had in mind and were dealing with the subject of laws enacted by the General Assembly. Besides, as we have already seen, where the framers of the Constitution intended a provision to apply to municipal corporations, they used the word "municipality."

It is next contended by the appellants that the ordinances violate § 16 of article 2 of the State Constitution and § 1, article 1, of the United States Constitution.

It is contended that the section violates these provisions of the Constitution because the ordinance says the license fee imposed shall be a debt due to the city of Little Rock.

The provision of the State Constitution relied on is as follows: "No person shall be imprisoned for debt in any civil action, or mesne or final process, unless in cases of fraud." Certainly, there could be no imprisonment in this case for debt in a civil action.

The ordinance provides for the payment of the license by every lawyer before carrying on the business or profession in the city of Little Rock, and punishes as a misdemeanor any one who violates the provisions of this ordinance by carrying on any business or engaging in the practice of law without paying the license.

"The power to tax attorneys at law, as in the case of occupation or license taxes generally, includes the power to compel the payment of such tax as a condition precedent to entering on or practicing such occupation, and the power to impose a fine or imprisonment as punishment for nonpayment of such tax is incident to the power to levy it. Provisions for the prosecution and punishment of those practicing law without paying for and taking out the required license are usually found in the statute or ordinance imposing the tax. In some jurisdictions an action at law will lie against an attorney at law to compel the payment of his occupation tax." 2 R. C. L. 951, § 20.

This court said in discussing an ordinance similar to the one here involved: "The requirement of the payment of the tax for the exercise of the privilege of pursuing an occupation and the imposition of a fine or other punishment for pursuing the business without having first paid the tax is a mere method of enforcing payment, and it clearly falls within the power of the taxing authority." *Davies* v. *Hot Springs,* 141 Ark. 521, 217 S. W. 269.

We do not think the section of the United States Constitution has any application.

Appellant next contends that the ordinances violate § 11 of article 16 of the Constitution, which reads as follows: "No tax shall be levied except in pursuance of the 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."

We think this section has no application to municipal ordinances. This section is found in the article of the Constitution on finance and taxation. A number of sections in this article refer specifically to counties and municipalities, and, when the whole article is considered as it must be in order to arrive at a proper interpretation

of the section involved, we think it clear that this section does not apply to municipal corporations.

What we have said above as to article 5 of § 23 applies here.

Ordinances of this character have been upheld so often that we do not deem it necessary to extend this opinion by a further review of authorities.

The decree of the chancery court is affirmed.

SECURITY INSURANCE COMPANY OF NEW HAVEN *v.* SMITH.

Opinion delivered February 16, 1931.

Cravens & Cravens, for appellant.

A. L. Smith, for appellee.

McHaney, J. Appellees sued appellant on a policy of fire insurance dated September 24, 1929, which insured appellee Smith as owner, and appellees, J. M. Gentry and W. O. Reed, as first and second mortgagees, respectively, as their interest might appear, in the sum of $2,000 on a certain house in Siloam Springs, Arkansas. The suit was brought in the chancery court for the reason that the mortgage clause in the policy named the State Bank as first mortgagee, whereas the truth was that J. M. Gentry was the first mortgagee instead of the State Bank, and that the bank's name was inserted therein by mutual mistake, and that it was necessary to reform the policy to show this fact. A trial resulted in a decree of reformation in this respect and judgment against appellant for the sum sued for with interest, 12 per cent. penalty and $250 attorney's fee for appellee's attorney.

Appellant defended the action on several grounds which are here urged for a reversal of the case, as follows: (1), that appellee Smith was not the owner in fee simple of the ground upon which the insured building was located at the date of the policy, September 24, 1929; (2), that, if he were the owner, his title and interest in the property was thereafter changed without the consent of the company, avoiding the policy; (3), that appellee Smith had sworn falsely in the proof of loss as to the value of the property and as to the ownership of the first mortgage by the State Bank instead of J. M. Gentry; (4), that the court erroneously assessed a penalty and attorney's fee against it on the ground that its refusal to pay the amount of the policy was not vexatious, but that its refusal was based upon a well-founded belief that it did not rightfully owe the appellees anything on account of said policy, and further that it could not know to whom it should pay as mortgagees without a reformation.

Relative to the ownership of the property, the policy provides that it shall be void, "if the subject of

insurance be a building on ground not owned by the insured in fee simple." The facts are that F. C. Main and his wife deeded the property to Smith under date of September 20, 1929, and left the deed in the First State Bank of Siloam Springs to be delivered to Smith when he delivered his deed to it conveying certain property to Main and paid it for Main, $350 in cash. In other words, Smith was exchanging certain property with Main for the insured property and paying him a difference of $350. The deal was not actually closed on that date, but was consummated a few days later, perhaps finally closed after the date of the policy. As above stated, the policy was dated September 24, 1929, but the proof shows it was not delivered until after title in fee to the insured property had vested in Smith. Conceding therefore that the title in fee had not vested in Smith at the date of the policy, it had it when it was delivered and when the loss occurred, and appellant is in no position to raise the question. It is the real status of the situation at the time of loss, and not at the time of the issuance of the policy, that controls liability under the policy. We so held in *North River Ins. Co.* v. *Loyd,* 180 Ark. 1030, 23 S. W. (2d) 988, and in *Merchants Ins. Co.* v. *Barton,* 182 Ark. 725, 32 S. W. (2d) 1069. In the latter case, the total concurrent insurance permitted in the policy was $12,000, whereas, at the time the policy in question was issued it and other insurance made a total of $12,750. We there said: "It is true that at the time this policy was issued, it together with other policies exceeded this amount. But the proof shows that Mr. Benson had canceled $3,250 of insurance other than the attempted cancellation of this policy prior to the loss, which reduced the amount of the insurance far below the total permitted. Such being the case the rule announced in the recent case of *North River Ins. Co.* v. *Loyd,* 180 Ark. 1030, 23 S. W. (2d) 988, applies, and this policy was not void for overinsurance." So in this case appellee Smith had contracted for the title prior to the date of the policy and had acquired the title

before the policy was delivered and before the loss, and the policy was not void because thereof.

■ It is next argued that the policy is void, even though Smith be held to be the owner of the property, for the reason that he thereafter mortgaged same to W. O. Reed without the knowledge and consent of appellant. We do not agree with appellant in this contention. The policy specifically provided in a mortgage clause attached to it that Reed was a second mortgagee and that he should be protected as his interest might appear. The facts are that Smith was indebted to Reed on an old indebtedness of $900. He borrowed $350 from Reed with which to pay Main the amount due him, and on October 5 he executed the mortgage to Reed for $1,250 to secure his note in said sum. Again, the above rule applies, that the situation existing at the time of the loss controls the liability on the policy. The fact that Reed did not actually have a mortgage at the date of the policy can make no difference to appellant, since by the express provision in the policy he was permitted to be a mortgagee.

■ It is next contended that Smith was guilty of false swearing in the proof of loss executed by him as to the value of the insured house, and that the State Bank was the holder of the first mortgage thereon, instead of said Gentry, which avoided the policy, under its provisions. We do not agree with this contention. In the first place, an adjuster representing the company came before proof of loss was made and denied liability. This action made it unnecessary to file a proof of loss and any statements made therein would be immaterial. In the next place, the house insured was totally destroyed by fire and under the provisions of the statute, 6147, Crawford & Moses' Digest, the full amount of insurance named in the policy became due and payable. Therefore, the value of the property became immaterial, except as it might tend to show fraud and collusion between the owner and the agent in procuring the policy. The statute made the claim in this case a liquidated demand for the full amount

stated in the policy for which a premium was charged and collected.

■ It is finally insisted that the court erred in assessing a penalty and attorney's fee on the ground that it did not refuse to pay for the purpose of vexation or delay, but because it believed in good faith, on account of the matters heretofore discussed, appellees were not entitled to recover, and for the further reason that it was necessary to reform the policy before it knew to whom it was liable. We think there is no merit in these contentions, and we decline to follow the decision of the Circuit Court of Appeals in *Standard Accident Ins. Co.* v. *Rossi,* 35 Fed. (2d) 667, for the reason that we have many times heretofore taken the contrary view. We have many times held that the insured is entitled to recover the penalty and attorney's fee in every case where there was a judgment rightfully obtained for the sum demanded, in accordance with the provisions of the statute. The statute provides that, if the company shall fail to pay within the time specified in the policy after demand therefor, it shall be liable for damages and attorney's fees. In *Fidelity & Cas. Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493, we said: "The fact that defendant found some justification in the certificates furnished for its contention that death did not result from the accident, does not put the case outside of the statutes providing for assessment of damages and attorney's fees where the liability is established and timely demand for payment has been made." So here the fact that appellant may have thought it had a meritorious defense, and in good faith presented same, does not take the case out of the statute. Nor did the fact that the policy provided that the State Bank was a mortgagee preclude it from making settlement by determining to whom the insurance was due and the amount to each of the parties, nor from bringing an interpleader's suit and depositing the money in court to be distributed by the court. It did neither of these things, but denied liability on other grounds.

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

HARRIS *v.* HARE.

Opinion delivered February 16, 1931.

Richardson & Richardson, for appellant.

W. P. Smith, for appellee.

MCHANEY, J. Appellant sued appellee in the court of a justice of the peace for $300 damages for breach of contract of bailment, where there was a judgment for appellant. Appellee appealed to the circuit court, where a trial was had *de novo* which resulted in an instructed verdict for appellee, on the ground that the effect of the suit was one for tort, seeking to recover damages for negligent driving of appellant's automobile, in a sum in excess of the jurisdiction of the justice. The complaint alleged: "That on date of August 29, 1930, while the plaintiff and defendant were in the city of Jonesboro, Arkansas, and while the plaintiff had his car parked on a street in said city, the defendant borrowed the possession of the said car from the plaintiff for the purpose of taking a joy ride in and about the said city; and pursuant to the said agreement plaintiff loaned the said car to the defendant for the aforesaid purpose, and the plaintiff delivered unto defendant the ignition key to said car; that the defendant assured and promised plaintiff that

he would handle said car safely and carefully, and return same to plaintiff in the same condition that it was at that time, and, relying on said promise and assurance of defendant, the plaintiff delivered the possession of the said car to the defendant; that the defendant invited several of his friends and persuaded the plaintiff to accompany him on the said joy ride, all of which they did, and after driving for a while in said city, the defendant drove same out on a road leading out of Jonesboro; and that while doing so, defendant increased the speed of said car to a high, dangerous and excessive rate of speed, and over the protest of the plaintiff and the other occupants of the car, and while driving same at a high, dangerous and excessive rate of speed, the defendant drove same off the road into a ditch, and wrecked same, thereby totally demolishing same; that defendant breached his contract of bailment, in that he did not safely and carefully handle said car, and return same to plaintiff in the condition that it was in prior to the wrecking of same, at which time it was worth the sum of $500, and that, after same was wrecked, it is worth only the sum of $200 or less, and that it will take $300 worth of repairs and labor to repair same."

The evidence is to the effect that appellant loaned appellee his car, and that he and others went on a joy-ride with appellee who carelessly and negligently wrecked the car; that the car was to be returned in good condition; and that appellee failed to do so by wrecking it. Is this a suit on contract? If so, the justice had jurisdiction. Or is it simply a suit for damages to personal property? If so, the justice did not have jurisdiction, and the circuit court did not acquire same on appeal. Section 40, art. 7, Constitution, 1874; § 6397, Crawford & Moses' Digest. We are of the opinion that the effect of the suit as shown by the evidence adduced on the trial, is for a tort, that is for the damage done to the car. The only contract appellant alleged or proved was for the loan of his car, to be returned in good condition. There was no contract for

appellee to pay him a certain sum of money, $300 for instance, in the event he failed to do so. If appellee, instead of wrecking the car after borrowing it, had converted it to his own use by selling it to another as his property, his action in so doing would have been a tort. It was so held in *Storm* v. *Montgomery,* 79 Ark. 172, 95 S. W. 119, which was a suit by a landlord against a tenant in which it was alleged that the tenant had abandoned the leased premises and sold the buildings thereon as trade fixtures and sought a recovery therefor based on the lease contract. This court there said: "This therefore must be considered as a suit for the conversion of property. As the amount claimed exceeds the sum of $100, the justice of the peace was without jurisdiction, and the circuit court acquired none."

The suit therefore is simply one for damages to personal property in which the amount claimed is in excess of the jurisdiction of the justice. The justice having no jurisdiction, the circuit court acquired none on appeal and properly directed a verdict against appellant. *Little Rock & M. R. Co.* v. *Manees,* 44 Ark. 100; *Thompson* v. *Willard,* 66 Ark. 346, 50 S. W. 870, and cases cited under § 6397, Crawford & Moses' Digest.

Affirmed.

PLATT *v.* OWENS.

Opinion delivered February 16, 1931.

Jo M. Walker, for appellant.

A. M. Coates, for appellee.

BUTLER, J. Appellee, plaintiff below, brought suit and recovered judgment for the breach of a contract of employment made for a period of one year.

It is conceded that the evidence was sufficient to establish the contract, which was one of employment for one year, and that the court, if there was liability under the evidence, correctly instructed the jury. The sole question is, was there substantial evidence to sustain the contention of appellee that he was wrongfully discharged?

Appellant was engaged in the business of making small short time loans, and appellee was employed as his local manager at Helena having general charge of the business there and of the collection of the loans and interest and the transmission of such collection to the appellant who lived in New Orleans, Louisiana. Appellee was discharged by P. A. Eyric, the general manager of appellant, on the 6th or 7th of January, 1930.

The only witnesses who testified as to the circumstances of the discharge and the reasons for it were the appellee on the one hand, and Eyric, the general manager, on the other. Appellee testified that he was discharged by Eyric on the 6th of January without any reason assigned other than that the business did not justify his further retention. He stated that at that time Eyric did not know that he was "short" and no such charge was made; that the last audit of the business was made about six months before and another audit was not made, or his shortage discovered, until he had been discharged by Eyric; that at that time he did not know whether he was short or not; that there were four others handling the cash, but he was in charge of the office and responsible for the amount, regardless of how it happened. In corroboration of the statement that his discharge was not because of any shortage, he introduced a letter written

shortly thereafter by the appellant to him and called particular attention to a part of same in which this statement was made:

"Whenever a new office is opened, it should pay back its investment in one year, and there is no man on this earth is going to stand for an office just to make enough each month to pay expenses and the owner does not realize a thing out of it for himself. You were given all the chance in the world to make a success of the office, and I was more than fair with you, and you could have worked for me for years, but the Helena office was falling each month, and I was forced to dismiss you as the office is opened two years now and you had a long enough chance to have made same pay for itself."

Appellee called attention to the fact that nowhere in the letter does the appellant charge him with a shortage or give that as the reason for his discharge. He also stated that, while appellant complained that the business was not a paying one, such was not the fact, but instead it was very profitable and had realized a large return on the investment.

Eyric, testifying for the appellant, stated that he had general supervision of the local managers and their business, including the appellee, whom he had hired as local manager for the Helena office; that in his supervision of the Helena office he observed that the appellee would take time off to go fishing and was gone a couple of times to Memphis, and that in October preceding the discharge of appellee in January, witness found that appellee was a little short, and that he told him that when he (Eyric) came back he wanted all of it; that he found that expenses were running up and remittances falling off; that only the appellee had access to the cash drawer and had a key to it; that he counted the cash in appellee's presence and found him short $77.44. He thereupon discharged appellee and gave him a week's salary, $40, which was credited on the shortage, appellee executing a note for the remainder and being then and there dis-

charged. This occurred on January 7 and not on the 6th as stated by appellee. On cross-examination, in answer to the question if the appellee had been returning to appellant and witness seventy-five to one hundred per cent. on the investment, "he would have been perfectly satisfactory and would have been there today," witness answered, "I suppose so." Witness introduced the note bearing date January 7, 1930, for $37.44 with the notation on one corner: "Shortage in checking out," and appellee, on being questioned regarding the notation, stated that that was what Eyric said it was for.

There was also introduced in evidence a letter from appellee to the appellant complaining of Eyric and blaming the loss of business to his interference and also accusing Eyric of not treating him fairly, but regretting that he was short $37.44 when he was checked out, and stating that if he had been "told sooner and give me a little notice, I could have checked out O. K."; and, "I don't want you to think I was trying to steal anything from you for I don't have to do that for a living. I was trying to pay for my car as I had told you some time ago. I didn't think about getting let out at all."

This is in substance the relevant evidence to the point in issue, and from it the appellee argues that an issue of fact was presented to the jury on conflicting testimony, the credibility and weight of which they were the exclusive judges. It is very true that there is a conflict in the testimony of the appellee and Eyric, either one of which the jury had a right to reject, but, with the testimony of Eyric eliminated, there remains evidence which is undisputed and which must be accepted and renders any statement of appellee to the contrary demonstrably false. It does not depend for its verity on the testimony of witnesses. If it did, then no matter how many in number they were or however plausible their statements, nevertheless they might be false, and, tested by the rules by which such testimony is weighed, rightly the jury might conclude that the appellee, interested as he was,

was the most worthy of belief, and that his single word outweighed them all. But here we have inanimate witnesses, the creation of appellee himself, that completely refute and discredit his statement, so much so that it approaches the realm of the morally impossible which may no more be disregarded than the physically impossible. Whether he was discharged on the sixth as he claims, or on the day following as stated by Eyric, on this later day he executed an instrument by the terms of which he agreed to pay a sum which he acknowledged was for money of his master which he had used in violation of his trust, and within a few days thereafter sought to excuse his dereliction and promised again to repay. To then accept a statement that when he was discharged his shortage was not known or mentioned to him does violence to every canon of reason or common sense. When evidence is adduced by human testimony, then the jury may weigh and assess, and, in determining where lies the truth, their judgment may not be disturbed, however slight a base it has whereon to rest, if there be a tangible one at all, or how much it might be thought they erred in their estimate of the truth. *Crump* v. *Stark,* 23 Ark. 131; *St. L. I. M. & S. R. Co.* v. *Wilson,* 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74; *K. City Sou. Ry. Co.* v. *Biggs,* 181 Ark. 818, 28 S. W. (2d) 68. But there is a limit to the sanctity of a jury's verdict, and where its conclusion has no basis in substantial evidence, or where such evidence is demonstrably false, courts will reverse judgments based on such verdicts. *Waters Pierce Oil Co.* v. *Knisel,* 79 Ark. 608, 96 S. W. 342.

The validity of these rules has not been impaired by any subsequent decisions. *Texas Co.* v. *Jones,* 174 Ark. 905, 298 S. W. 342.

As we consider and construe the entire evidence, this case is brought within the scope of the rules heretofore stated, and necessitates the reversal of the judgment of the trial court and the remand of the cause for a new trial. It is so ordered.

AMERICAN INDEMNITY COMPANY *v.* HOOD.

Opinion delivered February 16, 1931.

Reinberger & Reinberger, for appellant.
Danaher & Danaher, for appellee.

BUTLER, J. The cause was submitted to the court on an agreed statement of fact from which the following state of case appears: The Jefferson Motor Company sold Adams an automobile and retained title until the balance of the purchase price, amounting to $448.20 was paid. Immediately after his purchase of the car, Adams solicited from the appellant company a policy of insurance against loss by fire, etc., which policy he procured. Adams made payments to the Jefferson Motor Company

from time to time, so that in June, 1929, the amount due the Motor Company was reduced to $112.05, and on the 14th of said month the automobile was accidentally destroyed by fire.

The insurance company was notified of the loss and demand made for the sum of $448.20, the sum named in the policy. The insurance company denied liability except to the extent of the balance due on the purchase price which it tendered in settlement. The policy contains many provisions and is a lengthy document, which, when copied into the transcript, covers twenty-three pages, but only the insuring clause in the face of the policy, "section 9E" thereof, and an "indorsement" attached thereto is deemed relevant.

In the insuring clause in the face of the policy the company undertakes to insure Adams against loss by fire of the automobile for three-fourths of its value, not to exceed $448.20, loss payable to Adams and Jefferson Motor Company. Section 9E of the policy reads: "This policy is made and accepted subject to the provisions, exclusions and conditions and warranties set forth herein or indorsed hereon, and upon acceptance of this policy the insured agrees that its terms embody all agreements then existing between himself and the company," etc.

The "indorsement" provides that "in consideration of the premium at which the policy, to which this indorsement is attached, is written, it is hereby understood and agreed that the automobile described in the policy is being sold to S. B. Adams (herein referred to as the vendee), 1100 State Street, Pine Bluff, Arkansas, blacksmith, on the deferred payment plan, but it is the intent of this policy to protect only the interest of Jefferson Motor Company (mortgagee).

"It is also understood and agreed that the liability of the company under this policy shall be automatically reduced by the amount of each payment until the car is fully paid for, at which time the company's liability shall

cease, said liability in no event to extend beyond the expiration date set forth in the policy. * * *

"This indorsement, when countersigned by a duly authorized agent of the company and attached to policy No. 85047, issued to S. B. Adams, shall be valid and form a part of said policy."

If the clause in the face of the policy insuring Adams against loss for the destruction of the automobile is valid and controlling when the indorsement aforesaid is considered, then the judgment of the court below is correct. If, however, that clause is nullified by the indorsement above quoted and its terms prevail, then the contention of the appellant must be sustained. The question then is which of the two controls?

It is stated as a general rule in 14 R. C. L., p. 934, and in 26 C. J. (Fire Insurance) § 72, that a "slip" or "rider" will be construed in connection with printed provisions of the policy and the entire contract harmonized if possible, but, if there is an irreconcilable conflict, the slip or rider will control, and these statements are relied upon by the appellant in support of the position taken by it. The cases cited by the authors to support the declaration of the text are from some of the Federal District Courts and from courts of a few of the States. 92 Fed. 111; 55 *Ib.* 238; 34 *Ib.* 501; *German Ins. Co.* v. *Churchill,* 26 Ill. A. 206; *Mixon* v. *St. Paul F. & M. Ins. Co.,* 147 La. 302, 84 So. 790; *Jackson* v. *Orient Ins. Co.,* 106 Mich. 57, 63 N. W. 968; *Haws* v. *Phila. F. Assn. Co.,* 114 Pa. 431, 7 Atl. 759; *Couch* v. *Home Pro. F. Ins. Co.,* 32 Tex. Civ. Appeals 44, 73 S. W. 1077.

These cases, however, seem to have enunciated the rule as applying where the provision overruled by the rider was wholly printed and the rider written, basing this rule on that other well-recognized one in the construction of contracts that, in case of conflict between written and printed portions of an instrument, the writing will be presumed to represent the intent of the parties as against the printed portions. This rule was recognized

by this court in the case of *Planters' F. & C. Co.* v. *Columbia Cotton Oil Co.,* 126 Ark. 19, 189 S. W. 166; where the reason is given that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and should therefore control where there is conflict with the printed portions of the contract.

In the case at bar not all of the conflicting clauses were written, nor were they wholly printed. It is obvious that both are printed forms with blank spaces for the insertion of names, dates and the like. Therefore, there does not here appear the reason for the rule as broadly stated in 14 R. C. L. and 26 C. J., *supra,* and, as representing the intent of the parties, they are of equal dignity. This brings into the construction of the policy the settled rule that its provisions must be harmonized, if possible, but in case of doubt the provisions will be construed most strongly against the insurer and in favor of the insured. From an examination of the history of the adoption of this rule and of the instruments themselves, the reasons are patent and contains the belief that the terms of the instruments were not formulated by the insurers for the purpose of clearly informing the insured of the true extent of his protection or the limitations on their liability, but rather chosen with particular reference to their own interests. This is apparent from an inspection of the policy at hand with its involved phraseology and the numerous exceptions, conditions, and ambiguous provisions. There are two provisions which apparently conflict, but, on careful consideration, it might be said that there were two purposes sought to be effectuated by the contract; one, that Adams was to be protected for three-fourths of the value of the car, not to exceed the amount stated in the policy, and the other, that Jefferson Motor Company (Hood) should be protected to the extent of the balance of the purchase price due on the car. Taking the language of the insuring clause in the face of the policy alone, it is Adams who is insured, but the loss is

made payable to him and the Jefferson Motor Company, the amount to be paid to each not being disclosed; but, by the attached indorsement this uncertainty is removed, and it is there that the extent of the motor company's interest appears. We are not at liberty to consider any one clause or statement in either the insuring clause or in the indorsement, and with that as the basis construe the policy with respect to the rights and liabilities of the parties, but the language of the entire policy must be considered, and, thus considered, the conflict is more apparent than real. By the terms of the insuring clause the right of Adams is established; by the terms of the indorsement the extent of the motor company's interest is ascertained.

Since the indorsement was printed, the rule announced in *Planters' F. & C. Co.* v. *Columbia Cotton Oil Co., supra,* does not apply as the insuring clause on the front page of the policy and the indorsement attached to the back of same, are of equal dignity, as we have seen, then in the event of a conflict which could not be harmonized, the policy must be construed in favor of the insured, and the first provision must prevail over a later one. This does not contravene the doctrine of *National Union Fire Ins. Co.* v. *Avant,* 167 Ark. 307, 268 S. W. 20, and is supported by *Great American Cas. Co.* v. *Williams,* 177 Ark. 87, 7 S. W. (2d) 775, and *Leader Co.* v. *L. R. Ry. & Electric Co.,* 120 Ark. 221, 179 S. W. 358.

In this case, if it had been the intention of the insurer not to protect Adams in any event against loss, it could have plainly said so in the insuring clause, but, instead, in plain and unambiguous language, it insured him against the loss of his automobile by fire which contract it must make good.

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

SMITH, J., concurs in the judgment; KIRBY, J., dissents.

DAVIS *v.* WILSON.

Opinion delivered February 23, 1931.

[redacted]

Sam A. Davis, for appellant.

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

R. W. Robins, Amicus Curiae, for appellee.

HART, C. J., (after stating the facts). It is well settled that courts of equity will not interfere, by injunction, to determine questions concerning the appointment or election of public officers, or their title to office; and it does not matter whether the incumbent is an officer *de jure* or *de facto.* 22 R. C. L. 113, p. 454.

This rule is in accord with the repeated holding of our own court. In *Rhodes* v. *Driver,* 69 Ark. 606, 65 S. W. 106, 86 Am. St. Rep. 116, the court quoted with approval from High on Injunctions, the following: "No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence, is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal

nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum of determining the disputed questions of title to public offices, or for the trial of contested elections, but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy, by proceedings in the nature of a *quo warranto.*" High, Injunctions (3d Ed.), No. 1312.

This doctrine has been reaffirmed in the following cases: *Hester* v. *Bourland,* 80 Ark. 145, 95 S. W. 992; *Lucas* v. *Futrall,* 84 Ark. 540, 106 S. W. 667; *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579; *Harrison* v. *Norton,* 104 Ark. 16, 148 S. W. 497; *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C, 980; and *Allen* v. *Sellers,* 141 Ark. 206, 217 S. W. 257.

The Supreme Court of the United States is committed to the doctrine that a court of equity has no jurisdiction over the appointment and removal of public officers. In *White* v. *Berry,* 171 U. S. 366, 18 S. Ct. 917, it was held that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. It was further held that the jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised by certiorari, error or appeal, or by mandamus, prohibition, *quo warranto,* or information in the nature of a writ of *quo warranto,* according to the circumstances of the case, and the mode of procedure established by common law or by statute.

In the case of *Walton* v. *House of Representatives,* 265 U. S. 487, 44 S. Ct. 628, it was held that a court of the United States, sitting as a court of equity, is without jurisdiction of a suit to enjoin the prosecution of a proceeding to remove a State official from office.

In the application of these settled principles of law, the court is of the opinion that the chancery court has no

jurisdiction to restrain the Lieutenant Governor from recognizing R. E. Spence as a State senator or recording his vote as prayed in the complaint.

It is claimed, however, that the court has jurisdiction to restrain the Lieutenant Governor from issuing vouchers to R. E. Spence as State senator and J. Oscar Humphrey from issuing warrants upon said vouchers. This contention proceeds upon the theory that R. E. Spence was a *de facto* officer and, as such, was not entitled to the salary allowed to State senators.

Reliance is placed upon article 4, §§ 5 and 12, of our Constitution. Section 6 provides that the Governor shall issue writs of election to fill such vacancies as shall occur in either house of the General Assembly. Section 11 provides that each house shall be the sole judge of the qualifications, returns and elections of its own members.

On the one hand, it is sought to uphold the decree of the chancery court on the theory that constitutional provisions of this kind are found in the organic laws of several of the States, making each branch of the Legislature the judge of the election and qualifications of its members. It is claimed that such a provision is a grant of power and constitutes each the exclusive tribunal as to the qualifications of its own members. On the other hand, it is insisted that this provision should be construed only to mean that the acts of Senator Spence in the present case, in voting upon measures and acting generally as a State senator, could not be called in question in a collateral proceeding, but that he was only a *de facto* officer, and as such was not entitled to the emoluments which belong by law to his office; therefore it is insisted that the chancery court had the power to enjoin the issuance of a voucher of his pay as State senator to him.

In the first place, it will be seen that a decision of this question would, as to all practical purposes, settle whether Spence was an officer *de jure* or *de facto;* and, as we have already seen, a court of equity will not per-

mit itself to be made the forum for the purpose of determining disputed questions as to the title of public offices.

It is suggested that article 16, § 13, gives the chancery court jurisdiction. That section provides that any citizen of any county, city or town may institute suit in behalf of himself and all others interested to protect the inhabitants thereof against the enforcement of any illegal exaction whatever. Reference to the cases cited under the section in the Constitution will show that the section has reference to taxes levied without any warrant of law. The section is but a recognition of the well-known principles of equity, as expounded in *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C, 980, and in many other cases decided by this court, the jurisdiction of a court of equity is expressly limited to the protection of civil and property rights. Civil rights have no relation to the establishment or management of the government. They consist in the power of acquiring and enjoying property and exercising the paternal and marital powers and the like. This distinction was also pointed out in *Harrison* v. *Norton,* 104 Ark. 16, 148 S. W. 497. There the court said that courts of equity have no power to try election contests, but that they do have the jurisdiction in a suit to restrain the enforcement of an alleged illegal exaction, which was in that case a road tax, alleged to be illegal and unauthorized.

Again, it is said that courts of equity have inherent jurisdiction to restrain the officers of a municipality or other governmental corporation from making an unauthorized appropriation of the corporate funds, as decided in numerous cases by this court, including *Town of Jacksonport* v. *Watson,* 33 Ark. 704; and *Russell* v. *Tate,* 52 Ark. 541, 13 S. W. 130, 7 L. R. A. 180, 20 Am. St. Rep. 193. The reason is that the corporation holds the money for the inhabitants to be expended for legitimate corporate purposes, and a misappropriation of these funds is an injury for which no other remedy is so effectual and appropriate as an injunction. It presents a multi-

plicity of suits and a misappropriation of the funds for a purpose which in itself is illegal. In *Russell* v. *Tate,* 52 Ark. 541, 13 S. W. 130, this doctrine was reaffirmed, and it was held that the officers in whose hands moneys are intrusted for a municipality are trustees in the management and application of such funds; and that the application of these funds to a purpose other than that provided by law is a breach of such trust, which may be enjoined in equity. See also *Sanderson* v. *Texarkana,* 103 Ark. 529, 146 S. W. 105. This was the proper application of the well-known power of equity to protect the citizens in their property rights, and it was properly held that a city clerk could be prevented by a suit in equity from appropriating the funds of the city to the building of a courthouse, which was a purpose not authorized by law.

In the present case, it cannot in any sense be said that the appropriation of the money by the issuance of the voucher was for an illegal purpose, the purpose being to pay a State senator which was authorized by law. The only question is that Spence was not the proper person to receive the salary or compensation. The purpose itself was lawful, and the question whether Spence was the proper person to receive the compensation depended upon the construction of the clause of the Constitution above referred to. As we have already seen, it is the settled law of this State that courts of equity have no jurisdiction in matters of an executive or political nature. To assume jurisdiction in controlling the exercise of political powers would be to invade the dominion of other departments of government, and to encroach upon the jurisdiction of the courts of common law. *Arnold* v. *Henry,* 155 Mo. 48, 55 S. W. 1089, 78 Am. St. Rep. 556.

Again the equitable maxim is invoked, that courts of equity will always assume jurisdiction where there is no adequate remedy at law. If it be conceded that, in the construction of the sections of the Constitution above re-

ferred to, Spence is not an officer *de jure* but is only an officer *de facto,* still the plaintiff would have an adequate remedy at law. In *Cox* v. *State,* 72 Ark. 94, 78 S. W. 756, it was held that the Governor had no inherent power by virtue of his office or of article 6, § 23, and of the amendment to the Constitution, providing for filling vacancies in office until the next general election (which provisions plainly refer only to elective offices), to appoint the State Capitol Commissioners, a board created for a special purpose, the members of which are not elective, and whose terms will expire with the completion of the work. In that case the Attorney General brought suit against Cox and others who were appointed by the Governor to serve as members of the Board of State Capitol Commissioners. The circuit court found the law to be in favor of the contention of the Attorney General and gave judgment of ouster against the defendants. Upon appeal, the judgment of the circuit court was affirmed, thereby recognizing the jurisdiction of the circuit court in cases of this sort. This in accord with the general rule on the subject in the cases above cited.

If the Attorney General should refuse to bring suit upon the relation of a citizen and taxpayer, such person could bring suit in his own name under the authority of *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380; *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579; and *Green* v. *Jones,* 164 Ark. 118, 261 S. W. 43.

In this connection, we also call attention to the case of *Stephens* v. *Campbell,* 67 Ark. 484, 55 S. W. 856, where it is said: "Under the statutes of this State, an officer *de facto,* without legal title to the office, is a usurper (*Lambert* v. *Gallagher,* 28 Ark. 451; *Wheat* v. *Smith,* 50 Ark. 267-273, 7 S. W. 161), and can be removed from office by 'an action by proceedings at law instituted against him, either by the State or the party entitled to the office.' Where he 'has received fees and emoluments arising from the office,' he is liable therefor to the person entitled thereto, who may claim the same in the action

brought to deprive him of the office, * * * or in a separate action. If no one be entitled to the office, * * * the same may be recovered by the State, and paid into the State Treasury. Sandels & Hill's Digest, § 7371. The fees are not his, and he is not entitled to hold them. If he collects any fees for services rendered, he holds them at sufferance."

We do not think that the case of *State of Montana* v. *Hart,* 56 Mont. 571, 185 Pac. 769, 7 A. L. R. 1678, has any application. There the relator instituted mandamus proceedings against the State Treasurer to enforce payment of a warrant as a member of the House of Representatives.

So, if it should be held here that Spence was merely an officer *de facto,* he could not maintain an action for the salary, because, as pointed out in *Stephens* v. *Campbell,* 67 Ark. 484, 55 S. W. 856, such action would put in issue his legal title to the office. The reason is that the act of an officer *de facto,* when it is for his own benefit, is void, because he shall not take advantage of his own want of title, which he must be cognizant of, but where it is for the benefit of strangers, or the public, it is good. This not being a suit by Spence for the salary of his office, we do not think that the principles of law decided in the Montana case have any application whatever.

The majority of the court is of the opinion that injunction is not the proper remedy, and equity is not the proper forum for determining the legality of the acts of the Lieutenant Governor and the Auditor of the State in issuing his salary, nor the legality of the appointment of Spence to the office of State Senator. The complaint, considered in all its aspects, must be held to be a suit for the purpose of trying the right of Spence to hold the office of State Senator; and, under the established rule in this State, a court of equity does not have jurisdiction for the reasons above set forth and for the additional reason that the plaintiff had a plain and adequate remedy at law, as above stated. In short, according to our own

decisions, the plaintiff had a plain and adequate remedy at law to try in one suit in the circuit court not only the title to the office but the right of Spence to the salary thereof. Therefore the decree of the chancery court will be affirmed.

SMITH and MEHAFFY, JJ., dissent.

SMITH, J., (dissenting). Whatever this case may be, it is not a contest for an office, nor does any one claim that R. E. Spence is an usurper, holding an office to which another is entitled. No other person asserts any right to exercise the functions of the office which Senator Spence is now filling. We need not, therefore, consider what remedy such a person should pursue, if there were such a person.

The allegations of the pleadings are that Senator Spence has been recognized as a member of the Senate by that body and is serving as a member thereof. He is, at least, a *de facto* member of that body, and, so long as the Senate recognizes his right to serve as such, it cannot be directly questioned except by and in the Senate. The citizen and taxpayer who has brought this suit does not question Senator Spence's right to act as a *de facto* officer; his insistence is that he is not entitled to be compensated for that service.

The few and the simple facts of this case should be kept in mind in determining the question which the taxpayer does raise, and that is, whether Senator Spence, although a *de facto* senator, has the legal right to draw compensation from the State Treasury for his service as a senator. The facts are undisputed and are all matter of public record.

The first senatorial district is entitled to a senator; and it had one. That senator resigned while the Senate was in session, and the Governor has appointed a successor, and this successor is now serving. Has this successor the legal right to receive compensation for that service?

It is unimportant that the Auditor of State has not refused to issue a voucher upon the State Treasury to compensate that service. The legal and constitutional question is no more affected by the willingness of the Auditor to issue this voucher than it would be by his refusal to do so. The question is not, what has the Auditor done, or is willing to do? The question is, what is the duty and what is the power of the Auditor under the Constitution and laws of this State? And the decision of that question should not be confused by any consideration of the fact that no other person claims the right to discharge the duties of Senator from the First Senatorial District of the State. The question raised by the citizen and taxpayer, as we have said, is the right of Senator Spence to have the Auditor draw in his favor a warrant upon the State Treasury to compensate him for that service. Certainly the complaisance or the obduracy of the incumbent filling the office of Auditor of State cannot be decisive of a question of such constitutional importance. His successor might be of another opinion, and constitutional rights cannot be made dependent upon the policy of the Auditor of State. I assume this officer wants only to know what his duty is under the Constitution and laws of the State, and no reflection upon him is intended. But what I do insist is that the willingness or unwillingness of the Auditor to issue the warrant is of no importance and cannot affect the decision of the question which the citizen and taxpayer has raised.

When the merit of the case is reached, the question appears to me to be a very simple one, and that is, did the Governor of the State have the authority to make the appointment? Section 6 of article 5 of the Constitution answers this question. It reads as follows: "The Governor shall issue writs of election to fill such vacancies as shall occur in either house of the General Assembly," and it is not insisted in any of the briefs filed in this case that this direction is not mandatory. On the contrary, the universal rule of construction is that such

provisions of the Constitution are to be construed as mandatory. As no one questions this rule of construction, I shall not argue it further nor cite cases to support it.

It is, however, suggested in the brief by *amicus curiae* that § 23 of article 6 provides that "When any office from any cause may become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have the power to fill the same by granting a commission, which shall expire when the person elected to fill said office at the next general election shall be duly qualified." Now, it may be conceded that an enabling act is necessary to make § 6 of article 5, above quoted, effective, and that, in the absence of an enabling act, § 23 of article 6 would confer upon the Governor the power to make the appointment, if, in fact there were a vacancy, and no mode had been provided by the Constitution to fill it. But such is not the state of the law. Full and adequate provision has been made for filling the vacancy as the Constitution contemplated should be done. By § 4962, Crawford & Moses' Digest it is provided that: "When any member elected to either house of the General Assembly shall resign in the recess thereof, he shall address and transmit his resignation, in writing, to the Governor; and when any such member shall resign during any session, he shall address his resignation to the presiding officer of the house of which he is a member, which resignation shall be entered upon the journal; in which case, and in all cases of vacancies happening or being declared during any session of the General Assembly, by death, expulsion or otherwise, the presiding officer of the house in which such vacancy shall happen shall immediately notify the Governor thereof, who shall immediately issue a writ of election to fill such vacancy." Section 4963, Crawford & Moses' Digest provides that when the Governor shall receive any resignation or notice of vacancy, he shall, without delay, issue a writ of election to fill such

vacancy. Sections 4964 and 4965 Crawford & Moses' Digest provide how the special election shall be held which the Governor is required to call.

The duty of the Governor is therefore mandatory, and full provision is made whereby that duty may be discharged. It appears therefore that the Governor is without power to make the appointment, and therefore Senator Spence is not a *de jure* senator. Consequently, the Auditor is without authority to issue the voucher.

In the recent case of *Hill* v. *Rector,* 161 Ark. 574, 256 S. W. 848, Hill brought suit against the city of Rector to recover a sum alleged to be due him for his services as mayor of that city. He alleged that the legally elected mayor had resigned, and that the city council, at its first regular meeting, had elected him as mayor to serve for the unexpired term. On behalf of the city it was denied that Hill had been elected in the manner provided by § 7518, Crawford & Moses' Digest, and that he was not, therefore, the legal mayor of the city, although he had served in that capacity. We there said: "It follows that the appellant failed to prove that he was duly elected mayor of the city of Rector. The appellant, however, does prove that he was the *de facto* mayor of the city of Rector. But in the case of *Stevens* v. *Campbell,* 67 Ark. 484, 55 S. W. 856, quoting from *Andrews* v. *Porter,* 79 Me. 490, we held: 'A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performs under color of an appointment, but without legal title. He cannot maintain an action for the salary. His action puts in issue his legal title to the office, and he cannot recover by showing merely that he was an officer *de facto.*' The fact that the appellee (the city) in its answer recognized that the appellant 'was permitted to act as mayor' does not estop the appellee from setting up that appellant was not the duly elected mayor of the city. The appellee expressly denied that appellant was such mayor. We conclude therefore that

the court did not err in directing the jury to return a verdict in favor of the appellee."

The reasons which induced us to hold that Hill was not entitled to recover compensation for his services as mayor of the city of Rector, although he had served in that capacity, are applicable here, and should result in the holding that Senator Spence is not entitled to compensation for his services as senator, although he has served in that capacity.

We have many times held that any citizen and taxpayer may, in his own name, institute suit in the chancery court to prevent any public official from paying out public revenue contrary to law, the most recent of these being the case of *Rose* v. *Brickhouse,* 182 Ark. 1105, 34 S. W. (2d) 472, in which the opinion was delivered January 19, 1931, and a number of cases to the same effect were there cited. That was a case in which Rose, as a citizen and taxpayer, was permitted to enjoin Brickhouse from drawing compensation for services in an official capacity which was unauthorized by law.

I am therefore of the opinion that, although Senator Spence is a *de facto* senator, and may act as such so long as he is permitted to do so by the Senate, yet his right to draw compensation for that service is one which any citizen and taxpayer has the right to raise, and, as Senator Spence is serving without authority of law, he is not entitled to be compensated for that service, and the Auditor should be enjoined from issuing him a voucher paying him therefor.

I am authorized by Mr. Justice MEHAFFY to say that he concurs in the views here expressed.

AMERICAN INSURANCE COMPANY OF NEWARK, NEW JERSEY, *v.* RUSSELL.

Opinion delivered February 23, 1931.

H. M. Barney, for appellant.

E. F. McFaddin, for appellee.

HUMPHREYS, J. Appellee brought this suit against appellant to recover $395 on two items covered by an insurance policy for $3,000, which also covered twelve other items, or a total of fourteen items. Each of the fourteen items was separate and set out specifically as to the amount of insurance thereon in said policy. The policy was issued by appellant to appellee on September 20, 1926, for a period of five years from the 16th day of September, 1926, to the 16th day of September, 1931, for a total premium of $325.80, payable $65.16 in cash, and a like amount on the first day of October, for the years 1927, 1928, 1929 and 1930, respectively; the deferred payment being evidenced by one note in the total sum of $260.64, due in installments as aforesaid.

It was alleged in the complaint that on the 24th day of October, 1929, the barn and certain provender, being two items covered by the policy, were destroyed by fire, and that proof of loss was made within the period of sixty days after the fire provided in the policy for making such proof.

Appellant filed an answer denying liability under the policy on the ground that the policy was suspended on October 24, 1929, when the barn and provender were

destroyed by fire, on account of appellee's failure to pay the premium installment on October 1, 1929, amounting to $65.16. The suspension clause relied upon as a defense was set out, in substance, in the answer, and is as follows:

"And it is hereby agreed that, in case of nonpayment of either of the installments herein named at maturity, this company shall not be liable for loss during such default, and the policy for which this note was given shall lapse until the payment is made to this company, * * *. The payment of the premium, however, revives the policy, and makes it good for the balance of the term."

The cause was submitted upon the pleadings and the testimony adduced by the respective parties, at the conclusion of which the court peremptorily instructed a verdict for appellee in the amount sued for, from which is this appeal.

The record reflects that appellee had the money in the bank with which to pay the premium on October 1, 1929, but forgot to do so until after the barn and provender were destroyed by fire. Immediately thereafter he informed appellant's local agent of the fire, and, following his advice, sent a check to appellant on the 31st day of October, 1929, for $65.16 to cover the premium due on October 1, 1929, but did not inform appellant in the letter inclosing the check of the fire. Appellant received and cashed the check without any knowledge that the barn and provender had been destroyed by fire. Later, and within sixty days after the fire, appellee made proof of his loss by fire in accordance with the terms of the policy and mailed same to appellant. This was the first knowledge appellant obtained that the barn and provender had been destroyed by fire. It immediately denied liability upon the ground that the policy was suspended under the express provisions thereof during the time appellant had defaulted in the payment of the premium installment due October 1, 1929, and that the policy was void and of no binding effect on appellant at the time the barn and

provender were destroyed by fire. It retained the total premium and refused to pay appellee's loss.

Appellant contends for a reversal of the judgment under the general rule adopted by this court to the effect that policies of fire insurance may provide against liability on the part of the insurer during default in the payment of the installments of the premium agreed upon as a consideration for the protection. The doctrine invoked and relied upon by appellant may be found in the cases of *Jefferson Mutual Life Insurance Co.* v. *Murray,* 74 Ark. 507, 86 S. W. 813; *American Insurance Co.* v. *Hornbarger,* 85 Ark. 337, 108 S. W. 213; *Fidelity Mutual Insurance Co.* v. *Bussell,* 75 Ark. 25, 86 S. W. 814; and *American Insurance Co.* v. *Austin,* 178 Ark. 566, 11 S. W. (2d) 475.

Appellee concedes the general rule provided in the cases cited, but contends that the instant case is not governed by the general rule, but by the exception thereto to the effect that suspension of forfeiture clauses in policies may be waived by the insurer. Appellee argues that the retention of the premium installment paid by him on October 31, 1929, which was due October 1, 1929, after receiving notice of the loss by fire, was a waiver of the suspension or forfeiture clause contained in the policy and set out above. He cites in support of his contention the case of *Ætna Insurance Co.* v. *Daggett & Yancey,* 177 Ark. 109, 5 S. W. (2d) 719. The compelling facts in the case cited do not appear in the instant case. In the case cited the insured was not aware of a fire and loss when they paid the delinquent installment of the premium. It accepted all of the overdue premium with full knowledge of the fire loss, and, instead of denying liability, entered into negotiations for a settlement by sending an adjuster to investigate the fire and causing or inducing the insured to go to trouble and expense.

In the instant case appellee did not notify appellant of the fire loss when he remitted the delinquent premium installment, although knowing of it himself. In other

words, he withheld this information from the insurer so at the time it received the remittance and appropriated same it had no knowledge of the fire loss. Immediately upon obtaining the information, the insurer denied liability and did not enter into negotiations for a settlement or by any act induce appellee to go to trouble or expense relative thereto. All that it did was to retain the installment of premium remitted to it after it became aware of the fire loss. The cases are not parallel in their salient facts, and, therefore, the instant case is not ruled by the case of *Ætna Insurance Co.* v. *Daggett & Yancey, supra.* The retention of the installment premium under the circumstances was not sufficient in itself to constitute a waiver of the suspension clause as a matter of law; nor was it, standing alone, sufficient to carry the question of waiver to the jury. The rule stated in 32 C. J., at page 1351 (§ 629) is as follows:

"Acceptance of a past-due premium after loss without knowledge of the loss does not revive a previously forfeited policy." And further, (§ 630): "The exercise by the company of its right to accept the premium after due, under a provision in the contract expressly stipulating as to the effect of such an acceptance, does not in itself waive a forfeiture or provision against liability during the suspension of the policy."

Instead of instructing a verdict for appellee, the court should have instructed a verdict for appellant.

On account of the error indicated, the judgment is reversed, and the cause is dismissed.

COCA-COLA BOTTLING COMPANY OF ARKANSAS *v.* COCA-COLA BOTTLING COMPANY.

Opinion delivered February 23, 1931.

[redacted]

Coleman & Riddick, for appellant.

Hays & Smallwood, for appellee.

KIRBY, J., (after stating the facts). The only issue involved in this appeal is whether the court erred in holding that appellee company owned the exclusive right to bottle and sell bottled Coca-Cola in Paris under its contract.

The intention and rights of parties under a contract must be determined as they existed at the time the contract was executed, the cardinal rule for construction and interpretation being that the intention of the parties shall be effectuated, as gathered from the whole context of the agreement. *Glover* v. *Bullard,* 170 Ark. 58, 278 S. W. 645; *Fort Smith Light & Traction Co.* v. *Kelley,* 94 Ark. 161, 127 S. W. 975; *Temple Cotton Oil Co.* v. *Southern Cotton Oil Co.,* 176 Ark. 608, 3 S. W. (2d) 673.

"Courts may acquaint themselves with persons and circumstances that are the subjects of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described." *Inter-Southern Life Ins. Co.* v. *Shutt,* 175

Ark. 1161, 1 S. W. (2d) 801. See also *Maloney* v. *Maryland Casualty Co.,* 113 Ark. 174, 167 S. W. 845.

The undisputed testimony shows that appellee had been serving Paris with Coca-Cola for more than 4 years prior to the execution of its present contract, and that on the date of its execution there was no rail connection whatever between Little Rock and Paris, the only connection by rail being the Arkansas Central Railroad, which extended only from Paris to Fort Smith, and which was used in serving the Paris territory in the beginning.

Meek, one of the lessors, testified that he had secured the same territory in the last contract that he had been serving under the first with some additional, the description being, "also the territory along the Arkansas Central Railroad from Fort Smith to Paris."

Appellant insists that the word "to" used in this description is a term of exclusion unless there was something in the connection which makes it manifest that it was used in a different sense, and cites in support thereof 9 C. J. 153 and *Breashear* v. *Norman,* 176 Ark. 26, 2 S. W. (2d) 53.

The court held, however, and correctly so under the circumstances of this case, the situation and relation of the parties considered, that the word "to" and the sense in which the word is commonly understood is inclusive rather than exclusive. *Bennett Lumber Co.* v. *Walnut Cypress Co.,* 105 Ark. 421, 151 S. W. 275; *Hastings Industrial Co.* v. *Copeland,* 114 Ark. 415, 169 S. W. 1185; *Bloch Queensware Co.* v. *Smith,* 107 Mo. 13, 80 S. W. 592. The Supreme Court of Missouri stated in the above mentioned case: "The word 'to' has no specific meaning in a legal sense, although it is a word of exclusion. Its meaning is ascertained from the reason and sense in which it is used."

In *Union Pacific Rd. Co.* v. *Hall,* 91 U. S. 343, 23 L. Ed. 428, the Supreme Court of the United States said the words "from," "to" and "at" are taken inclusively according to the subject-matter. See also *President, etc.,*

of Farmers' Turnpike Road v. *Coventry,* 2 Johns (N. Y.) 389; *Hazelhurst* v. *Freeman,* 52 Ga. 244; *People* v. *Klammer,* 137 Mich. 399, 100 N. W. 600; *Rio Grande R. Co.* v. *Brownsville,* 45 Tex. 88; *McCartney* v. *Chicago & Evanston R. R. Co.,* 112 Ill. 611; 8 Words & Phrases, first series, page 6986; 4 Words & Phrases, second series, page 930.

In *National Equity Life Ins. Co.* v. *Bourland,* 179 Ark. 398, 16 S. W. (2d) 6, this court said: "It is a well-established principle of law that, in the interpretation or construction of contracts, the construction the parties themselves have placed on the contract is entitled to great weight and will generally be adopted by the courts in giving effect to its provisions. This is especially true in case of ambiguity in the written contract." See also *Temple Cotton Oil Co.* v. *Southern Cotton Oil Co.,* 176 Ark. 601, 3 S. W. (2d) 673; and *Webster* v. *Telle,* 176 Ark. 1149, 6 S. W. (2d) 28.

From 1910 to 1928, a period of 18 years, the appellee company and its predecessors served the people of Paris without objection from the Bellingraths, lessors of appellant company. Meek testified that he had no knowledge that they made any claim to the territory of Paris until he received their letter of June 23, 1928. Meek had made two sub-bottlers' contracts with parties in the Paris territory, which had been approved by the present company, and had never been questioned by Bellingrath. Early in 1927, when the concrete highway was being completed from Dardanelle to Fort Smith and offering greater facilities for transportation of bottled Coca-Cola, the Bellingraths wrote a letter, the letter of May 30, 1927, questioning the right of appellee company to furnish Coca-Cola to several small towns west of Dardanelle, Paris not being mentioned therein. By letter of June 3, 1927, answering Meek's request for a definite statement of the territory claimed Bellingrath wrote, "the points in question are points lying east and southeast of Paris, namely, Corley, Subiaco, Ellsworth, Blaine, Delaware and other points in this vicinity."

Appellee's contract for its territory was prepared by attorneys for the Georgia Coca-Cola Company, and the rule is, "in construing a written contract it should be interpreted more strongly against the party who prepared it." *Morley* v. *Hackler,* 176 Ark. 238, 3 S. W. (2d) 20.

It follows from the application of the principles announced that the court correctly construed the contract, and did not err in affording the relief appellee prayed and was entitled to. We find no error in the record, and the judgment is affirmed.

SCHOOL DISTRICT NO. 26 *v.* BAXTER COUNTY BOARD OF EDUCATION.

Opinion delivered February 23, 1931.

Northcutt & Northcutt and *Claude Cowart,* for appellant.

Kent K. Jackson, for appellee.

KIRBY, J. On a petition duly filed on the 19th day of September, 1929, the county board of education of Baxter County made an order in accordance with the prayer of the petition consolidating School Districts Nos. 61 and 26 into School District No. 61, under the provisions of the statute, § 8823, Crawford & Moses' Digest, as amended by act 156 of 1929.

An appeal was taken from this order to the circuit court, where, upon a hearing, the order of the board of education was affirmed, the court saying: "There has been a mass of testimony introduced and the court cannot tell, from the evidence, whether some of the signers of the petition lived in the territory affected by the order of consolidation or whether they reside in that part of Norfolk Township not affected or not included in the order of consolidation. The board of education has threshed that matter out, and the court, to some extent, respects their acts and findings in the matter." This language was preceded by the court's finding: "that a majority of the qualified electors of the territory affected by the proposed consolidation signed the petition asking for the order of consolidation."

The court, after finding that it would be for the best interests of a substantial majority of persons residing in the territory affected, further found that the order of the county board of education should be affirmed and so ordered, "except that the court will order that for a period of two years the board of directors of the consolidated district maintain and operate a school in the present School District No. 26 of not less than the first six grades, and for a period of not less than eight months each year, or until transportation facilities can and will be furnished to the school children of District No. 26, and that after the expiration of said two years the maintenance and operation of a school in District No. 26 shall be left to the discretion of the board of directors of the consolidated district, as in the judgment of the

board would be for the best interest of the persons living in what is now District No. 26."

This appeal is prosecuted from this judgment.

It is urged that the court's finding that the petition for consolidation of Districts Nos. 61 and 26 was signed by a majority of the qualified electors in the territory to be affected is contrary to the evidence, and that its judgment of affirmance of the board's order of consolidation, with a condition attached, was beyond the court's power and ineffectual to consolidate the districts.

It is true the testimony was in conflict as to the number of qualified electors residing in the territory affected and as to whether the petition contained a majority thereof, but there was much testimony showing such to be the fact. The postmaster in the district who procured the signers to the petition testified that it contained such a majority, making explanations of all exceptions thereto as to particular individuals challenged as not being legal petitioners; and the court also gave some weight to the finding of the board on this point, as it had a right to do. *Bledsoe* v. *McKeowen,* 181 Ark. 584, 26 S. W. (2d) 900. In *School District No. 26* v. *District No. 32,* 177 Ark. 497, 6 S. W. (2d) 826, the court said: "We are not called upon to determine whether the judgment of the court is supported by the weight of the evidence. The rule is that if the finding of the court is supported by any substantial evidence this court cannot disturb it on appeal."

Although it is true that the county boards of education are vested by law with a sound discretion in the determination of matters necessary to the formation of new school districts and the orders therefor, subject to review only when it appears that such orders are arbitrary or unreasonable, no such discretion is vested in the circuit court as held in *Bledsoe* v. *McKeowen, supra.* The court therefore was without authority, having found that the order of consolidation was valid and should be affirmed, to attempt to make its judgment conditional upon the

continuance by the board of a certain grade of school for two years in the territory of one of the districts consolidated, in order that transportation facilities to the central school could be furnished for the children therein. Such order was but only surplusage not affecting the validity of the judgment of affirmance of the board's order of consolidation, which the court had the power to make, and amounted to no more than a suggestion to the board of the best method for effecting in fact the consolidation of the schools.

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

WASHUM *v.* LESTER.

Opinion delivered February 23, 1931.

G. M. Gibson, for appellant.

E. H. Tharp and *W. P. Smith,* for appellee.

HUMPHREYS, J. This suit was brought on January 15, 1930, by appellee against appellant in the chancery court of Lawrence County, Eastern District, for contribution on account of having paid a judgment in favor

of William R. Moore Dry Goods Company for $6,174.81, which it obtained against Sam Ellis, J. H. Washum and himself on May 21, 1928, in the United States District Court, Eastern District, Jonesboro Division. The transcript of the judgment, duly verified, was filed in the office of the clerk for the Eastern District of Lawrence County, and appellee paid the judgment to avoid the levy of an execution issued thereon and caused the judgment to be satisfied of record. The prayer of the complaint was for judgment against appellant for one-third of the amount paid by him in satisfaction of the judgment, less credits, in the total sum of $166.29, leaving a balance of $2,047.65.

Appellant filed an answer interposing the defenses of the statute of limitations and estoppel.

The cause was submitted to the court upon the pleadings and testimony, resulting in a decree in favor of appellee for $1,410.22, from which is this appeal.

The facts, in substance, are as follows: The Wilson Mercantile Company was a corporation and appellant, appellee and others were stockholders therein. In the years of 1924 and 1925 its financial condition was such that it became necessary for its stockholders, either severally or jointly, to personally indorse its notes and guaranty the larger part of its accounts in order for it to carry on. The indorsements and guaranties made by them severally and jointly amounted to over thirty thousand dollars when the corporation failed in the year 1926, at which time appellee had indorsed and guaranteed through himself or jointly with some of the others over $30,000 of the corporation's indebtedness, and appellant had indorsed and guaranteed $7,000 of the amount. In order to secure the stockholders for their indorsements and guaranties of the corporation's indebtedness the board of directors passed a resolution that the manager assign notes and accounts belonging to said corporation to said stockholders. At the time of the failure of the corporation, notes and accounts amounting to $16,938.30 belonging to the corporation had been assigned to T. J.

Wilson for himself, J. M. Lester (appellee), J. L. McKamey and J. H. Washum (appellant), all of whom were stockholders in the corporation. Appellee had guaranteed orally $2,996.05 of said accounts and notes on account of the corporation having furnished his tenants with supplies and J. G. Richardson, a solvent planter, had guaranteed orally $3,070.29 of said notes and accounts on account of supplies which had been furnished his tenants by said corporation. The testimony was to the effect that each had agreed to pay for the amounts furnished to said tenants, if the tenants themselves did not pay same. The goods were charged on the books to their several tenants and not to appellee or Richardson. After the notes were pledged to the four as security for their respective indorsements and guaranties and the corporation failed, there remained with the trustee in bankruptcy accounts totaling $8,545.41 which were sold to J. M. Lester for $150 by the trustee in bankruptcy. During the progress of the proceedings in bankruptcy against the said corporation all the notes were released by the referee in bankruptcy to T. J. Wilson, J. L. McKamey, J. H. Washum and J. M. Lester, who were the only stockholders who had indorsed or guaranteed the accounts aforesaid, to protect their indorsements and guaranties, and all of the notes and accounts were delivered to J. M. Lester (appellee), except such as had been pledged as collateral security to the People's Bank of Imboden, totaling about $2,890. Appellee collected $192.20 out of the notes assigned to them before the failure of the corporation, and $482.05 out of those delivered to them by the trustee in bankruptcy. The testimony was in conflict as to whether appellee made every reasonable effort to collect the notes and account. He testified that he did the best he could with the notes and accounts. Appellant offered to assist him if he was remunerated for his services, but appellee refused to allow him to retain a per cent. on collections. Appellant made no further effort to get any of the notes and accounts and no attempt whatever to collect same in order to protect his indorse-

ments and guaranties. Several witnesses testified that in their opinion eighty-five per cent. of the notes and accounts were collectable at the time they were delivered to appellee. Both appellant and appellee, together with Sam Ellis, indorsed and guaranteed the claim of the William R. Moore Dry Goods Company upon which it obtained the judgment against the three of them in the Federal court. When the William R. Moore Dry Goods Company obtained judgment against the three of them in the Federal court, appellee did not request or move for a summary judgment for one-third of the amount against appellant. It seems fairly certain from the testimony that appellee paid $30,124 and appellant $2,317.80 out of their own pockets on their respective indorsements and guaranties of the indebtedness of the Wilson Mercantile Company.

Appellant's first contention for a reversal of the decree is that appellee's claim for contribution was barred by his failure to move for a summary judgment against appellant in the United States District Court where the judgment was rendered in favor of the William R. Moore Dry Goods Company against them, in the time and manner required by §§ 8294 and 8295 of Crawford & Moses' Digest. The remedy provided in the sections referred to in behalf of sureties who pay joint obligations is not exclusive but cumulative. In the enactment thereof the Legislature did not intend to oust the chancery court of its ancient jurisdiction to enforce contribution between joint judgment debtors by an independent action. In 13 C. J., p. 833, the rule is announced in the following language:

"Summary proceedings provided by statute for the enforcement of contribution constitute a cumulative remedy. They do not bar an independent action."

Appellant also contends for a reversal of the decree upon the ground that appellee estopped himself from claiming contribution from appellant by his neglect to collect the notes and accounts which had been delivered to him. These notes and accounts were assigned to the

four stockholders mentioned above, including appellant and appellee, in equal proportion. That is, each was to have 25 per cent. of the amount of the notes and accounts, when collected, to apply upon his liability as indorser and guarantor. We find nothing in the record to indicate that the duty of collecting the notes and accounts was imposed upon either one of the indorsers or guarantors. The fact that they were in the manual possession of appellee did not impose any duty upon him to collect them and there was no agreement that he should do so. So far as the record reflects, appellant might have collected any of the notes and accounts himself. In view of this fact, he cannot say in good conscience that appellee is responsible to him for neglect or failure to collect any part of said notes and accounts. It is also argued that appellee should be required to account to appellant for at least 25 per cent. of the accounts he orally guaranteed totaling $2,996.05 on account of purchases made by his tenants from the corporation. This guaranty was oral and within the statute of frauds. It amounted to nothing more on the part of appellee than a moral obligation. He failed to collect the amounts from his tenants just as he did from the other debtors of the corporation. A court of equity cannot enforce obligations which are of no binding effect on the parties interested.

Under our view of the law and the facts reflected by the record, appellant is entitled to a total credit of $435.48 on appellee's claim of $2,214.21, including interest, leaving a balance due appellee of $1,778.73 instead of $1,410.22, the amount of the decree rendered in his favor.

The decree of the trial court is therefore modified to conform to this finding, and, as modified, is affirmed.

GRETZINGER *v.* WYNNE WHOLESALE GROCER COMPANY.

Opinion delivered February 23, 1931.

Caraway, Baker & Gautney, for appellant.

Giles Dearing, for appellee.

MEHAFFY, J. On October 25, 1929, the Wynne Wholesale Grocery Company, C. E. Martin and Morris Packing Company, commenced this action against S. C. Gretzinger, Robert Kirby and Dewey Sellers, alleging that Gretzinger and Kirby were owners and operators of a bakery at Wynne, consisting of an oven, mixer, engines, pans, cooking utensils, vessels and complete bakery outfit of the value of $3,500. Kirby had charge of and operated the bakery business and bought and sold all goods, wares, and merchandise and equipment used in the business.

S. C. Gretzinger and Robert Kirby were partners and they became indebted to the Wynne Wholesale Grocery Company and others. Prior to the time that Gretzinger and Kirby became partners, Gretzinger owned the property and Luther Beck managed it. They rented the building, both of them signing the rental contract. Whether Gretzinger and Beck were partners is immaterial.

While Beck was managing the business, it was operated as the "Wynne Bakery." After Kirby and Gretzinger formed a partnership it was operated as "Kirby's Hot Shop."

The stock of goods was bought by Kirby in the firm name, and it consisted of bakers' supplies, flour, sugar, yeast, fuel, etc. The firm had a truck which it used to distribute the products. The daily amount of stock on hand averaged around $200 or $250. The bakery purchased raw material and made bread, cakes, cookies, pastries, etc., and sold these products at wholesale and retail. The fixtures consisted of show cases, wrapping counter, cash register, desk, chair, bread mixer, molding machine, baking utensils, and equipment. Gretzinger and Kirby sold to Dewey Sellers the fixtures and all property and good will for $3,000, $1,000 cash, $1,000 due in six months, and $1,000 due in one year, evidenced by two promissory notes, bearing six per cent. interest per annum.

The chancellor found that Gretzinger and Kirby, while operating the business as partners, contracted the debts sued for, and gave judgment against Gretzinger and Kirby for the amount of the debts. He also found that the sale by Gretzinger and Kirby to Sellers was in violation of the Bulk Sales Act, and that the said purchaser, Dewey Sellers, was liable as receiver, for all the goods, wares, and merchandise, together with the fixtures and equipment purchased from Gretzinger and Kirby, and restrained Sellers from paying over to Kirby and Gretzinger any of the remaining $2,000 and impounded the notes in the First National Bank, and also held that the proceeds, when paid, be applied to the payment of debts proved against the Wynne Bakery and Kirby's Hot Shop.

The undisputed proof shows that Gretzinger and Kirby owed the debts, and the chancellor was therefore correct in rendering judgment against them.

The important question in the case, however, is whether the sale by Gretzinger and Kirby to Sellers was in violation of the Bulk Sales Act.

This sale was made on October 23, 1929. The Bulk Sales Act, the violation of which is alleged by the appellees is act 23 of the Acts of the General Assembly of 1929, approved February 19, 1929. Among other things this act provides: "The sale, transfer, mortgage or assignment in bulk of any part of or the whole of a stock of merchandise, or merchandise and fixtures pertaining to the conduct of any such business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, transferrer, or assignor, shall be void against the creditors of the seller, transferrer, mortgagor or assignor, unless the seller, transferrer, mortgagor or assignor and the purchaser, transferrer and assignor shall, at least ten days before the sale or the giving of the said mortgage, make a full, detailed inventory and preserve the same, etc."

It is conceded that this act was not complied with. The contention of the appellant, however, is that a bakery is not included within the prohibition of the act; that the Bulk Sales Act does not apply to such a transaction.

Appellants call attention to and rely on *Ramey-Milburn Co.* v. *Sevick,* 159 Ark. 358, 252 S. W. 20. In that case the court said: "It is clear from the language used that the purpose was to regulate bulk sales of merchandise as a part of the stock of a mercantile establishment. It has no application to a manufacturing plant which sells its product merely as an incident to the business." The court further said: "Other courts have so interpreted similar or identical statutes." Citing numerous authorities.

In that case the merchantable property consisted of logs and lumber of small value compared to the aggregate value of all of the property conveyed. The property consisted of several small manufacturing plants in White County, one a veneer mill at Higginson, and four sawmill

plants, one at Walker, one at Higginson, one at Crosby, and another at West Point.

It appears from that case that there was no stock of merchandise sold except some logs and lumber which were of small value. Certainly the manufacturing plants and real estate that were sold could not be said to be a stock of merchandise.

Another case cited and relied on was the *Fisk Rubber Co.* v. *Hinson Auto Co.,* 168 Ark. 418, 270 S. W. 605. The court said in that case: "A stock of merchandise might, of course, consist solely or largely of automobile parts and accessories, but we have concluded that the finding of the court below that there was no sale of a stock of merchandise is not clearly against the preponderance of the evidence. The business sold was primarily and essentially a repair shop, including an agency for the sale of cars, but it is not contended that any automobiles were included in the sale. To carry on this business it was essential that various parts be kept in stock, but such parts were kept ordinarily for use in repairing cars, and the articles were usually adjusted to the cars of the purchaser."

The sale of the property above described was not within the Bulk Sales Act.

In the case of *Root Refineries* v. *Gay Oil Co.,* 171 Ark. 129, 284 S. W. 26, 46 A. L. R. 979, the cases relied on by appellant, *Ramey-Milburn Co.* v. *Sevick* and *Fisk Rubber Co.* v. *Hinson Auto Co.*, were considered and the court said: "In this connection it may be stated that in *Ramey-Milburn Co.* v. *Sevick,* 159 Ark. 358, 292 S. W. 20, it was held that a person operating a veneer mill and sawmills, at which logs were manufactured into lumber and then sold, is not within the purview of our Bulk Sales statute, though he sells substantially all the lumber he has on hand at a particular time. The reason is that the sale of the lumber was only an incident to the operation of the manufacturing plant.

"On the other hand, if the main business of Sevick had been to operate a lumber yard, the sale in the bulk of his lumber and trade fixtures would have fallen under the ban of the statute, although he might have operated a sawmill and a veneer mill for the purpose of supplying, in whole or in part, stock for his lumber yard.

"Merchandise means something that is sold every day, and is constantly going out of the store and being replaced by other goods."

The court in the last case quoted from, cited *Boise Association of Credit Men* v. *Ellis,* 26 Idaho 438, 144 Pac. 6, 6 L. R. A. 1915E, 917, a decision of the Supreme Court of Idaho. The Idaho statute did not include the word "fixtures" and the Supreme Court of Idaho said that they could not read the word "fixtures" into the statute, and that merchandise, as used in this statute, must be construed to mean such things as are usually bought and sold by merchants. "Merchandise means something that is bought and sold every day, and is constantly going out of the store and being replaced by other goods; but the fixtures are not a part of the trade or business. They are not sold in the ordinary trade as goods."

It is also said in the Idaho case that the complaint did not charge that the goods, wares, or merchandise were sold to respondent Buhl, but it in effect claims that he should pay for them because he bought the fixtures, and this theory of the case would make the goods, wares and merchandise a part of the fixtures, instead of the fixtures being a part of the goods.

Our statute expressly includes fixtures and prohibits the sale in bulk of merchandise and fixtures in violation of its provisions. This court has held that a restaurant that had a soda fountain and sold cold drinks, cigars and confections, was not within the purview of the Bulk Sales Law, the court saying in speaking of the things sold: "This was however, incidental to its main business, that of serving foods to its customers." The court further said: "Clearly, we think, a keeper of a restaurant,

whose business it is to serve food and drink to the public, is not engaged in the mercantile or merchandising business, nor is he a merchant within the meaning of the Bulk Sales Law. Even though he may keep some merchandise which is used or useful in his business, including cigars and cold drinks, still we are of the opinion that this does not change the character of the business but is only incident thereto." *D. C. Goff Co.* v. *First State Bank of DeQueen,* 175 Ark. 158, 298 S. W. 884.

It was also held by this court that an electrical business which did repair work was not a merchandise business within the meaning of the Bulk Sales Law. The purchaser in that case "testified that he bought the contracting, wiring and repair business that Culberson and Benton then had on hand. * * * None of the material and supplies on which their accounts were based were in stock at the time he bought except one Westinghouse range, which was still on hand, which had been purchased from the Southwest Power Company. This was the only item in the stock at the time he bought that belonged to either the appellant or any of the intervening appellants. He further testified that 80 per cent. of the business is for contract work and repairs, and that the stock kept on hand is for his own convenience for fulfilling contracts and doing repair work. He stated that he would not estimate that over 10 per cent. of his business was for sales of accessories and stock carried away by the customer at the time of sale." *Wellston Radio Corp.* v. *Calhoun,* 175 Ark. 921, 300 S. W. 443.

In the instant case everything except the fixtures was not only for sale, but was sold every day and was constantly going out of the store or bakery and was being replaced by other goods. The principal business of the bakery was selling bread, cakes, cookies, pastries, etc. These were sold every day, and, while the stock kept on hand was not large, it was a stock constantly kept on hand, constantly being sold, and replaced by other goods. It is true that stock of merchandise was not large com-

pared with the value of the fixtures, but our statute includes fixtures as well as the stock of merchandise.

A sale or transfer of property in bulk is not within the condemnation of the statute unless the property falls within the statutory description at the time of the sale, but both the merchandise and fixtures are within our statute, and there is no property involved in this case except property within the statute, merchandise and fixtures.

It has been generally held that goods, wares and merchandise includes all classes of commodities kept for sale in the usual course of trade. 27 C. J. 880.

The stock of merchandise or goods, wares, and merchandise, do not include fixtures or other property not kept for sale, although used in connection with the business. Fixtures are not kept for sale, and if not included in the statute, would not be within the Bulk Sales Act. Our statute, however, includes fixtures.

It therefore appears that there was nothing sold to Sellers except the things included in the Bulk Sales Act.

There is some conflict in the decisions of the different courts in construing these statutes. The conflict in the decisions, however, is largely because of the differences in the statutes themselves. Some statutes mention stock of merchandise or goods, wares and merchandise and other goods, wares, merchandise and fixtures. Courts construing the statutes that did not name fixtures have held that fixtures were not included; that fixtures were not a part of the stock of merchandise. We do not deem it necessary to review the authorities because we think what is meant by the Bulk Sales Act in this State is settled by the decisions of this court, and, while statutes of this character are to be strictly construed, and not extended by construction, it is equally true that they should be construed and applied with a view to cure the evil at which they are aimed.

The following cases, most of them annotated, are cases construing statutes similar to the one herein in-

volved, *Boise Association of Credit Men* v. *Ellis,* 26 Idaho 438, 144 Pac. 6 L. R. A. 1915E, 617; *Everett Produce Co.* v. *Smith,* 40 Wash. 566, 82 Pac. 905, L. R. A. 2 (N. S.) 331; *Plass* v. *Morgan,* 56 Wash. 160, 78 Pac. 784; *Gallus* v. *Elmer,* 193 Mass. 106, 78 N. E. 772, 8 A. & E. Ann. Cas., 1067; *Hanson* v. *Vose,* 1441 Minn. 264, 175 N. W. 113, 7 A. L. R. 1573; *Blanchard Co.* v. *Ward,* 124 Wash. 204, 213 Pac. 929, 33 A. L. R. 59; *McPartin* v. *Clarkson,* 240 Mich. 390, 215 N. W. 338, 54 A. L. R. 1535.

The case of *Root Refineries* v. *Gay Oil Co., supra,* reviewed the cases decided by this court prior to that time and stated: "Merchandise means something that is sold every day and is constantly going out of the store and being replaced by other goods."

The distinction between this case and the cases where sales of restaurants were considered is that the bakery was selling merchandise every day. It was constantly going out of the store and being replaced by other goods, whereas the principal business of a restaurant is the serving of meals, not selling merchandise in the usual and ordinary way, and was therefore held to not be within the purview of the Bulk Sales Act.

The decree of the chancery court is affirmed.

KIRBY, J., dissents.

SHORT *v.* KENNEDY.

Opinion delivered February 23, 1931.

C. H. Herndon, for appellant.

O. A. Featherston, for appellee.

MEHAFFY, J. This suit was begun by appellee, who filed the following complaint in the justice of the peace court in Pike County:

"That some time in the month of May, 1929, the defendant cut and converted to his own use 3,234 feet of pine logs from the lands of the plaintiff. That said logs so converted by the defendant are worth the sum of $30, and that the defendant has failed and refused and still fails and refuses to pay the plaintiff therefor, although payment has been repeatedly demanded of the defendant by the plaintiff. Wherefore plaintiff prays that he have judgment against the defendant for the sum of $30 with interest thereon from the date of the conversion of the said timber, together with costs of this suit, and for all other legal and other relief."

The appellant filed several motions which the court overruled, and then answer was filed denying that appellee owned the land from which the timber had been cut and alleging that if any timber had been cut, it had been paid for in full. There was a trial and judgment for

appellee for the amount sued for, and appellant appealed to the circuit court. In the circuit court objections to the jurisdiction of the court were renewed and the several motions of appellant were presented and overruled. The trial in the circuit court resulted in a verdict and judgment for the appellee, and the case is here on appeal.

The appellant contends, first, that the case should be reversed because the court did not require the appellee to file his title papers, and because the court did not require the appellee to allege in his complaint whether this was an action for breach of contract or trespass.

The introduction of the title papers, if necessary for any purpose, would be evidence, but it was not necessary for the appellee to file his title papers. The rule requires a statement of the facts constituting plaintiff's cause of action, and it does not require the plaintiff in a case to file his evidence. *Driesbach* v. *Beckham,* 178 Ark. 816, 12 S. W. (2d) 408; *Ellis* v. *First National Bank,* 163 Ark. 471, 260 S. W. 714; *Cox* v. *Smith,* 93 Ark. 371, 125 S. W. 137, 137 Am. St. Rep. 89; *Bruce* v. *Benedict,* 31 Ark. 301; *Turner* v. *Tapscott,* 30 Ark. 312; *Ferrell* v. *Elkins,* 159 Ark. 31, 251 S. W. 380.

Appellant's motion to require appellee to state whether he was suing on a breach of contract or for trespass was properly overruled. The complaint stated plainly that the appellant had converted logs belonging to the appellees, of the value of $30, and asked judgment for that amount. It was therefore perfectly plain from the complaint filed that it was a suit for the value of the logs.

Appellant's motion to require the Caddo River Lumber Company and the Bank of Amity to be made parties was correctly overruled. His motion as to the Caddo River Company states no reason why the Caddo Lumber Company should be made a party. Without stating any facts at all, he simply asks that the Caddo River Lumber Company be made a party. In his motion to require the Bank of Amity to be made a party, he states that the legal

title to the land from which the timber was cut is in the Bank of Amity. He does not state any facts, and some one other than the plaintiff might have the legal title to the land, and still the plaintiff have the right to sue for timber converted.

All of these questions, however, are now immaterial, even if the appellant had stated facts, instead of mere conclusions of law, in his motion and answer.

The appellant, however, contends that the suit was for a trespass on land in Montgomery County, and that the suit could only be maintained in the county where the land was situated, and relies on § 1164, C. & M. Digest. The fourth subdivision, the one relied on, reads as follows: "Actions for the following causes must be brought in the county in which the subject of the action or some part thereof is situated. * * * For an injury to real property." And it is argued that this is an action: * * * Fourth. For injury to real property. This is not an action for trespass or injury to real property, it is a suit for the recovery of the value of certain logs alleged to have been converted by appellant to his use.

The case of *Jacks* v. *Moore,* 33 Ark. 31, was a case where the plaintiff alleged that the defendant entered on the land and cut timber growing thereon and otherwise injured the same, that is, injured the land. It was a suit for injury to the land.

In a later case the court, in discussing the case of *Jacks* v. *Moore*, said: "That case fell directly and palpably within the very terms of the statute, and no question is made but that it was correctly decided." *Jones, McDowell & Co.* v. *Fletcher,* 42 Ark. 422. The court also said in the last case mentioned: "The chief question is, and must be, in its ultimate form and effect: Does the decree appealed from operate directly and primarily upon the estate or title, or does it operate alone upon the persons of the appellants, and only indirectly and incidentally upon the estate or title?" In the instant case there can be no room for disagreement as to this question.

The judgment does not and could not operate upon the estate or title, and nothing is sought except a personal judgment against the appellant.

This court has said: "It is contended that the demurrer to the interplea is good because the interplea raised an issue as to the title to land, which the justice of the peace had no jurisdiction to try. This is incorrect. The interplea raised the question whether Whitecotton, Wise and Cravens were tenants of Strayhorn, and whether they had contracted to pay or were obliged to him for rent, to recover which he was suing. Their contention was that they did not hold under him as tenants; that he was not their landlord. An answer of this kind to an action in a justice's court, setting up a want of title to the land, is not, of itself, sufficient to oust the jurisdiction of the court, without evidence on the trial tending to bring the title into question." *Jansen* v. *Strayhorn,* 59 Ark. 330, 27 S. W. 230.

The court again discussing the case of *Jacks* v. *Moore, supra,* said: "In *Jacks* v. *Moore, supra,* the complaint alleged that the defendant entered upon the following land (describing it) and cut the timber growing thereon, and otherwise injuring the same to the damage of the plaintiff $200. That was a suit for trespass upon the land and injury to it. But such is not the nature of this suit. It is simply a suit for the value of timber, which appellee alleged belonged to him, and which his agent, appellant, had converted to his own use. There is no allegation that the land itself was injured or damaged, or that appellant had trespassed thereon in order to convert the timber. The Columbia Circuit Court had jurisdiction, under the allegations of this complaint, to render judgment for the value of timber, if any, that was converted by appellant from the land in Nevada County." *Emerson* v. *Turner,* 95 Ark. 597, 130 S. W. 538.

Like the suit in the last case cited, this is a suit for value of timber. There is no allegation that the land was damaged or injured, but a personal judgment against

appellant for the value of the timber is sought, and the judgment in no way operates on or affects the title to real estate. The action therefor might be brought wherever service could be had.

It is argued by appellant that the case of *Emerson* v. *Turner, supra,* is in conflict with the case of *Jacks* v. *Moore.* There is no conflict. The case of *Jacks* v. *Moore* was a suit for damages to land, and under the statute that sort of a suit must be brought in the county where the land is situated. The case of *Emerson* v. *Turner* was a suit for the value of timber, just as the suit at bar is, and was not in any sense a suit for damages to land. Therefore the court in Montgomery County had jurisdiction.

It is contended, however, that the justice court had no jurisdiction because title to land was involved. The statute reads as follows: "A justice of the peace shall not have jurisdiction where a lien on land or title or possession thereto is involved." And, of course, if the justice of the peace had no jurisdiction, the circuit court would not acquire jurisdiction when the case was appealed, but in this case there was no question about a lien on land and neither the title nor possession was involved.

This was simply a suit to recover $30 alleged to be the value of timber belonging to the appellee converted by the appellant to his own use. It would make no difference where or how the appellee acquired the timber if it was his, but a bond for title was introduced showing that appellee purchased the land on the 7th day of October, 1919. Fifty dollars was paid cash, and the balance was to be paid in installments.

The evidence also shows that the appellee had been in possession and paying taxes since 1919, and no one else claims title or any interest in the land. Appellant offered no evidence tending to show that the land and the timber belonged to any one other than the appellee. The title to the land was therefore not involved, nor was

the possession of the land involved. The appellee had been in possession of the land and paying taxes for more than ten years, this suit having been brought on the 20th of August, 1930.

"There was no controversy concerning the title to land. The plaintiff was not bound to prove or disprove her title to the land in order to establish her right to recover in the action. The undisputed evidence shows that she was to take possession of the land for the year 1910, and to receive the rent for the same. Her tenant left her share of the crop in the field, and she had a right to recover it from the defendant who had unlawfully taken possession of it. The lease contract was not an issue in the case, and the title to the land was not involved." *Cline* v. *Cline,* 101 Ark. 250, 142 S. W. 167; *Mathews* v. *Morris,* 31 Ark. 222; *Nolen* v. *Royston,* 36 Ark. 561; *Bramble* v. *Beidler,* 38 Ark. 200; *Jordan* v. *Henderson,* 37 Ark. 120; *Jansen* v. *Strayhorn,* 59 Ark. 330, 27 S. W. 230.

The defendant in a suit cannot defeat the jurisdiction of the justice court merely by alleging that the plaintiff has no title. The evidence in this case clearly shows that the appellee had purchased the land in 1919, was in possession of it, and had paid taxes on it for more than ten years. No one else was claiming the title. The title to the land was not involved.

This was a suit for $30, the alleged value of timber, and the justice court had jurisdiction. The fact is that the appellant alleged that the timber had been paid for by the Caddo River Lumber Company, but that question was submitted to and determined by the jury, and we find no error, and the judgment of the circuit court is therefore affirmed.

SMITH, J., (dissenting). Jurisdiction is determined by the allegations of the pleadings, and the majority opinion recites that the complaint filed in the justice court alleged that "The defendant cut and converted to his own use 3,234 feet of pine logs from the lands of the

plaintiff." It would be difficult, if not impossible, to cut that amount of timber without entering upon the lands upon which it stood, so that the complaint alleges a trespass upon land, and the character of the suit is not affected by the allegation that the defendant converted the timber after cutting it down.

The instant case is identical with that of *School District* v. *Williams,* 38 Ark. 454, in which it is recited that "School District No. 11, of Faulkner County, sued Williams in trespass before a justice of the peace for cutting and removing timber from a sixteenth section, and laid the damage at $100." Reversing the judgment for $72.50 in the circuit court upon the appeal from the justice court, Chief Justice ENGLISH said: "The Constitution does not invest justices of the peace with jurisdiction of trespass upon real estate. Section 40, art. 7. The justice of the peace had no jurisdiction of the subject-matter of the action in this case, and all of the proceedings before him were *coram non judice* and void." The cases of *Cockrum* v. *Williamson,* 53 Ark. 131, 13 S. W. 592, and *Halpern* v. *Burgess,* 13 S. W. 763, are to the same effect.

The majority cite *Jansen* v. *Strayhorn,* 59 Ark. 330, 27 S. W. 230, and similar cases to the effect that "an answer of this kind to an action in a justice's court, setting up a want of title to the land, is not, of itself, sufficient to oust the jurisdiction of the court, without evidence on the trial tending to bring the title into question." These are cases in which the relation of landlord and tenant was alleged to exist, and the holding of the court was that, if that relationship existed, the plaintiff's title was immaterial, as the tenant could not question it.

The case of *Bramble* v. *Beidler,* 38 Ark. 200, cited by the majority, was one in which a grantor sued his grantee in the justice court for a balance of $92.75 due upon the sale of a small tract of land. It was held that the jurisdiction of the court was not affected by the denial of the plaintiff's title to the land sold, the principle applied

being that a purchaser, who had received a deed with covenants of warranty, under which he had entered into possession, could not, so long as he retained possession, deny his vendor's title or refuse to pay the purchase money.

Here no relation is alleged to exist which precluded the defendant from questioning plaintiff's title. On the contrary, it appears from the majority opinion that the defendant not only denies plaintiff's title, but alleges it to be in the Bank of Amity, and that the plaintiff, so far from having a title, has only a bond for title. We have repeatedly held that a bond for title not only does not convey the title, but is not even color of title. It is a mere contract to make a title upon the performance of the named conditions. *White* v. *Stokes*, 67 Ark. 184, 53 S. W. 1060; *Beasley* v. *Equitable Securities Co.*, 72 Ark. 600, 84 S. W. 224; *Willm* v. *Dedman*, 172 Ark. 783, 290 S. W. 361; *Butler* v. *Johnson*, 180 Ark. 156, 20 S. W. (2d) 639. Here defendant attempted to show that the title was in the Bank of Amity, and that plaintiff had only a bond for title, and the court refused even to make the Bank of Amity a party. If this bond for title should be canceled, there are possibilities of a suit for this same trespass on the part of the bank, the owner of the land, which is not concluded by the judgment here appealed from, as the bank was not a party to that suit. But, by whomsoever brought, the suit should have been commenced in the circuit court. Title to the land is essential to maintain a suit of this character, and, as was said by Judge English in the school district case, *supra*, the justice of the peace had no jurisdiction and all the proceedings before him were *coram non judice* and void, and the circuit court, of course, acquired no jurisdiction on the appeal.

I am authorized to say that Mr. Justice Humphreys concurs in the views here expressed.

JIM FORK COAL COMPANY *v.* RHOTENBERRY.

Opinion delivered February 23, 1931.

John W. Goolsby, for appellant.

Earl Dunn and *George W. Dodd,* for appellee.

McHANEY, J. Appellee, a coal miner, received personal injuries by the falling of a rock in an entry in the mine of appellant, in which he was working, and brought this action against it to recover damages therefor. He alleged negligence of appellant in failing to furnish props or timbers with which to support and safeguard the roof of the entry in which he was working, within a reasonable time after demand was made therefor by him. The case was tried to a jury which resulted in a verdict and judgment against appellant for $900.

For a reversal of the judgment against it, appellant first says the court erred in permitting the following question to be asked appellee: "Q. Describe the rock that fell from the roof and the cause of its falling. First, I will ask you, on the day of the injury did you request props and timbers?" Objection was made to the question on the ground that it was leading. The court permitted the witness to answer that he did ask for timbers. The above question could hardly be classed as leading, as it did not suggest the answer. The witness might have answered it yes or no. But, even if it were leading, it was not prejudicial, as all the appellee's evidence was to the effect that he did demand props, and that they were promised him but not delivered. *Southern Cotton*

Oil Co. v. *Campbell,* 106 Ark. 379, 153 S. W. 256. Such matters rest largely in the discretion of the trial court.

Appellee was also allowed to testify, over objections of appellant, that he ordered props sent down on Friday, Saturday and Monday, the day he was injured, and that some two or three were sent down on Friday, but that another workman in the mine, one Wooten got them. This testimony was competent as tending to show that props were demanded by appellee.

The other assignments of error urged relate to instructions 1 and 2 given by the court at the request of appellee and over appellant's specific objections. We do not set them out and discuss them separately as no good purpose could be served thereby. The court gave all instructions asked by appellant, except one, which was peremptory, and we think fully and fairly instructed the jury. The principal question was one of fact, that is, whether appellee had ordered props which appellant neglected to furnish, and whether the rock that fell and injured appellee was one that should have been propped, or should have been taken down. There is no question about the fact of appellee's injury, or the extent and nature thereof, nor the amount of the verdict. The instructions being correct, and the evidence being ample to support the verdict, the judgment must be affirmed.

It is so ordered.

McNeese *v.* Raines.

Opinion delivered February 23, 1931.

[redacted]

Richardson & Richardson, for appellant.

W. P. Smith and *O. C. Blackford,* for appellee.

McHaney, J. Appellant brought this suit against appellee and one John Gullett to recover damages for personal injuries sustained by him while he and said Gullett were in the employ of appellee. Appellee is a contractor, and was engaged in the erection of a brick building in Hoxie, Arkansas. Appellant alleged that appellee negligently failed to furnish the employees a container or means of getting the brick up on the scaffold for the masons to put in the wall, and that appellee directed him to stand on the scaffold, about 7 feet above the ground, and catch the brick as they were pitched to him by Gullett and stack same on the scaffold convenient to the masons; that the bricks were pitched up to him two at a time, and that, while placing two bricks on the scaffold with his face turned away from Gullett, Gullett pitched two more bricks before he was ready to receive them, which struck him in the groin, causing great pain, from which he fainted, fell off the scaffold and was severely injured. He later amended his complaint alleging negligence of the appellee in the employment of Gullett in that Gullett was incompetent "at and prior to the time plaintiff was injured," because he was nearsighted and could not know that he was not ready to catch the brick at the time he was injured, which was known to the appellee, or, by the exercise of ordinary care, could have been known to him, and which was unknown to appellant. He further alleged that Gullett had a bad disposition towards appellee and the other workmen which was also known, or by the exercise of ordinary care could have been known, by the appellee. It was further alleged that the manner of getting the brick upon the scaffold was dangerous, and that appellee was warned thereof by him, who agreed to furnish containers for carrying the brick up, of a kind similar to that used for carrying

up the concrete, and that he relied upon such promise, but the appellee failed to furnish same.

Appellee interposed a general demurrer to the complaint and the amendment which was sustained by the court. Appellant declined to plead further and the court entered a judgment dismissing his complaint. The case is here on appeal.

For a reversal of the case appellant relies upon two acts of negligence alleged in his complaint, one that appellee failed to furnish him a safe place to work, and safe tools and appliances with which to work; and second that said Gullett was incompetent to do the work allotted to him with safety to appellant.

It is conceded that Gullett was appellant's fellow-servant, and that appellee is not liable for the mere negligence of Gullett. *Walsh* v. *Eubanks, ante* p. 34, 34 S. W. (2d) 762, being the latest case on the subject. The allegation in the complaint that appellee failed to furnish him a safe place to work and safe tools and appliances with which to work does not state a cause of action because it is not alleged that he was injured by reason of the unsafety of the place in which he was working nor by reason of any defect in any tools or appliances with which he was working. He was working on a scaffold. It is not alleged that the scaffold was defective or that it fell or that he fell off the scaffold by reason of any defect therein. And he was not working with any tools or appliances. He was simply catching brick that were pitched to him by his fellow-servant, and any injury he received was caused by the negligence of such fellow-servant in pitching the brick at a time when he was not ready to receive them.

As to the allegation that Gullett was incompetent to do the work with safety to appellant because of defective eyesight or bad disposition, we think the complaint fails to state a cause of action for the reason that, if it be true, as alleged, that he was so afflicted and had been all the time appellant was working with him, the means of dis-

covering same was as open to appellant as to appellee. The allegation in the complaint is that Gullett was incompetent "at and prior to the time plaintiff was injured."

The complaint therefore failed to state a cause of action, and the trial court correctly sustained the demurrer.

Affirmed.

TAYLOR *v.* ERMEN.

Opinion delivered February 23, 1931.

Bruce Ivy, for appellant.

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

BUTLER, J. This suit was brought by the appellant to enforce the statutory liability of stockholders of insolvent banks as fixed by § 702 of Crawford & Moses' Digest. Appellant alleged that the Citizens' Bank of Osceola became insolvent on the 5th day of January, 1928, at which time the appellee was the owner of sixty shares of the corporate stock of said bank of the par value of $1,500; that, as Bank Commissioner, he made an assessment of 100 per cent. against all the stockholders and against the appellee who failed and refused, after demand made, to pay the assessment, and that, by reason

of said assessment and appellee's failure to pay, appellee became, and is, indebted to the appellant as Bank Commissioner in the sum of $1,500, for which judgment was prayed. The appellee answered admitting all the allegations of the complaint except that which alleged ownership in him of the sixty shares of stock. This he denied, and testimony was heard, and the case submitted to a jury on that issue. The verdict was for the defendant, and from the judgment of the court based thereon is this appeal.

The following facts appear to be undisputed: First, the appellee, during the year 1927 and on the 5th day of January, 1928, was shown by the bank's records to be the owner of the sixty shares of stock. During the year 1927, and for many years prior thereto, he was and had been, a director of the bank, punctual in his attendance on all of the directors' meetings, with knowledge of the loans made, and giving at each monthly meeting his approval of the loans made for the month next preceding. He took part at such directors' meetings in the discussions regarding the affairs of the bank with his fellow directors, and with the bank examiner, from time to time as examinations were being made of the condition of the bank. He attended the last meeting of the board of directors that was held before the doors of the bank were closed on January 5, 1928. He drew a monthly salary as director, two of his last salary checks being drawn and delivered to him in the month of December, 1927.

Second, on the 6th day of May, 1927, he made a written assignment of his certificates of stock in blank and delivered them to A. J. Baber, but did not notify the president and cashier of the bank, or either of them, of this action on his part, nor was there any notation of this assignment made upon the books of the bank. Baber presumably had possession of these certificates of stock from that time until December 29, 1927, when he in turn, for a consideration of $900 to be paid, assigned the said

certificates to B. R. Moore who executed notes the first of which was due in three months. These notes were delivered to the appellee by Baber on the following day. At the time or shortly after the bank closed, Moore notified the appellee that the purchase of stock by him was made under certain conditions which were not carried out, and that he would not pay the notes or any of them. This suit was filed on the 28th day of December, 1928, but the appellee had taken no action to enforce the payment of the notes up to and including the date of the hearing of this case in the circuit court.

It is insisted by the appellant that under the facts in this case the appellee is liable, first, because he did not sell his stock; second, that the sale, if made, was with the knowledge that the bank was insolvent, and that it was not made in good faith but to escape his statutory liability; third, that because of his peculiar relation to the bank and the bank's condition before and at the time of the purported sale, the same would be ineffectual to relieve appellee of liability because the stock was not transferred on the books of the bank and a certificate signed by the president and cashier deposited with the county clerk of the county in which the bank was located.

Appellee testified that he did not know the failing condition of the bank at any time during the year 1927, and that the sale was not made for the purpose of avoiding his statutory liability, but that he was getting old and was trying to dispose of all the stock that he owned in various corporations, including the bank stock in question; that he assigned the stock to Baber and directed him to dispose of it and left it to his judgment as to terms and price. Appellant insists that, under the circumstances of the case, the appellee cannot be heard to deny knowledge of the condition of the bank, and that all the circumstances of the case conclusively show, notwithstanding appellee's statement to the contrary, that the sale was a mere subterfuge on the part of the appellee to escape liability, and that appellee is not within the

rule laid down in *Taylor* v. *McKennon,* 178 Ark. 223, 10 S. W. (2d) 360, because in that case the undisputed facts show that the stock was sold at a time when the bank was solvent, and there was no suspicion of fraud in the transaction. McKennon was not an officer or director of the bank, and he received full value for his shares of stock, the sale having been made approximately a year and a half before the bank was closed. The court there held that, under those circumstances, McKennon was not liable because the transfer was not made in conformity with § 686 of the Digest.

But it is insisted that the case last cited has no application to the case at bar because of the essential dissimilarity of the facts, both as to the condition of the bank and the relationship that sellers of the stock sustained to the bank; that under the facts in the instant case the law will impute to the appellee knowledge of the condition of the bank, which, considered with the circumstances attending the transfer of the stock by the appellee to Baber and the latter's delay in making the sale, and the price for which the stock was sold, the time of the sale to Moore and the condition of the bank prior thereto conclusively show lack of good faith in the transaction—so much so as to prevent the escape of appellee from liability. There are a number of circumstances appearing in the record which bear upon the contention of the appellant as above stated, which we deem it unnecessary to mention as we prefer to place our decision on the fact that there was, indeed, no completed sale made by the appellee to Baber, or by Baber to Moore, and that appellee was in fact the owner of the stock in question on the 5th day of January, 1928.

Appellee, while stating in answer to a question, that he had made an outright sale to Baber in May, 1927, immediately corrected that statement, and the effect of his testimony was that there was no sale in fact to him but that the transaction was merely to enable Baber to more readily dispose of the stock to another. Therefore, from

May, 1927, down to the 29th day of December, 1927, appellee was the owner of the stock which was assigned to Baber, and which was in his possession only for the purpose of its disposal, and in his dealings with Moore, Baber merely acted as the agent of the appellee, being clothed by the latter with authority to deal with the stock and make such terms with respect to the sale thereof as if he were in fact the owner. So, whatever deal was made by Baber with reference to the sale to Moore would be binding on the appellee. Baber did not testify in the case, there being but one witness who testified regarding the sale of the stock on December 29 to Moore, and that was Moore himself. This testimony was not disputed by any other testimony in the case, and we must accept it as true. According to that testimony, the sale was not to be a completed contract, or the notes executed evidencing the purchase price a binding obligation, unless and until Baber had the necessary certificate of transfer issued by the bank officials and such disposition of it made as to meet the requirements of law and proper record made on the books of the bank. He failed and neglected to comply with any part of this agreement, which was a condition precedent to the completion of the sale of stock.

The rule is that in sales of chattels the intention of the parties shall govern as between them, and they may prescribe the terms upon which a sale shall become a completed transaction and name the conditions which must be met before the same becomes a finality. The test as to whether or not there was a completed sale in this case is, could the appellee under these facts enforce the payment of the notes by Moore, the alleged purchaser of the stock? This court, speaking through Mr. Chief Justice HILL in the case of *Graham* v. *Remmel,* 76 Ark. 140, 88 S. W. 899, 6 Ann. Cas. 167, approved and adopted the rule announced in *Burke* v. *Dulaney,* 153 U. S. 228, 14 S. Ct. 816, where, commenting on the effect of the evidence offered, it was said, it "tended

to show that the written instrument was never in fact delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this is based, was not—except in a named contingency—to become a contract or promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract, entitling the party who claimed the benefit of it to enforce its stipulations.''. This now seems to be the settled rule. *Barr C. & P. Co.* v. *Brooks,* 82 Ark. 219, 101 S. W. 408; *Kimbro* v. *Wells,* 112 Ark. 132, 165 S. W. 645; *Cochran* v. *Shull,* 115 Ark. 229, 170 S. W. 997; *Inman* v. *Quirey,* 128 Ark. 605, 194 S. W. 858.

Applying this rule to the facts attendant upon the sale as disclosed by the undisputed testimony of Moore, we hold that the sale never became a completed contract, that the notes were void and uncollectable, and that the appellee was the owner of the stock on the date that the doors of the bank were closed, and therefore liable for the assessment made by the Bank Commissioner. It follows that the judgment of the court below is reversed, and the cause remanded for further proceedings in conformity to law and not inconsistent with this opinion.

RURAL SPECIAL SCHOOL DISTRICT No. 21 *v.* COMMON SCHOOL DISTRICT No. 87.

Opinion delivered February 23, 1931.

Reed & Beard, for appellant.

Trimble, Trimble & McCrary and *O. E. Williams,* for appellee.

BUTLER, J. On the 28th day of March, 1930, a petition for the consolidation of Rural Special School District No. 21 with Common School District No. 87 of Lonoke County, after the required notice had been given and proof thereof made, was filed with the county board of education of said county. Thereafter, on the date of the hearing thereof, April 12, 1930, there were three other petitions filed affecting district No. 87, one praying that, in the event it was found that district No. 87 should be abolished, or that its boundary lines be changed, certain named sections thereof be detached and annexed to Special School District No. 10, alleging that it was for the best interests of the patrons and school children residing on said land and of all parties affected that the same be annexed to Special School District No. 10, and concluding with the prayer that the boundary lines of district No. 87 be changed and the territory named annexed to said district No. 10. Another asking that certain other sections of district No. 87 be detached and annexed to Common School District No. 92; the third, that the other parts of district No. 87 be annexed to Common School District No. 90. No notice of these three petitions for the change of the boundary lines of district No. 87 and the annexation of its parts to Special School District No. 10 and Common School Districts Nos. 90 and 92 was given. On April 12, 1930, the petition for the consolidation of Common School District No. 87 and Special School District No. 21 was presented to the board for its action, as were also the other petitions. The board ignored the last three petitions filed and made an order consolidating districts Nos. 21 and 87 as prayed. An appeal was taken to the circuit court, and at the hearing all of said petitions were considered. The court heard the case on said petitions and testimony introduced on behalf of the appellants and the appellees and the following stipulation of counsel: "It is admitted by all parties hereto that a majority of the electors of Rural Special School District No. 21 and Common School District No. 87 have signed

the petition herein for a consolidation of said districts, but that only two or three of the signers of the petition of those who live in Common School District No. 87 are qualified electors, said latter petition containing 24 names; and that the respective petitions from Common School District No. 87, Common School District No. 90, Common School District No. 92, and Rural Special School District No. 10, contain.....names, and are a majority of the qualified electors from said districts as to the territory affected under these petitions."

The court thereupon rendered judgment, which, omitting formal parts, is as follows:

"Since the school is going to maintain a bus to transport the children to and from school, who are located in sections 11, 12 and 13, the court finds that district No. 10 is a party to this lawsuit and has a graded school, and the testimony shows that they are not overcrowded, and it is for the best interest of Special School District No. 10 to have sections 29 and 30 and the south half of sections 19, 20 and 21. The court further finds that district No. 90 is a party to this lawsuit, and the undisputed evidence shows that the children who live in sections 11 and 12 are unable to be transported to Central High, nor to district No. 10, and it would be to the best interest and benefit to the people who live in these sections to join over in district No. 90. The court further finds under the undisputed testimony that the children who live in sections 13 and 14 could not be transported to Central High on account of the high water, and they are not attending district No. 92, and it would be to the best interests that they be annexed to No. 92. The court further finds that the majority of the parties who are qualified electors of School District No. 87 are opposed to going into district No. 21, and it would be to the best interest of district No. 87 to remain like it is. The court further finds that district No. 21 is overcrowded, and, unless you can agree to the division, the court finds it is to the best interest of the districts and the territory as a whole, and the per-

sons thereof, that district No. 87 be not annexed to district No. 21, and that No. 21 and No. 87 remain like they are, and that the action of the Lonoke County Board of Education in, by its order, changing the boundary line between Rural Special School District No. 21 of Lonoke County, Arkansas, and Common School District No. 87 of Lonoke County, Arkansas, so as to embrace and include in its entirety all the territory of Common School District No. 87 within the boundaries of Rural Special School District No. 21 is arbitrary and unreasonable."

To reverse the above judgment this appeal has been prosecuted.

1. It may first be said that the effect of the several petitions for the change of the boundaries of district No. 87 and attaching parts of its territory to school districts Nos. 10, 90 and 92, respectively, if granted, was to dissolve and dismember district No. 87.

"The county board of education shall have power to dissolve any school district now established or which may hereafter be established in its county, and attach the territory thereof in whole or in part to an adjoining district or districts, whenever a majority of the electors residing in such district shall petition the court so to do." Section 8869, Crawford & Moses' Digest.

"When such dissolution is proposed, notice shall be given by those proposing the same by posters in four public places in the district. Such notices shall be posted thirty days before the meeting of the board at which such petition is proposed to be presented." Section 8870 *Ib.*

The compliance with § 8870, *supra,* as to notice, is jurisdictional, and, as no notice was given, the board properly ignored the three petitions last filed. *Rural Special School Dist.* v. *Baker,* 144 Ark. 397, 222 S. W. 732; *Mitchell* v. *Directors Special School Dist.,* 153 Ark. 50, 239 S. W. 371; *Acree* v. *Patterson,* 153 Ark. 188, 240 S. W. 33.

Since a majority of the qualified electors of the territory embraced within the boundaries of district No. 87 and district No. 21 signed the petition and due notice of its presentation to the county board of education was given, the board acquired jurisdiction to hear the same. It appears that no testimony was heard or offered before the county board, but it had the power, nevertheless, to make the order, which is valid unless it is shown that the order was an abuse of its discretion.

It would hardly be possible to create a school district or to change its boundaries so as to give equal convenience to each child residing therein. Some must necessarily be further removed from the school than others, not all the ways from the home to the school would be alike, and in matters of schools, as in all the other affairs of men, some must suffer for the common good. The primary object for the creation of school districts is to give such educational advantages as will tend to a diffusion of knowledge and the growth of intelligence among all classes, and all considerations should be secondary to this; and it is this which the lawmakers contemplated when, in providing for the change, formation, or consolidation of school districts, it was stipulated that this should be done in a manner that "would be for the best interest of all parties affected." In these matters the rights of everyone must be respected, and no one should be unncessarily inconvenienced or oppressed, and whenever any district is created or consolidated with another, or its boundaries changed, the county board of education may not "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 of the whole territory should be respected if, in doing so, it would not greatly harm the other parties affected." *Bledsoe* v. *McCowan,* 181 Ark. 584, 26 S. W. (2d) 900, and cases there cited.

Applying the principles announced to the evidence, we are unable to see how it supports the findings of the

learned trial judge that the action of the county board of education was arbitrary and unreasonable. It is true that a number of witnesses testified that some of the children residing in district No. 87 would be greatly inconvenienced by the consolidation of that district with district No. 21, and that school districts Nos. 10, 90 and 92 would be greatly benefited by the annexation of the territory of district No. 87 to these districts. The school for white children in district No. 87 as maintained consisted of a one-room school house conducted by one teacher, having an attendance of from eight to fifteen children. The school in district No. 21, called Central High, is composed of a number of commodious modern school buildings with all of the necessary equipment, having thirteen teachers, with grades running from the primary up to and including a high school course, it being known as a Class A school, and its graduates admitted to the State University without examination. In comparing the advantages of these two schools to a child, two of the witnesses for the appellees testified that it had much better advantages in the former school than in the latter. However, this opinion, which may have some justification in the reasons given by the witnesses, seems to run counter to the trend of modern thought, and certainly would not warrant the assumption that the board was arbitrary and unreasonable in holding to a contrary view.

On behalf of the appellant, it was shown that there was a highway running across the territory of district No. 87 to the school in district No. 21, on which highway buses for the transportation of children might be, and were, operated, and that the time required to transport the children from district No. 87 to the school in district No. 21 was from fifteen to thirty minutes. It was also shown that about two miles was the greatest distance any of the children had to walk to reach the highway, and that shelters were to be erected to be used by the children while awaiting the arrival of a bus; that the attendance of children from the territory of district No. 87 to the

school in district No. 21 had been greater since the consolidation of the district than the attendance at the school in district No. 87 before such consolidation.

District No. 87 had no outstanding indebtedness, while district No. 21 had an outstanding indebtedness of $34,000, which had been incurred in the erection of school buildings. It was shown, however, that the revenue exceeded the current expenses which included the incidental expenses, teachers' salaries, and interest on bonds, and from the excess revenue the school authorities had been able to retire several thousand dollars of the outstanding bonds. One of the complaints made by the witnesses for the appellees was that the negro school in district No. 87 had been reduced from a six months' to a five months' term, but it was also stated by these witnesses that the person principally interested had been promised that the same kind of a school for the negroes should be maintained as had been before.

Prior to the consolidation, district No. 87 had only a ten-mill levy, and it appears that fear of an increase in the tax rate was one of the principal reasons for the circulation and presentation of the three petitions filed before the county board after the first petition for consolidation. It was the opinion of the trial judge and one of the reasons given for his judgment that the school in district No. 21 was overcrowded. While a great number of children attended that school, we have been unable to discover the evidence upon which this opinion was based, and, if the entire school population of district No. 87 should regularly attend the school in district No. 21, it could not greatly augment the number, for these were only fifteen.

The county board of education, with the advice and information furnished it by the county superintendent of schools, has been deemed by the Legislature the tribunal most competent to pass on such questions as are here presented, and in reviewing its action every legitimate presumption must be indulged in to sustain its orders,

and upon those who would have same vacated for an abuse of discretion rests the burden of establishing it. We are of the opinion that under the evidence adduced in this case it cannot be said that the county board acted arbitrarily within the rule before stated, and therefore the judgment of the trial court is reversed, and the cause remanded, with directions to affirm the order of the county board of education.

BOYDSTUN *v.* CONDRAY.

Opinion delivered March 2, 1931.

Gibson & Burnett, for appellant.

J. M. Brice and *C. E. Condray,* for appellee.

SMITH, J. Appellant, a citizen and taxpayer of Arkansas County, brought this suit December 23, 1930, against the incoming and outgoing county judge and county clerk of that county and certain persons who were designated as courthouse commissioners, to restrain them from letting a contract to construct a courthouse in the southern district of Arkansas County.

Testimony was heard by the court supporting the allegations of the complaint and answer to the following effect. In November, 1927, the levying court of Arkansas County adopted a resolution authorizing the construction of a new courthouse on the site of the old one, and authorizing the expenditure of a sum not exceeding $50,000 for that purpose, payable $5,000 per annum. Thereafter, at the January, 1928, term of the county court, commissioners were appointed to execute this

order, and they employed an architect to prepare plans for the building, and paid him $350 for that service.

The revenues of the county are sufficient to make the annual payment of $5,000 for the courthouse and still leave enough revenue to meet the other necessary expenses of the county's government. The commissioners have not let a contract for the building of the courthouse, but have matured their plans and are about to let a contract, and will do so unless they are restrained. No election has been had on the question of building the courthouse as required by amendment No. 15, adopted at the general election in 1928, whereby counties were authorized to build courthouses and jails and to issue bonds to pay therefor.

The court below declared the law to be that amendment No. 15 did not apply to the facts of this case, for the reason that the construction of the courthouse had been authorized in the manner provided by law before amendment No. 15 was adopted; and this appeal has been prosecuted to review the decree dismissing the complaint as being without equity.

In the case of *Carter* v. *Cain,* 179 Ark. 79, 14 S. W. (2d) 250, certain persons, who had been appointed commissioners to erect a courthouse and jail in Woodruff County, reported to the county court on November 30, 1928, that they had previously procured a lot and had prepared plans and specifications for the courthouse and jail, and the commissioners were then ordered by the county court to proceed with the execution of their plans. Thereupon a citizen and taxpayer brought suit to enjoin this expenditure, upon the allegation that no power existed to make a contract of this character until a vote of the citizens of the county had authorized it as required by amendment No. 15, there referred to as amendment No. 11, Applegate's Annotated Constitution, page 235.

We there reviewed cases which had construed the amendment referred to as No. 11 (the correct number of

which appears to be No. 8, Applegate's Annotated Constitution, page 219), prohibiting the counties, cities and towns of the State from increasing their existing indebtedness, in which cases we had held that a county might distribute the payment of the cost of a courthouse or jail over a period of years, provided such payments, together with the other necessary expenses of government, did not exceed the annual revenues of the county. We there said: "After the court had construed this amendment No. 11 to mean that a county could go in debt for courthouses and jails, the people then adopted amendment No. 17, vesting the authority and right to construct courthouses and jails and to levy taxes to pay for them, in the qualified electors of the county. Amendment No. 17 was evidently adopted for the very purpose of meeting the decision of this court and accomplishing what they thought was accomplished by amendment No. 11, when adopted. That is, to prevent counties from going in debt, and provide a method for building and paying for courthouses and jails. But it is insisted that there are two methods now. We do not agree to this contention."

The effect of the decision in *Carter* v. *Cain, supra,* is that, if a county wishes to erect a courthouse or jail, and finds it necessary to distribute the payment of the cost over a period of years, authorization so to do must be obtained at an election in which the question is submitted to the electors as required by amendment No. 15.

It is insisted, however, as was decided by the court below, that amendment No. 15 does not apply to the facts of this case, for the reason that the construction of the courthouse was authorized by the levying court before the amendment was adopted. Such also appears to have been the fact in the case of *Carter* v. *Cain,* but, whether this was so or not, it was decided in *Carter* v. *Cain* that amendment No. 15 deprived a county, after the adoption of the amendment, of the right to contract for a courthouse or jail for which it could not pay out of current revenue except after an election at which the electors had authorized that action.

It is not alleged or shown that the commissioners here had let a contract before the adoption of amendment No. 15; indeed, such a contract has not been let even yet. We have here no question of the validity of a contract let before the adoption of amendment No. 15. We have only the authorization of such a contract by the levying court. But before the power thus conferred was exercised, it had been withdrawn by amendment No. 15, and it no longer exists.

The commissioners are therefore without authority to proceed to let a contract to erect the courthouse, no election having been held and the county being unable to pay for the building without increasing its indebtedness.

The decree of the court below will therefore be reversed, and the cause will be remanded, with directions to make the restraining order perpetual, as prayed.

NASH *v.* PENDLETON.

Opinion delivered March 2, 1931

Walter L. Brown and *Donald F. Brown,* for appellant.

Marsh, McKay & Marlin and *Neill C. Marsh, Jr.,* for appellee.

SMITH, J. This suit was brought by appellees to restrain appellants from obstructing College Avenue, a street in the city of El Dorado. The temporary restraining order which was granted when the complaint was filed was made permanent on the final submission, and this appeal has been prosecuted to reverse that decree. The essential facts out of which the litigation arises are

substantially stated in the opinion in the case of *Gaddy* v. *Pendleton,* 171 Ark. 878, 286 S. W. 1025, and need not be repeated.

Pendleton was the plaintiff in that case, and in this. In the first case he alleged that he had bought lots in the Ouachita subdivision to El Dorado, and that Gaddy had closed Murphy Avenue and Reid Street in this subdivision, which streets had been dedicated to the use of the public by the filing of the plat of Ouachita subdivision by J. J. Hudson, as trustee. The circumstances under which and the purposes for which the plat had been filed are fully stated in the former opinion.

We there said, quoting from 6 Words & Phrases, page 5403, that "a plat is a subdivision of land into lots, streets, alleys, marked upon the earth, and represented on paper in such a way that the streets, lots and blocks can be identified," and we held that, under this definition of a plat, the plat of Ouachita subdivision, there offered in evidence, was void as being a mere picture, which failed to describe the land involved or to locate or show the size of the lots, streets or alleys embraced therein or to definitely locate the survey of the subdivision with reference to the quarter section of land in which it was located.

In the instant case Pendleton and another property owner in Ouachita subdivision alleged that appellants are obstructing College Avenue in this subdivision. College Avenue is parallel with Murphy Avenue and one block from it, and both streets are intersected by Reid Street. It is therefore insisted that the opinion in the former case is decisive of the instant case.

We do not think so. The cases are similar, but in the instant case we have additional proof in regard to the plat, and we have a different plat. The original plat of the survey of this subdivision, which was filed in the office of the circuit clerk and recorder but never recorded prior to the institution of this suit, has been discovered and was offered in evidence at the trial from which this

appeal comes, but was not in evidence in the former case. The plat introduced in this case meets the objections to the plat offered in the former case which induced us to hold that it was void for indefiniteness. The new plat shows that it was filed with the city council on November 9, 1909, and adopted as the official plat of that portion of the city on the same day. As we have also said, it was filed with the circuit clerk and recorder, but not recorded. This plat ties to Government corners, which are shown on the plat, and it shows the scale to which it was drawn, so that the width and length of all the streets and alleys in the subdivision, as well as the boundaries of every lot and block and the size thereof, may be ascertained from an inspection of the plat.

As appears from the opinion in the former case, in which the present appellee was a party, all parties derive title from M. G. Murphy, the title of the defendants—appellants here—having been acquired in March, 1919, whereas the title under which appellees' claim rests upon a deed from Murphy executed prior to that date.

The court below found the fact to be that the portion of College Avenue in question is shown to be a part of said street on the plat of the survey thereof filed in the office of the circuit clerk and recorder of Union County on November 9, 1909. The testimony supports the finding. The map now before us, unlike the one relied upon in the former case, is sufficiently definite to locate the property comprising this subdivision and to define the boundary lines of College Avenue and the width thereof. The filing of this plat and the sale of lots with reference thereto constitutes an irrevocable dedication of the streets and alleys shown thereon. *Holthoff* v. *Joyce,* 174 Ark. 248, 294 S. W. 1006.

It was also contended that the public had, through long use of College Avenue, acquired a right by prescription to continue its use; but it will be unnecessary to consider this question, as we hold that the right was acquired by dedication.

It follows, therefore, that the decree of the court below is correct and must be affirmed, and it is so ordered.

[redacted]

ALCORN *v.* ALCORN.

Opinion delivered March 2, 1931.

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[redacted]

[redacted]

[redacted]

C. T. Carpenter, for appellant.

Thomas W. Hughes and *Allen Hughes,* for appellee.

SMITH, J., (after stating the facts). Many cases cited in the brief of counsel for appellee and cross-appellant support the statement of law found in 46 C. J., page 1261, at § 38 of the chapter on Parent and Child, to the effect that a father who is able to do so is bound to maintain and educate his children at his own expense, although the children may have property of their own sufficient for the purpose. A number of cases are cited in the note to the text which support it. This duty is said, in 20 R. C. L., page 622, at § 30 of the chapter on Parent and Child, to be correlative to the father's right to the custody, control and earnings of his minor child.

The first question of fact appears, therefore, to be whether Mr. Alcorn possessed the means personally to support and educate his son. There was no exception to the administrator's settlement putting this question specifically in issue, but enough testimony was offered on this question to make it appear that he was not, and the court below so specifically found. Mr. Alcorn testified that he was not, and there was no contradiction of this testimony except as hereinafter stated.

Mr. Alcorn was entitled, as tenant by the curtesy, to appropriate to his own use the rent of both the Arkansas farm and the Memphis home. Mrs. Alcorn died before

the passage of act 149 of the Acts of 1925, page 441, abolishing curtesy in this State. *Day* v. *Burgess,* 139 Tenn. 559, 202 S. W. 911; *Schaffler* v. *Handworker,* 152 Tenn. 329, 278 S. W. 967. The amount of income from this property is unimportant, therefore, except for the purpose of determining whether Mr. Alcorn had the means from this or any other source to support himself and to support and educate his son.

Mr. Alcorn testified that he did not have, and there is no testimony to the contrary with this exception. He testified that after the death of his wife he rented out the residence in Memphis, and that he received from $75 to $85 per month as rent. But he also testified that the house was not always rented, nor was he always able to collect the rent when he had a tenant. He was, of course, under the duty of paying the taxes, and he was also required to maintain repairs to preserve the rental value of the property, and may also have paid insurance and have incurred other expense, although, as we have said, this feature of the case was not fully developed, and no attempt was made to show that Mr. Alcorn had not performed his duty in these respects.

The farm in Arkansas had been rented for the year in which Mrs. Alcorn died for $1,500, of which $500 was paid in advance and $400 additional during Mrs. Alcorn's last illness, leaving only $600 due as rent when she died. Mr. Alcorn testified that about $140 or $160 of this balance was not collected, and that out of the balance actually collected he paid a note for $250 signed by both himself and his wife, so that the net rent collected that year amounted to only about $210 after Mrs. Alcorn's death, with no account taken of taxes, repairs, and expenses of that character. He further testified that the rental value of the farm diminished, and we gather from his testimony that the farm has been practically abandoned and some of the houses thereon nailed up, and that he had no sufficient means to support and educate his son, and that he is now attempting in a small way to farm in Mississippi

The testimony appears to us to be of such a character as to be insufficient to support a finding that Mr. Alcorn possessed the personal means to support and educate his son, and, this being true, authority existed under the law to use such portions of the minor's estate as were necessary for his support and education.

The law is thoroughly well settled that the administrator, as such, has nothing to do with the support and education of the minor children of his intestate, and, if nothing more appeared in this case than that the administrator had done so, then he would have no right to make this charge against the estate of his intestate. *Stuckey* v. *Stephens,* 115 Ark. 572, 171 S. W. 908, Ann. Cas. 1917A, 133; *Campbell* v. *Clark,* 63 Ark. 450, 39 S. W. 262.

It appears, however, that the administrator applied to and received from the probate court authority to expend money in excess of the minor's income for his support and education. This order was, no doubt, made pursuant to the authority conferred by § 92, Crawford & Moses' Digest, which reads as follows: "In all cases where minors when they arrive at their majority will have any estate due them, but have no guardian, the court having jurisdiction of the matter may, at its discretion, make an order directing the administrator or other person having control of the estate due, or that will be due, to such minor, to pay over, from time to time, such amount as the court may think proper for the support and education of such minor." This statute does not contemplate that an administrator may be authorized to convert a minor's estate into cash and make such use of it as he thinks proper for the support and education of the minor, and, although the order of the probate court, quoted above, directs the administrator to apply the proceeds of the sale of the stock, "or so much thereof as is really necessary, to maintenance and education of said minor," the court did not, and could not, abandon its control over the estate. The administrator misinterpreted the effect of this order. He should, from time to time, have received

orders from the probate court as to what expenditures were proper. Had he done so, he would have been protected. Failing to obtain this authorization, he made expenditures for the purposes stated at his peril and subject to the right of the court to review them when he did make a report thereof. Neither an administrator nor a guardian may expend a minor's estate in this manner. The hand of restraint should be laid upon the minor, and the improvidence into which the minor's inexperience and youth might lead him be averted.

We are therefore of the opinion that, although this young man has no guardian, but does have a remainder interest in both the Arkansas and Memphis property, subject to his father's curtesy, his expenditures, even for the purpose of maintenance and education, should have been controlled and made under the direction of the court, and made in conformity to his station in life and the value of his estate.

As there was no specific authorization of these expenditures, they were, as we have said, made at the administrator's peril, and the merit of each of the items for which the administrator asks credit is now subject to review. The court below did not make this review, for the reason that in the opinion of the court none of them were proper credits.

We do not review the various items included in the settlement, as the testimony concerning them has not been fully developed, and the matter should first be passed upon by the court below after hearing such additional testimony as may be thought relevant and necessary. We merely say, for the guidance of the court below, that, in passing upon the question discussed, credit should be allowed only for such expenditures as were in keeping with the young man's station in life and the value of the estate.

We may say also, in this connection, that the expenses of the young man should be considered with reference to the school which he attended, rather than some other

school which may have been cheaper, for the reason that he had been placed in this school in the lifetime of his mother from whom his inheritance comes.

Upon the remand of the case we are of the opinion that the following legal principles should be applied in determining whether the administrator should be charged interest on the money which came to his hands.

If it be found, as the testimony before us appears to indicate, although the fact is not as fully developed as it may be, that the administrator placed the money to his credit as administrator and made no personal use of it, he should not be charged with interest on it. In the case of *Jacoway* v. *Dyer,* 50 Ark. 217, 6 S. W. 902, it was held to be the duty of an administrator to report collections promptly, to the end that demands against the estate might be paid, and that when he failed to do so interest would be charged. Here, however, there were no demands to be paid, and, if the administrator was holding the money intact except as expenditures required its disbursement, the balance to be paid over to the young man when he arrived at age, and he was eighteen years of age when his mother died, we think no interest should be charged. Sections 71 and 72, Crawford & Moses' Digest.

As to the funeral expenses, it may be said that this question was considered in the case of *Beverly* v. *Nance,* 145 Ark. 589, 224 S. W. 956. The facts there were that an item of this character was presented to the probate court, approved, allowed and classified, but the husband of the deceased, who was also the administrator of her estate, paid this and other claims with his personal funds, and, in disallowing credit for this item paid by the husband with his personal funds, we said: "Incident to the duty of a husband to maintain his wife is the corresponding duty of paying for her reasonable burial expenses."

Without review of the authorities on the subject, we follow the rule announced in the Beverly case, *supra,* that, if the husband pays the funeral expenses, he cannot recover them from his wife's estate. But it is to be re-

membered that in the Beverly case the facts were that the husband was not only able to pay the funeral expenses of his wife, but had done so with his own funds, and his attempt was to be reimbursed. Here the testimony appears to be undisputed that the administrator not only did not pay the funeral expenses with his own funds, but was unable to do so. We have here the specific finding made by the court below that "At the time of Mrs. Alcorn's death her husband had no property of his own, and there was little cash on hand, and for that reason the court finds that the administrator was entitled to pay the funeral expenses out of the wife's estate." Such facts entitle the husband to charge the funeral expenses to the estate.

The judgment of the court below will therefore be reversed, and the cause remanded, with directions to restate the administrator's account in accordance with the principles herein announced.

MINICH *v.* BASS.

Opinion delivered March 2, 1931.

Rowell & Alexander and *W. A. Leach,* for appellant.

G. W. Botts, for appellee.

HUMPHREYS, J. This suit in unlawful detainer and for the possession of lots 13 and 14 in block 14 in the incorporated town of Gillett was brought in the circuit

court of Arkansas County, Southern District, by appellant against appellee. It was alleged in the complaint that appellee entered into possession of this property under a verbal lease with the then owner, W. B. Sanders, trustee, for the term of five months beginning July 1st and ending December 31, 1929, at a monthly rental of $25, and, although notified of the purchase of the property by appellant and to vacate same in thirty days after the termination of the lease, he continued in the possession and refused to pay rent.

Appellee filed an answer denying that he was in possession of the property under a rental contract, but, on the contrary, was occupying same under an oral contract to purchase from W. B. Sanders, trustee, which antedated appellant's purchase of the property.

The cause was tried to a jury upon the pleadings and testimony resulting in a verdict against appellant, and a consequent judgment dismissing his complaint, from which is this appeal.

Said lots, together with other property in and around Gillett, was owned by appellee prior to his failure in business. His creditors instituted bankruptcy proceedings against him, and, during the pendency thereof, an arrangement was entered into between him and them whereby they would buy in all his property in the name of W. B. Sanders, trustee, and then resell it and a large stock of merchandise to him for $30,000. This arrangement was perfected, and under the agreement appellant paid his creditors about $18,000, leaving a balance due them of over $12,000. On account of a depression in business, he was unable to pay them as rapidly as desired, so, in order to close the matter up and put it in tangible form, said creditors sold the lots in question and other real estate to appellee for the balance due them, payable in monthly installments. The contract of sale was reduced to writing on April 2, 1928, and appellee took possession of the real estate, personally occupied the business buildings on said lots and rented the other real

estate to third parties. He paid the installment note due May 1, 1928, but made default in the payment of the others subsequently falling due. On or about July 1, 1929, the contract was terminated by mutual agreement, the notes being returned to appellee and the contract to W. B. Sanders and, by agreement, appellee remained in possession of all real estate, and there is conflict in the testimony as to whether he retained the possession under lease or whether under a new contract of sale and purchase thereof.

The testimony introduced by appellant was to the effect that appellee rented the lots from W. B. Sanders, trustee, for a monthly rental of $25 per month, and that he agreed to collect the rents on the other real estate and remit same to W. B. Sanders; that he did collect the rents on the other real estate and remitted same, together with his own rent, to W. B. Sanders until January 1, 1930, after which time he refused to remit the rents collected or to pay his own rent.

The testimony introduced by appellee was to the effect that he remained in possession of all the real estate after the termination of the written contract under an oral contract for the sale and purchase thereof for $12,000, the balance of his indebtedness to his creditors, with the understanding that he would pay as much as he could per month, in addition to the rents collected on the other property, upon the indebtedness and would negotiate a loan and pay the remainder on or before January 1, 1930; that he remitted certain amounts thereafter to W. B. Sanders, as trustee, until the 1st day of January, 1930, together with a statement showing the sources from which the amounts were received, and in the meantime notified W. B. Sanders, trustee, that he had obtained a loan from the Building & Loan Association and wanted to close the matter up with them; that he received no response from them relative to the matter.

Appellant introduced three of the statements appellee sent with the monthly remittances. They are alike in

form, so only one of them will be set out herein. It is as follows:

"Bass & Sons
"Gillett, Ark.

Rent Acct., Oct. 22-29
T. P. Bass, Oct. 1 to Nov. 1.....$25.00
I. J. Rollison, Sept. 15 to Oct. 15..... 25.00
E. T. Leslie, not paid.
Ira Beasley, Sept. 15 to Oct. 15.
House 1 South..... 10.00
House 2 North, vacant.
"Cashier check for same.

"T. P. Bass.

"Think I can get the Leslie check this week and send to you.

"T. P. Bass."

When asked on cross-examination, if the amounts were payments upon the indebtedness he owed his creditors instead of rent for the use of the property, why it appeared as a rent account on the statement, he replied that he used printed rent statements in sending the remittances that Bass & Sons had used in their business prior to their failure.

The firm of Bass & Sons was adjudged a bankrupt on December 6, 1922. On the 19th day of March, 1923, the trustee in bankruptcy conveyed the above described real estate, along with other properties, to W. E. Collier, one of the creditors. On the 8th day of May, 1923, W. E. Collier and wife conveyed said property to W. B. Sanders, as trustee. On the 23rd day of December, 1929, W. B. Sanders, trustee, conveyed said property to the appellant.

The only question at issue in the trial court under the pleadings and testimony was whether or not the relationship of landlord and tenant or that of vendor and vendee existed between appellee and W. B. Sanders, trustee. The jury was told by the court to return a verdict for the appellant if it found that the relation-

ship of landlord and tenant existed between appellee and W. B. Sanders, trustee, but, if the relationship of vendor and vendee existed between them, to return a verdict for appellee. As stated before, there was a verdict and judgment for appellee. The sole question therefore on this appeal is whether or not the evidence, viewed in the light most favorable to appellee, is sufficient to sustain the verdict.

Appellant argues that appellee's testimony to the effect that he was not a tenant of W. B. Sanders, trustee, is wholly discredited by the written statements he made in remitting the monthly amounts under the last agreement. It is true that the statement shows on its face to be one for rents, and, without any explanation on appellee's part, would show that he was a tenant and not a vendee. His explanation, however, was that the statement he mailed to W. B. Sanders each month was made out on an old printed form for rent accounts that was used by Bass & Sons before they failed in business. The three statements were introduced in evidence and inspected by the jury. The jury evidently accepted the explanation by appellee as true and treated the amounts remitted as payments upon the indebtedness to his creditors and not as rents for the use of the property. In view of the explanation, we cannot say as a matter of law that the statements wholly discredited appellee's testimony. Treating it as credible, we can say that the undisputed evidence reflects that appellee was a tenant. Appellant also argues that, if full credence be given the testimony of appellee, the contract of sale and purchase was within the statute of frauds and void because there was no change of possession of the real estate when same was entered into between the parties. According to appellee's testimony, the last agreement was but a continuation of the former written contract for the sale and purchase of the property, so we think the last agreement was clearly supported by the possession he acquired under the written agreement and retains under the oral agree-

ment. The retention of the possession under the circumstances was tantamount to again taking possession under the oral contract, and was sufficient part performance to take the sale and purchase of the real estate out of the statute of frauds. It would have been a needless and useless ceremony to have moved out and immediately moved back again.

No error appearing, the judgment is affirmed.

RICE & HOLIMAN *v.* HENDERSON.

Opinion delivered March 2, 1931.

Caraway, Baker & Gautney, for appellant.

Dudley & Barrett and *Huddleston & Hughes,* for appellee.

MEHAFFY, J. Rice & Holiman is a partnership operating a gin at Lepanto, Arkansas. On December 29, 1928, the appellee, while in the employ of the appellants, was engaged in freeing lint cotton which had hung in the ribs of a breast machine and his hand was caught in the saws and cut off.

In order to perform the duties he was at the time engaged in, it was necessary to raise the breast free of the saws, and this was done by the use of a lever at the right side of the breast machine. The lever was about 18 inches off the floor. By moving said lever to a position on the floor and throwing it into a catch, the breast was raised, the saws disengaged, and the lint cotton could then be freed without coming in contact with the saws. It was necessary to perform this duty several times a day.

At the time of the injury the appellee used the lever in the manner indicated and with a small stick he was engaged in raking out and freeing the lint cotton. Appellee's right hand was caught in the machine and cut off.

It is alleged that the appellants were negligent in failing to furnish a reasonably safe place to work and because of the defective condition of the lever, cogs, and other machinery, and the unnecessary and violent vibration of the power plant, and that this negligence caused the breast to fall, catching appellee's hand.

Appellants admitted that appellee was in their employ and admitted the injury, but denied all other material allegations in the complaint, pleaded contributory negligence, and that appellee assumed the risk.

Appellee was, at the time of the injury, 23 years old, and testified that he was in the employ of the appellants and did anything he was told to do; that he was not the foreman at the time of the injury; that Mr. Rice, one of the employers, told the employees what to do; he had been employed for some time around gins and had been employed at this gin for about six months; he was receiving forty cents an hour and averaged ten or twelve hours a day. The injury was caused by the gin breast falling on his hand. The gin breast is the place where cotton is separated from the seed. There is a roll and two sets of ribs. The cotton comes between the two sets of ribs on the roll. It was appellee's duty to take a stick about six or eight inches long and rake this cotton out between the ribs so the seed would pass through the cotton conveyor in the bottom of the ribs. When it gets stopped up, the seed cannot fall out. It was appellee's job to do this. It was not customary to stop the gin in order to do this work. You just raised the breast up so the saws would not be in the way, and the breast fell on his hand. When you press down on the lever, you raise the breast. It does not stop the saws from revolving, but raises the breast off the saws. The saws keep running but the breast is cleared of the saws. The gin can be stopped by pulling the clutch out. The lever is about eight or ten inches long and stood up to the right of the gin breast, and by pulling this lever down to the floor it raises the breast clear of the saws.

Witness testified that there were no saws in the way, but the little piece being worn caused it to trip and fall. The piece witness was looking at was new, had never been used. It fastened on the lever so you can raise the breast up, and when the lever pulls this little piece raises on edge. It, being worn, set over a little bit, and that caused it to fall. It was rusted and worn and had not been run the fall before then. He had not been warned by the defendants of the worn condition.

A piece of iron exhibited by witness is called a toggle gear. Witness said there was a little vibration, not noticeable, the usual cotton gin vibration. In unchoking the gin after raising the breast, it was necessary for witness to put his hand up between the ribs where the cotton hung between the ribs to keep the seed from coming out. You could see the toggle gear in place but could not see its worn condition. Witness did not know its worn condition. The breast fell off on witness, throwing him backwards, and his hand was left in the machine. Appellee was an experienced ginner but had had only about six months' experience with the machinery on which he was injured.

The toggle gear or machinery claimed to be defective was introduced in evidence, and photographs were also introduced. During the time appellee operated this gin, Mr. Rice, one of the partners, was around and saw the way he did it. He was doing it the same way at the time he got hurt. The part that was defective was the rivet that goes through the toggle. By looking at it you could not tell that it was worn.

Mr. E. M. Perry testified that he had worked around gins, been foreman in charge of gins, and had built gins; operated the Rice & Holiman gin its first season. He testified about the lever and breast and about the toggle gear, and the manner in which the breast was raised. If the toggle gear was worn, it would not hold perfect, and the vibration would cause it to crash off and cause the gin breast to fall. If the toggle gear was defective, very few people could have detected it.

Dr. Ragan testified as to the extent of the injury.

C. H. Rice, one of the defendants, testified that appellee was employed as a ginner; that he was foreman and in charge of the gin; had a right to do what he thought best; had a right to stop the machinery when he wanted to; it was his duty to repair any machinery needing it. The toggle and lever introduced was the same that was on the machine at the time; is still in use, the same toggle. Knew nothing of it being worn; did not become loose; the rivet could not wear so that the vibration of the gin could cause the breast to fall; had been operating the gin since 1925. If the bolt in the toggle was loose, you could ascertain it by working it back and forth in your hands; the bolt being worn would not cause the breast to drop; it could not fall if the lever was pulled down to the floor. If the lever is pulled down to the floor, raising the breast, there is no way the breast can drop except to raise the lever; it is impossible for it to fall. If the breast was partly raised, it could have fallen. The breast weighs 250 or 300 pounds. It is impossible to eliminate all vibration in the gin. The gin stands rest in concrete foundations. The piece of concrete is 36 feet long, 48 inches wide, and 34 inches deep, solid with a trough in the center for the seed conveyor. The gin stands are bolted to the foundation, the bolts are set into the concrete when it is made. There is very little vibration. This witness' evidence was corroborated by the evidence of W. B. Holiman and U. S. Holiman.

The engineer, Charles Johnson, was in the building where he could see appellee when he was hurt; was ten or fifteen feet from him. Witness came through and the gin stand was choked. He asked appellee if he wanted to shut down and appellee said "No." Was looking right at appellee when he was caught. Appellee squatted down and put his hand under the gin breast. When it caught him, he pulled back, and, in so doing, pulled the gin breast off; could have stopped the engine in two or three minutes. It is frequently stopped while the gin is being

unchoked. Appellee told witness he did not want it stopped. When the lever and toggle gear are used in raising the breast, you don't have to shut down the gin. Appellee had a stick in his hand, squatted down and reached under the gin with it; had on a glove. The injury happened about 10:30 A. M.

Lorraine Jackson testified that what first attracted his attention was that the gin breast fell off and knocked appellee out in the floor. His hand was off then; had to get pliers to get his fingers out of the nozzle.

C. H. Rice was recalled, introduced a number of photographs in evidence and explained the photographs and toggle joint. Parts of the machinery were introduced in evidence and exhibited.

The jury returned the following verdict: "We, the jury, find for the plaintiff and assess his damages in the sum of $1,500, with hospital and doctor's bills to be paid by defendants." This verdict was signed by ten of the jurors.

The court thereupon rendered judgment for the sum of $1,745 with 6 per cent. interest from date until paid.

Motion for new trial was filed and overruled, and the case is here on appeal.

It is first insisted by the appellant that the physical facts show there is no defect in the toggles, and the breast could not have fallen had the lever been depressed to the floor, and it is claimed that there is no evidence tending to show that the left toggle was defective, and, unless it was defective, the breast could not have fallen if properly raised. At the time of the injury appellee had been working at this gin for about two weeks. He had been working, however, for the appellants for about six months. He testified that the rivet in the toggle gear was rusty and worn, and that this defect, together with the vibration of the gin, caused the gin breast to fall.

E. N. Perry, who had worked at this gin breast, and who understood machinery of this kind, testified that, if the toggle gear was worn, it would not hold perfect, and

the vibration would cause it to crash off and cause the gin breast to fall.

It therefore appears from this evidence that the toggle gear might be so worn that, with the slight vibration of the gin, the breast would fall. This evidence is contradicted by appellant's witnesses, but the question on the conflicting evidence was properly submitted to the jury. The gin breast and toggle gear were also exhibited and introduced in evidence. The jury had an opportunity to and did examine these things.

The undisputed proof shows that this gin had been operated 3 or 4 years, and the appellee testifies that it was not used the season before and was permitted to rust.

While Mr. Perry testifies that, if the toggle gear was worn, as testified by the appellee, it would cause the gin breast to fall; he does not testify that there was any defect. He did not know whether there was a defect or not. The only evidence that there was any defect was the evidence of the appellee. He stated that the rivet in the toggle gear was worn and rusty. His testimony, however, also shows that one could not discover this while the machinery was in place, and that he did not know there was any defect until after the injury. He could, of course, only know about the rust and the defect by examining it after the injury. If he did this, his evidence fails to show it. The toggle that he testified about and exhibited was new. He said he was unable to get the original toggle gear because it had been removed. There was therefore no evidence that the machinery had rusted or that the toggle gear had become worn and defective by any witness who said he had examined the toggle gear.

This court has many times held that, in order for a servant to recover because of the failure of the master to furnish him with safe appliances or a safe place to work, the burden is upon the complaining party to establish the fact that the appliances or place was unsafe, and also that the master either had notice of the unsafe condi-

tion or could, by the exercise of ordinary care, have known of the defect. A master is not required to furnish an absolutely safe place to work, but he is required to exercise ordinary care to provide safe appliances and a safe place to work. *International Harvester Co.* v. *Hawkins,* 180 Ark. 1056, 24 S. W. (2d) 340.

While it is the duty of the master to exercise ordinary care to provide a safe place to work and safe appliances and his duty to exercise ordinary care to inspect same, and while the servant has the right to assume that the master had performed his duty, it is also true that the master is presumed to have performed his duty, and no presumption of negligence arises from the mere happening of the accident which caused the injury. It is not sufficient for a servant to show that he was injured and that the injury resulted from a defect in the machinery; but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises. *Bryant Lumber Co.* v. *Stastney,* 87 Ark. 321, 112 S. W. 740; *St. L. I. M. & S. R. Co.* v. *Gaines,* 46 Ark. 555; *Graysonia-Nashville Lbr. Co.* v. *Whitesell,* 100 Ark. 422, 140 S. W. 592; *K. C. Sou. Ry. Co.* v. *Cook,* 100 Ark. 467, 140 S. W. 579; *Wheeler* v. *Ellis, ante* p. 133.

While the verdict of the jury is conclusive here on conflicting evidence, if there is any substantial evidence to support it, we think the evidence of the appellee, that he could not discover the defect before the injury, and his failure to testify that he had seen it since that time, is insufficient to support the verdict of the jury. As we have said, he must not only show that the master was negligent, but he must show that the negligence of the master caused his injury.

It was, of course, not the servant's duty to inspect the machinery, but this was the duty of the master, and the evidence is in conflict as to whether there was a defect. Both the question of the master's negligence and the contributory negligence of the servant are questions of fact for the jury.

It is next contended that the court was without authority to add $245 to the judgment, and that the verdict returned by the jury was improper. The verdict of the jury should have been for a specific amount, but, if the court had added $215 instead of $245, the case would not be reversed because of the form of the verdict. The undisputed proof showed that the doctor's bill was $215, but there was no evidence whatever as to the amount of the hospital bill. It was therefore improper to add the hospital bill or whatever the item was, making the difference between $215 and $245.

Appellant also urges a reversal because the court refused to give instructions Nos. 11 and 12. No. 11 reads as follows: "If you find from the evidence that just prior to the time plaintiff was injured, defendants, through their servant or employee, asked plaintiff to be permitted to stop the machinery until the gin could be cleaned, and plaintiff told said defendant that it was unnecessary, and that he could remove the material from the gin without stopping it, and that as a result of such action his hand was caught in the saws of the gin and injured, then you are instructed that he assumed the risk of injury and cannot recover."

No. 12 was to the same effect.

Instruction No. 13 reads as follows: "You are instructed that if plaintiff was warned not to undertake to clean the choked cotton and seed from the gin while it was running, and that he disregarded such warning and undertook to unchoke said gin while same was running, and that as a result of such action his hand was caught in the saws of the gin and injury resulted, then you are instructed that plaintiff assumed the risk of such injury and can not recover."

We think the court was correct in its refusal to give these instructions. It was not the duty of the appellee to have the gin stopped in order to unchoke it. He performed his duty in the usual way, as he had a right to do. The evidence shows that this was the customary way

to unchoke the gin breast, and, while the gin had been in operation 3 or 4 years, there is no evidence that the breast had ever fallen before.

Instruction No. 13 submitted to the jury the question of appellee's contributory negligence, and the jury were told that if he were guilty of any negligence which contributed to the injury, that he could not recover. This feature of the case, however, was covered by the court's other instructions which were given.

The court gave instruction No. 8, which is as follows: "If you find that plaintiff in undertaking to free the gin from its choked condition, and that in doing so he was careless and negligent, and that, by reason thereof, he was injured, then he cannot recover, although you may find that defendant was also negligent."

The question of assumed risk was also submitted to the jury. When one enters the employ of another, he assumes all the risks or hazards ordinarily incident to the employment, and the master is not liable for injury resulting to the servant if the injury to the servant was caused by one of the ordinary and usual risks or hazards of the employment; but the servant does not assume the risk of the negligence of the master for whom he works, unless he knows of such negligence.

If there was a defect, as claimed by appellee, which could not be discovered by him in the performance of his duty, but which defect would have been discovered by proper inspection, the failure to discover it would be the negligence of the master, and the servant would not assume this risk. The appellee was injured, suffering the loss of his right hand. Perry swore, as we have said, that if the toggle gear was defective this would cause the breast to fall. The appellee testified that it was defective, but there was no evidence either by him or any one else that it had been examined after the injury or at any other time, and the defect discovered or seen. Appellee may have examined the toggle gear and rivet after the injury, but he does not so testify, and since

he testifies that he could not see it before the injury so as to tell it was defective, there was not sufficient evidence to sustain the verdict.

The judgment will therefore be reversed, and the cause remanded for a new trial.

McHaney, J. I concur in the judgment of reversal, but am of the opinion that the case should be dismissed on a ground not discussed in the opinion of the majority. The undisputed evidence shows that appellee's fingers were found in the cotton chute, and the physical fact is that they could not have gotten there unless he had his hand behind the back set of ribs. If he had his hand between the two sets of ribs, his fingers could not have been carried back into the cotton chute. Having voluntarily put his hand behind the back set of ribs to unchoke them, he is bound to have known that he would be injured if he came into contact with the closely revolving saws. He was therefore guilty of contributory negligence in attempting to do so without stopping the gin and assumed the risks of doing so. *Ward Furniture Mfg. Co.* v. *Wiegand,* 173 Ark. 762, 293 S. W. 1002.

Pratt *v.* Martin.

Opinion delivered March 2, 1931.

Hill, Fitzhugh & Brizzolara, for appellant.

Warner & Warner, for appellee.

MEHAFFY, J. The appellee began this action in the Sebastian Circuit Court against the appellant to recover damages for injury to his automobile, alleged to have been caused by the appellant. The appellant is engaged in the automobile, garage, and storage business in the city of Fort Smith.

On the 23rd day of March, 1930, the appellee entered into a contract with the appellant through appellant's agent, the Ward Hotel, by the terms of which the appellant undertook and agreed to take charge of appellee's Buick sedan automobile and store it at appellant's garage in the city of Fort Smith.

Appellant, through its employee, William Clardy, took possession of said automobile to drive same to appellant's garage. Instead of driving direct to the garage, the employee of appellant drove about seven miles. He took the chauffeur of appellee, Will Chester, to the colored section of town to get him a room. He thereafter drove the car of the appellee towards the garage, and, when he reached the intersection of N. 8th and I streets, a collision occurred between the car he was driving, which was appellee's car, and a car belonging to Mr. Ivy. Appellee's car was damaged by the collision. Appellee knew nothing about his car being driven anywhere except direct to the garage, and the appellant did not know that his employee was driving the car elsewhere until after the collision.

The Ward Hotel issued the ticket for the storage of appellee's car in the regular course of business for the storage of guests' cars with appellant. This had been the custom since the hotel commenced business. After the Ward Hotel had issued the ticket, appellant's em-

ployee, Clardy, in the performance of the storage agreement, took possession of the car at the hotel and drove it away. He went first direct to the garage, but, instead of putting the car in storage, he proceeded to drive the car other places without the knowledge of appellant or appellee.

The appellee bases his right to recover on the contract of bailment with appellant. He alleges that there was a contract of bailment for the storage of his car, a violation of this contract, and damages to his car.

There was a jury trial, a verdict for $850, and judgment entered accordingly.

Appellant filed motion for new trial, which was overruled, and, to reverse the judgment of the circuit court, he prosecutes this appeal.

It would serve no useful purpose to set out the evidence in this case. It is undisputed that the employee of the appellant went to the Ward Hotel in the city of Fort Smith, got possession of appellee's car for appellant, and, instead of taking the car direct to the garage, drove about seven miles without the consent or knowledge of appellant, and, on his way returning to the garage the collision occurred which resulted in the damages to appellee's car. This was after the contract of bailment had been entered into and appellant, through his employee, had taken possession of the car.

The appellant urges a reversal of the judgment, first, because the court refused to give instructions Nos. 9, 10 and 11, requested by him, which would have submitted to the jury the question of whether Clardy, the employee of appellant, was acting within the scope of his employment at the time of the accident. The sole question in this case is whether the bailee for hire may be made to respond in damages to his bailor for a breach of his contract of bailment where the bailee's employee, instead of delivering the car direct to the garage, took the car for his own purpose without the consent of the bailee, and, while the car was in the exclusive possession of the ser-

vant of the bailee for the purpose of performing the contract of bailment, the car was damaged.

In ordinary actions against a master for injury caused by the negligence of the servant, it is well settled that the master is not liable unless the servant was at the time not only in the employ of the master, but was about the master's business. The master is liable only for the negligent acts of the servant when the acts complained of are within the scope of the employment.

It may be conceded that the courts are not in entire harmony as to whether the limit of the master's responsibility is determined by the scope of the servant's authority or by the course of his employment. There are some courts that hold that the bailee is not liable for the negligence of the servant unless the act is within the scope of his employment. Other courts hold that, in the action for the breach of contract of bailment, the injured party may recover, notwithstanding the damages done by the servant, the same as if the act had been done by the bailee himself.

As we have said, the authorities are in conflict, and it would serve no useful purpose to review them here. The authorities relied on by appellant would justify a reversal of the case if we applied the rules applicable to ordinary cases of negligence.

This suit, however, is based on an alleged breach of contract of bailment, and we think the better rule is that the possession of property, held by one as bailee, when confided to the servant of the bailee, so continues for the purposes of the master's contractual obligation to a third person until the bailee had performed his contractual obligation, and that an act done by the servant which results in the injury to the property of the third person, in the possession of the servant by the authority of the master, is the act of the master, for which the master is responsible upon contractual obligation to such third person, notwithstanding the fact that the particular

action causing the injury was done in violation of the master's instructions.

When the bailee contracts to take charge of and care for property and the property is damaged while in his possession, the liability of the bailee arises out of the contract. The master himself cannot, by any act or conduct of his own, release himself from the contract or its obligations, and he cannot accomplish by a servant that which he cannot accomplish in his own person. The liability of the master grows out of the fact that the master has failed to do the thing he agreed to do, and, if one enters into a contract to do a certain thing, such as receive property as a bailee for hire, he cannot, by either his own conduct or the conduct of a servant, release himself from liability. The act of the servant is the act of the master.

In an action for tort or negligence, the theory is that the thing done is done in obedience to the master's will, and an act done by a servant in order to render the master liable, must be done while the servant is about the master's business.

In a breach of contract for bailment, the bailee is liable if he does not do the thing agreed to be done, and it makes no difference whether the failure to perform the contract is brought about by the act of the master or his servant.

The Ohio Supreme Court said: "Possession by the servant became *ipso facto* the possession of the master. When did the possession pass from the master? Can it be said that it rests in the breast of the servant to release his master from contractual liability to a stranger to the servant by himself becoming unfaithful to his master? If so, the contract of bailment affords the bailor scant protection. If the master be not responsible for the act of his servant, the bailor, for his own security, before entering into such contract, must not only investigate and determine the trustworthiness and financial responsibility of the bailee, but must do the same with reference to

each of his servants. The doctrine of *respondeat superior* makes the master responsible for the tort of his servant done in the performance of the master's business; and an agent may bind his principal to a third person within the scope of his authority. But neither a servant nor an agent is imbued with power to absolve his master or principal from his contractual obligation to a third person by an act which, if done by the master or principal, would not have absolved him. * * * The reason that the same theories do not apply to the liability of the master for a breach by his servant of a contractual obligation of the master to a third person is that the obligation of the master to such third person does not arise out of the relationship of master and servant, but arises out of the master's contract from which he cannot by any conduct of his own alone release himself. He cannot accomplish by his servant that which he cannot accomplish in his own proper person." *National Liberty Ins. Co. of Amer.* v. *Sturtevant-Jones Co.,* 116 O. St. 290, 156 N. E. 446, 52 A. L. R. 705; *Corbett* v. *Smeraldo,* 91 N. J. L. 29, 102 Atl. 889; *Employers' Fire Ins. Co.* v. *Consolidated Garage & Sales Co.,* 85 Ind. App. 674, 155 N. E. 533; *Maynard* v. *James,* 109 Conn. 365, 146 Atl. 614, 65 A. L. R. 427.

In the last case cited the Connecticut court said: "The argument of the defendants is largely based upon the thesis that they are not liable for the negligence of the helper because at the time of the accident he was not acting within the scope of his employment. However that may be, their contention overlooks a clear breach of duty which fastens an unquestionable liability upon them. One of the bases of recovery stated in the complaint is that the defendants did not regard their undertaking to store and safely keep the car for the plaintiff, and the trial court states as one of its conclusions that they did not perform this obligation. * * * We think this case does not involve the question of the master's responsibility for the tortious acts of his servants. It involves, rather, the question of the master's liability for breach of his own contract."

In the instant case the appellant contracted as bailee to safely keep the car of appellee, and he cannot, either by his own wrongful act or the wrongful act of his servant, release himself from the obligation of this contract. *Bradley* v. *Cunningham,* 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679; *Employers' Fire Ins. Co.* v. *Consolidated Garage & Sales Co.,* 85 Ind. App. 674, 155 N. E. 533.

There are many cases that might be cited which hold that the bailee for hire is liable for a breach of contract of bailment by his servant, although the servant is not acting at the time within the scope of his employment, but we do not think it necessary to cite or review other authorities. The cases decided by this court and referred to by appellant are cases where the action was based on the negligence of the servant.

The conclusions we have reached as the ground upon which liability exists makes it unnecessary to discuss any other questions.

The judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* GILSINGER.

Opinion delivered March 2, 1931.

Thos. B. Pryor and *Thos. B. Pryor, Jr.* for appellant.

A. N. Hill, for appellee.

McHaney, J. On September 29, 1928, appellee shipped over appellant's railroad from Charleston, Arkansas, to Kansas City, Missouri, two cars of cattle. The shipment left Charleston about 4 P. M. of that date, which was on Saturday, and arrived in Kansas City in the afternoon of Monday, October 1, too late to be sold on Monday's market. They were sold on Tuesday, October 2, and in the meantime cattle had declined in price. Appellee brought this suit against appellant to recover damages for negligent delay in transportation, and alleged that the cattle should have been transported to the Kansas City stock yards in time for sale on Monday's market. He alleged damages in the sum of $172.90, and a trial resulted in a verdict and judgment in his favor for $70.50.

The first assignment of error is that the court refused to direct a verdict for appellant. We agree with appellant in this contention, and it therefore becomes unnecessary to discuss other questions. The only question at issue in the case was that of delay in the delivery of the cattle, and the burden was upon appellee to establish an unreasonable delay by a preponderance of the evidence. We think the appellee failed to prove any unreasonable delay. He testified himself that the cattle arrived in Kansas City at 3:48 Monday afternoon. The schedule clerk for appellant testified that the two cars arrived at destination at 2:30 P. M. on Monday, October 1; that these two cars made schedule time, and in fact arrived at destination a little ahead of time. Proof shows that it was necessary for the cattle to be unloaded en route for feed and rest as appellee had not signed a thirty-six hour release. The proof shows that the cars arrived in Van Buren about eight o'clock Saturday night; that they left Van Buren about 2:00 A. M. September 30 and arrived at Coffeyville, Kansas, at 2:30 P. M. the same day where they were fed, watered, rested, reloaded and arrived in Kansas City, as above stated. The undisputed proof shows that appellant had a regular scheduled train, No. 168, due to leave Van Buren 10:15 P. M., arrive at

Coffeyville 10:15 A. M. the next morning, and due at the Kansas City stock yards at about 8 A. M. Monday morning. It will be seen however that, had the cars of cattle in question moved on train No. 168, scheduled as above, they would still have been required to unload at some intermediate point, either at Coffeyville or Ossawatomie, as under the Federal law (45 U. S. C. A., § 71) cattle are not permitted to remain in cars in transit for a greater period than twenty-eight hours unless a waiver is signed. Therefore if the cattle had moved on an earlier train out of Van Buren, they could not have reached the stock yards in time for Monday's market unless a special train had been run, which was not done. The undisputed proof shows that the cattle moved out of Coffeyville on the first available train after being unloaded, fed, watered and rested, as required by law, and that there was no delay in reaching Kansas City.

There is therefore no substantial evidence to support the verdict. The judgment will be reversed, and the cause dismissed.

HUMPHREYS, J., dissents.

FEATHERSTON *v.* JACKSON.

Opinion delivered March 2, 1931.

John J. DuLaney, W. F. Reagan, Alfred Featherston and *O. A. Featherston,* for appellant.

Tom Kidd, for appellee.

McHaney, J. Appellee sued appellant for damages done to his automobile in a collision between the two cars caused, as alleged, by the negligence of appellant. Appellee's son, Harold Jackson, a minor seventeen years of age, in company with three friends, was driving east on highway 26 to go fox hunting, in his father's car, without the knowledge or consent of his father, but with the general permission of and without objection from his father. Appellant was driving west on said highway. Both cars were traveling at about the same rate of speed. They collided, as appellee contends, because appellant was traveling on the wrong side of the road, failed to turn to the right as they approached each other and failed to keep a lookout, while appellant contends that the reverse is true. He filed a cross-complaint against appellee seeking to recover the damage done to his car. A jury trial resulted in a verdict and judgment for appellee in the sum of $50.

Appellant first says the evidence is insufficient to support the verdict. We cannot agree with him in this regard, as the evidence is in dispute as to what position on the road appellant had taken and whether he was negligent. Appellee's witnesses testified that appellant was running in the middle tracks in the road, with his left wheels in the rut occupied by the left wheel of appellee's car, which was on the right side going east. Witnesses who examined the tracks made by the cars shortly after the accident testified that appellant's car was on the wrong side, or too far to the left of the middle. Appellant testified that he was on the right side and that appellee's car had only one headlight, was on the wrong side and struck him. This made a disputed question of

fact for the jury, and we cannot say there is no substantial evidence to support it.

On the trial a rough sketch, or map, showing the tracks or ruts in the highway was used by appellee in examining his witnesses. Appellant objected to the use of said map. It was not introduced in evidence, but the day after the trial was over, he filed a motion to require appellee to file the map. This came too late, and the court correctly denied the motion.

Error is urged in the giving and refusing to give certain instructions. We find it necessary to discuss only one of them. Instruction No. 3, given at appellee's request, over appellant's objections, is as follows: "You are instructed that the negligence of Harold Jackson in operating the car, if any, will not bar a recovery against the defendant, O. A. Featherston, provided that you find that O. A. Featherston was guilty of negligence in the operation of his car." Appellant asked instructions in varying forms to the converse of the above instruction, which the court refused to give. Is the above instruction correct? We think it is. In this State we have no "family purpose" doctrine in its broadest sense. *Norton* v. *Hall,* 149 Ark. 428, 232 S. W. 934, 19 A. L. R. 384; *Valentine* v. *Wyatt,* 164 Ark. 172, 261 S. W. 308; *Johnson* v. *Newman,* 168 Ark. 836, 271 S. W. 705. In order for the father to be liable for the negligence of his son in driving his automobile, the relation of principal and agent, or master and servant must exist. No such relationship existed in this case. The son was neither the agent nor servant of his father on this fox hunting trip, and he must therefore have been a gratuitous bailee of the car. He was in the same position as any other person to whom the car had been loaned by the father, appellee, and the same rules of law must apply. The modern rule and the one supported by the weight of authority is stated in *Mo. Pac. Rd. Co.* v. *Boyce,* 168 Ark. 440, 270 S. W. 519, as follows, quoting syllabus: "Where a truck struck by a train had been loaned to the driver for use for his own

pleasure, the driver's negligence could not be imputed to the owner nor be interposed as a defense, as the negligence of a bailee is not imputable to the bailor where the subject of the bailment is damaged by a third person." See also cases cited in that case.

We have carefully examined all the instructions complained of, those given and those refused, and find that the court fully and fairly instructed the jury, perhaps more favorably to appellant than the law of the case justified. For instance, in instruction 14½, requested by appellant, the jury were told that they must find for appellant if it was an unavoidable accident, "or was caused by the concurring negligence of the drivers of both cars." This was in conflict with instruction No. 3, which, as above shown, is a correct declaration of law, and constituted an error in appellant's favor for which he cannot complain.

We find no error, and the judgment is affirmed.

McCullars *v.* State.

Opinion delivered March 2, 1931.

A. B. Caplinger, for appellant.

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

BUTLER, J. About one o'clock in the afternoon of the 29th of March, 1930, the dead body of Agnew Mardis was found in a ditch beside the public road which ran from Harrisburg, Arkansas, to Bay Village, Arkansas, at a point about three miles south of Harrisburg in Poinsett County. There was one wound on the body made by a bullet which entered the head on the left side just below and slightly back of the left ear. There were no eyewitnesses to the killing.

The defendant was arrested in Williamson County, Texas, on or about the 10th day of April, 1930, returned to Arkansas, and tried in the circuit court charged with the murder of the deceased. The trial resulted in a verdict of guilty of murder in the first degree, and punishment fixed at imprisonment in the State Penitentiary for life. A motion for a new trial was filed in apt time, which was overruled, and judgment was entered according to the verdict, from which is this appeal.

The evidence which most nearly tends to connect the defendant with the commission of the crime is substantially as follows: The body of Mardis was discovered shortly after the murder. Several witnesses testified as to having seen Mardis at different times before the date of the homicide in company with a man whom they identified as the defendant. Two women testified that they had seen Mardis in company with the defendant at about seven o'clock on the morning of the day that he was killed. One of these stated that Mardis, in company with a man, came to her house and stayed about twenty min-

utes; that the man whom she afterward identified at the trial as the defendant, had a finger off the right hand. The other woman stated that the two came to her house about the same time and stayed about thirty minutes, and that after they left she saw them coming back by her house going south about 11 o'clock; that the man in company with Mardis had a heavy ridge or big vein across his eye which was very noticeable, and she identified the defendant as that man. Another witness by the name of Moore stated that he had bought some chickens from a man who was with Mardis in a car about eight o'clock on the morning of the day of the murder, but the witness was unable to identify the defendants as the man who was with Mardis at that time. Two other persons, however, who were present when the chickens were bought, testified that the defendant was the man with Mardis at that time.

The defendant was a stranger to these witnesses, and his identification was based on a comparison of the appearance of the defendant with the person whom they testified was in the company of Mardis on that day. One Joseph who testified that he had known the defendant for three or four years and had been introduced to him by Mardis, stated that he had bought chickens from the defendant and Mardis some months before the homicide, and had met the defendant on Wednesday before the killing on Saturday, and that at that time the defendant was driving a Baby Overland closed car; that he had seen the two together frequently. Another witness, Ogle, testified that he had known the defendant about fifteen years and had seen the defendant and Mardis together on Thursday or Friday night before the day Mardis was killed, and that he saw Mardis with three twenty dollar bills at that time. The witnesses who testified to having seen the defendant in company with Mardis on the day of the homicide stated that the two were riding together in a closed car. This was substantially all the testimony adduced on the part of the State.

A number of witnesses for defendant, John Minor and members of his family, testified that they, too, had seen Mardis in company with a stranger driving in a two-door Baby Overland car, and that they came to the house of John Minor on the morning of March 29, 1930; that both were under the influence of liquor, and the stranger with Mardis was described as being a square-built man with an unusually large scar running between his eyes nearly to the back of his head, and that this individual was not the same person as the defendant. Two other witnesses besides the members of the Minor family also testified as to having seen Mardis in company with a stranger on the morning of March 29th, and that, in their opinion, the defendant was not such person.

A number of other witnesses from Williamson County, Texas, testified that they were acquainted with the defendant, and that he had been continuously in that county working in a cafe in the Chapman Oil Field from the 18th or 20th of March down to, and including, the 10th or 11th of April, 1930, the day on which he was arrested. These witnesses testified that they saw the defendant frequently during the day, and that he worked continuously as a dishwasher and waiter in the cafe all of that time. One witness, a drilling contractor, engaged in drilling an oil well in that field, stated that he kept a log of the well and knew from that what he was doing each day; that the log showed that about eleven or twelve o'clock on the night of March 29, 1930, witness went to Lundy's Cafe to get something to eat, and defendant was then at that place and helped push a car some distance.

One witness, E. G. Edge, testified that he was the constable of the precinct in which Chapman Oil Field was located and spent nearly every day and well into the night in that vicinity attending to his duties as constable; that he received a telegram from Arkansas directing the arrest of a Charles McCullars, who was described in the telegram as a little low, dark complexioned fellow with a scar on his face. When witness received the telegram, he

read it in the presence of the defendant but did not arrest the defendant because he did not answer to the description, and because he knew that the defendant had been in the oil field working at the cafe before and at the time of the homicide; that the defendant knew of the receipt of the telegram by witness about nine o'clock at night, and the defendant remained on until the next day about twelve o'clock when the sheriff came over and placed him under arrest.

It will be seen that the testimony upon which the State relies for conviction is wholly circumstantial and, to connect the defendant with the commission of the crime, it is necessary to establish his identity as that of the stranger who was last seen in company with Mardis. Question of identity is one about which mistakes are not infrequently made, and there was a dispute among the witnesses as to whether or not the defendant was the person last seen in company with Mardis. This, together with the evidence of witnesses who testified to establish the alibi, might have made it doubtful whether the defendant was indeed the person last seen in company with Mardis, and, while the testimony may be sufficient to sustain the verdict, it is far from satisfactory.

After the verdict was rendered, and within the time prescribed by law, the defendant moved for a new trial on the ground, among other things, of newly discovered evidence. In the motion he alleged that he did not know that one John Hopkins knew anything about the case, and that he had used due diligence to obtain all of the evidence relating to the homicide, but had learned on the day after the verdict was returned that Hopkins was a material witness. At the hearing of the motion, Hopkins was introduced and testified that he lived in Poinsett County, on his own farm, and that on the morning of Saturday, March 29, 1930, he was returning from Harrisburg to his home about eleven o'clock, and at a point about three hundred yards from the place where the body of Mardis was afterward discovered he saw a car backed

into a gulley by the side of the road, and in this car was Mardis, whom he knew well, and another man who was unknown to him. Witness assisted them in getting their car out of the gulley and talked with both of them. He stated that the man in the car with Mardis called him to the car, and that he looked him full in the face and had an opportunity to, and did, closely observe him; that the man had a scar across his face as large as witness' finger and that "any one would notice that about the first time you looked into his face"; that witness would know the man again by that scar. When Charles McCullars was pointed out to the witness, in answer to a question as to whether or not he was the man with Mardis, the witness answered, "He don't look like the man to me. Of course, there has been a lot of talk, too, about such as that—that a man would change."

The court, in passing on the motion for a new trial, said: "I am sorry that this negro, John Hopkins, was not brought before the jury to testify. Here is a negro who has lived for many years in one community, who owns his own home and stands high in that community as an honest, reputable citizen, and whose reputation for honesty and truthfulness the sheriff of this county willingly and without hesitation says is good. * * * All the facts which have a material bearing on the case should be brought out, and the jury given the benefit of it. There is no way of knowing what effect this negro's testimony would have had on the jury or what weight the jury would have given it in this case. I am not satisfied with it. This negro, so far as the testimony shows, was the last person to see the deceased and the man who was with the deceased, and only a few moments and only about three hundred yards from the place where the killing took place. I again say that I am sorry that he was not given an opportunity to testify and the jury given the benefit of his testimony."

It is the position of the State that the testimony of John Hopkins was cumulative, that several witnesses,

members of the family of John Minor, had testified that the stranger in the car with Mardis had a large and prominent scar on his face such as the defendant did not have, and that the testimony of Hopkins was only to the same effect. It is true that Hopkins' testimony is cumulative in a sense, and yet Hopkins related facts about which no other witness testified—that a scar-faced stranger was in a car with Mardis on the morning of the homicide at a point about three hundred yards from where the body of Mardis was afterward discovered, and that he was with Mardis but a short time before the commission of the crime, and that the scar was so large it would be the first thing noticed about the individual. These additional facts rendered the testimony of the witness Hopkins original and not cumulative. That it was highly important, there can be no doubt. The identification made by the witnesses for the State was unsatisfactory and based upon observation more or less casual and shaken as this testimony was by contradictory testimony and that tending to establish the alibi, the jury might well have given great weight to the testimony of Hopkins, whose attention was especially called to Mardis' companion and the incident fixed in his memory by its close proximity in time and place to the tragedy. That the trial judge regarded this testimony as material and important is shown by his comments above set out, which were equivalent to a finding that the testimony of Hopkins was material and of such nature as might profoundly influence the mind of the jury. It is clear that the trial judge felt that the rights of the defendant had been greatly prejudiced by not having had an opportunity to examine Hopkins on the witness stand, and that, if this testimony had been produced, the verdict of the jury might have been different.

It is the duty of the trial judge, where it appears that the defendant has discovered important evidence in his favor since the verdict which he could not have before anticipated or obtained by the exercise of due diligence,

to grant a new trial. Subdiv. 6, § 3219, Crawford & Moses' Digest. In the case of *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851, we held that, if the trial court finds and announces that the verdict of the jury is against the preponderance of the evidence on the material issue in the case, he must set aside such verdict, and, where he fails to do so, this court, on appeal, will reverse for a new trial. This rule was recognized and followed in *Mueller* v. *Coffman,* 132 Ark. 45, 200 S. W. 136, where, in overruling the motion for a new trial, the court said: "I must confess that the verdict as returned by the jury was somewhat of a surprise to the court; but, as there were disputed questions of fact for the determination of the jury, and though contrary to the judgment of the court as to what the verdict should have been, I do not deem it proper to disturb the verdict of the jury. I think, if you were to take Gordon (meaning Mr. Beauchamp, attorney for the plaintiff) to one side and ask him to make a confidential statement, he would doubtless admit that he won a lawsuit which he expected to lose." *Held* this an expression of the view that the verdict of the jury was against the preponderance of the evidence, and the court erred in not granting a new trial. See also *Spadra Creek Coal Co.* v. *Calahan,* 129 Ark. 408, 196 S. W. 477.

The rule announced in these cases is applicable to the instant case. We can see no difference in principle where a trial judge clearly indicates that, in his opinion, the verdict of the jury is against the preponderance of the evidence and refuses to grant a new trial, from a declaration by him tantamount to a finding that material and important evidence has been discovered by the defendant after the verdict is rendered; for it would be equally his duty to grant a new trial in either case. As we have said, the statements made by the trial judge were equivalent to an express finding that the defendant had brought himself within subdiv. 6 of § 3219, *supra,* and, having done so, when he failed to grant the motion for a new trial, he failed in his duty. We have frequently held that it is the

province of the trial judge to promptly set aside a verdict of the jury when in his opinion such verdict is against the weight of the evidence, or where, for some other reason, there was not a fair and impartial trial, and when the trial judge surrenders this province he "destroys the integrity of the best system that thus far has been devised in this country for the administration of justice."

We hold therefore that the trial court abused its discretion in failing to set aside the verdict of the jury, and its judgment will be reversed and the cause remanded for a new trial. It is so ordered.

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

Opinion delivered March 2, 1931.

C. T. Carpenter, for appellant.

Chas. D. Frierson, for appellee.

BUTLER, J. This suit was filed by the appellant in the circuit court of Poinsett County on the 3rd day of April, 1922. A demurrer was interposed to the complaint and sustained, from which an appeal was taken to

this court, where it was decided that the allegations of the complaint stated a cause of action. The cause was remanded with directions to overrule the demurrer and for further proceedings according to law. *Keith* v. *Drainage Dist. No. 7, etc.*, 181 Ark. 30, 24 S. W. (2d) 875. Thereafter the case proceeded to trial upon the complaint, the original answer and an amendment thereto called the "separate plea of defendant," the reply to the same, and the testimony of witnesses. At the conclusion of the testimony, the court instructed the jury as to the law of the case in a number of instructions given at the instance of the plaintiff and of the defendant, and submitted the following interrogatories:

"Int. No. 1. Q. Do you find from a preponderance of the evidence in the case that the defendant diverted the waters of Right Hand Chute and the waters of the St. Francis River from their natural course, and that, as a direct result of such diversion, the lands in controversy here were damaged?

"Int. No. 2. Q. Do you find from the proof in the case that the lands in controversy here were damaged to any extent by ditches or other improvements in Mississippi County or Craighead County or in the State of Missouri?

"Int. No. 3. Q. If you answer interrogatory number one 'Yes,' then you are told to fix the damage to the land directly resulting from the diversion of said waters, as shown by the proof.

"Int. No. 4. Q. If you answer interrogatory number two 'Yes,' then fix, from the proof in the case, such damages as you find these lands sustained, by reason of said agencies, from the proof."

To interrogatories No. 1 and No. 2 the jury returned an affirmative answer fixing the amount of damage under interrogatory No. 3 at $8,000 and under interrogatory No. 4 at $4,800. After the jury brought in their answers to the aforesaid interrogatories, the trial judge, at the request of the defendant, made the following finding:

"As a finding of law and fact, the court declares that the plaintiff cannot recover because of lack of title upon which to base a recovery," and thereupon rendered judgment "that plaintiff have and recover nothing notwithstanding the verdict of the jury." From that judgment the case is here on appeal.

A description of the territory included within Drainage District No. 7, and the nature and course of the structures erected by it, are fully set out in the complaint in the case of *Keith* v. *Drainage Dist. No. 7,* 181 Ark. 30, 24 S. W. (2d) 875, *supra,* and in the cases of *Sharp* v. *Drainage Dist. No. 7,* 164 Ark. 306, 261 S. W. 923, and *Hogge* v. *Drainage Dist No. 7,* 181 Ark. 564, 26 S. W. (2d) 887.

It was alleged that the levees of the district were so constructed as to inclose a large quantity of land, a part of which was the land of the appellant, and so as to dam the main channel of the St. Francis River and the Right Hand Chute of Little River, both of which were natural water courses, thereby diverting the waters from their natural flow and impounding them on the lands of the appellant; that these lands, prior to the construction of the levees, were fertile and suitable for cultivation, and that the construction of the improvement had rendered them valueless. This allegation was denied, and much testimony was introduced, both on the part of the appellant and the appellee, as to this issue. It would unduly extend this opinion to set out this testimony in detail. It suffices to say that the testimony introduced on the part of the appellant tended to establish the truth of the allegation of his complaint and was ample to support the finding of the jury, and this is virtually conceded by the appellee.

In the briefs of counsel some space is devoted to the discussion of the question as to whether or not appellant's cause of action was barred by the statute of limitation. It is unnecessary for us to consider this question because it was not an issue in the court below. The appel-

lee did not raise this question by demurrer, or in its answer, and it is settled law that, in order to obtain the benefit of a defense of the statute of limitation, it must be pleaded either by demurrer or answer. *Shirey* v. *Clark,* 72 Ark. 539, 81 S. W. 1057; *Kelley* v. *K. C. So. Ry. Co.,* 92 Ark. 465, 123 S. W. 664; *Earle* v. *Malone,* 80 Ark. 218, 96 S. W. 1062.

Appellee takes the position that, if the trial court erred in the judgment rendered, the case should be reversed and remanded for a new trial because of certain errors in the conduct of such trial:

First, because of the refusal of the court to permit the introduction in evidence of an alleged report made by the engineer of appellee district which was offered in evidence as exhibit B to the testimony of Mr. Fairley, the engineer of the district, who testified in the case. The report offered in evidence had never been filed with the proper officials and was a lengthy document purporting to give a description of the territory and the opinion of the engineer making it as to the adaptability of the land within the levees for cultivation, together with other matters not relevant to the issues. As the engineer who testified was permitted to use the report as a memorandum and testified as to all of the material matters set out therein, there was no prejudice and no error.

Second, it is insisted that the court erred in refusing to permit a witness to testify that, if the St. Francis River had been leveed with the levees running near and parallel to its banks, the same damage would have resulted to the lands of the appellant as from the present structures. This, of course, was mere speculation, and we cannot see how the action of the court in this particular was erroneous. This witness also was asked regarding the governmental requirement of the flow to be maintained in the St. Francis River. We do not see how this was material, because, no matter what the requirement might have been, the result as found by the jury would have been that the structures damaged the land of the appellant.

Third, that, because plaintiffs were permitted to introduce a certain map showing the territory embraced within the levees and the course they ran around the territory and across the waters of the Right Hand Chute and St. Francis River. It appears that this map was prepared by the engineers of the district, filed with the board of directors on the 4th of October, 1920, by its secretary and in the office of the county clerk on November 1, 1920. This map appears to have been properly identified and in the proper depository, and was competent, although it might have been superseded by a later map. The map which it was claimed superseded the one introduced was not available to the plaintiff, and was not introduced by the defendant.

Fourth. It is insisted that the court erred in refusing to declare the law as requested by the defendant district in instructions 2 and 5. Instruction No. 2 tells the jury that the damage must be fixed as of the date when the levees and dams were completed, and instruction No. 5 reiterates that with a declaration that such structures were completed in the spring of 1926. The court was correct in refusing these instructions as we shall presently show.

Fifth, that the court erred in refusing to give instruction No. 4, requested by the defendant. It told the jury that the defendant would not be liable for diverting the surplus or flood waters by levees, dams or otherwise, so long as said waterways were permitted to carry the water to the extent of their full capacity. The court properly refused this instruction, as it is in conflict with our holding in the Sharp, Keith and Hogge cases cited, *supra.*

Sixth. Instruction No. 3, given at the request of plaintiff, is objected to by appellee. That instruction, in brief, directed the jury to find for the plaintiff if the defendant by its structures, diverted the waters of Little River into a reservoir, and if, by the construction of the levees of the reservoir and the dam across St. Francis River, the waters thereof were collected and impounded

and diverted from their natural course, flooding the land of plaintiff. The criticism is because of the use of the word "reservoir," which, it claims, was not a term established by the uncontradicted evidence. That is true. The engineer, Mr. Fairley, and the attorney for the appellant indulged in some argument as to the proper description of the territory within the structures of appellee district, the attorney preferring the use of the word "reservoir" and the engineer preferring the use of the term "storage basin" After quite a bit of argument they were unable to state the difference between a reservoir and a storage basin. Neither do we see any difference. It appears to us that the two are synonymous, but, if the appellee preferred "storage basin," it should have requested that the word "reservoir" be stricken out and "storage basin" substituted therefor. Other objections were made to the instruction, but we cannot see their merit, and certainly the instruction was not inherently wrong; and, if its phraseology was confused or ambiguous, the appellee should have made specific objection to it.

■ The real question in this case is that raised by the amendment to the answer of the defendant filed May 12, 1930, and called by it "separate plea of defendant," the gist of which is that Keith, the appellant, was not entitled to recovery "because he had lost his title." In order to properly appreciate the force of this plea, a brief history of that title is necessary. Prior to 1917 the land in controversy was the property of the United States Government, which title was acquired by Keith and patent issued to him in 1920. In 1921 these lands were assessed for levee taxes due the St. Francis Levee District. In 1922 taxes for general purposes were assessed against the lands. In June, 1923, the lands were sold for the general taxes delinquent, and in the fall of that year a decree was entered fixing the levee district's lien for the taxes of 1921 and 1922, and on December 3, 1923, said lands were sold under the decree and the levee district became the purchaser.

The fundamental doctrine that private property cannot be taken for public use without compensation requires that the owner shall receive the market value of the land at the time of the taking, and, in view of the condition of the title to the lands in controversy, as before stated, it becomes important to determine, (a) what constitutes a "taking" within the meaning of the rule, (2) the time the taking is consummated, and (c) to whom compensation must be made.

(a) This is answered by Mr. Angell in his work on Water Courses, § 465, where the doctrine is laid down that a serious interruption to the common and necessary use of property is equivalent to the taking of it, and in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wallace p. 166, quoting from page 177, in a case where by reason of a dam the waters of a lake were so raised as to cause it to overflow the lands of plaintiff and to so continue to overflow such lands from the completion of the dam to the beginning of the suit, the court, in answering the argument of the defendant that there was no taking of the land within the meaning of the constitutional provision but that damage was a consequential result of a use made of a navigable stream by the Government for the improvement of its navigation, said: "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 narrowest 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 invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

This rule was expressly approved in *Hogge* v. *Drainage Dist. No. 7, supra,* and finds support in many of our decisions and in the great weight of authority. In fact, it is recognized by the very language of our Constitution, which provides not only that private property may not be taken for public use, but also that it may not be damaged without just compensation. Therefore, when there is any invasion of private property by lawful authority for a public use and the property is damaged thereby, there is a taking within the meaning of our law, and where the damage is such as to deprive the owner of the beneficial use of his property, he may require that its value be paid him.

(b) The plans for the improvement were filed in 1919, and the evidence on behalf of the plaintiff was to the effect that the work of actual construction began in the latter part of the summer or early fall of that year, which was not disputed by Mr. Fairley, the engineer of the district, who testified that he did not remember whether the work began in 1919 or 1920. The evidence shows that, prior to 1919, of the 320 acres of land owned by the plaintiff the greater part lay upon the ridges which were extremely fertile and susceptible of successful cultivation during ordinary seasons and considered at that time, according to the testimony of a number of witnesses, very valuable for agricultural purposes. There is but little dispute that beginning with 1920 the waters of the St. Francis River began to be impounded by the construction of the levees and by 1921 or 1922 the waters rose so high and remained so long upon the land as to destroy their value for purposes of agriculture, and that

such condition remained from then until now. As previously stated, the plans for the improvement were filed in 1919, by which plans it was apparent that the structures contemplated were levees and dams such as were finally built across the Right-Hand Chute of Little River and the main channel of the St. Francis River and with a spillway leading in a southwesterly direction from the southern end with flood gates where the spillway left the line of the levees. It is insisted that the work was not completed in accordance with the plans of 1919, but under later plans filed in substitution of the first. It is nowhere shown, however, or claimed that these later plans altered the character or course of the levees and dams as affecting the lands of the plaintiff.

In the case of *Newgass* v. *Railroad Co.*, 54 Ark. 140, 15 S. W. 188, which is a leading case, and where the question for determination was the time of the taking of the land under condemnation proceedings for the right-of-way of a railroad as a basis for fixing the compensation, the court said: "It is insisted that compensation should have been assessed with reference to the value of the land taken as of the time of filing the petition, and not as of the time of the entry upon the land by the corporation. Upon this question the courts in different States have established different rules. It is held by some that the assessment should be made with reference to the time of entry; by others, with reference to the time of filing the petition; and by still others, with reference to the time of the award. (Lewis on Eminent Domain, § 477, and cases cited). The court below adopted the first rule, against the objection of the appellant who contended for the second one. We recall no case in which the question has been presented for the decision of this court; but there are references by the court to it, and, in so far as they indicate an opinion, it is favorable to the contention of appellant. Either rule is liable to operate harshly in special cases—as well against the landowner as the corporation—but we see nothing in the one con-

tended for which indicates that it would more often work harshly than either of the others; and it has the advantage of fixing a certain and definite time with reference to which the estimate must be made. Besides the corporation has the right to acquire the land. When it files its petition, it declares its purpose to appropriate it and to render just compensation to the owner. Until it has done that, it is in default; but afterwards it can do nothing more until, in the regular course of procedure of the courts, a legal ascertainment of the amount to be paid is made. As the filing of the petition is the attempt to assert the right of condemnation, and subsequent delay is without fault of either party, it seems fair to each alike that the assessment should be made with reference to value as of that date."

School District of Ogden v. *Smith,* 113 Ark. 535, 168 S. W. 1089, was a suit brought by the school district to acquire title to land owned by Smith, and on the question of damages the court held that the authority of the act under which the district proceeded was similar to the power of eminent domain, and that the damage should be estimated from the time of the taking, which time the court held was fixed, and the taking consummated in contemplation of law upon the filing of the petition to condemn the land. In that case the court said: "So here appellee was entitled to have his compensation from the time that the appellant filed its petition to condemn his land, and the jury, in awarding damages, estimated the value of the land at the time the petition was filed." See also *K. C. & Sou. Ry. Co.* v. *Boles,* 88 Ark. 533, 115 S. W. 375. It is clear, under the decisions cited and because of the fact that work had actually begun and the damage inflicted prior to the filing of plaintiff's complaint, that there had been an effectual taking when the complaint was filed, and the cause of action had accrued, and therefore instructions Nos. 2 and 5, referred to *supra,* requested by defendant, were properly refused.

(c) Assuming that the plaintiff's title was divested by the sale of December 3, 1923, of his land for levee

taxes delinquent to the levee district, the question is, did such divesture work a forfeiture of plaintiff's cause of action and prevent his recovery for the damage inflicted? In taking the position that this would happen, the appellee assumes that the appellant's title was lost before his cause of action accrued. In this, the appellee is clearly mistaken. As we have seen, appellant's cause of action accrued upon the filing of plans, which of themselves were sufficient to apprize the landowners of the extent and nature of the structures to be erected and the probable consequences which would ensue. It was apparent from the plans that, when the levees had been completed and the dams constructed, the entire lands within those levees would be formed into a storage basin where the flood waters of the St. Francis River might be impounded and through flood gates allowed to flow out gradually and methodically into the lower stretches of the river and thus prevent the inundation of the lands to the south of the district. This was the avowed purpose of the formation of the district, and necessarily worked the destruction of the agricultural value of the lands within the basin. Appellant was the owner of lands at that time and remained so until the consequences to be expected from the formation of the district had actually resulted.

The case of *Young* v. *Vincent,* 94 Ark. 115, 125 S. W. 658, was an action for damage to lands by the digging of a large pit at the rear end of two lots and the carrying away of the soil. The effect of the court's holding was that the proper party to maintain the action was the one who owned the land at the time of the trespass, although he subsequently sold the land to another. Appellee insists that a decision of that question was not necessary for a determination of the case, and that that case is not authority for the rule it seems to announce, and cites, as intimating a contrary doctrine, the case of *Miller Levee Dist. No. 2* v. *Dale,* 172 Ark. 942, 290 S. W. 948. It insists that in that case the defendant raised the point that the plaintiff was not the owner of the land and not the

real party in interest, and that the court apparently assumed that this would have been a good defense. Appellee has misread that case, for the point raised was that the plaintiff was not the owner of the land *at the time of the taking* and therefore had no right to maintain the action.

It is the general rule that the compensation for damages inflicted upon real property must be made to the person who owns the land at the time it is taken or injured. *Newgass* v. *Railroad Co., supra; K. C. Sou. Ry. Co.* v. *Boles, supra,* and *School District* v. *Smith, supra. Young* v. *Redfork Levee District,* 124 Ark. 61, 186 S. W. 604; *Converse* v. *Atkinson,* 142 U. S. 671, 125 Ct. 351; *Tuskeege Land Co.* v. *Birmingham R. Co.,* 161 Ala. 542, 49 So. 378; *Davidson* v. *Boston, etc. R. Co.,* 3 Cush. (Mass.) 91; *Davis* v. *Titersville Ry. Co.,* 114 Pa. 308, 6 Atl. 736. We have been unable to find any rule contrary to the one announced, and it is therefore our conclusion, inasmuch as the damage occurred potentially and in fact prior to the time of the filing of the complaint, that the plaintiff should recover, and that the court erred in its judgment.

■ This brings us, in the last place, to a consideration of the amount due the appellant under the finding of the jury in answer to the interrogatories propounded. It is the contention of the appellant that a fair consideration of the language of the interrogatories and the answers thereto force the conclusion that it was in the mind of the jury that the appellant's damage caused by the structures erected by the appellee district, and independent and exclusive of damage arising from any other source, was the sum of $8,000, but we have reached the conclusion that an analysis of the several interrogatories does not support the contention of the appellant, but that of the appellee, *i. e.,* "that the total damage from the diversion of water was $8,000 and of said total other drainage and levee districts had caused $4,800 worth"; that Drainage District No. 7 therefore had caused only

$3,200 of the damage; for if interrogatories Nos. 1 and 3 referred solely to the damage caused by the structures erected by District No. 7, instructions Nos. 2 and 4 would have been superfluous. As the jury must have had in mind the court's declaration of law No. 13 "that the measure of damages is the difference between the market value of the land before the alleged taking of the land and its value, if any, after that time; *less,* however, such damages, if any, as you find due to other causes than the defendant's structures," and, by finding the damage occasioned by other improvements, must have intended that the difference between the amount of this and that first found, should be the extent of defendant's liability.

As we have seen the trial court erred in its judgment, and for the errors indicated the same is therefore reversed, and, as the facts in the case appear to have been fully developed, the clerk of this court is directed to enter judgment here in favor of the appellant, plaintiff below, in the sum of $3,200, together with interest thereon from the date of the judgment in the court below.

SMITH, J., dissents.

REYNOLDS *v.* BALDING.

Opinion delivered March 9, 1931.

Hogue & Burney, for appellant.

Jno. E. Miller, C. E. Yingling and *J. R. Linder,* for appellee.

HART, C. J., (after stating the facts). We have copied the deed from Mrs. Mary E. Mason to her daughter, Gertrude Balding, in our statement of facts, and it need not be repeated here. It is well settled in this State that, if a deed duly executed and so drawn as to convey a present title, is deposited by the grantor with a third person with directions to deliver it to the grantee after the death of the grantor, and the grantor reserves no dominion or control over the deed, the deed is not an attempted testamentary disposition, but is effective as a conveyance of the title as of the date when the deed is deposited. *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244; *Fine* v. *Lasater,* 110 Ark. 425, 161 S. W. 1147; and *Brown* v. *Brown,* 134 Ark. 380, 203 S. W. 1009.

In *Sutton* v. *Sutton,* 141 Ark. 93, 216 S. W. 1052, it was held that an instrument, in the form of a warranty deed, and acknowledged as such, and so headed, conveying land to a grantee, "and unto his heirs and assigns forever," but with an habendum clause making the instrument inoperative until the grantor's death, is a deed and not a will. The court said that the limitation does not defeat the passing of the title, but does reserve possession to the grantor during his lifetime.

In the application of these principles of law, we are of the opinion that the chancellor properly held that the instrument under consideration in this case was a deed from Mrs. Mary E. Mason to Gertrude Balding, and conveyed the title from the grantor to the grantee.

It is claimed, however, that there was no delivery of the deed from the grantor to the grantee. The record shows that the deed was executed on the 26th day of March, 1918, and acknowledged on the same day. It was filed for record on April 9, 1918. The recording of the deed raises a presumption of the delivery to and acceptance thereof by the grantee. It is evidence of the most cogent character tending to show delivery. It is a solemn proclamation to the world that there has been a transfer of the title to the property from the grantor to the grantee, of which our law makes every one take notice. *Graham* v. *Suddeth,* 97 Ark. 283, 133 S. W. 1033; and *Holland* v. *Alexander,* 147 Ark. 513, 227 S. W. 778.

But, it is contended that the *prima facie* evidence of delivery by recording the deed was overcome by the repeated statements of the grantor to her other children afterwards that she had never delivered the deed to her daughter, Gertrude Balding, and by the subsequent deed which she made which contains a recitation that it is made for the purpose of cancelling the deed which she had formerly executed to Gertrude Balding on the 26th day of March, 1918, and which had been recorded on the 9th day of April, 1918. In the first place, it may be said that the execution of this later deed to her daughter,

Olive E. Miles, contains an express recitation that she had executed the first deed to her daughter, Gertrude Balding. Neither the testimony of the witnesses as to the declarations of their mother, Mary E. Mason, relative to her execution of the first deed to her daughter, Gertrude Balding, nor her subsequent recital in the deed to her daughter, Olive E. Miles, which was not made in the presence of Gertrude Balding, are admissible in evidence to defeat the deed to her. It is well settled in this State that the acts and declarations of the grantor or of a person in possession of a tract of land are admissible to show the character and extent of his possession, but not to contradict his deed to another. It has always been held by this court that the declarations of a grantor against the title of his grantee, made in the latter's absence, are not admissible in evidence to defeat the title of the grantee. *Prater* v. *Frazier,* 11 Ark. 249; *King* v. *Slater,* 96 Ark. 589, 133 S. W. 173; *Welch* v. *Welch,* 132 Ark. 227, 200 S. W. 139; and *Brown* v. *Brown,* 134 Ark. 380, 203 S. W. 1009.

Therefore, we are of the opinion that the court correctly awarded the title to the land in the plaintiff. It is next insisted that the defendant, Marshall B. Reynolds, had possession of the land, and that the chancery court had no jurisdiction of the case. The record shows that the case was first brought in the chancery court and then transferred to the circuit court. Subsequently, the case was retransferred without objection by the circuit court to the chancery court. Hence, under our settled rules of practice, the chancery court had jurisdiction to try the case, and any objections to the jurisdiction of the chancery court were waived by the failure to object at the time and to save exceptions to the action of the court. *Taylor* v. *Bank of Mulberry,* 177 Ark. 1091, 9 S. W. (2d) 578, and cases cited.

It follows that the decree of the chancery court must be affirmed.

SHACKLEFORD *v.* ARKANSAS BAPTIST COLLEGE.

Opinion delivered March 9, 1931.

John D. Shackleford, for appellant.

Booker & Booker and *Frauenthal, Sherrill & Johnson,* for appellee.

SMITH, J. H. R. Coffman, as trustee, obtained a decree of foreclosure against the Arkansas Baptist College, under which certain lands were sold in partial satisfaction of the judgment for debt there rendered. Later an amended complaint was filed in the same cause, in which it was alleged that one R. S. Bowers, as executor, had in his hands certain money and property which had been devised to the college by one W. W. Wheeler, deceased, and it was prayed that this money be subjected to an equitable garnishment for the benefit of Coffman, trustee, *et al.* On these pleadings an order was made by the court, in which it was recited that the college was indebted to J. D. Shackleford, as its attorney, for services rendered, and that the attorney had a paramount claim to the money in his hands for the satisfaction of his fee. It was then ordered that Shackleford be paid his fee, and that the balance be paid by the executor into the registry of the court.

Before the final submission of the cause, a number of pleadings were filed, and an order of court was entered which recited a submission "on the petition of the plain-

tiffs praying the court to require John D. Shackleford to pay into the registry of this court all funds and property in his hands belonging to the defendants, and on the petition of John D. Shackleford praying that the court allow him a reasonable attorney's fee for services performed for the Arkansas Baptist College. * * *" The court fixed Shackleford's fee at $1,527.77, and he prayed an appeal from that decree, and a cross-appeal was prayed by the Arkansas Baptist College to this court.

Upon the submission of this cause it was held by us that the fee allowed was excessive, and it was reduced to $500. *Shackleford* v. *Arkansas Baptist College,* 181 Ark. 362, 26 S. W. (2d) 124. When the mandate went down from this court, Shackleford filed a petition which contained a review of the former litigation, in which he prayed judgment against the college for a sum alleged to be due him for professional services, in addition to those rendered in connection with the settlement of the Wheeler estate. The value of these services were alleged to be $1,461.50, or $6.38 more than the amount of money which Shackleford admitted having in hand belonging to the college. This account relates principally to services in connection with the settlement of the Wheeler estate, although there are items having no relation to it.

A demurrer to this petition was sustained, and, no further pleadings being filed, a decree was rendered on the mandate fixing Shackleford's fees for services to the college at $500. He was, in addition, allowed $11.50 for costs and expenses, this being an item allowed in the final decree from which the first appeal was prosecuted, and which was evidently regarded as being unaffected by that appeal or the judgment or decree of this court thereon.

Shackleford has appealed from this decree, and insists that the former appeal adjudged only the compensation due him in connection with the settlement of the Wheeler estate and took no account of, and did not include, the services for which he now asks compensation.

Whether this be true or not, the former litigation progressed to the point that the question in issue was the state of the account between Shackleford and the college. This question was collateral to the question raised by the original plaintiff, but it became a question in the case and was adjudged by the court. The lawsuit was one in which the attempt was being made to subject funds in Shackleford's hands belonging to the college to the payment of a judgment recovered by Coffman, trustee. Upon this issue the amount due Shackleford by the college was the pivotal question. To determine what sum Shackleford had in his hands due the college, it was necessary to ascertain what fees were due him by the college, and this issue is concluded by the opinion of this court on the former appeal. This is true because, whatever the former case may have been, the present one is a mere continuation of it. No new suit has been brought, and no new issues have been joined. It is the same case between the same parties, and any issues which can now be litigated could formerly have been litigated, and must necessarily be concluded by the decree from which the first appeal was prosecuted and the order and judgment of this court modifying that decree.

A headnote in the case of *Newton* v. *Altheimer,* 170 Ark. 366, 280 S. W. 641, reads as follows: "A judgment on a former appeal became the law of the case and is binding upon a second appeal, and conclusive, not only of every question of law or fact which was decided in the former suit, but also of the grounds of recovery or defense which might have been, but were not, presented."

The principle there announced is conclusive of the point here raised. If Shackleford did not claim all the fees to which he was entitled, he should have done so, and if he can do so now, he should have done so then, and, as he could and should have claimed credit then, he cannot do so now.

The demurrer to the petition was therefore properly sustained, and the decree of the court will be affirmed.

CRIGLOW *v.* STATE.

Opinion delivered March 9, 1931.

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

SMITH, J. Appellant was jointly indicted with Elmer English and C. M. Cunningham, upon the charge of robbery. The indictment alleged that "the said R. E. Criglow, Elmer English and C. M. Cunningham, in the county and State aforesaid, on the 22d day of March, 1930, wilfully, maliciously, feloniously and violently, from the person of O. G. Allen and against his will and putting him, the said O. G. Allen, in fear, did take, steal and carry away, $196, gold, silver and paper money of the value of $196, said money being then and there the property of the said Safeway Stores, Inc., a corporation operating and doing business as the Piggly Wiggly Stores."

A demurrer to the indictment was filed upon the grounds: (1) that it did not state of what country the

money was legal tender or had been issued; (2) it did not allege whether the Safeway Stores, Inc., is a domestic or foreign corporation, and, if a foreign corporation, whether it is authorized to do business in the State.

The demurrer was overruled, and no error was committed in so doing. Section 2506, Crawford & Moses' Digest, provides that, in all prosecutions for the unlawful taking of money by larceny, embezzlement or otherwise, it shall not be necessary to particularly describe the kind of money taken further than to allege gold, silver or paper money, and it is there further provided that "a general allegation in the indictment and proof of the amount of money taken shall be sufficient." The purpose of this statute was to abolish the requirement that the indictment allege the kind and character of money taken (further than that it was gold, silver or paper money), a requirement which had, in many cases, rendered it very difficult, and frequently impossible, to prove the allegations of the indictment as to the kind of money taken, even in cases where the testimony was perfectly clear that money of some kind had been taken. This statute requires the courts to know what everybody else knows, that money is money.

We said in the case of *Cook* v. *State,* 130 Ark. 90, 196 S. W. 922, that the dollar is the money unit of the United States, and that an indictment charging the larceny of a dollar sufficiently charged the taking of a money unit of this country, whether gold, silver, or paper money, and that it was unnecessary to allege its value, because money itself was the measure of value, both of itself and of all other things.

The indictment does not recite whether the Safeway Stores, Inc., the alleged owner of the stolen money, was a domestic or a foreign corporation, nor that, if a foreign corporation, it was authorized to do business in this State. But these allegations were unnecessary. Even though the owner were a foreign corporation doing business in this State without authority of law, it would not be *caput*

lupinum. It was unlawful to steal the money of a corporation, whatever its classification may be, and, certainly, an allegation as to the classification into which the Safeway Stores, Inc., falls is not essential to enable the defendant to prepare his defense or to interpose a plea of former jeopardy against another prosecution for the same offense. *Spears* v. *State,* 173 Ark. 1071, 294 S. W. 66.; § 3013, Crawford & Moses' Digest.

No question is made as to the legal sufficiency of the testimony. Cunningham, who was jointly indicted with appellant, became a witness for the State, and detailed the circumstances of the crime, which he stated was committed by himself, appellant and English. The latter, testifying as a witness on behalf of appellant, who was separately tried, denied any knowledge of or connection with the crime. But the corroboration of Cunningham was abundant. O. G. Allen, the man alleged to have been robbed, and Durwood Jones, who was in the store at the time, both testified that they recognized appellant as one of the robbers.

E. E. Brooks was called as an expert by appellant, and a hypothetical question was submitted upon which his opinion was asked. This question would have called for the opinion of the witness as to the powers of observation and recollection of Allen and Jones in the matter of their identification of appellant as one of the robbers, they never having seen him prior to the robbery. The court properly excluded this testimony. There was no contention that these witnesses were of unsound mind. It was, of course, proper to inquire how badly the witnesses themselves were frightened by the robbery, and this information might have been elicited by the examination of the witnesses themselves on that subject. It would not have been improper to have asked other witnesses present what opportunity Allen and Jones had to observe the robbers, also what their conduct was during the robbery. But the question whether these witnesses were mistaken in their identification, whether from

fright or other cause, was one which the jury, and not an expert witness, should answer. This was a question upon which one man as well as another might form an opinion, and the function of passing upon the credibility and weight of testimony could not be taken from the jury. *Dickerson* v. *State,* 121 Ark. 564, 181 S. W. 920; *Mitchell* v. *Lindley,* 148 Ark. 37, 228 S. W. 728.

The prosecuting attorney remarked in his argument that counsel for appellant was an expert in establishing the defense of an alibi. Upon objection being made the court told the jury that the argument was improper and to disregard it, and the prosecuting attorney was cautioned not to repeat the statement. We must assume that this rebuke and admonition removed any prejudice carried by the argument.

The jury returned a verdict of guilty and fixed the punishment at three years imprisonment in the penitentiary, and recommended that the sentence be suspended. It is insisted that this recommendation rendered the verdict illegal, indefinite and void. We held to the contrary in the case of *Clarkson* v. *State,* 168 Ark. 1122, 273 S. W. 353, where sentence was imposed notwithstanding the recommendation of the jury that it be suspended. We there said: "Under Act 76, Acts 1923, page 40, circuit judges are authorized, under certain circumstances, to suspend the sentences of convicted persons, but the act vests this discretion in the judge, and not in the jury. It would, of course, be proper for the court to consider any recommendation the jury might make in the matter, but the jury can only recommend and cannot control the discretion vested in the judge. *Kelley* v. *State,* 133 Ark. 261, [202 S. W. 49]."

Certain other errors are assigned in the motion for a new trial, but they relate to questions which have been so long and so definitely settled that no useful purpose would be served by discussing them.

As no error appears, the judgment must be affirmed, and it is so ordered.

MOREHEART *v.* MABELVALE ROAD IMPROVEMENT DISTRICT NO. 29.

Opinion delivered March 9, 1931.

A. L. Rotenberry, Lee Miles and *John D. Shackleford,* for appellant.

Wallace Townsend, for appellee.

HUMPHREYS, J. This is a suit by appellants, citizens and taxpayers, against Road Improvement District No. 29, in Pulaski County and its commissioners, to restrain them from selling bonds and extending and collecting taxes based upon assessment of benefits. It was alleged in the complaint that the commissioners entered into a contract with the county court to construct a road for $7,000 per mile; that one-half of the road had been built by the county, and that appellees were about to sell bonds and extend and collect taxes based upon the benefits to pay for the road already constructed and to pay for the entire road when completed; that the contract was void because the county court had no right under the law to become a contractor for the construction of roads under contracts with the commissioners of improvement districts.

Appellees filed an answer admitting the execution of the contract and part performance thereof, but denying all other material allegations in the complaint.

The cause was submitted to the trial court upon the pleadings and testimony, resulting in the dismissal of appellants' complaint, from which is this appeal.

The record reflects the following facts: The district in question was properly organized under act number 126 of the General Acts of the Legislature of 1923 and amendments thereto. The estimate of the cost of the road was $126,665. Instead of advertising and letting a contract, the commissioners of said district entered into a contract with the county court to construct the road in accordance with the plans and specifications for $7,000 per mile. The county court proceeded to construct the road and completed 3.2 miles thereof for which it received no remuneration from the district. The commissioners were about to sell bonds in the sum of $63,000 to pay for the work which was done and to pay the balance due when the road should be completed. Benefits to the property were assessed, taxes extended and collected in part to pay bonds to be issued and sold with the interest thereon. The county was not made a party to the suit. The present county judge refused to complete the road unless appellees pay $20,000 more than the contract price to construct necessary bridges.

Appellants contend that the contract entered into by the county was without authority and void, and on that account it has a right to restrain the sale of the bonds and the extension and collection of taxes against the property in the district based upon the assessment of benefits to the property. Even if the contract was void, which we deem it unnecessary to determine, the complaint was properly dismissed because the prayer thereof was to prevent the district from issuing bonds, levying and collecting taxes based upon the benefits assessed against the property in said district in accordance with the estimated cost of the improvement. When properly organized under act number 126 of the Acts of 1923 and amendments thereto, an improvement district has a right to issue and sell a sufficient number of bonds to construct the improve-

ment and to assess the benefits to the property and to levy and collect taxes to pay the bonds and interest thereon. It is conceded that appellee district was formed in accordance with said act and amendments thereto. Appellants, therefore, could not and cannot maintain a suit to restrain the commissioners from doing these things which it is authorized by the act to do.

Appellants argue that their complaint was wrongfully dismissed because the money to be derived from the sale of the bonds cannot be used in payment of that part of the road already constructed by the county under the alleged illegal contract. Their argument is not sound because the district received the benefits of the contract to the extent of that part of the road completed, by using same, and cannot refuse to pay therefor. *White River L. & W. Ry. Co.* v. *Star R. & L. Co.*, 77 Ark. 128, 91 S. W. 14.

No error appearing, the decree is affirmed.

ARMOUR & COMPANY *v.* ROSE.

Opinion delivered March 9, 1931.

George R. Herr and *Hill, Fitzhugh & Brizzolara,* for appellant.

Hardin & Barton, for appellee.

MEHAFFY, J. The appellant, Armour & Company, is engaged in the business of selling meats, refrigerator products, ammonia, compound lards, canned meats, pork and beans, pharmaceutical products, cheese and other products at their branch office at Fort Smith, Arkansas, and T. H. McKay was manager from 1925 to and including the date of the accident to appellee September 30, 1928.

On September 30, 1928, about 11 o'clock in the forenoon the appellee fell into an open, unguarded elevator shaft in the place of business of Armour & Company in Forth Smith, receiving serious and permanent injuries.

This action was brought against Armour & Company and Clarence Fine, its employee, for damages sustained by reason of his fall into the elevator.

It is alleged that appellant's negligence caused the injuries. Appellee was 44 years old and had operated a shoe repair shop in Fort Smith for about 20 years and

was making about $300 per month in the operation of his business.

Appellant, Fine, was a traveling salesman, but was at the place of business of Armour & Company on Saturdays and Sundays. Appellee had been in the habit for seven or eight years prior to the accident of buying meat products from the Armour place on Sundays and other days of the week from Fine and other employees.

The manager of the Fort Smith branch had been instructed by his superiors to sell only to wholesalers, retail dealers in its supplies, hotels and large restaurants, its principal business being to sell for resale. They were permitted, however, to sell to the employees of appellant for their own use. The manager had instructed his salesmen to rigidly enforce this rule.

On the day of the accident, appellee, with his family drove to the place of business of Armour & Company about eleven o'clock and parked his car. He got out, walked to the front door of Armour & Company's place of business; the front door was open, appellee walked into the main entrance, up to a window where Mr. Fine and two or three other employees of Armour & Company were seated in the office room. Mr. Fine asked appellee what he could do for him, and appellee replied that he wanted to get some ham and bacon. Fine got the key and went with appellee back to the cooler where they found the bacon, but failed to find the ham. Fine then suggested that they go back to the smokeroom, as there might be some hams there. They walked out of the cooler, Fine locked the door, and led the way down a long, narrow, dark passageway to the smokeroom. He opened the door, switched on the light on the inside of the smokeroom, but when they got in the smokeroom they failed to find any hams. They walked back from the smokeroom, which had double doors, Fine opened the door, and stepped back for appellee to step out. Appellee stepped out, and Fine switched off the light, and pushed the doors and was in the act of closing them. Just as appellee stepped out and stepped back to wait

for Fine, he stepped into an open elevator shaft, and fell upon the basement floor at the bottom, a distance of about fifteen feet. His hip and ankle were broken, and he was otherwise injured. The injuries are permanent.

The Armour & Company plant was not open in the regular way on Sunday, but some of the men in the office work there at times. There were two or three offices in the place, one for the manager, and another where traveling salesmen and other employees went on Sunday. The freight elevator was used to carry heavy articles. It had gates in front, and they were ordinarily closed when the elevator was not in use. There was an electric light over the opening of the elevator shaft, but this was not lighted on Sunday. The light was much dimmer in the plant on Sundays than on other days. As a rule, none of the electric lights were burning except the one in the shipping room, and lights would be turned on in the office if anyone was there on Sunday. Fine was usually in the plant on Saturday and Sunday, and occasionally made sales.

Fine and appellee had been friends for a number of years. Fine told appellee, in 1921 or 1922, that it was against the rules of the company for him to sell to appellee in the way he did, but in order to accommodate him he would do that, and while appellee continued to buy for seven or eight years, not only from Fine, but from others on Sunday, it was never suggested to him after the first time that there was any violation of the rules.

When a sale was made by Fine, tickets would be made out. According to Fine's testimony the ticket was made out against him. Appellee and others testified that the ticket was made out against appellee.

The testimony is in conflict as to whether the manager knew of the sales made by Fine, and it is also in conflict as to the number of sales made, but there is no dispute about the fact that the sales continued from time to time for seven or eight years. The evidence also shows that there was a sign displayed to the effect that no sales were made at retail.

As shown by the blue print, the passageway into which Fine and appellee walked, was eight feet wide. The door, however, through which they went, was in the middle of the room, so that when they stepped out, they were approximately four feet from the side of the passageway on which was the open shaft of the elevator. There is a conflict as to what occurred when they passed out. The appellee testified that Fine opened the door, and appellee stepped out of Fine's way, walking three or four feet, and fell into the elevator. Fine knew that the elevator was there, the appellee did not know it. Fine closed the door, turned the light out, and, as he turned around, saw appellee fall into the elevator.

The jury returned a verdict for $7,500. Judgment was entered, and, to reverse the judgment of the circuit court, this appeal is prosecuted.

The appellant contends that the primary question is: Was it negligent for the company to have its place unlighted and its elevator shaft open on Sunday when the usual activities of the plant were suspended for the day in obedience to law and its own custom?

Appellant says that no customers were expected, and that none could lawfully be received as such, and that, therefore, leaving the plant in this unlighted condition, and the elevator shaft without a guard on Sunday, is not negligence, because the company could not reasonably anticipate customers would enter there contrary to law and the rules and customs of the company.

The undisputed proof shows that the appellee had been going to the place of business for seven or eight years on Sundays to purchase articles from appellant. There is a conflict in the evidence as to how often he went. The appellee testified he went two or three times a month, but whether he had gone as often as he claimed or not, the appellant knew that the elevator was there, and that the shaft was open, and the passage was dark.

Fine himself testified that the dealings began in the summer of 1921 or 1922, and that the first time he made a

sale he told appellee that it was against the rules to sell merchandise that way, but he would get it and charge it to himself. That was seven or eight years before the accident, and Fine does not claim that he ever suggested to him after that that it was a violation of the rules. Yet they continued to sell to him on Sundays, and, when he came on the morning of the accident, the undisputed proof shows that Fine went with him to get the articles he wanted, and Fine knew about the elevator and the appellee did not. Of course, it would not be negligence for the appellant to close its place of business on Sunday and leave the elevator shaft open if no customers were expected, but they had a right to expect that the appellee would come because it had been his custom for seven or eight years.

As to the negligence of Mr. Fine, he himself said that he went to the manager's office, procured the key and went out with the appellee, the appellee following him. The passage in which they were just prior to the accident was about eight feet wide, the door through which they came was in the middle of this passageway, and, after coming through the door and getting out of Mr. Fine's way so that he could close the door, the appellee testified that he took one or two steps and went into the shaft.

Under the evidence in the case, it was a question of fact for the jury as to whether the appellants were guilty of negligence. Actionable negligence means the violation of some duty which results in injury to another, and in this case we think it a question of fact properly submitted to the jury as to whether the appellants owed the appellee any duty and whether appellee was injured because of a violation of that duty.

Appellants contend that the case should be reversed because of the contributory negligence of appellee. Appellee testifies that he was going with Mr. Fine; that he did not know there was an elevator there; that the passageway was dark; that he only took one or two steps

in getting out of the way of Mr. Fine, and fell into the elevator. The question to be determined was whether the appellee at the time acted as a man of ordinary prudence would have acted under similar circumstances, and this was also a question for the jury.

Appellee was asked how close he went to the elevator when he went in there, and he said while he could not tell exactly, it was maybe two or three feet. He did not know the elevator was there, and he could not see on the side the elevator was on. There was not any light, and when Mr. Fine turned to close the door, the appellee had to back out of his way. He had to get out of Mr. Fine's way so he could close the door. Mr. Fine walked out first and held the door open for him to walk out. He took only one or two steps and fell into the shaft.

Appellee calls attention to the case of *Murray* v. *McClain*, 57 Ill. 378, as supporting its contention that the appellee was guilty of contributory negligence, but the court said in that case: "This hatchway was located some 65 or 70 feet back from the front of the building, where were situated the office and room, where others having business with the house transacted it; and was at a place where no one, except the inmates and employees of the house had any business, and could not reasonably have been expected to be there, exposed to danger. Had the hatchway been at a place where persons were accustomed to pass and repass, or to be about, and their presence there ought to have been reasonably anticipated, a higher degree of care might have been exacted of the appellants." The court also said in that case, speaking of the injured party: "He was in the habit of bringing the kegs in a wagon to the front door. Just after the accident his wagon was found at the door with a load of kegs upon it. The deceased had not shown himself to anyone in the office and was not seen about the building prior to his fall." After his injury and before his death he stated that he knew where the hatchway was just as well as any of them knew.

In the case just quoted from the appellant knew nothing about the presence of the injured party, and had no reason to anticipate that either he or anyone else would be about the hatchway. In the instant case the appellants not only had reason to anticipate that the appellee might be there, but they knew he was there and knew of the open elevator shaft.

Appellant next calls attention to and relies on the case of *Johnson* v. *Ramberg,* 49 Minn. 341, 51 N. W. 1043. The court stated in that case: "The wareroom was lighted by a window in the front or south end, by a window over the sliding door, opposite this stairway, by the large doorway, when that door was open, and by the glazed door in the partition near the head of the stairway. In the daytime, the plaintiff, finding the sliding door in the wareroom wide open, sought to enter the store that way, as we assume he had license to do. Entering the wareroom, he passed over the partition door to pass through that into the store, but, as he says, meeting the defendant coming into the wareroom from the store, he stepped aside for him to pass, and in doing so he stepped off the head of the stairs and fell, causing the injuries for which a recovery is sought. The evidence shows conclusively, and without denial, that the room was so lighted that any one who looked about him would see the open stairway. The plaintiff admits that he could have seen it if he had looked, but that he did not look. Not only was the wareroom light, but the stairway and the cellar below were light. While the plaintiff was permitted to pass through the wareroom into the store, he could not but know from the surroundings that the place was not a passageway merely, but that it was also largely, if not principally, devoted to the private uses of the proprietor connected with his business; and the plaintiff was not justified either in closing his eyes as he went through, or in neglecting to observe where he went."

The statement from the opinion clearly shows the distinction between that case and the case at bar.

Attention is called to the case of *Shaw* v. *Goldman,* 116 Mo. App. 332, 92 S. W. 165. The court cited another case and said: "A husband and wife called upon a pork packer from whom they usually purchased meats and desired to buy a shoulder. The foreman in charge pointed out certain meats and then accompanied them into the rear of the establishment, walking immediately in front of the wife, 'who stepped into a pitfall and was injured. This court held and very properly we think, under the circumstances that neither the husband nor the wife is to be regarded as having been a trespasser or a bare licensee in the portion of the building where the open hatchway was situated,' and the recovery was sustained."

The facts in the instant case are very similar to the ones in the case mentioned in the *Shaw* v. *Goldman, supra.* The appellee, as was his custom, went to the place of business of the appellant to purchase meats, and Fine, the employee, accompanied him to the places where they expected to get the articles desired, walking immediately in front of him, until they reached the door which the employee opened and the appellee, in stepping out of the way, stepped into the elevator.

Appellant cites and relies on the case of *Beal-Doyle Dry Goods Co.* v. *Carr,* 85 Ark. 479, 108 S. W. 1053, 14 Ann. Cas. 48. In that case the injured party knew that the elevator was there and knew that it was open. He stated that the door of the elevator was open, but that it looked to him exactly like there was as much floor inside as out and he stepped in the hole. The injured party went to the elevator, knew that it was open, and stepped in, thinking there was a floor; it was dark. But in that case, where the injured party was going alone and saw the elevator, without any examination to see whether there was a floor, he thought there was and stepped in, the court held that it was a jury question.

The court said in the above case: "There is strong reason for finding that appellee was guilty of negligence in walking into the open elevator shaft, if it was open

as he claims; but we cannot say, as a matter of law, that he was negligent. That was a question for the jury. It is true that he might, by close investigation, have discovered that the car was not in place, and that the shaft was open, but that is not the question. Did he exercise such care for his own safety as a person of ordinary prudence would have done under like circumstances? That is what the law required of him, and all that it required; and whether or not he did that is a question of fact to be determined from all the evidence."

The above rule is well established by the decisions of this court. Wherever the evidence is such that different minds would arrive at different conclusions as to negligence or contributory negligence, it is a question for the jury.

"After all, the test is, what would an ordinarily prudent person have done under the circumstances as they then appeared to exist? Can we say that all reasonable minds would reach the conclusion that plaintiff failed to exercise due care to avoid this collision?" *Coca Cola Bottling Co.* v. *Shipp,* 174 Ark. 138, 297 S. W. 856.

We also said in that case: "The rule is, that where fair-minded men might differ honestly as to the conclusion to be drawn from the facts, either controverted or uncontroverted, the question at issue should go to the jury." *St. L. I. M. & S. Ry. Co.* v. *Fuqua,* 114 Ark. 112, 169 S. W. 786; *Ark. P. & L. Co.* v. *Shryock,* 180 Ark. 705, 22 S. W. (2d) 380, 20 R. C. L. 169.

Wherever there is conflict in the testimony, it is the province of the jury to pass upon the weight of the evidence and the credibility of the witnesses, and, even if it appears that the verdict is contrary to the preponderance of the testimony, this furnishes no ground for reversal. *Ark. P. & L. Co.* v. *Cates,* 180 Ark. 1003, 24 S. W. (2d) 846; *Hyatt* v. *Wiggins,* 178 Ark. 1085, 13 S. W. (2d) 301; *S. W. Bell Tel. Co.* v. *McAdoo,* 178 Ark. 411, 10 S. W. (2d) 503; *Ark. P. & L. Co.* v. *Orr,* 178 Ark. 329, 11 S. W. (2d) 761; *Mo. Pac. Rd. Co.* v. *Juneau,* 178 Ark. 417, 10 S. W. (2d) 867; *Mo. Pac. Rd. Co.* v. *Edwards,* 178

Ark. 732, 14 S. W. (2d) 230; *Western Union Tel. Co.* v. *Downs,* 178 Ark. 933, 12 S. W. (2d) 887; *Wright* v. *State,* 177 Ark. 1098, 9 S. W. (2d) 233; *Turner* v. *State,* 109 Ark. 138, 158 S. W. 1072; *People's Bank* v. *Brown,* 136 Ark. 517, 203 S. W. 579; *Harris* v. *Wray,* 107 Ark. 281, 154 S. W. 499; *Gazola* v. *Savage,* 80 Ark. 249, 96 S. W. 981.

Appellants next contend that the appellee was a licensee only, and that Fine, the employee, was acting for appellee. The uncontradicted evidence shows that the appellee had been going to the place of business of appellant on Sunday for seven or eight years to purchase such articles as he needed and were sold by appellant. One who goes to the place of business of another to purchase merchandise where he had been in the habit of going in like manner for a number of years, is an invitee and not a licensee.

The court said: "According to the evidence adduced it was at the time of appellee's injury the general custom of employees to ride on the engine from their places of work to their homes. This was done by the direction of the superior agents of the company in charge at Muskogee. This custom became impliedly an element of contract between the company and its servants at that place, and appellee was entitled to the privilege as a part of his contract." *St. L. I. M. & S. Ry. Co.* v. *Barron,* 166 Ark. 641, 267 S. W. 582.

The general rule is that the owner or occupier of premises is under no duty to protect those from injury who go upon the premises as volunteers or merely with his express tacit permission from motives of curiosity or private convenience in no way connected with business or other relations with the owner or occupier. A person going on one's premises under such circumstances would be a bare licensee, and the authorities cited and relied on by appellant would be applicable to such a situation.

The rule is also well established that a licensee who goes upon the premises of another for that other's pur-

pose by that other's invitation, is no longer a bare licensee. He becomes an invitee, and the duty to take ordinary care to prevent his injury is at once raised, and for violation of that duty the owner is liable if injury results to the invitee by reason of the negligence of the owner. *Glaser* v. *Rothschild,* 221 Mo. 180, 120 S. W. 1, 22 L. R. A. (N. S.) 1045; 45 C. J. 814; *Midland Valley Rd. Co.* v. *Littlejohn,* 44 Okla. 8, 143 Pac. 1.

There is a well-defined distinction between a mere licensee and an invitee. One who goes on another's premises for the purpose of purchasing goods which the other has for sale, and especially where this has been done for a number of years, is an invitee and not a bare licensee.

On the question of ratification, it is sufficient to say that appellee's testimony shows the manager knew of his habit of purchasing there on Sunday, and that no complaint was ever made of it, but that it was acquiesced in.

It is next contended by appellant that the violation of the Sunday laws was the proximate cause of the injury. However appellee was not violating the Sunday law. Section 2736 of C. & M. Digest makes it unlawful to sell goods, wares and merchandise on Sunday, but it does not make it unlawful to purchase, and certainly, if one is violating the law and negligently injures a person, his own violation of the law or wrongful act would not be a defense for his negligence. In other words, a person cannot be guilty of an act of negligently injuring another and be relieved of the consequences by showing that he, the wrongdoer, was at the time violating the law. But if both parties had been violating the Sunday law, it would not prevent one of them from recovering for injuries caused by the negligence of the other. 25 R. C. L. 1450; *Solarz* v. *Manhattan Ry. Co.,* 29 N. Y. S. 1123; *Ark. & La. Ry. Co.* v. *Lee,* 79 Ark. 448, 96 S. W. 148; *Feital* v. *Middlesex R. R. Co.,* 109 Mass. 398, 12 Am. Rep. 720; *Landers* v. *Staton Island Rd. Co.,* 13 Abbot's Practice Reports (N. S.) 338; *Bucher* v. *Fitchburg Rd. Co.,*

131 Mass. 156, 41 Am. Rep. 216; *Sutton* v. *Wauwatosa,* 29 Wis. 1, 9 Am. Rep. 534; *Kansas City* v. *Orr,* 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; *Louisville N. A. & C. Ry. Co.* v. *Frawley,* 116 Ind. 566, 9 N. E. 594; *Louisville N. A. & C. R. Co.* v. *Buck,* 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883; *Schmid* v. *Humphrey,* 48 Iowa 652, 30 Am. Rep. 414; *Stewart* v. *Davis,* 31 Ark. 518, 31 Am. Rep. 576.

We think, however, a complete answer to the argument that the violation of the Sunday law is a defense is that appellee was not violating the Sunday law.

We do not deem it necessary to set out the instructions, but we have carefully considered the objections of appellant and have reached the conclusion that the jury was correctly instructed.

The judgment of the circuit court is affirmed.

COLLINS *v.* STATE.

Opinion delivered March 9, 1931.

E. D. Chastain, for appellant.

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

MEHAFFY, J. Appellant was convicted in the Crawford Circuit Court of the crime of carrying a pistol. A jury was selected, and at the close of the evidence the court directed the jury to return a verdict of guilty, and the punishment was fixed at a fine of $50. Motion for new trial was filed, which was overruled, and the case is here on appeal.

The Attorney General confesses error on the ground that the court had no power to direct a verdict of guilty because the punishment could have been imprisonment, and also on the ground that the evidence, being in conflict as to whether the appellant was on a journey, should have been submitted to the jury.

Upon a careful examination of the record we find that the confession of error is well taken. The statute provides that any person convicted of carrying a pistol shall be punished by a fine of not less than $50 or more than $200 or imprisonment in the county jail for not less than 30 days nor more than three months or by both fine and imprisonment. Crawford & Moses' Digest, § 2806.

In misdemeanor cases, where the punishment is by fine only, the circuit judge would have the power to direct a verdict of guilty where the facts were undisputed and where guilt from all the evidence was the only inference that could be drawn. But where the punishment may be imprisonment or where the law provides that it may be fine or imprisonment, the trial judge has no power to direct a verdict. *Roberts* v. *State,* 84 Ark. 564, 106 S. W. 952; *Wylie* v. *State,* 131 Ark. 573, 131 S. W. 573; *Parker* v. *State,* 130 Ark. 234, 197 S. W. 283; *Snead* v. *State,* 134 Ark. 303, 203 S. W. 703; *Burton* v. *State,* 135 Ark. 164, 203 S. W. 1023; *Huff* v. *State,* 164 Ark. 211, 261 S. W. 654.

It therefore appears settled by the decisions of this court that the trial judge is without power to direct a verdict of guilty where the punishment may be imprisonment.

The appellant in this case testified in substance that he was on a journey at the time he was carrying a pistol,

and he was therefore not carrying it in violation of the statute. The statute reads in part as follows: "Provided further nothing in this act shall be so construed as to prohibit any person from carrying any weapon when upon a journey or upon his premises. Section 2804, Crawford & Moses' Digest. Appellant's testimony was corroborated by another witness. The evidence was in conflict as to whether appellant was at the time on a journey and whether he was or not was therefore a question for the jury.

"A verdict should not be directed except in cases where the evidence is so conclusive that reasonable minds could not differ as to the result to be reached. A verdict should not be directed unless the proof is free from substantial conflict, although the evidence preponderates in favor of one of the parties or although the conflict arises by indirection." *Paxton* v. *State,* 114 Ark. 393, 170 S. W. 80 Ann. Cas. 1916A, 1239; *Ellington* v. *Denniny*, 99 Ark. 236, 138 S. W. 453; *Pillow* v. *State,* 160 Ark. 195, 254 S. W. 462; *Allen* v. *State,* 165 Ark. 261, 298 S. W. 993.

The judgment of the circuit court is reversed, and the case remanded for new trial.

ARNOLD *v.* STATE.

Opinion delivered March 9, 1931.

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

BUTLER, J. This case is here on appeal from conviction on the charge of possessing liquor for sale. The appellant has filed no brief, but it is suggested in the abstract and brief filed by the appellee that the grounds assigned are that the verdict of the jury was not supported by sufficient legal testimony, that it was error not to quash the information because the prosecution was for an alleged violation of a city ordinance, that the State was not a proper party, and that the court erred in the admission of testimony regarding previous raids on defendant's premises and the search of same.

The evidence, about which there is no dispute, tended to establish the fact that upon search of defendant's premises eighteen gallons of whiskey were found, and that at other times the officers had found on his premises beer in his ice box, a lot of empty bottles and a plain trail leading from defendant's back door to a vacant house nearby in which was found from one to two hundred bottles of home-brew and two gallon jars of the brew in process of fermentation; that there was no other trail except that from defendant's back door to this vacant house; that on another occasion one of the police officers of the city of Hot Springs found from eight to a dozen bottles of home-brew at the home of defendant and met a drunken man coming out of defendant's house. The defendant did not testify in the case. The evidence, while circumstantial, was sufficient to go to the jury, and the weight of such evidence was a question for their determination.

The refusal to quash was not error as defendant was charged with violation of a State law which is found in Acts 1925, p. 363, § 1. We have held that where the defendant is charged with transporting liquor in violation of a city ordinance, and where from a conviction in the mayor's court on appeal to the circuit court it is found that he is not guilty of violating a city ordinance but of a violation of the State law against the transportation of liquor, on a verdict of guilty judgment is properly rendered.

We have many times decided that testimony relative to the search of the premises of one charged with the violation of the liquor law and the finding of liquor or vessels that have contained liquor were properly admitted as tending to shed light on the truth or falsity of the charge for which the defendant was tried. The rulings of the trial court as disclosed by the record, which we have examined, were perhaps more favorable to the defendant than he deserved, but the penalty for the offense charged is found in Acts 1925, p. 363, § 2, which is a fine in any sum not more than $1,000 nor less than $50. The court, therefore, erred in its instruction to the jury relative to the amount of punishment they might fix upon conviction, and in its judgment based upon such verdict which was for a fine of $200 and imprisonment in the county jail for a period of thirty days.

The judgment of the trial court will therefore be modified by eliminating that part of it which provides for imprisonment in the county jail for thirty days, and as modified will be affirmed. It is so ordered.

COBB *v.* PARNELL.

Opinion delivered March 9, 1931.

Frauenthal, Sherrill & Johnson, for appellant.

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

BUTLER, J. Act No. 10 and act No. 34, amendatory thereto, were passed at the present session of the General Assembly of the State of Arkansas. By this legislation a board was created consisting of the Governor, the Auditor of State, the Chairman of the Highway Commission, and seven others, designated as the State Agricultural Credit Board. These acts empowered said board to issue bonds in the sum of $1,500,000, for which the full faith and credit of the State is pledged, for the purpose of financing farmers and stock raisers for agricultural

purposes. The loans are to be made by finance corporations, already organized and to be created, under the supervision of the State Agricultural Credit Board according to rules prescribing the conditions under which the loans shall be made to the farmers and the manner of repayment, which rules the board are empowered to promulgate. A general annual tax of one-half mill is levied, which, when collected, shall be devoted solely to the payment of the bonds.

The reasons for the enactment of this law are to be found in the emergency clause, which is as follows: "It is ascertained and hereby declared that, owing to the terrible drouth in the State of Arkansas during the year 1930, and to the failure of more than one hundred banks in this State during the fall and winter of 1930-31 whereby several millions of dollars of deposits have been tied up, many of the farmers of the State have no means to plant a crop this year; and that, unless means are provided forthwith, many of said farmers and their families will suffer in health for want of proper food, and some may die from starvation; and it is therefore ascertained and declared that an emergency exists, and that for the immediate preservation of the public health and safety, it is necessary that this act should go into immediate operation, and be in full force from and after its passage."

In order to make the provisions of the act immediately effective, the sum of $1,500,000 was appropriated out of the funds in the State Treasury to the credit of the Highway Department, with provision that, when the bonds authorized by the act are sold the funds arising from such sales shall be immediately transferred from the credit of the Credit Board to the credit of the Highway Department, and deposited for its use to reimburse it for the amount transferred from its funds as aforesaid.

This action questions the constitutionality of the act, and the attack is made upon it on four grounds, the last two of which we shall consider first.

It is claimed by the appellant that the act is void in that no provision is made for the levying or collecting

of the tax sought to be imposed. This objection is not tenable, for the levy was in fact made by the Legislature which has the inherent authority to make the levy, and, as it is a general tax, the laws relating to the collection of State general taxes will govern.

The further point is raised that the act is unconstitutional because said act creates the board which is to carry out the purpose of the act and in the same act appropriation is also made to meet and carry into effect the purpose of the act. As stated in its title, the act is "an act to enable agriculture finance corporations to obtain funds with which to carry out the purposes of their organization, to levy a tax for the repayment thereof, and for other purposes." There is but one subject embraced in the act and it, therefore, complies with the requirements of § 30 of article 5 of the Constitution.

These objections are not seriously urged by the appellant, but it is insisted that the act is void because it violates § 1 and § 11 of article 16 of the Constitution.

Section 1, article 16: "Neither the State nor any city, county, town or other municipality in this State shall ever loan its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the present existing indebtedness, and the State shall never issue any interest-bearing treasury warrants or scrip."

Section 11, article 16: "No tax shall be levied except in pursuance of law, and every law imposing a tax shall distinctly state the object of same; no moneys arising from a tax levied for one purpose shall be used for any other purpose."

Section 1, article 16, of the Constitution is ambiguous, and for a time it was thought by some that it precluded the State from issuing any interest-bearing evidences of debt except in payment of the indebtedness existing at the time the Constitution was written.

It is a fundamental and universally recognized canon of construction that the Constitution of this State is not a grant, but a limitation, of power, and in all cases where there is not an express or necessarily implied limitation of its power by the Constitution, the Legislature is supreme; and it is always the presumption that in the enactment of a law the power of the Legislature has not been limited, and it is properly exercising its inherent authority. Therefore, a statute will be upheld unless it is clearly prohibited by the Constitution, and, where it is doubtful whether an act comes within the inhibition of the Constitution, the doubt must be resolved in favor of the constitutionality of the act. *State* v. *Crowe,* 130 Ark. 272, 197 S. W. 4; *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.

Although every presumption must be indulged in favor of the constitutionality of an act, some of the older decisions in States having constitutional provisions similar to the one under discussion have held that acts like the one before us were prohibited by the Constitution. The Supreme Court of Kansas had occasion to construe a statute passed by the Legislature of that State for the relief of farmers in certain areas of the State where the crops had been destroyed by drouth. This act appropriated a sum of money derived from the general revenue to be loaned to the farmers through agencies created by the act for the purpose of enabling them to buy seed and grain. The court held that the purpose for which the appropriation was made was not a public one, and that it was a loan of the State's credit in violation of the Constitution, and, after reciting the provisions of the act under review, the court said: "These various provisions show that the idea of the Legislature was not the relief of the helpless and penniless, but the assistance of a class temporarily embarrassed." *State* v. *Osawkee Township,* 14 Kan. 418, 19 Am. Rep. 99.

A constitutional provision similar to ours was considered by the Minnesota court in the case of *William*

Deering & Co. v. *Peterson,* 75 Minn. 118, 77 N. W. 568, construing an act of the Legislature providing for the loan of seed grain to farmers owning less than 160 acres of land and to those owning more than that amount if the land was free from mortgage incumbrance. The act was held unconstitutional on the ground that it appropriated public money for a private purpose. In commenting on the purposes of the act, the court said: "It permits every one who has not more than 160 acres of land free from mortgage incumbrance to borrow from the State. A person might have 10,000 acres of land worth $100,000 subject to a mortgage of only $500, and he would be entitled, under the terms of this act, to borrow from the State. He might also have one million dollars worth of personal property and still he could borrow from the State. * * * Taxation cannot be imposed for a private purpose, and if the State can appropriate for a private purpose the money in its treasury and then replace it by taxation, it can do indirectly what it cannot do directly."

As supporting the rule the cases of *Citizens' Savings' etc.* v. *Topeka,* 20 Wall. 655, 15 Am. Rep. 56; *Allan* v. *Inhabitants of Joy,* 60 Me. 124, 11 Am. Rep. 185; *Lowell* v. *Boston,* 111 Mass. 454, 15 Am. Rep. 39; and *Coates* v. *Campbell,* 39 Minn. 498, 35 N. W. 366, may be cited.

The modern doctrine, however, seems to be more elastic and liberal than the one laid down by those decisions. In the case of *Shenandoah Lime Works* v. *Mann,* 115 Va. 865, 805 E. 753, Ann. Cas. 1915C, 973, an act of the Legislature providing for the working of convicts by a board created for that purpose for the manufacture of lime and for its disposition to the citizens of the State was attacked by a number of merchants on the ground that it appropriated public funds for a private business. The court upheld the statute as a valid exercise of the police power.

For the same reason an act of the Alabama Legislature was upheld providing for the taxing of fire insur-

ance companies, the proceeds to be administered through a private association to aid in fire prevention. The court recognized that under constitutional inhibition taxes could be levied for public purposes only, and said: "The objects for which money is raised by taxation must be public, and such as sub-serve the common interest and well-being of the community required to contribute. To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at the first blush. * * * The purposes for which this tax is imposed are not private or individual. * * * The prevention and suppression of calamities, involving the destruction of property, peril to life, the disturbance of public security, is a governmental function and duty, aid and assistance in which it is the duty of every citizen to render. Sacred as are the rights of private property, jealous as is the law of every infringement or invasion of them, emergencies or occasions may arise in which they are subordinate and must yield to public necessity." *Phoenix Assurance Co.* v. *Montgomery Fire Department,* 117 Ala. 64, 23 S. E. 843, 42 L. R. A. 468.

Also in *State* v. *McCown,* 92 S. C. 81, 75 S. E. 392, an appropriation of State funds to create a warehouse system was upheld. The substance of the reason for the enactment of the law as stated by the court was that, by affording the farmers of the State a means of storing their cotton and borrowing money on the same under the plan set out in the act, they would be enabled to prevent the manipulation of speculators in cotton by which price of the commodity would be depressed. The attack on the statute was on the ground that it appropriated public revenues for private purposes. In upholding the act, the court said: "In passing this statute, the State was clearly within the exercise of its police power, which in its last analysis simply means the State's right of self-

defense. * * * The act in question was for a public and not a private purpose."

In 1890 the Legislature of North Dakota passed an act which, among other things, provided that, in any county in the State where the crops of the preceding year had been a total or partial failure by reason of drouth or other cause, the board of county commissioners of such county might issue bonds of the county pursuant to the provisions of the act and with the proceeds thereof purchase seed grain for those as were in need of same and who were unable to procure it. The act further provided for a tax levy sufficient to pay the principal and interest on the bonds. Objection was made to the act on the ground that it was forbidden by the Constitution which expressly provided that the State could not lend its aid to either corporations or individuals, and that the tax was not for a public purpose. The test laid down by the court was this: "Is the tax provided for in the statute laid for a public purpose?" In answering this question in the affirmative, the court took occasion to say that the act was passed because of successive crop failures, a numerous body of citizens were reduced to extremities without fault on their part and so impoverished that they were unable to obtain the grain necessary for seeding the lands from which they derived the necessities of life. The court said: "It is agreed on all sides that this class of citizens, having already exhausted their private credit, must have friendly aid from some source in procuring seed grain if they put in any crops this year. The Legislature, by this statute, has devised a measure which seems well adapted to meet the exigency and promises to give the needed relief with little ultimate loss to the county treasurer." After discussing certain authorities the court proceeded: "We have carefully examined the authorities above cited, and many others of similar import, and, while fully assenting to the principles enunciated by the cases, viz, that all taxation must be for a public purpose, we do not, with the single exception of

the Kansas case (*State* v. *Osawkee Township*), regard them as parallel cases, and applicable to the question presented in the case at bar. As we view the matter, the tax in question is for a public purpose, *i. e.*, a tax for the 'necessary support of the poor'."

"This review of legislation in aid of destitute farmers will serve to illustrate the well known fact that legislation under the pressure of a public sentiment, born of stern necessity, will adapt itself to new exigencies, even if in doing so a sanction is given to a broader application of elementary principles of government than have before been recognized and applied by the courts in adjudicated cases. It is the boast of the common law that it is elastic, and can be adjusted to the development of new social and business conditions. Can a statute enacted for such broadly humane and charitable purposes be annulled by another branch of the Government as an abuse of legislative discretion? We think otherwise. Great deference is due from the courts to the legislative branch of the State Government, and it is axiomatic that in cases of doubt the courts will never interfere to annul a statute." *State* v. *Nelson County*, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283.

A cyclone destroyed a large part of the city of New Richmond, Wisconsin, killing and injuring many of its inhabitants. To bury the dead, care for the injured, clear up the debris to prevent disease, and to relieve and aid the homeless, destitute and impoverished, the city incurred large expense. Afterward it borrowed from the State out of certain funds a sum of money. At the next session of the Legislature an act was passed making an appropriation from the general fund for the purpose of relieving the city of its indebtedness. This act was attacked as unconstitutional on the ground that the money appropriate was for a private and not a public purpose. The Supreme Court of Wisconsin, in passing on this question, said: "Can we say that the appropriation in question was for a public purpose and such as subserved the common interest and well being of the people of the

State? * * * The condition of things so suddenly precipitated, the claim of humanity, and the good of the State called for immediate and extraordinary relief. In passing the act the Legislature were called upon to consider the whole situation. The people of the commonwealth were bowed in sorrow over the great calamity, and the call was for the immediate exercise of the police power of the State on a large scale. The object of the act being public, and to subserve the common interest and well-being of the people of the State at large, brought the subject legitimately within the power of the Legislature." *State ex rel. New Richmond* v. *Davidson,* 114 Wis. 563, 88 N. W. 596, 58 L. R. A. 739.

The Constitution of the State of Montana provided by § 1 of article 13 that "neither the State, nor any county, city, town, municipality, nor any other subdivision of the State shall ever give or loan its credit in aid of, or make any donation or grant by subsidy, or otherwise, to any individual association or corporation." The Legislature of that State passed an act, the outstanding purpose of which was to furnish aid in the shape of seed grain to needy farmers who could not procure the same, and authorized the issuance of bonds to procure money for the purchase of seed grain, and provided that those obtaining the grain should sign a contract for the repayment of the cost with six per cent. interest. This act was attacked as being in violation of the section of the Constitution quoted above and because it was not for a public purpose. It was stated by the court that "public authorities may not do by indirection what they cannot do directly; and forasmuch as the bonds or warrants authorized by this act to be issued and sold must, to the extent that repayment fails or is delayed, be made good by taxation, it is entirely clear that their issuance cannot be authorized save for a purpose for which taxation is lawful. Hence the rule that taxes may not be laid except for a public purpose is properly invoked. May this be considered such a purpose? That depends on what is meant by 'needy farmers who are unable to pro-

cure seed'; for, vast and important as farming operations are, and worthy as they may be of such public encouragement as many of our statutes do authorize, still, as such, they are private and not public. * * * Now, to the farmer, unfavorably situated, drouth, hail, or other causes of crop failure may entail results equally ruinous and not different in character from those of pestilence or fire; they may drive him to the verge of the poorhouse, and he becomes, as the victim of misfortune, a person with claims upon the sympathy and aid of society—the more so as he is unwilling to become wholly dependent—for which the county may and must provide. If, therefore, the phrase 'needy farmers who are unable to procure seed' may be taken to mean persons engaged in agriculture who, by natural or other conditions beyond their control, are so reduced in circumstances that they have neither money, nor credit, nor property, in shape to be pledged or mortgaged, and who without some aid will become paupers, dependent on the county for support—and we think this is the meaning—then the purpose to aid them is a public one, and the only subject left to consider is the validity of the means prescribed. * * * If any course proposed is a measure of poor relief and is prescribed by law, there is no contravention of § 1, article 13, even though it should involve a loan or a donation. As a matter of fact, the origin and purpose of the restrictions in § 1, art. 13, are well known. They arose in a time when the evils of public aid to railroads were notorious; they were intended to prevent the extension of such aid to either individuals or corporations for the purpose of fostering business enterprises, whether of a semi-public or private nature; they had and were designed to have no reference whatever to suitable measures, elsewhere commanded, for the relief of the poor." *State* v. *Weinrich,* 54 Mont. 390, 170 Pac. 942.

■ In construing § 1, art. 16, of our Constitution, this court refused to accept the narrow view taken by some that the credit of the State could not be pledged

for any purposes, for it had in mind the history of the times just preceding the adoption of the Constitution and the evils sought to be corrected. Among the evils were precisely those mentioned in the case of *State* v. *Weinrich,* 170 Pac., *supra.* The State had just been liberated from the domination of alien adventurers who, under the guise of fostering the industries of the State by lending to them credit, had looted the treasury. A notable example of unwarranted and improvident loans of the State's credit was the aid given to the building of railroads. That it was only to prevent a recurrence of this that § 1, article 16, was adopted was apparent from the fact that at the first session of the Legislature after the adoption of the Constitution of which article 16 is a part, the Legislature passed an act providing for the issuance of bonds as noted in the case of *Hays* v. *McDaniel,* 130 Ark. 52, 196 S. W. 934. Since that time the credit of the State has been used for the promotion of the general welfare of the State and appropriations made from revenues derived from general taxation for the purposes of protecting the State from disease, from hazards by fire, and for exhibiting the resources of the State at various expositions, the design of which was to attract immigration and to secure the development of our own resources. Therefore, it has become recognized that the State, although prohibited from lending its credit in the furtherance of private enterprises, may still use that credit for the promotion of the common good. *Hays* v. *McDaniel, supra; Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9, *supra.*

The question then presented for our consideration is this: Is the purpose and effect of the act now before us a loan by the State of its credit to foster individual enterprises, or is it one which has for its end the accomplishment of a purpose which will secure the State from a general threatened evil and promote the welfare of its citizens? In other words, is it for a public purpose?

These are the circumstances which called into existence the act in question, to which reference is made in

its emergency clause. A great drouth prevailed in the State of Arkansas throughout the entire growing season of 1930 which caused in the greater part of the State, the entire failure of corn, the principal grain grown, and all other crops except cotton; while cotton is among the most drouth resistant of plants, many parts of the State made less than one-tenth of the normal crop, and except in a few favored localities, small in area, the cotton was not more than 50 per cent. of a normal yield. The total production of cotton for the State was less by approximately 500,000 bales than the year preceding, and was produced at a cost based on normal production and an average price of twenty cents. About the time of the maturity of the crop prices of cotton began rapidly to decline, and, when farmers began to harvest and market the crops, its value was not more than half the price per pound obtained for the crop of 1929. This gave the farmers, according to locality, from one-twentieth to one-fourth of a normal return for their expenditures in making and gathering the crop; and as it was made on borrowed money, the vast majority of farmers were unable to pay but a fraction of their debts, for the payment of which all they had stood pledged. Therefore, they faced another year without food for man or beast, heavily burdened with debt, and their securities exhausted. To add danger to this situation, twenty-one of our sister States had suffered severely from the effects of the drouth, though in none of them was the drouth so complete and prolonged as with us, and, to complete the burden of calamity, an economic depression obtained throughout the nation, more pronounced perhaps than ever before in history, and, largely because of this, together with the failure of crops, late in November, 1930, the largest bank in the State closed its doors. Immediately before, or soon thereafter, bank after bank throughout the State became insolvent and went into liquidation until more than one hundred banks, within a space of three months, had closed their doors, thus rendering unavailable a major part of the liquid capital of the State. The farmer had

already mortgaged, for debts he could not pay, all he had, and could borrow no more. This was the plight of vast numbers of men and women when winter closed down. The larger landowners, the merchants, the banks to whom they were accustomed to go for help were themselves bankrupt, or their credit exhausted. What money the thrifty and careful had hoarded was locked behind the doors of insolvent banks and dreadful, sudden poverty gripped the State within all her borders. Relief from private sources at home was pitifully inadequate, and, but for aid from without, thousands of our people would have already starved. That everready agency of a benevolent people, the society of the Red Cross, came to the succor of our distress with the utmost speed and generosity. The extent of the aid needed and furnished is almost beyond belief. In many of the counties and in some—naturally the most productive—a majority of the entire population was provided with means of subsistence, and in one, out of a population of some 22,000, it was necessary that more than 20,000 be given aid, and in practically every county except possibly two or three of the 75 counties, a considerable number of the people have been maintained by the Red Cross.

Our accredited representatives in both houses of the National Congress, have entreated, in the most moving terms and with some measure of success, aid from the Government of the United States, but with all this the measure of relief is still insufficient, and the people, though saved from immediate starvation, are now undernourished, and with vital forces so depleted as to be unfit to perform hard physical labor and are subject to the inroads of disease.

With measures of relief still insufficient, the Legislature now in session, passed the acts which we have under consideration. The plight of our citizens, most feebly and inadequately here described, was the motive moving our General Assembly—the relief of a people wholly destitute and utterly helpless its aim and purpose.

It will be seen by a review of the cases heretofore cited that under constitutional inhibition like or analagous to ours, aid has been extended by the State under varying circumstances, to ward off anticipated dangers, or relieve present calamities; and, even in those cases denying the authority of the State to lend its aid, the intimation is that statutory relief was denied not so much for lack of power, but rather that the power was improvidently exercised and without sufficient reason.

But, even under the view prevailing a half century ago of the limits of legislative power, when the case of *State* v. *Osawkee Township,* 14 Kan. *supra,* was written, we are justified, from the language there used in the opinion, that had the people of Kansas been suffering under so wide-spread an irremediable catastrophe as are now the citizens of Arkansas, the decision would have been quite otherwise, for there it was said: "The relief of the poor, the care of those who are unable to care for themselves, is among the unquestioned objects of public duty. In obedience to the impulses of common humanity, it is everywhere so recognized. * * * Something more than poverty, in that sense of the term, is essential to charge the State with the duty of support. * * * It is not one who is in want merely, but one who, being in want, is unable to prevent or remove such want. There is the idea of helplessness as well as of destitution. We speak of those whom society must aid, as the dependent classes, not simply because they do depend on society, but because they cannot do otherwise than thus depend. * * * It matters not through what the inability arises, whether from age, physical infirmity, or other misfortune; it is enough that it exists."

The case of *William Deering & Co.* v. *Peterson,* 75 Minn. 118, 77 N. W. 568, is a case as we have already seen which held unconstitutional an act for the purchase and distribution of seed grain to farmers. But the conception of the State's duty had broadened, and there it was said: "The cases of *Lowell* v. *City of Boston,* 111

Mass. 454 [15 Am. Rep. 39]; and *State* v. *Osawkee Tp.*, 14 Kan. 418 [19 Am. Rep. 99], are much in point. The latter case holds that no one can obtain such public aid unless he is actually a pauper, however imminent and immediate the danger of his becoming such. It may be that, if this question were before us, we would not go thus far, but would hold that, in the midst of such a great public calamity, a person who is within one degree of being a pauper, and in imminent and immediate danger of becoming such, may, for the purpose of preventing him from becoming such, be given aid by the State or municipality without violating the Constitution."

Again we say, in none of the cases either upholding or denying the right to aid was there such general destitution and complete helplessness as exists now in this State and which moved the Legislature to action. Through the leaders of the State we have applied to the Red Cross for aid, and our cry has been heard and heeded; through our representatives in Congress a measure of relief has been granted. While the private resources of the citizens of this State are exhausted, the credit of the State itself is not, and now to say, because of a narrow and scholastic interpretation of our Constitution that the State is unable itself to give what measure of relief it can is a contention to which we cannot assent. We think the need is great, and the means for its relief but a use of the credit of the State for its own protection, as, protecting its citizens from famine and disease, it protects itself, and the aid extended is for a public purpose. The protection of its citizens from danger of whatever kind is the duty of the State and in this case the measure is but a valid exercise of the police power and the means employed finds ample justification in the maxim "The safety of the people is the highest law."

The landowners in many sections of this State had become heavily burdened by taxes placed by themselves upon their lands for the construction of local improvements. It was feared that they would be unable to pay these taxes and therefore would lose their lands. These

improvements were not made for the benefit of the citizens of the State as a whole, although they might indirectly inure to the general benefit, but because of the theory that the improvement would enhance the value of the land taxed. But, notwithstanding this, the State recognized that a considerable number in the State could not suffer without great hurt to the whole, and issued its bonds for their relief. The act of the Legislature authorizing the issuance of the bonds was sustained in the case of *Bush* v. *Martineau, supra,* on the theory that the State was not loaning its credit, but using it for a public purpose, in that the poverty of many would injure the prosperity of all. If it was a public duty to relieve a large number of our citizens from a burden of taxation improvidently assumed by themselves and for their own benefit, and the act sustained as the use of the State's credit for a public purpose, then where a law is enacted for relief from certain starvation and probable disease, certainly it, too, must be but the use of the State's credit for a public purpose. This we so hold as consonant with the impulses of common humanity and natural justice, our conclusions finding support in the authorities we have cited and reviewed. The doctrine announced in this case has no application except in cases where the calamity is certain and irremediable in its nature and general in its scope.

The last objection raised is that the act violates the provisions of section 11, article 16, because it diverts funds belonging to the Highway Department and levied for the construction of roads to the credit of the State Agricultural Credit Board. To this contention we do not agree, because there was no diversion. The section in question by the use of the word "diversion" evidently meant a permanent taking from one fund to the use of another and did not mean a temporary transfer of the funds as in this case. Funds are not to be diverted, but to be transferred temporarily with adequate means for their return provided.

Our conclusion, therefore, is that the act before us must be upheld as not in violation of §§ 1 and 11 of article 16 of the Constitution, but as a use by the State of its credit for a public purpose and a valid exercise of its general police power. The decree of the trial court is correct, and it is therefore affirmed.

HART, C. J., (dissenting). It seems to Judge SMITH, Judge MEHAFFY and me that this is a case which calls for the application of the old and often quoted maxim that hard cases make shipwreck of the symmetry of the law.

Article 16, § 1, of our Constitution provides that neither the State nor any city, county, town or other municipality shall ever loan its credit for any purpose whatever. In the construction of this provision, the court has held that it prohibits the making of loans for private purposes by the State, either directly or by delegation of power. *Hayes* v. *McDaniel,* 130 Ark. 52, 196 S. W. 934; and *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.

In the case first cited, the money was borrowed and the bonds issued to cover deficiencies in the General Revenue Fund, and a tax was authorized to be levied to create a sinking fund for the payment of the principal and interest of said loan. The primary object of all taxation is for the support of the government, and there would seem to be no room for doubt that a loan for supplying a deficiency in the taxes collected for the support of the State government was for a public purpose. The loan proposed to be secured and the bonds issued in the case last cited were for the payment of certain obligations incurred by road improvement districts and other governmental agencies created for the purpose of constructing improved roads, and for constructing new improved roads by the State itself. This was for a public purpose. Highways are constructed and maintained for public use by the State itself or by governmental agencies created by law for that purpose. The making and maintaining of public highways has always been held to be governmental, and it has been recognized as one of the

most important duties of the State to provide and repair them. Therefore, public highways are for public uses, and there is no reason why the power of taxation by the State may not be exercised in their behalf.

It is elemental that taxes can only be levied for a public purpose. Indeed, there is no principle of constitutional law better settled than that taxes can not be levied for a private purpose. This brings us to a consideration of whether the present act is the loan of the credit of the State for a private purpose. Both the original act and the amendment thereto pledge the full faith and credit of the State for the payment of the bonds proposed to be issued. This shows that the State is lending its credit to whatever purpose for which the bonds are issued.

"If the State can not loan its credit, it can not borrow money on its own bonds, and then loan the money. It can not do indirectly what it can not do directly." *During* v. *Peterson,* 75 Minn. 118, 77 N. W. 568.

It is true that the Governor, State Auditor, and Chairman of the Highway Commission are created as a board to carry out the provisions of the act. This does not make any difference. "The right to tax depends upon the ultimate use, purpose, and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it. A tax for a private purpose is unconstitutional, though it pass through the hands of public officers; and the people may be taxed for a public work, although it may be under the direction of an individual or private corporation." *Sharpless* v. *Mayor of Philadelphia,* 21 Pa. St. 147; and *Coates* v. *Campbell,* 37 Minn. 498, 35 N. W. 366.

It is true that there is no hard and fast rule by which to determine which purposes are public and which private. *People* v. *Salem,* 20 Mich. 452. Judge Campbell in a concurring opinion at page 495 said: "It can not be claimed that there is no limit to the power of taxation, which can

prevent the imposition of taxes for all purposes which the Legislature may choose. There are purposes the illegality of which would be so manifest that, although not mentioned in any Constitution, no one could hesitate to say the burden was not validly imposed to further them. The purposes for which taxes are imposed must be public purposes, and however close things may be to the dividing line, yet whenever any subject lies clearly on one side or the other, the courts must sustain or reject the tax accordingly, whether the purpose be laudable or not."

This means that the power of taxation can not be resorted to in aid of any class in business, although it might promote general prosperity. The reason is that taxation is only lawful to enable the State to fulfill its public duties, and to tax the people to pay the expenses of public business.

By section 5 of the original act, the board created by the act was empowered to make loans from the fund provided for the purpose of purchasing capital stock in corporations organized for the purpose of financing farmers and stock-raisers for agricultural purposes. The section provides that the loans shall be evidenced by the note of the individuals, secured by an assignment of the stock so purchased, etc. The section further provides that preferences shall be given borrowers subscribing stock in finance corporations already organized rather than in corporations hereafter organized. The aggregate loans to counties are fixed not to exceed $50,000, and to individuals not to exceed $2,000. In the amended act it is provided that the loan to any one individual shall not exceed $5,000. Thus, it will be seen that the act by its terms does not propose to be a measure of poor relief, but only to lend to the needy to keep them from becoming objects of charity.

Once the agencies of taxation are operated to anticipate further want, no one can foretell what the ultimate result will be. It is the character of the use, and

not the number of persons affected, that makes a public or a private purpose. Otherwise, by insensible degrees, sanctioned by judicial approval, subsequent Legislatures, swayed by the misfortunes of the people of the State, might be carried step by step into the exercise of illegal powers of taxation without perceiving the progression.

The cardinal rule for the interpretation of statutes is the ascertainment of the meaning of the language used in the statute, and not what the lawmakers themselves meant. *State* v. *Trulock,* 109 Ark. 556, 160 S. W. 516.

As we have already seen, taxation is the means of raising revenue for public purposes. Section 3 of the amended act expressly provides that the Credit Board is empowered to make loans to individuals for the purpose of purchasing capital stock in corporations proposed to be organized in the various counties to finance farmers and stock-raisers. The section further provides that preferences shall be given to borrowers subscribing stock in corporations already organized, and that no loan shall be made to any individual to exceed the sum of $5,000. Section 5 provides for incorporation of these credit corporations under act 250 of the Acts of 1927, regulating the organization of business corporations. The language used shows that a loan of money is contemplated from funds ultimately to be collected by taxation.

If, as we have already seen, the term "public purpose" has no relation to the urgency of the public need, but is merely a term of classification to denote the objects for which the State is under the duty to provide, we have an act to loan the public money, not to persons who are classified in law as poor persons for whom it is the duty of the State to provide, but to persons who may need as much as $5,000 to carry on their farming operations for a single year. If this be a public purpose and their farming operations end disastrously and the loan becomes too burdensome, then a subsequent Legislature might provide for the release of the borrowers from any further obligations on bonds issued under the provisions

of the act, just as was done when the bonds issued by the various road improvement districts became too burdensome to bear. The Legislature alone may declare the public policy of the State with reference to taxation, and the courts have nothing to do with the wisdom and expediency of its acts, when done within constitutional limitations. It is the duty of the courts, however, to act when the Legislature attempts to levy taxes for uses that are usually classified in law as private purposes.

Owing to the public importance of the question, we have deemed it proper to express our dissent in writing, and to express the view that the Legislature might make an appropriation of the public money for those who may now be properly classed as poor persons, but not to loan its credit to individuals to prevent them from becoming a charge on the public.

The views we have expressed render it unnecessary to consider the remaining questions raised by the appeal.

WHITE & BLACK RIVERS BRIDGE COMPANY *v.* VAUGHAN.

Opinion delivered March 16, 1931.

[redacted]

Cooper Thweatt and *Chas. B. Thweatt,* for appellant.

S. Brundidge, for appellee.

HART, C. J., (after stating the facts). It is first insisted by counsel for the defendant that there is no basis for the allowance of the $1,000 attorney's fee, which must have entered into the verdict of the jury. The verdict of the jury was for $2,750 for the plaintiff on his complaint, and it was adjudged that this amount should bear interest at six per cent. from the 8th of June, which was fixed

by the court as the date of the termination of the plaintiff's employment. It is insisted by counsel for the defendant that the only basis of allowance of the $1,000 item was the testimony of Vaughan to the effect that it is claimed "for value of my interest in Des Arc Bridge Company, taken over under promise to compensate me by attorney's fees." It is insisted that on the trial of the case Vaughan's attorney called this a retainer fee, and that this is the only basis of sustaining it as a part of the claim of Vaughan against the defendant. In making this contention, counsel for the defendant invoke the rule laid down in *Windett* v. *Union Mutual Life Insurance Co.*, 144 U. S. 581, 12 S. Ct. 751, in which the court said that an agreement to pay a retainer for services which are never performed is not to be implied. In that case there was no express agreement to pay a retainer. We do not think that the question as to whether an implied agreement may be made to pay a retaining fee arises in this case. According to the testimony of Vaughan, when he sold his interest in the bridge at Des Arc, it was understood that the defendant was to employ him as its attorney, but no stated amount was agreed on between them.

As said by Judge COOLEY, in *Detroit* v. *Whittemore*, 27 Mich. 281, the employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business. This rule has been recognized and applied in numerous cases in this court where it has been expressly recognized that, in the absence of an agreement for a stated amount, the attorney might recover upon a *quantum meruit* for services performed. The rule is so well settled that we need only cite the following cases: *Sebastian State Bank* v. *Holland*, 130 Ark. 59, 196 S. W. 482; *Valley Oil Co.* v. *Ready*, 131 Ark. 531, 199 S. W. 915; and *Bayou Meto Drainage District* v. *Chapline*, 143 Ark. 446, 220 S. W. 807.

In the application of this rule to the facts testified to by Vaughan, it will be seen that his contract for attor-

ney's fees was an express contract and not an implied agreement. He testified positively that they agreed to employ him as attorney in January, 1927, but that no stated amount was agreed upon. He continued in their employment for something over a year, and it was only when he presented an itemized account for his services that there was any dispute about the $1,000 item claimed by him or about any other item. It is true that his testimony is flatly contradicted by that of Bovay and Mills, but the jury were the judges of the credibility of the witnesses, and this court upon appeal cannot disturb the verdict when there is any evidence of a substantial character to support it.

Again it is insisted that the jury must have included the $450 item of office rent, stationery, stenographer, etc., when there was no substantial evidence to support it. Here again we are met with a conflict in the testimony which has been settled adversely to the contention of counsel for the defendant. If the testimony of Vaughan is to be believed, he was to furnish and did furnish an office, stenographer and stationery for the defendant during the time he was employed by it and such services were necessary. Therefore it cannot be said that there is no substantial evidence for this item. We do not know what items the jury allowed and what items were disallowed by it. The verdict shows that they cut the total claim of Vaughan nearly $1,000. This was within the peculiar province of the jury. The testimony of Vaughan, being that of a substantive character, we cannot consider upon appeal what items might have been allowed or disallowed by the jury. We can only consider whether the evidence as a whole would warrant the jury in returning its verdict in the amount stated above in favor of Vaughan.

In this connection, it may be stated that three attorneys testified that the fee claimed by Vaughan was a fair and reasonable one.

It is next insisted that the court erred in allowing Vaughan interest on the amount of the verdict from the 8th day of June, 1928, instead of the date of the judgment. In making this contention, reliance is placed upon the case of *Meek* v. *Christian,* 168 Ark. 313, 270 S. W. 614, where it was held that, in an action on a *quantum meruit* for the value of the engineer's services in making a preliminary survey for an improvement district which never became effective, it was error to allow interest on the certificates of indebtedness issued to him from the time of their issuance, but that interest should only have been allowed from the date of the judgment. In that case the record did not show that the commissioners and Christian ever took up the matter of settling his compensation upon a *quantum meruit* basis. He claimed that he was entitled to two per cent. under his contract, and the court held that the contract was not valid and binding on the defendant because the contemplated improvement was never constructed. If he had made a demand for services upon a *quantum meruit* basis, the holding would have been different. The reason is that he should have been paid for whatever the value of his services was then; and, as the district refused to pay him, interest would have been allowed. In effect, there was no demand for the value of services upon a *quantum meruit* basis until the judgment in the case was rendered.

Here Vaughan only claimed judgment upon a *quantum meruit* basis. He did not claim any contract, nor any stated amount for legal services was made with him. In *Prager* v. *New Jersey Fidelity & Plate Glass Ins. Co.,* 245 N. Y. 1, 156 N. E. 76, 52 A. L. R. 193, it was held that a claim for legal services resulting on *quantum meruit* draws interest to be computed from the date of the demand. It was further held that a demand for compensation for legal services on *quantum meruit* greatly in excess of the amount determined to be due does not prevent the adding of interest to the award. The opinion in that case is very comprehensive, and in a case note on page

197 of 52 A. L. R., it is stated as a general rule that interest on a claim for legal services is recoverable from the time it becomes due and payable, and that this is the time when the demand for payment is made.

In *Spalding* v. *Mason,* 161 U. S. 375, 16 S. Ct. 592, Mr. Justice WHITE, speaking for the court, said that interest is allowed both in law and in equity upon money due. Continuing, he quoted with approval from *Curtis* v. *Innerarity,* 6 How. 146, as follows:

"It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breech. * * * Every one who contracts to pay money on a certain day knows that, if he fails to fulfill his contract, he must pay the established rate of interest as damages for his nonperformance. Hence it may correctly be said that such is the implied contract of the parties."

Again in *Miller* v. *Robertson,* 266 U. S. 243, 45 S. Ct. 73, the court said that one who has had the use of money owing to another may justly be required to pay interest from the time it lawfully should have been paid.

The record in this case shows that interest was only allowed from the 8th day of June, 1928, and that Vaughan made the demand for the payment of his services, accompanied by an itemized list of his services and expenses, on the 31st day of May, 1928, and that payment of the same had been refused by the defendant. The demand was made upon a *quantum meruit* basis, and, under the principles of law in the cases above cited, the court properly allowed interest on his claim. See also *Rogers* v. *Atkinson,* 152 Ark. 167, 237 S. W. 679.

On the cross-complaint, the court told the jury that the burden of proof was upon the defendant because Bovay had transferred his interest in the claim to the bridge company. There was no error in this respect. It is true that in *Norfleet* v. *Stewart,* 180 Ark. 161, 20 S. W. (2d) 868, and cases cited, this court is committed to the

rule that, in all transactions between attorney and client, the burden is on the attorney to show that no advantage was taken of the client and that he gave him all the information and advice about the matter that was necessary to enable the client to act understandingly. That principle of law has been recognized and applied by this court in various cases, but it has no application here for two reasons. In the first place, it is alleged in the cross-complaint that Bovay had transferred his interest in the subject-matter of the cross-complaint to the defendant bridge company. The cross-complaint was filed by the bridge company, and, in addition, it introduced Bovay as a witness on this point. Bovay testified in positive terms that he had transferred his interest by written transfer to the bridge company, and that any money recovered on the cross-complaint should be paid to the treasurer of that company. The transaction complained of was made between Bovay and Mills on the one hand and Vaughan and House on the other. Hence no relation of attorney and client existed between the bridge company and Vaughan. In the second place, it may be stated that the undisputed evidence in the case shows that Bovay knew as much or more about the transaction as Vaughan. No attempt was made by Vaughan to conceal anything about the transaction. Bovay acted with a full and complete understanding of the whole matter and in his own interest.

The case was fully and fairly submitted to the jury under the principles of law above declared. We find no reversible error in the record, and the judgment must be affirmed.

KIRCHOFF *v.* WILCOX.

Opinion delivered March 16, 1931.

A. G. Meehan and *John W. Moncrief,* for appellant.

M. F. Elms, for appellee.

SMITH, J. The evidence tending to support the judgment from which this appeal comes is to the following effect. Wilcox purchased a new automobile from W. J. Kirchoff, a dealer. He traded in an old car, for which he was allowed a credit of $580, and gave a note for the balance, payable $50.83 on the 14th of each month. The sales contract reserved the title to the new car until all the purchase price was paid. The sales contract provided that time was of the essence of the contract, and that, upon failure to pay promptly any monthly payment when due, all unpaid payments should, at the option of the seller, become due, and the right was reserved, upon

default of any payment, to take possession of the car and sell it, at either public or private sale, after advertisement of the sale and notice thereof to the purchaser. The sales contract and the note evidencing it were sold and assigned to Wm. Joerns. The first payment fell due April 14, and was made one day after it was due by a deposit of the amount thereof to the credit of Joerns at the bank with which he did business. Joerns had purchased other similar notes from Kirchoff, and these notes were deposited by Joerns at his bank for collection. The second payment was made after a delay of several days.

Default was made in the third payment, but Wilcox promised to make the payment when demand therefor was made upon him. The contract of sale provided for "servicing" the car for a period of ninety days free of charge, and Wilcox advised that the car required adjustments, and he delivered the possession of it to Kirchoff and Joerns for that purpose. After obtaining possession of the car they advised Wilcox that possession would be retained until the car had been paid for.

On June 26, 1930, Joerns and Kirchoff wrote Wilcox a letter reading as follows: "Since we have had your Studebaker Dictator sedan in our garage for ten days, held by Mr. Wm. Joerns, who holds the note and sales contract on same against you for settlement, we are asking you hereby to come in and take care of the settlement thereof. Mr. Joerns will offer the car for sale after the third of July if you do not settle for same by that time."

Wilcox construed this letter as a waiver of his default provided he met the payment then past due by July 3. He testified that he was told that he might make the payment notwithstanding his default, and on July 3 he attempted to make the payment, but neither Joerns nor Kirchoff were in the city. He then went to Joerns' bank and deposited to Joerns' credit $50.83 and received a deposit slip from the cashier, and the amount thereof was credited by the cashier to Joerns' account.

The cashier of the bank testified that it was the practice of the bank to receive similar deposits for the credit of Joerns, but he did not claim any authority for the bank to waive Joerns' right to declare the entire debt due, as the sales contract authorized the holder thereof to do.

When Joerns was advised of the deposit, he denied the authority of the cashier to receive it, and drew a check to Wilcox's order on the bank for the amount of the deposit and left the check at the bank, and he advised Wilcox of that action. Wilcox declined to accept the check to his order and demanded possession of the car, and when this was refused he brought suit for its value, alleging its wrongful conversion. In the meantime the car had been sold pursuant to the notice of sale, and, there being no other bidders, Joerns became the purchaser on his bid of $400.

The parties differ as to the meaning and purpose of the letter of June 26, set out above. The contention of Joerns and Kirchoff was and is that they intended by the letter to say that the entire balance due on the car had been declared due and that the car would be surrendered only on payment of the entire balance of purchase money.

The court took the view that the letter was ambiguous and might be construed as contended by Joerns and Kirchoff, but was also susceptible of the construction placed upon it by Wilcox, and the meaning of the letter was submitted to the jury as a question of fact.

The jury was told that if Wilcox had breached his contract he could not recover, but that Wilcox contended that, while he did not make the payment promptly when due, he had an agreement with Joerns for an extension of time, pursuant to which agreement he had deposited the amount of the payment then due to the credit of Joerns at the bank with which Joerns did business.

We think no error was committed in submitting this question to the jury, and that it was properly submitted.

The letter is ambiguous, especially when read in connection with Wilcox's testimony concerning it. There is no question but that Joerns had the right to declare the entire debt due and to demand full payment thereof, although the possession of the car had been obtained upon the representation that the "service" which it required would be rendered. Neither is there any question but that Joerns might have waived this right, if he, in fact, represented that he would do so, upon condition that the payment were made by July 3, and pursuant to that agreement the payment was made, the right to require full payment was waived. The verdict of the jury is conclusive of this question of fact.

The jury returned a verdict in Wilcox's favor for $300, and judgment was rendered on August 6, 1930, for that amount, and we are asked to reverse it for the reason that it is contrary to the undisputed evidence. But, for the reasons stated, we do not concur in that view.

After the rendition of the judgment Wilcox went to the bank on August 9, 1930, and obtained from the cashier the check to his order above referred to, which had been kept at the bank, and cashed it, and thereafter entered upon the margin of the judgment record a receipt therefor as a credit upon the judgment in his favor.

On October 1, 1930, thereafter a supplemental motion for a new trial was filed, in which it was recited that Wilcox had cashed the check after the rendition of the judgment in his favor, and it is now insisted that this action on Wilcox's part relates back to the date of the check and confirms his default and the right of Joerns to the possession of the car.

We do not think so. The rights of the parties had been adjudged, and that judgment was final and had not been superseded. Wilcox may not have had the right to proceed in this manner to collect his judgment, but that is not the controlling question. Wilcox's unauthorized appropriation of the proceeds of the check to the partial satisfaction of the judgment did not affect the

validity of the judgment. The judgment was a valid and final adjudication of the rights of the parties at the time the credit was indorsed on the margin of the judgment record, and it remained so until set aside by the trial court or reversed by us, and, as we have said, its enforcement had not been superseded.

An instruction was given on the court's own motion which reads as follows: "If you find for the plaintiff your verdict should be: 'We, the jury, find for the plaintiff,' and assess whatever damages you think he is entitled to under the proof." No other instructions on the measure of damages was asked or given, and only a general objection was made to the instruction as given.

It is very earnestly insisted that this instruction was erroneous and requires the reversal of the judgment, and the case of *Kansas City Southern Railway Co.* v. *Biggs,* 181 Ark. 818, 28 S. W. (2d) 68, is cited in support of that contention. The judgment was reversed in the case just cited for giving a similar instruction, which, like the one in the instant case, furnished no correct guide to the jury as to the measure of damages, but left the jury to its own contrivance. The instruction set out above is open to that objection and is erroneous for that reason, but, as we have said, no other instruction was asked or given on this subject, and only a general objection was made to it. The instruction does not contain any erroneous declaration of law and does not announce an improper rule by which to measure the damages. Its defect is that it does not furnish a correct guide to the jury as to the measure of damages, and in this respect is similar to the one which led us to reverse the judgment in the Biggs case, *supra.*

An examination of the record and of the briefs of opposing counsel in the Biggs case discloses the fact that a specific objection to the instruction was urged, for the reversal of the judgment, that it was open to the objection stated, and it was not argued that no such objection had been made in the court below. The instruc-

tion was defended upon the ground that it was a correct declaration of the law except that it was more favorable to appellant than the law required it should be.

Here our attention is called to the fact that no specific objection was made to the instruction in the court below, and such is the state of the record.

The practice in such cases was defined by Chief Justice COCKRILL in the opinion on rehearing in the case of *Fordyce* v. *Jackson,* 56 Ark. 564, 20 S. W. 528, and it has never been our intention to depart from the rule there announced. On the contrary, we have consistently followed the rule there stated in all cases where our attention has been called to the absence of a specific objection to an instruction defective in form.

In the opinion on rehearing in the Jackson case, *supra,* after the judgment had been affirmed, the attention of the court was called to an instruction which had been given in the trial of that case which was defective in that it left to the jury to determine what were the elements of recovery, whereas that was a question of law for the court, and not a question of fact for the jury. In overruling the objection to the instruction, which the court did not question was well taken, the learned chief justice said: "It is not contended that the charge contains a misstatement of the law on the subject, but that it was the court's duty to go further than it did and make the charge more specific. It was the defendant's right to have the rule for the ascertainment of damages specifically defined by the court, so that the jury would have an accurate guide to conduct them to a proper award. But the defendant should have requested a more specific charge, if it conceived that the jury would be misled by the general language of the charge. It is the settled practice in this State that a party cannot avail himself of an omission which he made no effort to have supplied in the trial court. Our practice is in accord with the following statement from the text of Judge THOMPSON's work on Charging the Jury, § 82: 'If the charge is not a clear mis-

direction—if there is a *mere tendency* in it to mislead the jury, the defendant must ask additional explanatory instructions, in order to avail himself of its defectiveness in a court of error; but where it *necessarily* * * * misleads the jury, it is a fatal error. Nor will a judgment be reversed, because the charge is so general in its terms as to leave it doubtful whether the jury understood its application to the evidence. Here, as in the preceding case, the remedy of the party is to ask additional instructions before the jury retire. So where the judge has laid down a proposition, which, in the abstract is clearly right, but there is something peculiar in the situation of the parties, or their relations to each other, which would require a modification of it, and which had escaped the attention of the judge, it is the duty of counsel to call his attention thereto'." See also, *Hines* v. *Rice,* 142 Ark. 170, 218 S. W. 851; *Kirchman* v. *Tuffli Bros. P. I. & C. Co.,* 92 Ark. 117, 122 S. W. 239; *Western Coal & Mining Co.* v. *Buchanan,* 82 Ark. 503, 102 S. W. 694; *St. L. I. M. & S. Ry. Co.* v. *Jackson,* 78 Ark. 105, 8 S. W. 746; *Fox* v. *Spears,* 78 Ark. 76, 93 S. W. 560; *McGee* v. *Smitherman,* 69 Ark. 637, 65 S. W. 461; *White* v. *McCracken,* 60 Ark. 619, 31 S. W. 882.

Upon a consideration of the whole case, we find no reversible error in the record, and the judgment must be affirmed. It is so ordered.

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

JOHNSTON *v.* LINDSEY.

Opinion delivered March 16, 1931.

Brewer & Cracraft, for appellant.

A. M. Coates, for appellee.

HUMPHREYS, J. This suit was brought in the chancery court of Phillips County by appellants against appellees to recover $1,805.67, the value of materials they furnished to construct a building upon lots 34, 35 and 36 in Richmond Hill Addition to the city of West Helena in said county.

The suit is based upon a builders' bond executed by appellees to the Helena Building & Loan Association and conditioned that T. E. Lindsey, the owner of the lots, would construct a building thereon in accordance with plans filed by him with said association at a cost of not less than $3,500 and would "fully pay off and discharge all indebtedness incurred in the said construction to contractors, subcontractors, mechanics, laborers, materialmen, and any and all others who might in the absence of such payment obtain a lien on the real estate or building."

Appellees B. E. Leighton and J. C. Frazier, sureties on the bond, demurred to the complaint upon the ground that materialmen are not beneficiaries under the terms of the bond, and, for that reason, were without authority or right to maintain a suit upon the bond against them as sureties.

The demurrer to the complaint was sustained by the court, and the appellants refused to plead further, whereupon the complaint was dismissed for want of equity, from which is this appeal.

The only question for determination is whether the bond in question was made for the sole benefit of the Helena Building & Loan Association or for the benefit of the materialmen as well. The bond in form and substance is the kind of common-law bond usually executed

by contractors and bondsmen to protect the owner and builder against liens of laborers and materialmen. This court, in dealing with the liability of bondsmen on such bonds, has permitted a direct recovery from them by laborers and materialmen as being beneficiaries in the late cases of *Mansfield Lumber Co.* v. *National Surety Co.*, 176 Ark. 1035, 5 S. W. (2d) 294; *Leslie Lumber & Supply Co.* v. *Lawrence*, 178 Ark. 573, 11 S. W. (2d) 458; *Ætna Casualty & Surety Co.* v. *Big Rock Stone & Material Co.*, 180 Ark. 1, 20 S. W. (2d) 180. Appellees argue that the cases referred to deal with the liability of sureties on bonds of contractors and have no application to the instant case because the Helena Building & Loan Association was the obligee in the bond in question, whereas the owner of the property was the obligee in each of the cases referred to. The cases referred to did not turn upon the fact that the owner happened to be the only obligee specifically named in the bond. They turned upon the meaning of the language used in formulating the conditions in the bonds. The court interpreted the language used in formulating the conditions in the bonds as broad enough to include laborers and materialmen as beneficiaries therein. By reference to the bonds in the cases referred to it will be seen that the language used in formulating the conditions in the several bonds is, in substance, the same as that used in formulating the conditions in the bond now before us for construction. The construction, therefore, given the language in the cases referred to is applicable to the bond in question.

It follows that the court erred in sustaining the demurrer to the complaint and dismissing same. On account of this error the judgment is reversed, and the cause is remanded with directions to overrule the demurrer to the complaint and for further proceedings not inconsistent with this opinion.

HOPPER *v.* CHANDLER.

Opinion delivered March 16, 1931.

E. L. Carter, T. Nathan Nall, for appellant.

Isaac McClellan, for appellee.

MEHAFFY, J. The appellant, D. L. Hopper, began this suit in the Grant Chancery Court alleging that he was the owner of the north half of the northwest quarter of section 17, township 3 south, range 11 west, in Grant County.

On the 18th day of December, 1924, a decree was entered in the case of Road Improvement District No. 4 of Jefferson County v. Certain Delinquent Lands, and said land was condemned to be sold for the delinquent road improvement taxes which had been assessed against it.

On the 13th day of January, 1925, the above described land was sold to plaintiff by the commissioner appointed to make the sale, and a commissioner's deed was executed to appellant by the commissioner and is recorded in Grant County.

The appellee, E. S. Chandler, obtained from the State Land Commissioner, on December 17, 1927, a donation certificate to said land, and thereafter entered into and continues in possession.

The appellant alleged that appellee had cut $100 worth of timber; that he was insolvent, and a judgment against him for damages would be worthless. Appellant also alleged that the forfeiture and sale to the State was void for several reasons set forth in the complaint.

Appellee filed a demurrer to the complaint and also a motion to transfer the case to the law court, and the case was thereafter transferred. The demurrer was overruled, and the appellee filed answer and cross-complaint. The parties afterwards presented the demurrer to the court, which the court sustained, holding that the title was in the State at the time of the sale by the commissioner to appellant, the lands having been forfeited to the State to pay taxes for 1920.

It is the contention of the appellant that the sale to the State of Arkansas by the collector of Grant County for the delinquent taxes of 1920, on the 2d Monday in June, 1921, was void and conveyed no title to the State. The appellant claimed title under a deed from the commissioner appointed by the chancery court, on the 13th day of January, 1925, the land having been sold in a proceeding in said court, in which the Road Improvement District No. 4 was plaintiff and the Delinquent Lands were defendants.

The appellee obtained his donation certificate from the State Land Office based on a forfeiture and certification to the State December 17, 1927.

Appellant concedes that, if the forfeiture and sale to the State was valid, then the State had the superior title when the appellant acquired his title. In other words, it is conceded that, if the State had title when the land was ordered sold by the decree of the chancery court, the appellant would have no right to maintain the suit, because the forfeiture to the State necessarily suspends the enforcement of the special tax lien as long as the title remains in the State.

This court has said: "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 con-

struction 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 governmental agencies." *Turley* v. *St. Francis County Road Imp. Dist.*, 171 Ark. 939, 287 S. W. 196; *Wyatt* v. *Beard*, 179 Ark. 305, 15 S. W. (2d) 990.

It is contended, however, by appellant that these cases have no application because sales referred to in them were valid sales, and the sale involved in this case by the State is void. The appellant, however, in his statement of facts, says that this land was sold to the State of Arkansas by the collector of Grant County on the second Monday in June, 1921, for the delinquent State and county taxes for the year 1920, and was certified to the State Land Office in 1923 as State land. It will be observed that the contention is that the sale is void, and there is no contention that the taxes were not due. The taxes therefore were due the State, and the State had a lien on the land for same, and no one could acquire the land free from the lien of the State for taxes. It was after the lands had been certified that appellant purchased the land under a decree of the chancery court, and he does not claim that he had ever paid the taxes, and he had no interest in the land according to his own pleadings at the time of the forfeiture and sale.

"No person can question the validity of a tax sale unless he can first show that he, or those under whom he claims, had some title to the property at the time of the sale." 26 R. C. L. 446.

"It is conceded that the forfeiture of the land for nonpayment of taxes upon which the claim of the State was based was invalid. At the time of the sale the plaintiff, Mrs. Henry, had title to this land, and it is admitted by the defendant that she made no written contract in reference to this land." *Henry* v. *Knod*, 74 Ark. 390, 85 S. W. 1130.

Knod claimed to have bought the land under an oral contract. The court found that the sale to the State

was invalid, but that Knod's purchase was against the statute of frauds and void, and he therefore had no right to redeem.

"In order to question the validity of the tax title, the plaintiff must show that those under whom it holds were the owners of the land or had some interest in it at the time it was sold for taxes." *Osceola Land Co.* v. *Chicago Mill & Lbr. Co.*, 84 Ark. 1, 103 S. W. 609.

At the time of the sale for taxes the appellant had no interest and claimed no interest, and, so far as the record shows, there were no assessments due to Improvement District No. 4, at the time this land was certified to the State. It therefore appears that at the time of the forfeiture and sale for taxes neither the appellant nor the improvement district had any claim against this land, and, as the title was apparently in the State at the time of the sale under the decree of the chancery court, the chancery sale was void, and the court below was correct in so holding, and the decree must therefore be affirmed, and it is so ordered.

BELZUNG *v.* STATE.

Opinion delivered March 16, 1931.

Roy Gean, for appellant.

Hal L. Norwood, Attorney General, and *John H. Caldwell,* Assistant, for appellee.

McHaney, J. Appellant, a dairyman, was convicted on the first count of an information charging a violation of § 17 of the rules and regulations of the district board of health of the Fort Smith District of Sebastian County, adopted June 20, 1929, in that he had sold milk in said city without having paid the fees provided by said section, and fined $1. He assigns six reasons for a reversal of the judgment against him:

1. *That special act 629, Acts 1919, p. 870, is unconstitutional and void.* This is the act under which said district board of health is operating. It is entitled "An act to consolidate the health and sanitary offices in the Fort Smith District of Sebastian County, to abolish existing offices, to create a district board of health therein, and give it jurisdiction to select certain officers and to superintend their duties, to provide for the expenses incurred in such service, and for other purposes." We had this same act under consideration in *Fort Smith* v. *Roberts,* 177 Ark. 821, 9 S. W. (2d) 75, where its constitutionality was attacked on similar grounds, and the act was sustained as a valid exercise of the police power of the State, and not an unlawful delegation of legislative power. The attack now made upon the act by appellant goes further, alleges its unconstitutionality upon other grounds, all of

which we have considered and find them without merit. The act already having been sustained in the case above cited, we do not deem it necessary to discuss the grounds alleged separately.

2. *That the rules of the district board conflict with the regulations of the State Board of Health as applied to dairies.* He sets out eight rules of the district board that are claimed to be in conflict with those of the State Board, because the regulations of the State Board make no such requirements. Conceding them to be in conflict, which they are not, but only supplementary, (power so to do being conferred in § 2 of said act) appellant is in no position to complain. He was charged with the violation of two rules in two separate counts, § 17 and § 3, the latter for selling milk in the city without a permit from the health officer. He was found guilty of having violated § 17 only. Apparently appellant has violated only one rule of the district board, that of refusing to pay the small inspection fee of $10 per year, plus 50 cents per head per year for each cow more than ten. Having complied with all the other rules, it is difficult to see what right he has to complain of them, since they do not affect him. Section 17 is not in conflict with the regulations of the State Board, as it does not undertake to fix the fees for this inspection service.

3. *That the district health board's rules are in conflict with said act 629.* But not so. Section 2 of the act gives the district board power "to promulgate such rules and regulations not in conflict with rules and regulations of the State Board of Health as may be deemed necessary," etc. We think it was in the power of the board to promulgate § 17, and that such rule is not contrary to the act or in conflict with the rules of the State Board.

4. *That said act 629 confers no authority to levy the inspection fees or to fix a penalty for violating the rules.* We have already held that the district board was empowered to enact § 17, as stated above. As to the power

of said board to provide a penalty, appellant is concluded by the cases of *Davis* v. *State,* 126 Ark. 260, 190 S. W. 436, and *Cazort* v. *State,* 130 Ark. 453, 198 S. W. 103.

5. *That the district board's rules are discriminatory and unreasonable.* We have already held that § 17 is a reasonable rule, within the power of the board to enact; and that, since this is the only rule with which appellant is concerned, he is in no position to complain of others. The rules apply to all dairymen alike who sell milk in the Fort Smith district.

6. *It is finally said that the rules and regulations of the district board repeal ordinance 1468 of the city of Fort Smith.* We think it unnecessary to decide this question, as it has nothing to do with appellant's guilt or innocence of violating § 17 of the rules and regulations of the district board of health.

We find no error, and the judgment must be affirmed. It is so ordered.

CASTEEL *v.* YANTIS-HARPER TIRE COMPANY.

Opinion delivered March 16, 1931.

Simmons & Lister, for appellant.

Daily & Woods, for appellee.

BUTLER, J. In the trial of this cause in the court below a verdict was returned under the direction of the court against appellant, the plaintiff, in favor of the defendants, Yantis-Harper Tire Company, and, when that action was taken, a nonsuit was entered against their co-defendant, Robert Tolliver. We are therefore required by settled rules of practice to view the testimony on plaintiff's behalf, with the inferences properly deducible therefrom, in the light most favorable to her in the determination of the correctness of the court's ruling in directing a verdict in favor of the tire company. The suit was against S. B. Harper and Marshall Yantis, partners in business, operating under the firm name of Yantis-Harper Tire Company, and Robert Tolliver, a colored employee of that firm.

The testimony on plaintiff's behalf is to the effect that about 7 P. M. on Tuesday, November 12, 1929, she was standing in the safety zone at 11th Street and Garrison Avenue in the city of Fort Smith waiting for a street car. Several other persons were there also, among these being Walter Hager, who became a witness in plaintiff's behalf. While standing in this safety zone, through which automobiles were not supposed to drive, a car ran around another car and, traveling at a speed of from 25 to 30 miles an hour, drove through the safety zone, striking plaintiff and very seriously injuring her.

The suit was brought upon the theory that the car inflicting the injury was driven by the defendant, Tolliver, and that he was at the time engaged in his employ-

ment as the employee of his co-defendant, the Yantis-Harper Tire Company.

Tolliver denied striking plaintiff. In addition to this defense, Yantis-Harper Tire Company defended upon the ground that Tolliver was not in their service at the time of the injury, even though he, in fact, caused it. The evidence was to the effect that Tolliver had been employed by Yantis-Harper for several years as the driver of a service truck, his business being to deliver gasoline and tires and other commodities and to answer service calls over the city.

Hager testified that the car sped on after striking the plaintiff and went towards the place of business of Yantis-Harper, and that he followed on to that place, and that Tolliver came out on the walk and asked: "What's the matter; did I hit some one down there?" and that Tolliver made the further statement that he had been away to get or to deliver a package. This witness identified the car as belonging to the defendants, Yantis-Harper. The place of business of Yantis-Harper was only three-fourths of a block away from the place of the collision.

The testimony concerning the remarks of Tolliver was objected to as being incompetent as against Yantis-Harper. The car driven by Tolliver was of the kind used by him in the discharge of his regular duties.

It is not questioned that the testimony concerning the statement made by Tolliver after the collision was admissible against him, but it is insisted that it was not admissible and should not be considered in connection with the liability of Yantis-Harper, for the reason that it was not a part of the *res gestae,* and that it was improper to prove any act or declaration of Tolliver as tending to show his agency or employment.

The rule is settled that the declarations of an employee as to who was responsible for an injury, made after its occurrence, are incompetent as against his employer, for the reason that his employment does not carry

with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his employment. *River, R. & H. Const. Co.* v. *Goodwin,* 105 Ark. 247, 151 S. W. 267; *Stecher Cooperage Works* v. *Steadman,* 78 Ark. 381, 94 S. W. 41; *Caldwell* v. *Nichol,* 97 Ark. 420, 134 S. W. 622; *Pfeifer Stone Co.* v. *Shirley,* 125 Ark. 186, 187 S. W. 930; *Williams* v. *Elrod,* 128 Ark. 207, 193 S. W. 514; *Webb* v. *K. C. Sou. Ry. Co.,* 137 Ark. 107, 208 S. W. 301; *Frolich* v. *Hicks,* 143 Ark. 565, 222 S. W. 373; *St. L. S. F. R. Co.* v. *Vernon,* 162 Ark. 226, 258 S. W. 126. But that rule does not render this testimony incompetent. It is to be remembered that one of the issues in the case was the question of fact whether Tolliver was the driver of the car. He denied that he was. The testimony was therefore competent to identify him, and no error was committed in admitting it, not only as against Tolliver, but as against his codefendants and employers as well.

We think the testimony, when viewed in the light most favorable to plaintiff, as it must be, is sufficient to support a finding that plaintiff was struck by a car driven by Tolliver and owned by Yantis-Harper, and that in his regular employment he drove such a car. This is not seriously questioned. It is very earnestly insisted, however, that the undisputed testimony shows that Tolliver was not acting within the scope of his employment at the time of the injury, indeed, that he was not employed at all at that time.

The law on this subject has been so frequently considered by us that it may be treated as settled. The authorities from our own and other jurisdictions are reviewed in the recent cases of *Hunter* v. *First State Bank of Morrilton,* 181 Ark. 907, 28 S. W. (2d) 712, and *Andrews* v. *Bloom,* 181 Ark. 1061, 29 S. W. (2d) 284; and *Mullins* v. *Ritchie Grocery Co., ante* p. 218, and no useful purpose would be served by again reviewing them.

It was said in the Ritchie case that "the doctrine is settled in this State that, if the automobile causing the

accident belongs to the defendant, and is being operated at the time of the accident by one of the regular employees of the defendant, there is a reasonable inference that at such time he was acting within the scope of his employment and in the furtherance of his master's business. The inference or presumption of fact, however, may be rebutted or overcome by evidence adduced by the defendant during the trial. Where the evidence on this point is contradictory, the question is one for the jury. Where the facts are undisputed, and uncontradicted, it becomes a question for the court." Citing cases.

It is argued, however, that any inference or presumption which may have arisen from the plaintiff's testimony was overcome by the testimony on the part of the defendants, and that, as defendants' testimony was to the effect that Tolliver was not acting within the scope of his employment, nor was he employed at all at the time of the collision, there was no presumption to the contrary. This is true, but it does not follow, for that reason, that no case was made for the jury.

The record before us presents the question, not as a presumption of law, but as an inference, to be deduced from all the testimony, whether Tolliver was, in fact, employed and was acting within the scope of his employment at the time he collided with plaintiff, if he, in fact, did so.

The conditions under which the trial court may direct a verdict have been defined in many cases.

In the recent case of *Mutual Life Ins. Co. of N. Y.* v. *Raymond,* 176 Ark. 879, 4 S. W. (2d) 536, it was said: "For, if the facts are such that men of reasonable intelligence may honestly draw therefrom different conclusions on the question in dispute, then they were properly submitted to the jury for determination."

The testimony on the part of the defendants was to the effect that, although Tolliver had been employed by Yantis-Harper for several years, he was paid by the day, and was only paid when he worked, and that he was not

employed or paid on the day of the injury. Tolliver testified that he was not employed on this day, and the cashier and timekeeper of Yantis-Harper gave testimony to the same effect, as did other employees. Their testimony was to the effect that shortly before the collision Tolliver was loaned the use of one of Yantis-Harper's cars for the sole purpose of permitting Tolliver to go to his own home to get a raincoat which he wanted for his own use because it was raining, and that the use of the car had no relation whatever to any service performed for Yantis-Harper or in connection with their business by Tolliver, and had no relation to any duty on Tolliver's part as an employee, and that, indeed, he was not an employee at all on that day.

There are contradictions in the testimony of these witnesses, which prevent us from so holding, as a matter of law, and we are unable also to say, as a matter of law, that no bias on their part was shown.

In the case of *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243, Mr. Justice Riddick said: "It may be said to be the general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established, and a verdict directed based as on such evidence. But this rule is subject to many exceptions, and where the witness is interested in the result of the suit, or facts are shown that might bias his testimony, or from which an inference may be drawn unfavorable to his testimony or against the fact testified to by him, then the case should go to the jury."

Upon a consideration of the whole case, we are unable to say, as a matter of law, that the inference might not fairly and reasonably be deduced that Tolliver drove the car which ran over plaintiff or that he was not employed nor acting within the scope of his employment at that time.

The judgment of the court must therefore be reversed, and it is so ordered.

AUSTIN *v.* STATE.

Opinion delivered March 16, 1931.

M. L. Reinberger, for appellant.

Hal L. Norwood, Attorney General, for appellee.

PER CURIAM. There appears in the record what purports to be an agreed bill of exceptions which contains a notation signed by the prosecuting attorney as follows: "O. K. as an abstract of the testimony in the above case so far as I am able to remember." This cannot be considered upon appeal for two reasons: In the first place, it was not filed with the clerk within the time allowed by the court for filing a bill of exceptions. In the second place, it is still necessary that the trial judge sign the bill of exceptions in a felony case before it can be admitted as a part of the record upon appeal. *Ward* v. *State,* 135 Ark. 259. The trial judge did not sign what purports to be the bill of exceptions, and our review is limited to errors apparent on the face of the record. Both the indictment, which is for grand larceny, and the judgment and sentence, are in proper form. Therefore the judgment will be affirmed.

LOUISIANA OIL REFINING COMPANY *v.* RAINWATER.

Opinion delivered February 23, 1931.

Barber & Henry and *Troy W. Lewis,* for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

HART, C. J., (after stating the facts). Section 1715 of Crawford & Moses' Digest is § 12 of the act of April 12, 1869, which provides for the formation and regulation of business corporations. It provides that the president and secretary of every corporation organized under the provisions of the act shall annually make a certificate showing the condition of the affairs of the corporation in the manner provided in the section. Section 1726, which was a part of the act of May 6, 1909, provides that if the president or secretary of any such corporation shall neglect, fail or refuse to comply with the provisions of § 1715, he shall be liable to an action founded on the statute for all debts of such corporation contracted during the period of any such neglect or refusal.

It is conceded that, if these provisions of the Digest are still in force, the president was liable because the default is admitted. Our cases hold that where there has been a default in making the reports required by the

statute during a particular time, and during that time a debt is contracted, there is liability to a creditor as upon contract. It is said that the object of the statute is to require corporations to make such a public showing of their affairs as will enable those dealing with them to determine whether they can safely give them credit, and that the mischief at which it is aimed is not done unless the credit is actually given during the period of default. *Griffin* v. *Long,* 96 Ark. 268, 131 S. W. 672, 35 L. R. A. (N. S.) 855, Ann. Cas. 1912B, 622; *Hughes* v. *Kelley,* 95 Ark. 327, 129 S. W. 784; *McDonald* v. *Mueller,* 123 Ark. 226, 183 S. W. 751; and *Taylor* v. *Dexter,* 126 Ark. 122, 189 S. W. 1060.

It is sought to uphold the judgment, however, on the ground that these sections of the Digest have been repealed by act 250, passed by the Legislature of 1927, providing for the formation of corporations and the regulation thereof. Acts of 1927, p. 854.

It is a well-settled principle of statutory construction that repeals by implication are not favored. A statute may, however, be repealed by the express provisions of a subsequent statute, or by implication when the provisions of the earlier and later statutes are repugnant to each other and irreconcilable, or when the subsequent statute covers the whole subject-matter of the former and is manifestly intended as a substitute for it. This rule is so well settled that only a few of our cases on the subject need be cited. *Bank of Blytheville* v. *State,* 148 Ark. 504, 230 S. W. 550; *Ouachita County* v. *Stone,* 173 Ark. 1004, 293 S. W. 1021; and *State* v. *Standard Oil Company of Louisiana,* 179 Ark. 280, 16 S. W. (2d) 581.

It is the contention of counsel for appellees in the present case that the act of 1927 covers the whole subject of the earlier act relating to the formation and regulation of business corporations and embraces numerous new provisions. It is insisted that the act plainly shows that it was intended not only as a substitute for the earlier act but to cover the whole subject of the forma-

tion of business corporations and to prescribe the only rules in respect thereto. Hence it is contended that it operates as a repeal of all former statutes relating to the formation and regulation of business corporations, even if the former act or some of its provisions are not in all respects repugnant to the new act. A careful comparison of the earlier act with the later one does not, in our opinion, show that the later act was intended to be a revision of and substitute for the earlier one. As we have already seen, under the construction placed upon the provisions of §§ 1715 and 1726 by this court, the Legislature had a definite purpose in enacting this statute. It is true that the later statute is very comprehensive. It contains 57 sections and provides in detail for the manner of incorporating business corporations, defines their corporate powers, regulates the manner for issuing stock, and the powers of directors and other matters deemed necessary for the management of such corporations, but it contains no provision looking to the filing of an annual report showing the condition of the corporation so that creditors may be advised of the condition of their affairs and intelligently determine whether they can safely give them credit. The provisions of the earlier statute looking to this end fits in with the aim and scope of the later statute just as well as they do with the earlier one. There is nothing to indicate that it was the intention of the Legislature to repeal them. They are not in any wise inconsistent with the scope and purposes of the later act and serve the same purpose, so far as that act is concerned; as they did with the earlier act.

In this respect, it is different from the act which was held to be repealed in the case of *Ouachita County* v. *Stone,* 173 Ark. 293 S. W. 1021, relied upon by counsel for appellee. In that case, the provisions of the earlier act were wholly out of harmony with the scope and purposes of the later act, and for that reason the court held that the earlier act was repealed by the provisions of the later

one. When the scope and purposes of the later act in that case were considered, there seemed to be no place for the provisions of the earlier act, which was considered repealed.

We think the present case is more like that of *Bank of Blytheville* v. *State,* 148 Ark. 504, 230 S. W. 550. Therefore, we are of the opinion that the court erred in overruling the demurrer to the answer, and for that error the judgment will be reversed, and the cause will be remanded for further proceedings according to law and not inconsistent with this opinion.

McHaney, J., (dissenting). I cannot agree with the opinion of the majority for two reasons. The plain provision in § 1715, Crawford & Moses' Digest is that "The president and secretary of every corporation *organized under the provisions of this act* shall annually make a certificate showing the condition of the affairs of such corporation," etc. "This act" refers of necessity to the act of April 12, 1869, of which § 1715, Crawford & Moses' Digest is § 12 and § 1726, Crawford & Moses' Digest is § 21. In 1927 the General Assembly passed act 250, p. 854 Acts 1927, entitled, "An act to provide for the formation of corporations, the regulation of corporations and for other purposes." This act establishes a wholly different system for the formation and regulation of corporations from that established by the act of April 12, 1869. The Rainwater-McCarthy Company, of which appellee was president, was organized under the act of 1927, it being the only act under which a corporation of this kind could be organized, as by § 57 all laws in conflict are repealed, and the act of 1869 was in conflict. The act of 1927 is not amendatory of the act of 1869, but is in substitution thereof, providing a new and wholly different system, which does not include or embody §§ 1715 and 1726 of the Digest. Therefore, when § 1715 provides that "the president and secretary of every corporation organized under the provisions *of this act* shall file the report, it necessarily excludes corporations

organized under the provisions of any other act not making a similar requirement. The corporation of which appellee was president, not having been organized under the provisions of "this act,"—act of 1869—but under the act of 1927, is not affected by the provisions of §§ 1715 and 1726 of Crawford & Moses' Digest, and its officers were not required to file the report therein required, nor were they subject to the penalty provided for a failure so to do.

I am furthermore of the opinion that those sections of the Digest have been repealed by implication or substitution by the act of 1927. It takes up the whole subject-matter of the formation and regulation of corporations anew, and provides a wholly different system, both as to formation and regulation. As we said in *Cordell* v. *Kent,* 174 Ark. 503, 295 S. W. 404, cited with approval in *State ex rel. Atty. Gen.* v. *Standard Oil Co. of La.,* 179 Ark. 208, 16 S. W. (2d) 581: "Where the Legislature takes up a whole subject-matter anew, covering the whole ground, revising the whole subject-matter of a former statute, and evidently intending to enact a substitute, the old statute is repealed, although the new statute contains no express words to that effect." See also cases cited in *State ex rel.* v. *Standard Oil Co., supra.* I am of the opinion that that is exactly what the Legislature did in enacting the 1927 statute, and that §§ 1715 and 1726 are repealed by substitution.

Those sections never served but one purpose, to entrap the unwary president and secretary who, unthoughtedly or ignorantly, failed to file such report, which enabled some creditor who never extended any credit on the strength of such a report or refused credit for the lack of same, to recover a debt due by the corporation from them.

I think the judgment should be affirmed. Mr. Justice BUTLER joins in the dissent.

Opinion on rehearing delivered March 30, 1931.

McHaney, J. After a careful consideration of the briefs of counsel on the petition for a rehearing, and of the original briefs, a majority of the court has reached the conclusion that a rehearing should be granted. We, of course, recognize the general rule, of statutory construction, as stated in the original opinion, that repeals by implication are not favored. But, as there also stated: "A statute may, however, be repealed by the express provisions of a subsequent statute, or by implication when the provisions of the earlier and later statutes are repugnant to each other, or when the subsequent statute covers the whole subject-matter of the former, and is manifestly intended as a substitute for it." See cases there cited. As stated by Mr. Justice Field in *United States* v. *Tynen,* 11 Wall. (U. S.) p. 88, and quoted with approval on rehearing in *Mays* v. *Phillips County,* 168 Ark. 829-833, 279 S. W. 366: "When there are two acts on the same subject, the rule is to give effect to both if possible; but if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first, and, even where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." And this is true, even though the old act contains "provisions not embraced in the new." *Wilson* v. *Massie,* 70 Ark. 25, 65 S. W. 942; *Chicago, R. I. & P. Ry. Co.* v. *McElroy,* 92 Ark. 600, 123 S. W. 771; *Eubanks* v. *Futrell,* 112 Ark. 437, 166 S. W. 172; *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649; *State* v. *White,* 170 Ark. 880, 281 S. W. 678. The difficulty is not in stating the rule, as it appears to be one of universal application, but in applying it to a given case.

The Rainwater-McCarthy Motor Company was organized as an Arkansas corporation on October 13,

1928, and was dissolved December 14, 1929. It was therefore in existence little more than a year. Appellant sold it certain merchandise between October 8 and December 11, 1929, for which judgment is sought in this case. Other facts are stated in the original opinion.

The act under which the Rainwater-McCarthy Motor Company was organized is No. 250 of the Acts of 1927, p. 854. It is entitled "An act to provide for the formation of corporations, the regulation of corporations and for other purposes." The prior corporation act, the one under which a corporation of this kind would have been organized, but for the act of 1927 or some similar enactment, is the act of April 12, 1869, entitled, "An act to provide for the creation and regulation of incorporated companies." It will be noticed that the titles of the two acts are substantially the same, the one for the "formation" and "regulation" and the other for the "creation and regulation" of corporations. The purpose of both acts as stated in their titles is the same. They refer to the same identical subject-matter. Any person reading the two titles would know from a glance at the titles alone that the Legislature was dealing with the same subject-matter and was providing a new and different system for the "formation" or "creation" and "regulation" of corporations in the later act, from that in the Act of 1869. As above stated, the corporation in question was organized under the act of 1927. Indeed it was the only act under which such a corporation could have been organized, as the act of 1869 had been repealed by § 57 of the act of 1927 which provides that : "All acts and parts of acts in conflict with any of the provisions hereof be and they are hereby repealed," etc. The corporation act of 1869 is plainly in conflict with the act of 1927 as the latter, dealing with the same general subject-matter, provides a new and different scheme or system for the organization and regulation of corporations. This fact is further conclusively demonstrated by the provisions of §§ 54 and 55 of the latter act. Section 54 provides

that: "Any corporation organized and existing under the laws of this State on the date on which this act becomes effective may re-incorporate under this act either under the same or a different name" by following the procedure therein described. It is then provided that, when it has so done, it "shall be deemed to be incorporated hereunder and shall be subject to all *duties and liabilities of this act* and be entitled to and be possessed of all the privileges, franchises and powers as if originally incorporated under this act," etc. Section 55 provides: "Any existing corporation of this State, failing to avail itself of the provision of § 54 hereof prior to January 1, 1928, shall be deemed as a corporation created under the provisions of this act and subject to all its provisions as fully as if it had complied with the terms and provisions of this act." Therefore, it necessarily follows that the act of 1927 was the only act in existence at the time of the incorporation of the Rainwater-McCarthy Motor Company under which it could have been incorporated, and that all other similar corporations organized either before or after the effective date of the act of 1927 are now deemed to be corporations thereunder and "subject to all duties and liabilities of *this act*" and to none other. This action was brought against appellee to recover a corporate debt under §§ 1715 and 1726, Crawford & Moses' Digest. These were §§ 12 and 21 respectively of the act of 1869. There are no like provisions in the act of 1927, but it imposes other and different duties and liabilities. For instance § 49 provides: "A director, officer, agent, or employee of any corporation who knowingly and with intent to defraud concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition containing any material statement which is false shall be liable for all damages caused thereby." Evidently the Legislature intended to substitute the liability imposed by the above section for that provided in the act of 1869. The old act imposed the liability on the president and secretary alone

for an unintentional neglect. The new act imposes it upon any officer, director, agent or employee "who, knowingly, and with intent to defraud, concurs" in publishing any false, written financial statement. It would seem to serve a better purpose, for any person before becoming a creditor may require such a financial statement.

As above stated, the act of 1927 provides a new scheme or system for the organization and regulation of corporations. It takes up the whole subject-matter anew and sets up a new plan. It is in no sense amendatory to the old act, but it is a new enactment covering the same subject-matter. It runs through 40 pages of the printed acts, with 57 sections. As we said in *Cordell* v. *Kent,* 174 Ark. 503, 205 S. W. 404, cited with approval in *State ex rel. Atty. General* v. *Standard Oil Co.,* 179 Ark. 208, 16 S. W. (2d) 581: "Where the Legislature takes up a whole subject anew, covering the whole ground, revising the whole subject-matter of a former statute, and evidently intending to enact a substitute, the old statute is repealed, although the new statute contains no express words to that effect," and further, even though the old statute contains provisions not covered in the new. This is exactly what the Legislature did in enacting act 250 of 1927.

We deem it unnecessary to take up and compare the different provisions of the two acts to show further the applicability of the rules of law herein announced, as a reading of the two will demonstrate the correctness of the views here expressed. We have reached the conclusion that the act of 1869 has been repealed by the act of 1927, and that there is no longer any basis for the action sought to be maintained by appellant. The chancery court, therefore, correctly overruled appellant's demurrer to appellee's answer and correctly dismissed its complaint for want of equity when it declined to plead further.

Affirmed.

HART, C. J., and MEHAFFY, J., dissent.

MORGAN UTILITIES, INC., *v.* KANSAS CITY LIFE INSURANCE COMPANY.

Opinion delivered March 9, 1931.

[redacted]

G. E. Garner, for appellant.

Carmichael & Hendricks, for appellee.

McHANEY, J. On July 20, 1926, appellee sold and conveyed by deed of that date to Jewell Realty Company a plantation in Chicot County, Arkansas, known as "Sunnyside," and for a large portion of the purchase price took a mortgage from the Jewell Realty Company as security therefor. There was located upon said land at the time of the sale and mortgage a gin which was treated by both parties as a part of the realty and was included in both the deed and mortgage as such, although not particularly mentioned therein. Located in the gin building was a Fairbanks-Morse 80 H. P. oil-burning engine which weighed 25,000 pounds, set upon a heavy concrete base with bolts imbedded in the concrete. At-

tached to said engine was a large oil tank buried some 4 or 5 feet in the ground. In November, 1926, fire destroyed the gin and did considerable damage to the engine. The loss was adjusted by the insurance company having the risk with the Jewell Realty Company on a basis of about $800 damage to the engine and tank.

The Jewell Realty Company being in default in the payment of its indebtedness, appellee brought suit against it in April, 1928, to foreclose its mortgage, and in November, 1929, D. S. Clark was appointed receiver to take charge of the mortgaged property and rent out the land. The Jewell Realty Company is a foreign corporation not authorized to do business in Arkansas, but it entered its appearance in the foreclosure suit and was represented by an attorney who was present, together with its vice president, when the receiver was appointed. About December 12, 1929, the vice president of the Jewell Realty Company sold and delivered said engine and tank to appellant, Morgan Utilities, Inc., for a consideration of $500. Appellee did not discover that the engine and tank had been removed from the premises until about April 4, 1930. Prior to this time a decree of foreclosure had been entered, the sale advertised, and on April 5, the property was sold, pursuant to the decree of the court, at which sale the commissioner announced that it included said engine, but no personal property. Shortly thereafter citation was issued against appellant to show cause why it should not return said engine and tank to appellee, it being the purchaser at the foreclosure sale. On a hearing the fact was developed that said engine had never been set up and operated by appellant. The court made an order directing appellant to return it to the receiver. Appellant refused to obey the order, was held for contempt until bond was given, which was done, and appellant set up, began operating the engine and now has it in its possession. Thereafter appellant filed an intervention claiming the engine under its purchase, asked that the Jewell Realty Company be made a party, and that, if

the court held the engine to be the property of appellee, it have judgment against the Jewell Realty Company. The realty company answered that it could not be sued in this State because it had never complied with the law relating to foreign corporations, had not designated an agent for service, and that the service had upon the State Auditor was void as to it, which should be quashed.

Upon a hearing the trial court held that the engine was the property of appellee, and ordered that it be restored to it, found it to be of the value of $2,000, and entered judgment against appellant and its surety in the sum of $2,000 and against Jewell Realty Company in the sum of $500 in favor of appellant, from which Morgan Utilities and Jewell Realty Company have appealed, and appellee has taken a cross-appeal.

The court found that the engine and tank were fixtures, and we think the preponderance of the evidence supports such finding. The engine was a ponderous piece of machinery, weighing 10½ tons, was set on a concrete foundation several feet in thickness with 8 bolts buried in the concrete. Both engine and tank were used to operate the gin and the undisputed evidence shows that they were sold with the land as a part thereof, with a mortgage back on the same property sold. In addition to this it was the intention of the parties that they should be fixtures, and the intention of the parties is one of the principal rules in determining whether an article is a chattel or an irremovable fixture. In *Ozark* v. *Adams,* 73 Ark. 227, 83 S. W. 920, the rules for determining this question are stated in the first syllabus as follows: "The rules for ascertaining whether an article is a chattel or an irremovable fixture are as follows: (1) real or constructive annexation of the article in question to the realty; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make a permanent accession to the freehold, this intention being inferred from the nature of the article

affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made."

As above stated, the undisputed evidence shows that the title to the gin and all the equipment therein passed to the gin and all the equipment therein passed to the Jewell Realty Company by the deed from appellee and back to appellee by the mortgage. It was considered as realty by both parties and no special mention was made thereof either in the deed or mortgage. By its mortgage to appellee, the Jewell Realty Company parted with the legal title to the realty and all fixtures which had become a permanent accession to the freehold, and retained only an equitable interest therein. Therefore, it necessarily follows that, not having the legal title, it could convey none, except such as it had. But appellant says that, since the engine had gone through a fire which rendered it unfit for use without extensive repairs, it became personal property, ceased to be a fixture, even though it had formerly been such and was subject to sale as personal property by the Jewell Realty Company. We do not think so. In 11 R. C. L., p. 1066, the rule is stated thus: "But, on a mere temporary severance of articles which possessed the character of fixtures, they still remain a part of the realty, and likewise where the severance is by accident, at least until the owner, by appropriation or otherwise, converts the parts accidentally detached into personalty." Here the owner of the legal title, appellee, did not sever the fixture from the realty, nor was it done with its knowledge or consent, but against its will. If it could be said that it was severed by the fire, still it continued to be a part of the realty to which appellant acquired no title, as against appellee, in its purchase from the realty company.

Appellant also contends that it was not properly in court. The record shows it was cited to show cause why it should not return the property and an order was made

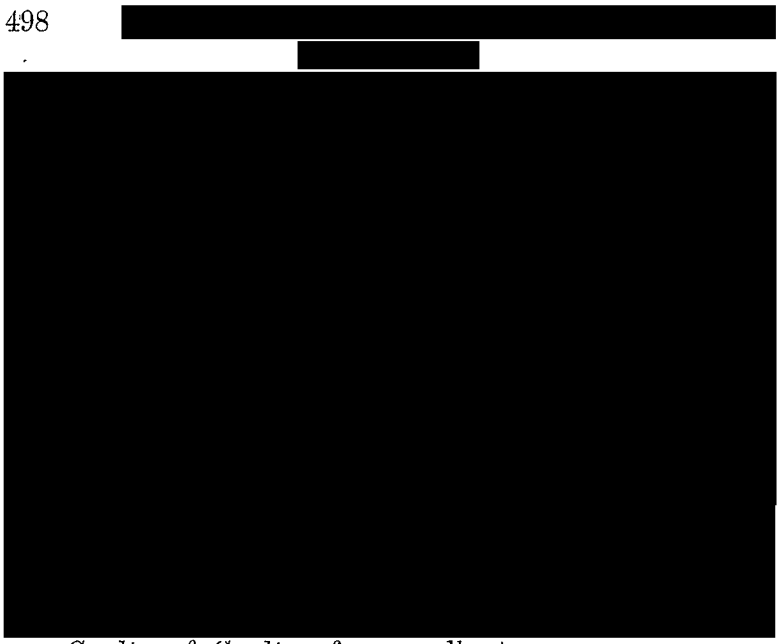
against it to return same. It thereafter voluntarily entered its appearance, intervened in the action, and set up its title to the property. We therefore think that the court had jurisdiction of appellant as also of the Jewell Realty Company.

As to the value of the property, the court found it to be $2,000, which we think is supported by the preponderance of the evidence. It is true that appellant paid only $500 for it, but it was buying only such title as the Jewell Realty Company had. Appellant had knowledge, either actual or constructive, of appellee's mortgage on the property and knew or should have known that it could acquire no title as against appellee. The proof shows the engine cost $4,200 about three years before the fire, and that the fire damage was adjusted at $800. Appellee's evidence was to the effect that the engine and tank were worth a minimum of $2,000 at the time it was sold to appellant, and we think the preponderance of the evidence supports the court's finding of the value of $2,000. It is true that appellant has repaired the engine at a cost of approximately $1,500, but this can make no difference. The effect of this action is in the nature of a suit for conversion, and the measure of damages is the value of the property at the time it was converted.

We are therefore of the opinion that the court was justified in rendering a judgment against appellant for the value of the property, $2,000. We are also of the opinion that the court correctly rendered judgment against Jewell Realty Company in the sum of $500, the amount received by it for said property. The case will be affirmed both on the appeal and cross-appeal.

AMERICAN LIBERTY MUTUAL INSURANCE COMPANY *v.* WASHINGTON.

Opinion delivered March 23, 1931.



Coulter & Coulter, for appellant.

Graham Moore, for appellee.

HART, C. J., (after stating the facts). The general ground upon which the judgment upon the insurance policy in the justice court is sought to be enjoined and set aside is that it was obtained by fraud. It is the settled law of this State that the fraud which entitles a party to impeach a judgment must be a fraud extrinsic of the matter tried in the case. It must not consist of any false or fraudulent act or testimony, the truth of which was, or might have been, in issue before the court, which resulted in the judgment that is thus assailed. It must be a fraud practiced upon the court in the procurement of the judgment. *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166, 118 S. W. 250; and *H. G. Pugh & Co.* v. *Ahrens,* 179 Ark. 829, 19 S. W. (2d) 1030.

The present case falls within this principle. The very issue of fact now proposed to be retried as the main thing that was controverted in the suit upon the fire insurance policy sued on in the justice court and was essential to the judgment.

It is next insisted that the justice court had no jurisdiction because twelve per cent. damages and $50 attorney's fee were awarded under the provisions of § 6155 of Crawford & Moses' Digest. We do not think this contention is sound. Under this statute an insurance company becomes liable for the twelve per cent. damages and attorney's fee when recovery is had upon the policy sued on for the amount sued for. The statute does not make the liability of the company depend upon its refusal to pay the loss, or its good faith in contesting the matter. The statute becomes a part of the contract of insurance and is cost to reimburse the plaintiff for expenses incurred in inforcing the contract. The allowance of the twelve per cent. damages is a matter of public policy declared by the Legislature, and its wisdom and expediency in the matter cannot be reviewed by the courts. *Arkansas Insurance Co.* v. *McManus,* 86 Ark. 115, 110 S. W. 1097; *Guardian Life Insurance Co.* v. *Dixon,* 152 Ark. 597, 210 S. W. 25; and *Security Insurance Co. of New Haven* v. *Smith, ante* p. 254.

The reason for the rule is that insurance companies are engaged in a business of such general and public concern as to permit the police power of the State to be invoked in aid of the rights and duties growing out of the relations of insured and insurer. *Germania Fire Insurance Co.* v. *Barber Tenton Bally,* 19 Ariz. 580, 173 Pac. 1052, 1 A. L. R. 488.

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

PARKER *v.* NICHOLAS.

Opinion delivered March 23, 1931.

[redacted]

McConnell & Jackson, for appellant.

SMITH, J. Appellee is engaged in cattle tick eradication work in Howard County, pursuant to the regulations of the Board of Control of the Arkansas Agricultural Experiment Station, having charge thereof. The validity of the regulations of this board has been recognized in numerous cases. Appellee sprayed three head of cattle belonging to appellant, two one day and the third the following day, and he demanded the fees for the service amounting to $9, $3 for each animal sprayed. When payment was refused, appellee drove away the last animal sprayed, for the purpose of selling it in satisfaction of his fees, but, before it could be sold, appellant brought suit in replevin to recover its possession, and from a judgment adverse to him in the circuit court is this appeal.

Two questions are presented for our decision, one of fact, the other of law. The question of fact was submitted under an instruction as favorable to appellant as could have been given, which reads as follows: "You are instructed that, if you find from a preponderance of the evidence, plaintiff was instructed by those in charge of tick eradication that if his cattle had been kept in a pasture and not allowed to run upon the range, and you find that such cattle had been so kept in a pasture, or if you find that those in charge of tick eradication had instructed plaintiff to dip or spray such of his cattle which were permitted to run at large on the range, and you find such of his cattle which ran at large upon the range were dipped or sprayed, as required by the authorities, and then placed in his pasture and kept there free from tick contamination, you will find for the plaintiff."

The testimony on the part of appellant was to the effect that he had kept in his pasture the animal which

was sprayed on the third day, and that he had been advised by the officers engaged in the enforcement of the tick eradication regulations that he would not be required to dip or have sprayed the cattle which had not been allowed to run on the range. But the testimony is conflicting on this issue of fact, and is sufficient to support the finding, not only that appellant was not so advised, but that, even so, the animal in question had not been continuously confined in the pasture but had been allowed to range outside.

The law question in the case is whether the authority exists to make a charge for spraying an animal, the insistence being that provision is made only for a charge for dipping; in other words, that a charge may be made for dipping cattle, but not for spraying them, and, as the plaintiff's cattle were sprayed, and not dipped, there is no authority to charge for the service rendered.

We do not so understand the law and the regulations of the Board of Control. Both dipping and spraying are intended to accomplish the same purpose, and both methods have been approved by the Board of Control.

Section 40 of bulletin No. 160, promulgated by the Board of Control, is a copy of § 1 of act 279 of the Acts of 1919 (General Laws 1919, p. 216), and reads as follows: "It shall be 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 or person having cattle in charge shall fail, refuse, or neglect to dip said cattle under supervision on regular dipping dates. The peace officer shall have free access to any premises, and is authorized to make a charge of not less than one ($1) dollar or not more than three ($3) dollars for each animal for their services, and the owner or person in charge of said cattle shall pay this fee, and, upon his failure to pay the same, the peace officer shall sell the cattle and take his fee and the expenses of the sale from the proceeds of the sale. Stray cattle shall

be dipped by any peace officer, and, if not claimed and the officer's fee paid, the cattle must be impounded and advertised for ten days, after which they may be sold, and after the fees have been taken from the proceeds of the sale the remaining, if any, shall be paid into the county general revenue fund."

Paragraph 2 of § 4 of Bulletin No. 160, above referred to, reads as follows: "In counties or portion 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."

We have expressly held that the board has authority to make such regulations as the one last quoted, and that the board has authority to enforce these and similar regulations, and that it is the duty of all persons coming within their purview to obey them. *Kansas City So. Ry. Co.* v. *State,* 90 Ark. 343, 119 S. W. 288; *St. L. I. M. & S. Ry. Co.* v. *Campbell,* 116 Ark. 119, 172 S. W. 823; *Davis* v. *State,* 126 Ark. 260, 190 S. W. 436; *Rider* v. *State,* 126 Ark. 501, 191 S. W. 12; *Cazort* v. *State,* 130 Ark. 453, 198 S. W. 103; *Palmer* v. *State,* 137 Ark. 160, 208 S. W. 436; *Ashcraft* v. *State,* 140 Ark. 505, 215 S. W. 688; *Boyer* v. *State,* 141 Ark. 84, 216 S. W. 17; *Teague* v. *State,* 141 Ark. 182, 216 S. W. 294; *Lee* v. *State,* 141 Ark. 490, 217 S. W. 455; *Housley* v. *State,* 166 Ark. 453, 266 S. W. 957; *Humphrey* v. *Tinsley,* 181 Ark. 73, 25 S. W. (2d) 1.

The regulations of the Board of Control treat dipping and spraying as having the identical purpose of applying to the tick-infested animal the solution approved by the Board of Control as an effective means of ridding the animal of the ticks which infest it. The service is identical, although the manner of rendering it is different, and both the statute and the regulations of

the board fix the fees for the service. The testimony shows that the board had fixed the fee for either service at $3, and the authority existed therefore for collecting this charge when the service had been performed.

It was therefore the duty of the plaintiff to pay this charge, and the peace officer who rendered the service had authority to retain the animal, subject to his right to sell in the manner authorized by the act of 1919, *supra*. Having refused to pay this charge, the plaintiff did not have the right to the present possession of the animal at the time he instituted this suit, and the judgment of the court to that effect must be affirmed, and it is so ordered.

NATIONAL SAVINGS & LOAN ASSOCIATION *v.* COOK.

Opinion delivered March 23, 1931.

Owens & Ehrman and *Ada Marett Carter,* for appellant.

John Baxter, for appellee.

HUMPHREYS, J. This is an appeal from the decree of the chancery court of Desha County, reforming a deed executed by appellees, Ben E. and Jennie Mae Cook, to appellees, A. O. and Grace Roscher, of date August 17, 1929, so as to make it read that the land therein described was conveyed by the Roschers subject to the mortgage lien in favor of appellant for $4,000 instead of reading that the Roschers assumed and agreed to pay the mortgage indebtedness to appellant.

In the mortgage foreclosure proceedings, appellant made the Roschers parties defendant and prayed for a personal judgment against them on the ground that, as a part of the consideration for the property, they agreed with the Cooks to assume the payment of said mortgage indebtedness to appellant. The deed from the Cooks to the Roschers was made an exhibit to appellant's complaint, and it contained a recital to that effect.

The Roschers interposed the defense to the prayer for a personal judgment against them that they bought the property subject to appellant's mortgage, and did not assume and agree to pay the mortgage indebtedness as a part of the consideration therefor.

This formed the only issue between appellant and the Roschers in the trial of the foreclosure proceedings and is the only issue involved on this appeal.

There is a conflict in the testimony of Ben E. Cook and A. O. Roscher relative to the contract of sale and purchase of the property. A. O. Roscher testified that he bought the property from the Cooks for $1,125, subject to appellant's mortgage. Ben E. Cook testified that he sold the property to the Roschers for $1,125 and the assumption of appellant's mortgage.

The record reflects, according to the undisputed testimony, that, after Cook and Roscher entered into the oral contract for the sale and purchase of the property, A. O. Roscher had his attorneys prepare a deed on a blank form for the Cooks to execute to him and his wife. Immediately after the description of the property, the following typewritten recital appears in the deed:

"Subject, however, to a first mortgage held by the National Savings & Loan Association of Little Rock, Arkansas, which mortgage debt it is expressly stipulated the grantees do not assume or agree to pay."

Roscher then mailed the deed, together with a written memorandum of the oral agreement signed by himself, to Ben E. Cook. At the bottom of the memorandum,

Roscher requested Cook to O. K. and to execute and return the deed to him.

Ben E. Cook received the deed and memorandum. He construed the words "subject to the mortgage" as an obligation by the Roschers to pay the mortgage indebtedness. He therefore changed, in ink, the wording of the deed by striking out the word "not" and by inserting the word "and" in place of the word "or" in said clause so as to make the clause in the deed read as follows:

"Subject, however, to a first mortgage held by the National Savings & Loan Association of Little Rock, Arkansas, which mortgage debt it is expressly stipulated the grantees do assume and agree to pay."

A. O. Roscher filed the deed for record without rereading it, under the impression and belief that it had been executed as originally written by his attorney. After being recorded, he retained the deed without discovering any change in the wording until this suit was brought.

The failure of Ben E. Cook to call the attention of A. O. Roscher to the change he made in the wording of the deed when he returned same and the failure of A. O. Roscher to discover that a material change had been made in the deed before the execution thereof, brings the instant case within the wholesome rule announced by this court in the case of *Bradley* v. *Minton,* 159 Ark. 659, 252 S. W. 921. The trial court correctly applied the rule announced in the Minton case, *supra,* to the facts in the instant case in reforming the deed.

The decree is therefore affirmed.

McHaney, J., disqualified and not participating.

Jacks *v.* Culpepper.

Opinion delivered March 23, 1931.

H. K. Toney and *Creed Caldwell,* for appellant.

McHaney, J. On December 20, 1929, a collision occurred between the cars owned and driven by appellant and appellee at the intersection of East Fifteenth Avenue and State Street in the city of Pine Bluff, Arkansas. Appellee was driving east on Fifteenth Avenue and appellant north on State Street. The collision caused personal injuries to appellee, for which he brought this action in February following, alleging negligence, and in which he recovered a judgment against appellant for $500.

It is conceded that the testimony is in conflict regarding responsibility for the collision, each claiming that it was the other's fault and each being supported by other evidence, and that the verdict and judgment are supported by substantial evidence. It is contended, however, for a reversal of the judgment, that the trial court erred in giving two instructions over appellant's objections and in refusing to give another requested by him.

The first instruction given, about which complaint is made, was appellee's requested instruction No. 1, as follows: "You are instructed that it is the duty of a person operating an automobile upon a public highway to drive the same with due care and circumspection, and at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic and safety of others, and he has no right to drive at such

speed or in such manner as to endanger the life, limb, or property of a person." The complaint made against this instruction is that it is inherently wrong, abstract, and that it assumes as a fact that appellant was driving his car at an excessive rate of speed when the evidence as to the excessive speed is conflicting. We cannot agree with appellant. The instruction is a clear and concise statement of the duty of any person operating an automobile upon a public highway. While requested by appellee, it applies to him as well as to appellant. It is substantially the same as § 3, act 223 of 1927, p. 721, defining reckless driving. It is not abstract for the court in instruction No. 2, immediately following, about which no complaint is made, applied the law as stated to the facts in this case, if so found by the jury. The instruction does not assume that appellant was driving at an excessive rate of speed. We approved a somewhat similar instruction in *Graves* v. *Jewell Tea Co.,* 180 Ark. 980-987, 23 S. W. (2d) 972.

■ The second instruction complained of is No. D, as follows: "Where two automobiles approach a street intersection at approximately the same time, the one on the left shall yield the right-of-way to the one on the right; however, where one automobile has already entered the intersection and the other has not, then the former has the right-of-way over the latter." Appellant objected generally and specifically to said instruction "because the proof shows that the plaintiff testified that he looked to the right and saw the defendant approaching before he entered the street." This specific objection is apparently based on the traffic ordinance of Pine Bluff relative to the right of way at street intersections, which provides that: "A driver of a vehicle approaching an intersection of streets shall give the right-of-way to the vehicle approaching such intersection from his right." Appellant's other assignment of error relates to the same subject-matter, and both will be discussed together. The court refused his requested instruction No. 6, as fol-

lows: "It is the duty of a driver of a motor vehicle at street intersections to watch for motor vehicles approaching from his right and to give such motor vehicles the right-of-way. If he should fail to do that and is injured by a motor vehicle approaching from his right, he would not be entitled to recover for an injury, the result of a collision occasioned thereby."

An ordinance of the city of Little Rock relating to the right-of-way of vehicles at street intersections was considered by this court in *Murray* v. *Jackson,* 180 Ark. 1144, 24 S. W. (2d) 960. There the ordinance was: "When two vehicles approach, or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right." It is conceded that if the Pine Bluff city ordinance were the same as that of Little Rock, the court's instruction D would be a correct declaration of law. While it is true the ordinance now under consideration omits the words "at approximately the same time," as contained in the Little Rock ordinance, we think their meaning is the same, and that the same rule applies to both. The Pine Bluff ordinance certainly does not mean what appellant contends it does in his instruction No. 6 above set out. If the driver of a motor vehicle had to wait at a street intersection for every motor vehicle "approaching from his right and to give such motor vehicle the right-of-way," no matter how far away he might see him approaching, it would be so unreasonable as not to admit of that construction. Just as here appellee testified he saw appellant approaching from his right, about 290 feet away, and he thought he had ample time to cross ahead of him in safety. Appellee had entered the intersection while appellant was still "approaching" it, approximately 290 feet away. The ordinance does not require one who has "entered" the intersection to yield the right-of-way to one who is "approaching" it from the right, for one who has entered the intersection cannot be said to be approaching it. It only

requires one who is "approaching" to yield to one on his right who is also "approaching," which simply means the same thing as the Little Rock ordinance construed in *Murray* v. *Jackson, supra.* Therefore it follows that instruction D is correct, and that appellant's requested instruction No. 6 is wrong, and was properly refused.

Judgment affirmed.

HERROD *v.* LARKINS.

Opinion delivered March 23, 1931.

PER CURIAM. Counsel for appellant asks for a rule on the clerk to direct him to file the transcript offered in this case. There appears as a notation from the judge's docket the following: "8/18/30. Judgment of lower court affirmed. 8/18/30, Motion for new trial filed; overruled; exceptions saved. Appeal prayed and granted and 60 days given to file bill of exceptions." The offered transcript also shows that motion for new trial was "filed 9/16/30."

Thus it will be seen that there is no final judgment entered of record from which an appeal will lie. In *Lowenstein* v. *Caruth*, 59 Ark. 588, 28 S. W. 421, it was held that the record of a judgment is the only evidence of its existence. Its enforcement does not depend upon its being entered of record, and an execution may be issued

upon it before it is recorded. To the same effect, see *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44.

In the Lowenstein case, *Los Angeles County Bank* v. *Raynor,* 61 Cal. 145, was cited as authority for so holding. In that case the court said that the entry of record of a judgment is a mere ministerial act, which is required to be done for putting in motion the right of appeal from the judgment itself.

The notation on the judge's docket was not an entry of the judgment upon the records of the court. It might have been used as a basis for a motion to require the clerk to enter the judgment of record. *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030; and *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44.

If Herrod wished to appeal from the judgment, he should have filed a motion to require the clerk to enter it of record as well as the order overruling his motion for a new trial. This is in accord with the view expressed in *Chatfield* v. *Jarrett,* 108 Ark. 523, 158 S. W. 140. There the court said:

"The lawmakers have prescribed a certain time within which to take an appeal and perfect it, and it is the duty of appellant to take all necessary steps to perfect the record within that time which was deemed sufficient by the lawmakers for that purpose. If the judgment or decree has been omitted from the record, it is within the rights of the losing party to move for entry of it, and it is his duty to do so if he desires to appeal from it. It devolves upon him to take whatever steps are necessary to perfect his appeal."

It follows that the motion for a rule on the clerk to file the transcript must be denied.

WINN *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Opinion delivered March 23, 1931.

Oscar H. Winn, for appellant.

Frauenthal, Sherrill & Johnson, for appellee.

PER CURIAM. Counsel for appellee have filed a motion to dismiss the appeal in this case because it was not taken in the time required by statute. The Prudential Insurance Company of America brought suit in the circuit court against Floy K. Winn and Oscar H. Winn to recover the possession of certain real property described in the complaint. On the 20th day of May, 1930, judgment was rendered in favor of the plaintiff against the defendants for the possession of the property. On June 9, 1930, the defendants filed what they call a motion to prevent writ of assistance and re-try the action. On the same day, the motion was heard by the court and overruled. On July 8, 1930, the defendants filed their motion for a new trial, which was overruled on the 29th day of July, 1930. The transcript of the case was filed in this court on December 2, 1930.

The judgment of May 20, 1930, contains an express recital that it is considered and adjudged that the Pru-

dential Insurance Company of America have and recover from the defendants, Floy K. Winn and Oscar H. Winn, certain real property which is specifically described. This was a final judgment from which an appeal would lie; and, under the settled law of this State, the appeal must be taken within six months from the date of the rendition of the judgment, and not from the date of overruling the motion for a new trial. *Chatfield* v. *Jarrett,* 108 Ark. 523, 158 S. W. 146; *Caudle* v. *Turner,* 179 Ark. 337, and cases cited. See also *Poe* v. *Walker, post* p.....

Nor can a party by filing a motion to set aside a judgment for irregularity, instead of appealing therefrom, extend the time in which to appeal. *Dent* v. *Farmers' & Merchants' Bank,* 162 Ark. 325, 258 S. W. 322, and cases cited.

The judgment of May 20, 1930, settled and adjudicated the right of the plaintiff against the defendants to the possession of the real property. It was a final judgment. The transcript was lodged in this court on December 2, 1930, which was more than six months after the rendition of the judgment. Therefore the appeal will be dismissed.

INTERNATIONAL SHOE COMPANY *v.* GIBBS.

Opinion delivered March 30, 1931.

H. B. Means and *McRae & Tompkins,* for appellant.

Joe W. McCoy and *John L. McClellan,* for appellee.

HART, C. J., (after stating the facts). The first contention in the case is upon the ruling of the circuit court on the question of the measure of damages. Appellant insists that the court erred in telling the jury that, in event it allowed a recovery by appellee, the measure of damages would be the difference in value of his land immediately before and after the stream running through his land was used as an outlet for the sewage from the septic tank constructed by appellant. The instruction was based upon the theory that the damages to the land of appellee were permanent. Appellant contends that the injury, if any, was only temporary, and that the measure of damages for appellee would be the diminution in the rental value of his land. The action by appellee against appellant was for damages for an injury resulting from the construction and operation of a septic tank by appellant whereby its sewage was discharged from the tank and allowed to flow into the branch or creek running through appellee's land and which rendered the water unfit for use by cattle and polluted the air by

noxious and offensive odors about a dwelling house on his land.

The general policy of the law in such cases is to avoid a multiplicity of actions, and, if practical, to afford compensation in one action for all injuries. Under a similar state of facts in the cases of municipal corporations and sewer districts organized in them, where the sewage was discharged into the bed of a stream, the riparian owner was allowed to recover on the ground that the nuisance thus created was of a permanent and continuous character, and the landowner damaged was allowed to recover in one action all damages, past and future, which the nuisance has caused or will occasion in the future. Hence it was held that the measure of damages was the depreciation in the market value of the riparian owner's land immediately before and after the nuisance was created. *McLaughlin* v. *Hope,* 107 Ark. 442, 155 S. W. 910, 47 L. R. A. (N. S.) 157; *El Dorado* v. *Scruggs,* 113 Ark. 239, 168 S. W. 846; *Jones* v. *Sewer Imp. Dist. No. 3 of Rogers,* 119 Ark. 166, 177 S. W. 888; and *Sewer Imp. Dist. No. 1 of Wynne* v. *Fiscus,* 128 Ark. 250, 193 S. W. 521, L. R. A. 1917D, 682.

In the cases cited the court said that the municipal corporations and sewer districts in constructing the sewer systems so as to turn the sewage into the streams, indicated an intention to acquire a permanent right to pollute the stream, and the damages to the riparian landowner should be assessed upon that basis and as though the corporation was proceeding to acquire it under the power of eminent domain. The court further said that the turning of the sewage into the stream and the pollution of the water to the damage of the riparian owner constituted a taking or at least a damage to the property for public use within the meaning of the Constitution.

The same rule and the same reasoning has been applied in the case of *quasi*-public corporations, such as railroads, under similar state of facts. *St. L. I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804,

30 Am. St. Rep. 174; *St. L. I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360, 35 S. W. 791; *Turner* v. *Overton,* 86 Ark. 406, 111 S. W. 270, 20 L. R. A. (N. S.) 894; *C. R. I. & P. Ry. Co.* v. *Humphreys,* 107 Ark. 330, 155 S. W. 127, L. R. A. 1916E, 962; and *Yates* v. *Missouri Pac. Rd. Co.*. 168 Ark. 170, 269 S. W. 353, 38 A. L. R. 1434.

Where the injury was of a permanent and continuing character, the rule as to the measure of damages has been the same in cases where the wrong was caused by a private person or corporation. *Czarnecki* v. *Bolen-Darnell Coal Co.,* 91 Ark. 58, 120 S. W. 326; *Junction City Lumber Co.* v. *Sharp,* 92 Ark. 538, 123 S. W. 370; *Falcon Zinc Co.* v. *Flippen,* 171 Ark. 1151, 287 S. W. 394; *Standard Oil Company of La.* v. *Goodwin,* 174 Ark. 602, 299 S. W. 2; and *Arkebauer* v. *Falcon Zinc Co.,* 178 Ark. 943, 12 S. W. (2d) 916.

Our attention has not been called to any distinction in the authorities generally in the application of the rule in connection with corporations having the power of eminent domain and in cases arising where the injury complained of was not caused by the exercise of that power. The fact that the injury was caused by the exercise of the power of eminent domain has been considered of no importance except as showing that the structure was permanent in character. *Virginia Hot Springs Co.* v. *McCray,* 106 Va. 461, 56 S. E. 216, 10 Ann. Cas. 179; *Highland Avenue & Belt Railroad,* 99 Ala. 24, 10 So. 267, 14 L. R. A. 462.

If appellant had possessed the power of eminent domain, and had the damages been assessed in condemnation proceedings, it would not have acquired title to the land. The same damages would have been awarded, and damages, which can be assessed in condemnation proceedings, can be assessed just as well in an ordinary action at law. When the tank was constructed, it was evidently intended by appellant that it should be permanent, and it has been so treated and used by it ever since. As long as the sewer is used, just so long will the nuisance con-

tinue to injure the land of appellee. This court has recognized the rule that, when a nuisance is of such a character that its continuance is necessarily an injury and is of a permanent character, so that it will continue without change from any cause but human labour, the damage is original and can be at once fully compensated. *St. L. I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360, 35 S. W. 791.

In the instant case, at the trial the parties treated whatever injury might be caused by the pollution of the stream by the discharge in it of the sewage and the noxious odors arising therefrom around the dwelling house as of a permanent and continuous character. Appellant did not even ask the court to submit to the jury the question whether the damage or injury to appellee was temporary or permanent. Having failed to ask that this question of fact should be submitted to the jury, it cannot now complain that the court submitted to the jury the case upon the theory that the damage was original and susceptible of immediate estimation.

It is next insisted that the verdict in favor of appellee for $1,000 was excessive. The witnesses for appellee estimated the value of the land for all purposes immediately before the construction of the alleged nuisance was somewhere from $3,500 to $6,000. Some of the witnesses said that the land was damaged fifty per cent. or more by the discharge of the sewage into the branch running through appellee's land. The jury might have found from the testimony of the witnesses that the land was not only valuable for use as a cow pasture, but that it was also susceptible of being cut up into small lots and sold to people desiring to erect houses in the immediate vicinity of the city of Malvern. When all the uses to which the land might be adapted are considered, it cannot be said that the jury's finding that the land was damaged to the extent of $1,000 is excessive.

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

FIRST NATIONAL BANK OF DEWITT *v.* HASTY.

Opinion delivered March 30, 1931.

George Pike, W. A. Leach and *Ingram & Moher,* for appellant.

A. G. Meeham and *John W. Moncrief,* for appellee.

HUMPHREY, J. This is an appeal from a decree dismissing appellant's complaint against appellee, Lillie M. Mobley, seeking to recover 25 per cent. of $11,000, which she received as a compromise settlement in a suit brought by her on the fourth day of September, 1922, against the administrator of the estate of W. F. Meacham, deceased, and against his heirs in the chancery court of Arkansas County, to establish a lost holographic will, alleged to have been made by him, in which all of his property, real and personal, was devised to said appellee.

Appellant made a written contract between appellee and John W. Moncrief the basis of its suit, alleging that it was the owner of the contract by virtue of the assignment thereof to it by Caroline Hasty, who had acquired same by assignment from John W. Moncrief. The contract is as follows:

"This contract and agreement entered into by and between Lillie M. Mobley, first party, and John W. Moncrief, second party, witnesseth:

"First party agrees to pay John W. Moncrief 25 per cent. of all money, notes, accounts and credits which may be recovered by means and on account of the suit

filed by Lillie M. Mobley against W. F. Meacham and others for the purpose of establishing the will of W. F. Meacham, deceased. 25 per cent. of all money, notes and accounts so recovered by virtue of establishing and probating such will belong to John W. Moncrief, and he shall have the right, authority and power to collect same from any person and all persons having same in hand or in possession or unto whose hands or possession same may come and this shall be an order to deliver such one-fourth of same to said John W. Moncrief.

"The said John W. Moncrief shall receive the aforesaid 25 per cent. in addition to the fee mentioned in a former contract heretofore made, and this contract here and now made shall not in any way supersede or replace the former contract. And this contract here and now made shall not be taken to effect in any wise the former contract.

"Given under our hands and seals on this the first day of November, 1922.

"Lillie Mobley,
"John W. Moncrief.

"Witness: K. D. Mobley and T. T. Hasty."

It was alleged that under said employment, John W. Moncrief recovered $11,000 in cash for appellee, and that appellant is entitled to 25 per cent. of said amount under the terms of the contract.

Appellee filed an answer denying any liability under the contract to either John W. Moncrief, Mrs. Caroline Hasty, T. T. Hasty or appellant, alleging that she and John W. Moncrief had entered into a previous written contract whereby he was bound to perform all services for her in the suit to establish the will, and that the last contract and the one sued on by appellant was without consideration and also that the consideration for said contract was unlawful and void as against public policy.

According to the undisputed testimony, the record reflects the following facts:

Appellee brought a suit in the chancery court of Arkansas County against the administrator and heirs of

W. F. Meacham, deceased, to establish his lost will, in which he devised his entire estate to appellee. J. W. Moncrief was her attorney in the proceedings, having been employed under a written contract of date April 24, 1920, in which he agreed for $500 and 4 per cent. of what he might recover to assist Crawford & Hooker in representing appellee in all litigation existing or that might arise in connection with the estate, administrator, or heirs of W. F. Meacham, deceased. During the pendency of the suit to establish the lost will, the contract sued upon herein was executed in the name of John W. Moncrief, but for the benefit and protection of T. T. Hasty, who was to receive the amount set forth in the contract as additional fee for J. W. Moncrief, upon conditions about which the parties differ. J. W. Moncrief was made the second party in the contract so that he might pay one-fourth of the amount that he recovered and collected to T. T. Hasty with the understanding that he would assign the contract to Caroline Hasty in order to protect T. T. Hasty from any claim J. W. Moncrief's representatives might make to 25 per cent. of the recovery, if he, J. W. Moncrief, should die before the collection was made. Subsequently, Caroline Hasty assigned the contract to appellant as additional security for certain existing indebtedness T. T. Hasty owed it.

In September, 1923, T. T. Hasty, who had theretofore purchased an undivided three-sevenths interest in the estate of W. F. Meacham, deceased, from several of the heirs, testified in the suit to establish the will that sometime in 1920 Mrs. Sarah Shanklin, who had been the housekeeper for W. F. Meacham for many years, showed him W. F. Meacham's will; that it was in the handwriting of W. F. Meacham, deceased, and that, according to its terms, all his property was devised to appellee.

After T. T. Hasty had testified, the case was compromised and settled by paying appellee $11,000 cash, she agreeing to relinquish further right to share in the Meacham estate.

The testimony is in conflict as to the consideration moving between Hasty and appellee.

T. T. Hasty testified that he was to get the percentage named in the contract if he would testify to the existence of the will; that all he was to do to earn one-fourth of the recovery was to help substantiate the will and its contents; that he and his mother together owned about three-sevenths interest in the estate and that the amount he was to receive for testifying to the existence of the will and its contents was about equal to his and his mother's share in the estate.

K. D. Mobley testified that he agreed to pay T. T. Hasty 25 per cent. of what his wife might recover in the suit to establish the will to produce said will, and that, after the agreement had been made, they repaired to the office of John W. Moncrief for the purpose of having same reduced to writing in the best form; that, after stating the terms of the contract to J. W. Moncrief, he prepared the contract of date November 1, 1922, which was immediately assigned to Caroline Hasty, and subsequently to appellant.

J. W. Moncrief testified that the consideration specified in the contract was for the use of T. T. Hasty and not himself, and that he was made party of the second part therein in order to collect and pay T. T. Hasty 25 per cent. of the recovery, and that he assigned same to Caroline Hasty without recourse at the request and instance of T. T. Hasty without consideration in order to protect him against any claim of his representatives in case of his death; that personally he had no interest whatever in the contract, and did not act as attorney for either party in writing same; that he rendered his services and received pay therefor under the contract of date April 24, 1920; that T. T. Hasty never produced the will of W. F. Meacham nor in any way earned the percentage of recovery named in the contract of date November 1, 1922.

Appellant contends for a reversal of the decree upon the ground that the trial court erred in finding that the

contract of November 1, 1922, was void for the want of consideration. The argument is made that, though it be conceded that J. W. Moncrief rendered no services thereunder but earned his fees under the contract of date April 24, 1920, yet there was a valuable consideration for the oral contract between T. T. Hasty and K. D. Mobley, which was adopted and used in formulating the written contract in which appellee appears as party of the first part and J. W. Moncrief as party of the second part. Attention is called to the fact that T. T. Hasty agreed to and had testified that W. F. Meacham died testate, and by his will devised all of his property to appellee, which testimony resulted in a benefit to appellee and a detriment or loss to T. T. Hasty, if appellant fails to recover on the contract. It is true that a benefit accruing to one and a loss resulting to the other party in the contract constitutes a valuable consideration therefor, but a valuable consideration is only one essential of a contract. There are several other necessary essentials to a contract, one being a lawful subject-matter. A contract relating to an unlawful subject-matter is void, even though supported by a valuable consideration. The testimony of T. T. Hasty, relied upon by appellant, if true, reveals that the contract is contrary to public policy and void. According to the facts, he agreed to testify, for a percentage of the recovery, that W. F. Meacham died testate, and that by holographic will he devised all of his property to appellee herein. This court is committed to the doctrine that a contract is void as against public policy in which one of the parties therein agrees to secure testimony that will enable the other to win an existing or contemplated suit. *Mendel Bros.* v. *Davies,* 46 Ark. 420; *Josephs* v. *Bryant,* 108 Ark. 171, 157 S. W. 136.

Having reached the conclusion that the testimony adduced by appellant renders the contract void, it is unnecessary to decide other questions argued by able counsel for apepllant.

No error appearing, the decree is affirmed.

TAYLOR *v.* STREET IMPROVEMENT DISTRICT No. 343.

Opinion delivered March 30, 1931.

Sam Rorex and *Nat R. Hughes,* for appellant.

S. L. White, Wallace Townsend, L. P. Biggs, L. C. Auten and *Horace Chamberlin,* for appellee.

KIRBY, J., (after stating the facts). Appellant urges that the chancellor erred in decreeing the deposits of the moneys of the districts in the failed bank special deposits or trust funds within the meaning of § 1 of act 107 of 1927, and entitled to priority of payment over general creditors, as such. The law designates all creditors of a bank, of which the commissioner has taken charge, "classifiable" either as "secured creditors," "prior creditors" or "general creditors," and expressly provides:

"* * * (4) The owner of a special deposit expressly made as such in said bank, evidenced by a writing signed by said bank at the time thereof, and which it was not permitted to use in the course of its regular business, (5) the beneficiary of an express trust, as distinguished from a constructive trust, a resulting trust or a trust *ex maleficio* of which the said bank was the trustee, and which was evidenced by a writing signed by said bank at the time thereof. * * * All creditors not in this section hereinabove classed as secured or prior creditors of said bank, including the State of Arkansas and any of its subdivisions, shall be general creditors thereof." A special deposit under the law must be expressly made as such in the bank and evidenced by a writing signed by the bank at the time it is made and which the bank is not permitted to use in the course of its regular business. In *Covey* v. *Cannon,* 104 Ark. 550, 149 S. W. 514, the court, after saying the moneys placed on deposit in the bank in the usual way would have been a general deposit and established the relation of debtor and creditor between the bank and the depositors, said: "If it was placed in the bank for safekeeping, and not to be checked

out by the depositor, or under an agreement that the bank should act as bailee or agent and deliver the money to some other persons under certain conditions or apply it to a special purpose, it would have been a special deposit and the bank or agent or bailee with no right, to use it and mingle it with its own funds." See also *Morgan* v. *State,* 162 Ark. 34, 257 S. W. 364; and *Warren* v. *Nix,* 97 Ark. 374, 135 S. W. 896. The Legislature appears to have restricted the definition of a special deposit in providing for their preferential payment to such only as are made expressly and evidenced by a writing signed by the bank at the time of the making thereof, showing such deposit is not permitted to be used by the bank in the regular course of its business.

There is no contention here that there was any written agreement between the bank expressly making the taxes collected by the improvement districts and deposited therein "special deposits" within the meaning of the law, or showing that they were such and the bank was not permitted to use the money in the course of its regular business. It is true the bank was designated in the pledges as the trustee therein and made a certificate of identification of each bond as one of a certain series as described in the pledge, but it is expressly provided in the pledge or mortgage: "That the said trustee shall be responsible only for wilful misconduct in the execution of its trust," and, "the recitals of facts contained in the said bonds or in this instrument are statements of the said district and shall not be considered as made by the trustee," the pledge or mortgage being signed only by the improvement district. The deposit of the funds of the improvement districts, taxes collected on benefits assessed, although they were trust funds, so far as the particular official collecting and depositing them is concerned, and known by the bank to be such, did not become special deposits in the absence of the written agreement by the bank making them such at the time of their deposit, and the deposit was a general one under the law, the owner or creditor standing upon the same footing

as the other general creditors entitled to no preference or priority of payment. *Warren* v. *Nix,* 97 Ark. 374, 135 S. W. 896; *Rainwater* v. *Davis,* 172 Ark. 538, 289 S. W. 471; *Talley* v. *State,* 121 Ark. 4, 180 S. W. 330; *State, use Prairie County* v. *McKee,* 168 Ark. 441, 270 S. W. 513; *School Districts* v. *Massie,* 170 Ark. 222, 279 S. W. 993; *Paul* v. *Draper,* 158 Mo. 197, 59 S. W. 77; *People* v. *Home State Bank,* 338 Ill. 179, 170 N. E. 205; *Officer* v. *Officer,* 120 Ia. 389, 94 N. W. 947.

The State itself has been held not to be entitled to a preferential claim over other creditors for its deposit made in a bank that afterwards became insolvent, the common-law rule of preference of the sovereign over the subject not being applicable, and she and her political subdivisions are placed in the class of general creditors by the act. *Maryland Casualty Co.* v. *Rainwater,* 173 Ark. 103, 291 S. W. 1003, 51 A. L. R. 1332. As confirmatory of the above as a correct construction of the statute, it may be said that the Legislature at the same session enacted act 182, approved March 22, 1927, requiring all commissioners, treasurers and other officials of improvement districts having in charge the moneys and funds of such districts, before depositing them in any bank, to require of such bank or depository a surety bond conditioned for the apt, full and complete payment of all such funds so deposited, together with the interest thereon and prescribed a penalty for failure to do so. The improvement districts could have protected their funds by making "special deposits" thereof under the first act or requiring bonds made for repayment thereof under said act 182 of 1927, but did not do so.

It follows that the chancellor erred in holding that the funds deposited in the failed bank were "special deposits" or trust funds entitled to priority or preferential payment over the claims of the general creditors, and the decree must accordingly be reversed and the cause remanded with directions to enter a decree in favor of the plaintiffs for the amount of their claims to be paid *pro rata* with the claims of the other general creditors. It is so ordered.

GATES *v.* GREENVILLE BRIDGE & FERRY COMPANY.

Opinion delivered March 30, 1931.

David A. Gates, Hal L. Norwood, Attorney General, and *Walter L. Pope,* Assistant, for appellant.

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

MEHAFFY, J. David A. Gates, Commissioner of Revenues, issued an order under the provisions of act 181 of the Acts of 1929 directed to the sheriff of Chicot County commanding him to levy upon and sell the property of the Greenville Bridge & Ferry Company or so much thereof as may be necessary for the payment of tax, penalty, cost, etc.

Section 6 of the act under which the order was issued contains the following provision: "Every person, firm or corporation who shall operate a privately owned toll bridge or ferry in this State shall pay for the privilege of operating the same, in addition to all taxes now levied, a State license tax of four per centum of the gross amount of all fares and charges collected by said bridge or ferry, which said privilege tax shall be paid quarterly."

The appellee, the Greenville Bridge & Ferry Company, filed its complaint in the Chicot Chancery Court against David A. Gates, Commissioner of Revenues of Arkansas, and Calmes Merritt, sheriff of Chicot County, Arkansas, praying for an order enjoining and restrain-

ing the appellants from levying on appellee's property and for the cancellation of the writ or orders issued by the Commissioner of Revenues.

David A. Gates, the commissioner, filed answer alleging that the orders issued by him were under and by virtue of act 181 of the Acts of 1929, and that the order was directed to the sheriff of Chicot County directing him to levy upon and sell the property of appellee or so much as might be necessary for the payment of a tax due the State of Arkansas with penalty added in the sum of $3,906.

The following statement was filed, and no other evidence was introduced: "It is agreed by and between the parties to this cause that the plaintiff is a corporation chartered under the laws of the State of Delaware operating a ferry boat for the transportation of vehicles and passengers across the Mississippi River from Greenville, Mississippi, to a point on the Arkansas shore; that the corporation is engaged exclusively in interstate commerce, and its boats are registered at the port of registry, Baton Rouge, Louisiana; that the situs of all its property is in Mississippi about four miles south of Greenville; that it has no property in Arkansas except a landing dock and property for the facilities of landing, that its boats only stop on the Arkansas side to load and unload passengers and vehicles; that the corporation has never paid taxes in Arkansas, and that Mrs. Kate C. Archer, the lessor of the plaintiff, has paid taxes on the land.

"It is further agreed that the gross proceeds of the corporation from April 23, 1929, to June 1, 1930, from tolls collected from passengers and vehicles crossing from both sides of the river is $65,100; that 50 per cent. of the tolls originate from States other than Mississippi and Arkansas; that approximately $32,750 originates in the State of Mississippi and in the State of Arkansas; that of the $32,750, one-half thereof originates in the State of Arkansas; that the embarkation of automobiles including cars from all States which cross the river is about one-

half on the Mississippi side and one-half on the Arkansas side.

"It is further agreed by the parties of this action that the Greenville Bridge & Ferry Company has not made the quarterly reports which are required of ferries by act number 181 of the Acts of Arkansas for the year 1929; that it had not paid the tax prescribed by said act. It is further agreed that none of the boats of the plaintiff are registered or located in any part of Arkansas.

"It is further agreed that an agent of the Commissioner of Revenues for the State of Arkansas has made a demand upon the plaintiff company for its records of tolls collected by said ferry during the period of April 23, 1929, to June 1, 1930, and that said demand was made upon Mr. J. S. Hafter, who is an officer of the company, being secretary, at his office in the city of Greenville, Mississippi; that the verbal demand so made was refused, which demand was made by C. M. Matthews. The demand was made in Greenville, Mississippi.

"It is further agreed that the Greenville Bridge & Ferry Company has not qualified under the laws of the State of Arkansas as a nonresident corporation and has no agent in the State of Arkansas upon whom service can be had."

The court issued an order enjoining the defendants from levying upon the property of appellees for the tax claimed in the suit and held that the tax of four per cent. provided in act 181 as applicable to appellee is a tax and a burden upon interstate commerce, and that the act was intended only as a tax on intrastate business.

The only question for us to determine is whether the tax provided for in act 181 is a tax or burden on interstate commerce, that is whether as applied to appellee it violates the Constitution of the United States.

The State has authority to tax foreign corporations for the right or privilege of doing business in the State, although the tax may incidently or remotely affect interstate commerce. *Ark. & Memphis Ry. Bridge & Term-*

inal Co. v. *State ex rel. Atty. Genl.,* 174 Ark. 420, 295 S. W. 378.

As stated by the Supreme Court of the United States: "The turning point in these decisions is whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distinctly affect it. *Hump Hairpin Mfg. Co.* v. *Emerson,* 258 U. S. 290, 42 S. Ct. 305, 66 Law. Ed. 622.

The agreed statement in this case shows that the appellant is a foreign corporation operating a ferry boat for the transportation of vehicles and passengers across the Mississippi River between Mississippi and Arkansas; that it is engaged exclusively in interstate commerce, and has no property in Arkansas except a landing dock and property for the facilities of landing; its boats only stop on the Arkansas side to load and unload passengers and vehicles. It has never qualified under the laws of the State of Arkansas as a nonresident corporation and had no agent in Arkansas upon whom service can be had. It therefore appears that the only business appellee does in Arkansas is a part of interstate transportation. It loads and unloads passengers and vehicles that are being carried in interstate commerce, and this business is not merely an incident, but is a part, of the interstate transportation.

In a case decided by the Circuit Court of Appeals of the 5th Circuit where the city of Natchez had adopted an ordinance which prohibited the operation of a ferry from any other landing than the one fixed in the ordinance and prescribing rates, character of boats, and granting exclusive privilege to operate a ferry, the court said: "It is clearly held that, while the States, and, consequently municipal corporations acting under their authority, may adopt and enforce reasonable regulations for the safety and convenience of the public using ferries, and

may fix reasonable rates to be charged in carrying passengers, vehicles, and freight from their own shores, they cannot prohibit the operation of a ferry, nor exact a license fee for the privilege of landing or taking passengers, vehicles, etc." *McNeely* v. *Natchez,* 4 Fed. (2d) 899.

"Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this court, unnecessary to be cited, that a State law which directly burdens such commerce by taxation or otherwise constitutes a regulation beyond the power of the State under the Constitution. It is likewise settled that transportation by ferry from one State to another is interstate commerce and immune from the interference of such State legislation. * * * While a State has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is in effect a tax for the privilege of transacting such commerce." *Helson & Randolph Co-partners* v. *Kent,* 279 U. S. 245, 49 S. Ct. 279.

A tax on the privilege of operating a ferry, where the ferry company is exclusively engaged in ferrying passengers across a river from one State to another, is a burden on interstate commerce which a State may not impose. *Helena-Glendale Steam Ferry Co.* v. *State,* 101 Miss. 65, 57 So. 362, Ann. Cas. 1914B, 682; *Phil. & So. N. S. S. Co.* v. *Pa.,* 122 U. S. 326, 7 S. Ct. 1118.

"While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce or upon transportation of persons or property or for the navigation of the public waters over which the transportation is made is invalid and void, as

an interference with and obstruction of the power of Congress in the regulation of such commerce." *Gloucester Ferry Co.* v. *Pa.*, 114 U. S. 196, 5 S. Ct. 826.

The court also said in the above case: "If such a tax can be levied at all, its amount will rest in the discretion of the State. It is idle to say that the interest of the State would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its moderation in that respect; they require security. And they may rely on the power of Congress to prevent any interference by the State until the act of commerce, the transportation of passengers and freight, is completed. The only interference of the State with the landing and receiving of passengers and freight, which is permissible, is confined to such measures as will prevent confusion among the vessels and collisions between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers or freight, which fall under the general head of port regulations."

Receiving and landing passengers is not only incident to their transportation, but a necessary part of it. The transportation is not complete until the passengers have disembarked or the freight has been unloaded, and the loading of the freight and passengers on the Arkansas side in the instant case and discharging of freight and passengers is a necessary part of the transportation and the tax levied by the act under consideration is a tax on the right to take on and discharge freight and passengers and is therefore a tax or burden on interstate commerce.

The appellee has no property subject to taxation in Arkansas; the real estate where passengers and freight are discharged or taken on, belongs to another person who pays the taxes on such property. The ferry boat belonging to the company can only be taxed at its home port.

It therefore appears clear that the tax sought to be collected is a tax on interstate commerce and invalid. The decision of the Supreme Court of the United States last referred to, we think, settles beyond controversy that this tax is void. There are many other decisions to which attention might be called among which are: *Port of Richmond and Bergen Point Ferry Co.* v. *Board of Chosen Freeholders of Hudson County,* 234 U. S. 317, 34 S. Ct. 821; *City of Sault St. Marie* v. *International Transit Co.,* 234 U. S. 333, 34 S. Ct. 826; *Fargo* v. *Mich.,* 221 U. S. 230, 7 S. Ct. 857.

The appellant cites and relies on Cooley's Constitutional Limitations, 8th Ed., vol. 2, 1296, and the case of *Conway* v. *Taylor,* 1 Black 603, 17 Law. Ed. 191, but the question involved in the section referred to in Cooley's and the case cited are not the questions involved here. There is no contention that the State would not have the right to make reasonable regulations and inspection for the benefit of the public. This is the effect of the holding of all the authorities, but we have not had our attention called to any authority that would authorize the taxing of the right or privilege to take on or discharge passengers or freight, where the only business engaged in is interstate commerce.

The decree is affirmed.

VAN BUREN COUNTY BOARD OF EDUCATION *v.* SUGGS.

Opinion delivered March 30, 1931.

Opie Rogers, for appellant.

Garner Fraser, for appellee.

McHaney, J. Appellees, residents of Choctaw Special School District, being desirous of transferring certain of their children from said district to Clinton Special School District, both in Van Buren County, filed separate petitions therefor with the county board of education. After considering each of said petitions, the county board denied the same and entered an order to this effect, from which an appeal was taken to the circuit court, where, on a trial *de novo,* all being there consolidated for trial, the petitions were granted and the transfers ordered. The case is here on appeal in the name of the county board of education, although it appears that Choctaw Special School District is the real party in interest.

In the circuit court, appellant moved to dismiss the appeal for want of jurisdiction on the ground that Choctaw Special School District was created by special act 381 of the Acts 1907, p. 961, and that the county board had no jurisdiction to order the transfers by reason of the last proviso in § 3 of act 143, p. 493, Acts of 1927, and that the circuit court acquired none on appeal. The court overruled said motion, and this is assigned as error. The act last referred to confers power on the county board to transfer children from one school district to another, but the proviso referred to is "that

none of the provisions of this act shall apply to school districts created by special act of a previous Legislature." It appears, however, that, in September, October and December, 1929, the county board had dissolved three other school districts in Van Buren County and "added," "annexed," or "attached" their territory to Choctaw Special, acting under authority of act 156 of the Acts of 1927, as construed by this court in *Manley* v. *Moon,* 177 Ark. 260, 6 S. W. (2d) 281. It therefore became a consolidated district, and lost its identity as a legislative district by special act. *Camp* v. *Barr,* 181 Ark. 939, 28 S. W. (2d) 1071; *Special School District No. 60* v. *Special School District No. 2,* 181 Ark. 253, 25 S. W. (2d) 443. And this is true, even though the consolidated district took the name of the former district created by special act. *Camp* v. *Barr, supra.* Upon the consolidations Choctaw Special ceased to be the same district created by the special act and no longer came within the proviso of act 143 of 1927, above referred to. It necessarily follows that the county board had jurisdiction of the subject-matter and the parties, that the circuit court acquired the same jurisdiction on appeal, and that the motion to dismiss was properly overruled.

It is next urged that the court should not have allowed the transfers because of the insufficiency of the evidence. Just what evidence is required to support an order to transfer, act 143 of 1927 does not state. Section 1 provides: "That the county board of education shall have power, upon the petition of any person residing in any particular district, to transfer the children or wards of such person, for educational purposes, to an adjoining district, or to an adjoining district in an adjoining county; provided that said petitioner shall state under oath that the transfer is for educational purpose alone." The authorization is to transfer "for educational purposes." There may be some doubt as to whether the county board has any discretion in the premises, when the "petitioner shall state, under oath, that the transfer is for educational purposes"—a ques-

tion we do not decide. Petitioners, ten of them in number, all resided in territory which had recently been annexed to Choctaw Special. The distance to either school is about the same, and most of them are conveying their children to school at their own expense. The effect of their testimony is that Clinton is the better school, has better teachers, better roads to it and better finances. We have examined the evidence, and find it substantial in support of the finding of the trial court.

It is finally urged that the circuit court tried the case *de novo,* without any regard for the finding and judgment of the county board, which it was without authority to do. It is difficult to perceive how else the court could have tried it. The law provides for appeals from the orders of the county board to the circuit court, but fails to provide that the circuit court shall try the case on the record made before the county board. Appellant's argument on this point is contrary to our decision in the recent case of *School District No. 26* v. *School District No. 32,* 177 Ark. 497, 6 S. W. (2d) 826, where we said: "It was provided by act 183 of the Acts of the General Assembly of 1925 that a party to the record in a proceeding before any county board of education, who feels aggrieved by any final order or decision of such board, may prosecute an appeal therefrom within thirty days to the circuit court of the district. The argument is made that, because said act fails to expressly provide for trial *de novo* in the circuit court, the Legislature only intended that errors of law or gross abuse of the power by such boards might be corrected on appeal. Had this been the intention of the Legislature, the act would not have provided for a general appeal, but for one limited in scope. No provision is made in the law for making and preserving the record of proceedings before the county boards of education and for transmitting same to the circuit court. Without such a record, it would be impossible for the circuit court to determine whether errors were committed in the proceedings or whether such boards grossly abused the power conferred upon

them. It is quite evident that the Legislature intended to allow any party to the record who felt aggrieved to appeal and try his case upon its merits in the circuit court."

No testimony was heard by the county board in this case and none preserved in the transcript. We therefore hold that the circuit court correctly heard the matter *de novo*.

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

STREET IMPROVEMENT DISTRICT No. 74 *v.* GOSLEE.

Opinion delivered March 30, 1931.

Murphy & Wood, for appellant.

George P. Whittington and *Arthur S. Cobb*, for appellee.

BUTLER, J. Street Improvement District No. 74 of Hot Springs, Arkansas is a municipal improvement district organized under the provisions of § 5647 *et seq.* of Crawford & Moses' Digest, for the purpose of paving

Hobson Avenue in the city of Hot Springs for its length and further on along other streets to the west boundary of the city. The district extended a full block on each side of Hobson Avenue for most of its distance, and the back side of the blocks on each side of Hobson Avenue faced on streets which were not to be paved. These unpaved streets are South Avenue, one block south of Hobson Avenue and Rector Avenue, one block north of Hobson Avenue, and facing on unpaved streets are the lots of appellee.

The fact that a part of the property in the district including that of the appellee did not abut on the paved street made a distinction between the assessment of benefits of the property facing the street to be paved and the property facing the streets one block away from the pavement. In making the original assessment of benefits the property abutting on the pavement was assessed at about twice as much as the benefits assessed on the property facing the back streets, a part of which belonged to the appellees. The original assessment of benefits was made in 1924 which assessment was revised in 1925 and again in 1928. In neither of those years was any attempt made by the assessors to change the assessment against any piece of property unless its physical condition had been changed and its value thereby increased or diminished, but from the revision by the assessors in 1928, which made no change in the benefits assessed against the property of the appellees, the city council on appeal overruled the action of the assessors and reduced the assessed benefits on appellees' lots to $100 for each lot, whereas the lowest assessment originally made was $280 and the highest $560.

This litigation grows out of the 1928 revision as ordered by the city council. There had been no change in the physical condition of appellee's lots since the time of the original assessment, the council apparently basing its finding on the testimony that the original benefit was not fifty per cent. of that of the property abutting on the paved avenue as found and returned by the asses-

sors in their original assessment, but the proportional benefits were much less, or that the benefits received were about one-fourth of that on the property facing the paved avenue.

Appellee finds authority for the act of the council in § 5664 of Crawford & Moses' Digest, which provides: "The commissioners of any such improvement district may require the assessors thereof to revise their assessment not oftener than once per annum, increasing or diminishing the assessment against particular pieces of property as justice may require." (Provision is made for notice of the reassessment and for appeals from the same to the city council). This section must be considered with other legislation on the subject and the general policy of improvement district laws, and, when so considered, we think the intent was that the assessments might not be increased or diminished except for some physical change in the condition of the property since the original assessment which would increase or diminish their value, or where there was a mistake in the assessment originally made which was demonstrably erroneous.

Section 5661 provides for the remedy for erroneous or inequitable assessments made by the board of assessors at the time of the formation of a district and the assessment of benefits, and we have held in repeated decisions that, unless the appeal provided for in that section was prosecuted within apt time, the assessment of benefits became conclusive except for some demonstrable error. This, of necessity, limits the powers of the assessors to make revision of the assessment for the purposes and reasons heretofore stated. It is the policy of the law that the assessment of benefits against each piece of property becomes fixed as of the time of the original assessment, so that the assessment may not be changed, for, as suggested by the appellant, great instability in property values might result with consequent loss in market value and be a hindrance to ready sales.

This conclusion makes it unnecessary to consider the other questions presented. The decree of the trial court is therefore reversed, and the cause remanded for such other proceedings according to law as may be necessary to carry into effect the revision and assessment as made by the board of assessors.

MEHAFFY, J., dissents.

MORGAN UTILITIES, INC., *v.* PERRY COUNTY.

Opinion delivered March 30, 1931.

Buzbee, Pugh & Harrison, for appellant.

Dean, Moore & Brazil, for appellee.

BUTLER, J. This suit was instituted by the appellee, Perry County, in the chancery court of said county. The complaint alleged that S. R. Morgan, G. B. Colvin, and certain others, were indebted to it by reason of a judgment which it had previously recovered in the circuit

court of said county, and that it had exhausted its remedies at law to enforce the same without effect, the executions issued from said court and directed to the sheriffs of Perry and Pulaski counties having been returned *nulla bona;* that, although the said sheriffs had failed to discover any assets of S. R. Morgan upon which levy might be made, he was in fact the owner of valuable properties, and that he and the defendants, M. B. Morgan, Morgan Utilities, Inc., and other defendants named in the complaint, had conspired together to conceal the assets of the said S. R. Morgan by the incorporation of the defendant Morgan Utilities, Inc., together with a number of other corporations, the capital stock of which was issued to various persons, and that the assets belonging to S. R. Morgan were held by the said corporations and M. B. Morgan; that M. B. Morgan and the defendant, Morgan Utilities, Inc., and other named corporations and individuals all of whom were made parties defendant with S. R. Morgan were merely the employees and creatures of S. R. Morgan and the assets held in their names were in fact the property of S. R. Morgan, and on information charged that in reality title to all of the assets was then in the name of S. R. Morgan by deeds and assignments in his possession, but which he, with the aid of the other named defendants, fraudulently concealed, so that the title appeared to be in M. B. Morgan and the other named defendants. The prayer of the complaint was for an injunction restraining S. R. Morgan and his codefendants from disposing of their properties and for production before a master to be appointed by the court of all books and other records belonging to the defendants to be used in the examination of witnesses produced by plaintiff before said master, and for a discovery by S. R. Morgan and his codefendants of conveyances and other transfers unrecorded and in his possession, conveying to him and to other persons for his use the properties held in the name of the various named defendants, and to require the said defendants to disclose what conveyances that may have been executed in

favor of S. R. Morgan or others for his use, and upon final hearing that the court find and declare the rights of defendants and each of them in regard to the properties and assets in the hands of the various defendants to the end that such properties as are in fact assets of the said S. R. Morgan be used in liquidation of plaintiff's judgment under such orders as the court might deem proper.

Summons was duly issued and served on G. B. Colvin, a resident of Perry County, and upon the defendants, S. R. Morgan, M. B. Morgan, Morgan Utilities, Inc., and the other named defendants in Pulaski County of which county they were, and are, residents. Thereafter, M. B. Morgan and Morgan Utilities, Inc., appeared specially and moved to quash service of summons because suit was brought in Perry County and service was had on them in Pulaski County, and for the further reason that there was no joint liability of G. B. Colvin and them in the suit instituted. This motion was overruled over the objection and exception of M. B. Morgan and Morgan Utilities, Inc. There was no other plea filed by these or any of the other defendants. The court rendered a decree reciting that the case was submitted upon the complaint of plaintiff and the amendment filed thereto, the return of the sheriff showing service of process upon the several defendants, and oral testimony adduced before the court which, among other things, found that "all assets and properties of every kind and description purporting to be that of the defendants S. R. Morgan & Co., Morgan Utilities, Inc., and M. B. Morgan are in fact the property of the defendant S. R. Morgan and the stock in defendant corporations or a material part thereof is carried in the name of M. B. Morgan and others for the purpose of concealing the assets of S. R. Morgan and for the purpose of defrauding plaintiff and to defeat the collection of its judgment debt." The decree, after appointing a receiver to take charge of the assets upon his giving certain bond to be approved by the clerk of Perry County, concludes as follows: "It is further

considered, ordered and adjudged that any and all properties and assets of every kind and description of said defendants, S. R. Morgan & Co., Morgan Utilities, Inc., Middle-South Utilities Co., and M. B. Morgan are in reality the assets and properties of the defendant S. R. Morgan, and as such assets and properties are hereby declared to be subject to execution or other process of law for plaintiff's judgment, and the clerk of this court is hereby directed to issue execution against said properties upon application of plaintiff for the sale of same or so much thereof as is necessary to satisfy plaintiff's judgment, together with the costs of this action, in the way and manner now prescribed by law."

From this decree the appellant sought and was granted an appeal to this court and here insists, first, that the motion to quash should have been sustained, second, that the court acquired no jurisdiction of appellant, and third, that the complaint is not sufficient to constitute a cause of action against the appellant. The appellee has filed a motion to dismiss the appeal for failure to comply with rule 9 of this court. We have examined the transcript in connection with the abstract filed by the appellants and find that the same is sufficiently comprehensive to enable us to understand the issues involved and therefore that the appellee's motion is without merit. We will first consider the last ground urged by the appellants for reversal.

■ It is clear that the intention of the pleader was to state a cause of action for discovery under § 4366 of Crawford & Moses' Digest. It contains a distinct statement of the nature of the claim sought to be enforced and alleged that it had exhausted its remedies at law to enforce the same and that the assets of S. R. Morgan were fraudulently concealed in the name of the appellants for the purpose of hindering the appellee in the collection of its debt, the prayer being for a discovery of the assets and that they be subjected, or so much thereof as necessary, to the payment of appellee's judgment. This constituted a cause of action under the section *supra*. *Robinson* v. *Citizens' Bank,* 135 Ark. 308, 204 S. W. 615.

2. The first and second grounds urged for reversal will be considered together and are the main questions in the case. Sections 84-95, both inclusive, of the Civil Code, now §§ 1164-1174, both inclusive, of Crawford & Moses' Digest and § 484 of the Civil Code, now § 1175 of the Digest, make provision for the venue in certain named actions; and § 1176 of the Digest provides that "every other action may be brought in the county in which the defendant, or one of several defendants, resides or is summoned." All of the actions in these sections refer to ordinary adversary suits by which some primary right of the plaintiff is to be ascertained or liability of the defendant declared. This is not, however, the purpose of § 4366, for there no primary right on the one hand or liability on the other is the end to be gained, but merely a remedy ancillary to, and in aid of, the right already established and the liability found evidenced by the judgment previously obtained. *Honore* v. *Colmesnil,* 4 Dana (Ky.) 291; *McDormant* v. *Lou. Cinn. Ry. Co.,* 11 Bush. (Ky.) 386; *Parks* v. *Jellicoe,* 136 Ky. 622, 124 S. W. 868. Hence the sections relating to the venue of actions above named have no application to the action at bar.

From the allegations of the complaint in the instant case and the relief therein prayed, it is clear, as maintained by the appellee, that the proceeding is brought under the provisions of § 4366, *supra.* This section was lifted out of the Civil Code of 1854 of the State of Kentucky and was § 474 of that Code. That section, as §4366 of the Digest, provides:

"After an execution of *fieri facias,* directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an action, by equitable proceedings, in the court from which the execution issued, or in the court of any county in which the defendant resides or is summoned, for the discovery of

any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions persons indebted to the defendant in the execution, or holding the money or property in which he has an interest, or holding the evidences or securities for the same, may be also made defendants."

It is the contention of the appellant that under the facts in the instant case this statute does not govern, for the reason that this suit was brought in the chancery court of Perry County, whereas the judgment sought to be enforced by it and the execution issued thereon were rendered and issued out of the circuit court of Perry County, and that, as appellants were not residents of, or summoned in, Perry County, the court acquired no jurisdiction. If the phrase, "in the court from which the execution issued," is to be considered as standing alone and literally interpreted, there would be much force in the view taken by the appellant. But such is not the correct rule of construction. The entire section, as related to other sections of the Code of which it is a part, must be considered as a whole, and, as thus interpreted, take into consideration the nature and constitution of the court with which the statute deals. When this section is thus considered, and as construed by the court of the State from which it was taken, which decisions are binding on us, it is clear that the court referred to is the circuit court as then constituted both in Kentucky and in Arkansas. It was a court of dual jurisdiction, the judge presiding in one division or "on the law side" as a judge of a superior court of common law, and also sitting in chancery as judge of a court of equity, maintaining two dockets and records, the one for actions at law and the other for suits in chancery: in reality, two courts of separate and independent jurisdiction presided over by the same judge. It is not to be doubted that, as constituted at the time of the adoption of the Code, of which, as we have seen, § 4366, *supra,* is a part, where a judg-

ment at law had been obtained and execution thereon issued from the law side, to maintain the action contemplated by the statute, the proceedings must have been instituted in chancery, for it was provided: "The plaintiff in execution may institute an action by *equitable proceedings,*" which is in the nature of a creditor's bill "for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled." Therefore, the provision that the action might be brought "in the court from which the execution issued" could not be taken in its literal sense and meant, and could only mean, that branch of the court having equity jurisdiction, to-wit, the chancery court whose presiding officer was the same individual sitting in chancery as the one presiding in the superior common-law court. To interpret the statute any other way would be to render it impotent. *Honore* v. *Colmesnil, supra; McDormant* v. *Sou. Cin. Ry. Co., supra; Jones* v. *Jeffress,* 11 Bush. (Ky.) 636; *Parks* v. *Jellicoe, supra; Robinson* v. *Citizens' Bank, supra; N. M. Uri & Co.* v. *McCroskey,* 135 Ark. 537, 205 S. W. 976.

The circuit court of Perry County continued with its dual jurisdiction until 1903 when, by act No. 166 of the General Assembly then in session, the jurisdiction was divided by the creation of a separate court of chancery. It is therefore argued that, because of this, "whatever may have been the rule with respect to legal and transitory actions prior to legislative changes, there can be no question now that an action like the one in the case at bar is of a transitory nature," and that "if the judgment creditor should seek to bring an independent action against the execution defendant in some other court of competent jurisdiction, to enforce any remedies he may have against the execution of the defendant he cannot proceed against him unless the execution defendant voluntarily submits himself to the jurisdiction of the court in which the action is commenced or is brought into court by proper process. If the action is transitory in nature, it must appear that he has been

properly summoned in the county in which the action is brought." What we have already said suggests the answer to this contention: First, that this is not an ordinary adversary suit, but an action by equitable proceeding in aid of the enforcement of a right already adjudicated and found to exist; and, second, that the legislative change in no wise affected the constitution of the court or its jurisdiction except as to its presiding officer. So, it is obvious that whatever powers the circuit court on its chancery side had under § 4366, *supra,* that authority has devolved on the chancery court as now constituted, and to carry out the purposes of the statute it must be considered as a component part of the court from which the execution issued, for thus it was when the statute was enacted and no legislation since that time has indicated any disposition on the part of the Legislature to alter the force and effect of that law.

This court, in *Robinson* v. *Citizens' Bank, supra,* has recognized the present validity of § 4366 of Crawford & Moses' Digest, then § 3308 of Kirby's Digest. In that case Robinson, having obtained judgment in the circuit court of Johnson County against one Stewart, instituted an action in the chancery court of that county against Stewart and appellee Citizens' Bank, a domestic corporation with its domicile in Madison County in which county it was served with process, to cancel a mortgage executed by Stewart to the appellant on lands owned by Stewart in Johnson County. He alleged that the Citizens' Bank, which was made a party defendant, held a mortgage on the lands of Stewart which had been paid, but that the bank was still holding the security to prevent the plaintiff from collecting his judgment, and prayed for cancellation as an impediment against the subjection of the real estate described therein to the satisfaction of appellant's judgment. The court held that the allegations of the complaint set forth an action for discovery of the property to be subjected to the mortgagor, and that it was properly brought and a decree correctly entered in conformity with the prayer.

So also in the case of *N. M. Uri & Co.* v. *McCroskey, supra,* the court recognized this statute, saying: "It is true, under § 3308 of Kirby's Digest that a judgment creditor may establish a lien upon the property of an apparently insolvent judgment debtor in the hands of a third party by instituting equitable proceedings to subject the property to the payment of his claim, which lien shall exist from the service of the summons."

It is our conclusion, therefore, that the chancery court of Perry County had jurisdiction, that it properly overruled the defendant's motion to quash, and that its decree should be affirmed. It is so ordered.

Mr. Justice KIRBY dissents.

AMERICAN COMPANY OF ARKANSAS *v.* WHEELER.

Opinion delivered March 30, 1931.

H. G. Wade, for appellant.

McMillen & Scott, for appellee.

PER CURIAM. City of New York Insurance Company and Rhode Island Insurance Company have filed a petition in this court against the American Company of Arkansas requiring it to appear and show cause why it

should not be punished for contempt of court in causing executions to issue upon certain garnishment judgments of the Ouachita Circuit Court against said insurance companies.

The facts upon which the petition is based may be briefly stated as follows: On June 14, 1929, City of New York Insurance Company and Rhode Island Insurance Company filed a bill of interpleader in the Ouachita Chancery Court and deposited the sum of $618.75 in the registry of the court to be distributed to the American Company of Arkansas and other defendants who might be entitled to receive the same on certain insurance policies. They also asked that the defendants in the equity suit be restrained from proceeding any further on certain garnishments in the Ouachita Circuit Court. In the chancery court it was adjudged that the American Company of Arkansas have and recover of the Rhode Island Insurance Company the sum of $618.75 and against the City of New York Insurance Company the sum of $79.40. The decree further recited that the Rhode Island Insurance Company, as garnishee, was indebted to W. F. Conine in the sum of $618.25, and that the garnishee, City of New York Insurance Company, was indebted to him in the same amount. Upon appeal to this court, which is reported under the style of *American Company of Arkansas* v. *Wheeler*, 181 Ark. 444, 26 S. W. (2d) 115, it was held that the decree should be reversed and the cause remanded with directions to the chancery court to order the amount of its judgment and interests paid out of the funds deposited in the registry of the court by the insurance companies. Because no appeal has been prosecuted by any of the defendants except appellant, it was held that the decree in other respects should be affirmed. In other words, the court said that the remainder of the fund deposited in the registry of the court, after satisfying the claim of appellant, should be disbursed by the chancery court in accordance with its former decree. A mandate

was duly issued by the clerk of this court. It is the duty of a chancellor to enter a decree in accordance with the directions of the Supreme Court, but the lower court may inquire into new matter which has never been adjudicated and which does not conflict with the mandate. *Hopson* v. *Frierson,* 106 Ark. 292, 152 S. W. 1008. The decision of the Supreme Court became the law of the case, and decided all of the issues presented. The directions of the court were specific, and its holding was to the effect that the petitioners herein were only liable to the American Company of Arkansas for the fund deposited in the registry of the court. Hence it could no longer issue any executions on the judgments against the petitioners herein in the garnishment proceedings in the circuit court. In short, the court held that the American Company of Arkansas should be paid out of the proceeds deposited in the registry of the chancery court by the petitioners herein, and this was, in effect, to hold that the payment out of that fund satisfied the judgments obtained in the circuit court on the garnishment proceedings. As we have already seen, our holding on that appeal became the law of the case, and the issue could no longer be litigated by the parties.

The petition for citation for contempt, however, will be denied because the court has no jurisdiction. The remand of the case by this court and the filing of the mandate with the clerk of the lower court within the time prescribed by statute gave the lower court jurisdiction of the case again, and this court no longer has jurisdiction. *Bowman* v. *State,* 93 Ark. 168, 129 S. W. 80, and cases cited; and *Bertig Bros.* v. *Independent Gin Co.,* 147 Ark. 581, 228 S. W. 392. It follows that the petition for citation for contempt must be denied because this court has no longer any jurisdiction in the case.

KORY *v.* LESS.

Opinion delivered April 6, 1931.

W. E. Beloate and *W. E. Beloate, Jr.,* for appellant.

E. H. Tharp, W. P. Smith and *O. C. Blackford,* for appellee.

HART, C. J., (after stating the facts). It is well settled here as elsewhere that every court of record has control over its own judgments and decrees, and has power, as well after the term is ended as while it lasts, to correct clerical mistakes and to cause them to speak the truth. The reason is that the entry in the record should correspond with the judgment or decree which was actually rendered, and the court has the power, and it is its duty, even at a subsequent term, to make such changes in the entry as will make it conform to the truth. Of course, under the guise of an amendment, there is no authority to correct a judicial mistake, but the authority of the court to amend its record in whatever way may be

necessary to make the record speak the truth, whenever the ends of justice require such amendment, has been recognized from the beginning of this court, notwithstanding the lapse of the term. The authority of the court is to amend its record so as to make it speak the truth, but not to make it speak what it did not speak but ought to have spoken. *King & Houston* v. *State Bank,* 9 Ark. 185, 47 Am. Dec. 739; *Arrington* v. *Conrey,* 17 Ark. 100; *Bobo* v. *State,* 40 Ark. 224; *Ward* v. *Magness,* 75 Ark. 12, 86 S. W. 822; *Liddell* v. *Bodenheimer,* 78 Ark. 364, 95 S. W. 475, 115 Am. St. Rep. 42; *St. Louis & N. A. Rd. Co.* v. *Bratton,* 93 Ark. 234, 124 S. W. 752, and cases cited; *Melton* v. *St. L. I. M. & S. Ry. Co.,* 99 Ark. 433, 139 S. W. 289; *United Drug Co.* v. *Bedell,* 164 Ark. 527, 262 S. W. 316, and cases cited; and *Evans* v. *United States Anthracite Coal Co.,* 180 Ark. 578, 21 S. W. (2d) 952, and cases cited.

Whenever the question has arisen, the court has held that mere lapse of time, where the rights of third persons have not intervened, does not render it inequitable to amend the decree. In *Liddell* v. *Bodenheimer,* 78 Ark. 364, 95 S. W. 475, 115 Am. St. Rep. 42, it was held that there is no limitation within which an order omitted from the record may be recorded. Again, in *Melton* v. *St. L. I. M. & S. Ry. Co.,* 99 Ark. 433, 139 S. W. 289, it was held that when the record of a judgment is amended by the court by a *nunc pro tunc* order, the amendment related back to the time when the original entry was made, and, except as to the right of innocent third parties, the effect is the same as if it had been entered upon the date when it was actually made. See also *Foohs* v. *Bilby,* 95 Ark. 302, 129 S. W. 1104.

In a case-note to 10 A. L. R. at page 568, it is said that the view now generally accepted is that all merely clerical errors or misprisions in judgments or decrees may and should be corrected by the court which rendered or made them in proper proceedings upon adequate evidence by appropriate *nunc pro tunc* amend-

ments, notwithstanding the lapse of the term and at later and subsequent ones. Many cases from courts of last resort are cited in support of the rule.

This court is also committed to the rule that parol or other satisfactory evidence is sufficient to authorize a *nunc pro tunc* order or judgment. All that is necessary is that the evidence should be satisfactory, clear and convincing. *Bobo* v. *State,* 40 Ark. 224; *Ward* v. *Magness,* 75 Ark. 12, 86 S. W. 822; *Liddell* v. *Bodenheimer,* 78 Ark. 364, 95 S. W. 475, 115 Am. St. Rep. 42; *Goddard* v. *State,* 78 Ark. 226, 95 S. W. 476; *Bowman* v. *State,* 93 Ark. 168, 129 S. W. 80; *Sutton* v. *State,* 163 Ark. 562, 260 S. W. 409; and note to 67 L. R. A. at 848.

Other cases adhering to the doctrine that courts of record have the power to amend *nunc pro tunc* their own judgments and decrees at subsequent terms to make them speak the truth and to correct clerical mistakes upon any clear, competent, and convincing evidence in point, either in or out of the record, and whether documentary or oral, official or unofficial, may be found in a case-note to 10 A. L. R. 641. Among the cases cited is *Murphy* v. *Stewart,* 2 How. (U. S.) 263.

In the case at bar, appellant alleges that the land allotted as dower to appellant was erroneously described in the decree. Treating the entry as a mistake of the clerk, as it should be treated, the case falls within the principles above announced that whatever limitation there may be upon the power of the court after the term of court to correct its judicial errors, there is nothing in the way of correcting clerical mistakes or misprisions so that the judgment may conform to what the court intended it should do. It has been well said that if courts did not have this power, they would be very inefficient agencies for the administration of justice. *McClure* v. *Bruck,* 43 Minn. 305, 45 N. W. 438.

The demurrer of appellant admits that the erroneous description of the land was not in accordance with the decree allotting dower to appellant. Hence there is nothing requiring proof to be made as a prerequisite of

the rights of appellees to have the judgment amended so as to speak the truth. *McNeese* v. *Raines,* 182 Ark. 109, 34 S. W. (2d) 225. There is no suggestion in the record that appellant or any third person will be injured by making the correction. On the contrary, the complaint alleges the facts to be that the person holding the land as tenant in common with appellees recognizes that the description in the original decree is a mistake, and that it should be corrected. There is nothing to show that appellant, relying on the original decree as written, has placed herself in such a position that, to correct the mistake, will operate to defraud her. Therefore, the chancery court rightly corrected its original decree so that the entry may contain a correct description of the land which was assigned to appellant as dower, as described in the complaint, and that the entry may conform to what the chancery court intended in the original decree. It follows that the decree will be affirmed.

AMERICAN RAILWAY EXPRESS COMPANY *v.* COLE.

Opinion delivered April 6, 1931.

Warner & Warner, for appellant.

D. H. Howell, for appellee.

HUMPHREYS, J. Appellee brought this suit against appellant in the circuit court of Crawford County to recover damages to a car of strawberries in transit, shipped from Alma, Arkansas, to Youngstown, Ohio, through the alleged negligence of appellant in delay, failure to furnish a properly constructed and equipped refrigeration car, and failure to properly ice the car *en route*.

Appellant filed an answer denying each specific allegation of negligence and interposed the further defense that the damage to the berries resulted from field diseases inherent in the berries.

The cause was submitted to a jury upon the pleadings, testimony and instructions of the court, resulting in a verdict and consequent judgment of $500, from which is this appeal.

According to the undisputed testimony, the consignee, Bloom-Rosenblum-Klien Company, paid appellee one-half of the loss under agreement that if he recovered damages from appellant on his claim, he would pay the amount back to it; whereupon the consignee orally authorized appellee to sue appellant in his own name for the entire claim. Appellant thereupon moved the court to instruct the jury that in no event was appellee entitled to recover more than one-half of the actual damage, which motion was overruled over his objection and exception. Appellant contends that the court erred in allowing appellee to maintain the suit for the entire claim in his own name. The contract of shipment was made with appellee, and the bill of lading was issued to him. The consignee could not have maintained a suit against appellant for any part of the damages under its oral contract with appellee, for there was no privity of contract between the

consignee and appellant. The suit, in effect, is a suit for damages on account of a breach of the contract. This court said in the case of *Cantwell* v. *Pacific Express Co.*, 58 Ark. 487, 25 S. W. 503, that (syllabus No. 1): "A person in whose name a bill of lading is taken for the benefit of himself and others may sue the carrier for breach of the contract of carriage." This ruling was reaffirmed in the case of *Johnson* v. *Ankrum*, 131 Ark. 557, 199 S. W. 897. Appellant contends for a reversal of the judgment on the ground that the evidence introduced by appellee does not tend to show any negligence on its part. We cannot concur in this view. The testimony introduced by appellee shows that at the hour the berries were shipped on May 12, they were in good, merchantable condition, and, according to official inspection, were within tolerance of the United States No. 1 grade, and that they were loaded in a pre-cooled express refrigerator car; that on the morning of the 14th, two days thereafter, when they arrived in Cleveland, Ohio, the berries were in a deteriorated condition; that berries in the condition of these at the time of shipment, loaded in like manner, carried under correct refrigeration, and handled properly, would stand up five or six days; that the deterioration in the opinion of experts was caused by poor refrigeration and defective equipment; that, on account of their damaged condition, it was necessary to divert the car to Youngstown, Ohio, for sale, where they were disposed of at a sum below the contract price. Appellant argues that negligence was not shown because the witnesses of appellee who attributed the damage to poor refrigeration and defective equipment admitted that they had no technical knowledge of refrigeration or refrigerating cars. This argument is not sound, as the opinion of the witnesses was based upon long experience as shippers and not upon technical knowledge relative to refrigeration and refrigerating cars. They testified that, from long experience as shippers of perishable goods in refrigerating cars properly iced, they knew how long such

commodities should keep in properly equipped cars sufficiently iced and handled with reasonable care.

Appellant also argues that because its expert witnesses attributed the deterioration of the berries to field diseases, their testimony should and must be conclusive of the issue. Their testimony is contradictory to that adduced by appellee, but this does not necessarily settle that issue. The settlement of the question was for the jury, because it is within the exclusive province of juries to settle disputed questions of fact. There is ample evidence of a substantial nature to show that the damage to the berries resulted either from improper equipment or from a failure to ice the car as it should have been.

Appellant also contends for a reversal of the judgment because the court gave certain instructions at the request of appellee making it liable as an insurer for the damage to the berries. Several of the instructions so declared, and for that reason were erroneous, as the action was based upon specific allegations of negligence, and not on appellant's common-law liability as an insurer. *Railway Co.* v. *Robson,* 176 Ark. 182, 2 S. W. (2d) 3. Appellees argue that these instructions were cured by subsequent instructions limiting appellant's duty to ordinary care. The result of giving the instructions referred to was to create an irreconcilable conflict in the instructions and leave the jury without any proper or consistent guide.

Appellant also contends for a reversal of the judgment because the trial court incorrectly instructed the jury on the measure of damages. Appellant is correct in this contention. The true measure of damages was the difference between the contract price and the market price in their deteriorated condition at the time sold, and not the difference between the sale price and the market price had they been delivered in good condition.

On account of the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

BAUGHMAN *v.* OVERTON.

Opinion delivered April 6, 1931.

Claude F. Cooper, Neil Reed and *T. J. Crowder,* for appellant.

Cecil Shane, for appellee.

KIRBY, J., (after stating the facts). There is no merit in appellant's contention that the court erred in not sustaining his plea of *res judicata,* the suit for injunction against appellant to prevent his interfering with the gathering of the crop by appellee, although testimony therein was heard, was dismissed "without prejudice." The court had the power to make such disposition of the case and order therein, and, having done so, the judgment was not *res judicata. Gosnell Special School District* v. *Baggett,* 172 Ark. 681, 290 S. W. 577; *Carpenter* v. *Dressler,* 76 Ark. 400, 89 S. W. 89; *Moss Tie Co.* v. *Miller,* 169 Ark. 657, 276 S. W. 586; *Mutual Benefit Health & Accident Assn.* v. *Tilley,* 174 Ark. 932, 298 S. W. 215; and § 1261, C. & M. Digest.

The majority is of opinion, however, that the court erred in not holding that it was without jurisdiction in the second case, because of the splitting of appellee's cause of action, the first suit being for the full amount of the jurisdiction of the justice of the peace. There is no doubt but that appellee was entitled to the value of his share of the crop produced by his labor less the amount due by him to the owner of the land, and to a lien therefor on the crop produced. The first suit was for $300 on this cause of action, the full amount of which the justice court had jurisdiction, and, although a litigant can bring suit in the justice court on a cause of action and a claim amounting to more than $300, by doing so and recovering thereon he waives or surrenders all right to recovery of any amount thereon beyond the jurisdiction of the justice court.

The fact that appellee knew of only a certain portion of the crop having been sold at the time the first suit was brought, his share of the value thereof amounting to $300, for which amount suit was brought, would not permit him later to bring suit for the value of his share of other portions of the crop subsequently discovered to have been disposed of by the owner or landlord, since it would be a splitting of his cause of action, he being entitled to the whole amount of the value of his share of the entire crop, which could constitute but a single cause of action. This is not a case of a new cause of action allowed to be maintained upon the same contract or transaction whenever, after the first action brought, a new cause of action has arisen therefrom as provided in the statute. Section 1083, Crawford & Moses' Digest.

The court had the right to remand or send back the case first appealed for proper service on appellant and his guardian, and, since it was brought for the full amount of the jurisdiction of the justice court on the single cause of action, the testimony having shown that the laborer was entitled to recover that amount, the value of his share of the crop being greater than the amount sued for, it could not then render judgment in the second case for $50 more than such amount, even though it was shown that appellee was entitled thereto, had it not been beyond the jurisdiction of the justice court under the circumstances.

The judgment of the circuit court for $50 in the second suit is therefore reversed, and the cause must be dismissed, said court having acquired no jurisdiction to hear the cause which was beyond the jurisdiction of the justice court wherein it originated. Otherwise the judgment of the circuit court is affirmed.

SOUTHWESTERN GAS & ELECTRIC COMPANY *v.* MURDOCK.

Opinion delivered April 6, 1931.

Evans & Evans and *Arnold & Arnold,* for appellant.

Roy Dunn and *John P. Roberts,* for appellee.

MEHAFFY, J. The appellee brought suit in the Logan Circuit Court alleging that on November 10, 1929, while he was in the exercise of due care and was working upon an automobile belonging to Dr. A. R. Hedrick in appellee's garage in Booneville, Arkansas, he received an electric shock, throwing him against the automobile, burning his body, injuring his back and spine, and otherwise injuring him. The negligence alleged is that the appellant neglected and refused to construct the transformers, distributors, and wiring of its electric system so that the wires coming into appellee's garage, instead of carrying 110 voltage, carried more than 350.

Appellant answered, denying all the material allegations in the complaint, and pleaded contributory negligence. There was a verdict and judgment in favor of appellee for $2,000. The case is here on appeal.

Appellant contends first, that the court erred in giving instruction No. 5, because it did not take into consideration the defense of contributory negligence. After a careful examination of the record, we have reached the conclusion that there is no evidence tending to show that appellee was guilty of contributory negligence, and there was therefore no error in giving the above instruction.

It is next contended by the appellant that Murdock was not entitled to recover on account of his own negligence. Contributory negligence, if shown by the evidence, would be a complete bar to appellee's right to recover. Appellant cites numerous cases to support its contention that appellee cannot recover if he was guilty of any negligence. It is unnecessary to discuss these authorities, but sufficient to say that this court has many times held in actions of this character that, if the injured party was guilty of negligence which in any way contributed to his injury, so that but for his contributory negligence the injury would not have happened, he cannot recover.

The only evidence in the record which appellant claims tends to show contributory negligence is the evidence of three witnesses, Roy Cannon, John Adney, and the appellee. There is no evidence in the record tending to show that either Cannon or Adney ever said anything to appellee about the conditions they testified about or that he knew anything about them. Plaintiff's own evidence shows, and this is undisputed, that he had received shocks many times in using the wire when it contained 110 volts. There is nothing in the testimony to show that he either knew of or appreciated any danger. He knew that if there were 110 volts it would sometimes shock one, but also knew that it was not dangerous.

It was the duty of the appellant to furnish proper and safe appliances, and the appellee had a right to assume that appellant had done this, and he was not guilty of negligence contributing to his injury unless he knew, or by the exercise of ordinary care could have known, that the appellant had not performed its duty, and the evidence does not show that he knew this. There is no evidence in the record tending to show that he knew of or appreciated the danger. He testified that he talked to the parties after this injury, but there is no evidence that he received any shock prior to the one he complains of in this suit that would indicate there was any danger.

Appellant argues, however, that the lights would burn out and the machinery run faster. Witness testified that about four lights burned out in twenty-four hours, but it was entirely reasonable for him to think this was caused by defective globes or some cause other than a greater voltage than should have been used.

If the appellee did what a man of ordinary prudence would have done under the circumstances, he was not guilty of negligence. Extraordinary care is not required nor is the utmost possible caution. The duty imposed on appellee was to exercise ordinary care, but there was no duty to possess knowledge or skill so as to know there was danger because the lights burned out or because the

machinery ran faster. Even if the injured party's act contributed to the injury, this would not bar recovery unless his act was negligent. It is not the contributory act that bars recovery, but contributory negligence. 45 C. J. 945; *Indiana Union Tract Co.* v. *Long,* 176 Ind. 532, 96 N. E. 604.

The rule is that to determine the question whether an injured person was guilty of negligence is whether he exercised such care as a reasonably prudent person would exercise under the circumstances. He is not required to have any expert knowledge, and the appellee in this case did not have expert knowledge, and whether his acts are negligent or not cannot be determined by ascertaining what one with expert or scientific knowledge would do under the circumstances. *Morrison* v. *Lee,* 16 N. D. 377, 113 N. W. 1025, 13 L. R. A. (N. S.) 650.

It has been said: "The prudent man is not the man who never forgets, who is never guilty of inattention, who never fails to think of any possible danger—that is the perfect the infallible man." *Britch* v. *Sheldon,* 94 Vt. 235, 110 Atl. 7.

In determining whether an injured party was guilty of contributory negligence we simply inquire whether a person of ordinary prudence, without expert knowledge, would have acted as the injured party did. 20 C. J. 372; *Mo. & No. Ark. R. R. Co.* v. *Clayton,* 97 Ark. 347, 133 S. W. 1124.

Appellant next contends that the verdict was excessive. After a careful consideration of the evidence we are of the opinion that the verdict was not excessive.

It is next contended by appellant that there is no evidence of negligence on its part. The evidence not only shows, but it is a matter of common knowledge, that a wire carrying 110 volts is not sufficient to shock and injure one as appellee in this case was injured. There is no dispute about the fact that the wire should have carried only 110 volts, and that that would not have caused the injury complained of.

It appears from the evidence that the appellant had been doing some construction work, and that in doing this the wires were in some way charged with a greater voltage than was proper. It was the duty of the appellant to protect appellee from injury while constructing its wires, and, if there were any danger, to warn him.

The judgment is affirmed.

Mr. Justice SMITH dissents.

MOSLEY *v.* RAINES.

Opinion delivered April 6, 1931.

Richardson & Richardson, for appellant.

W. P. Smith and *O. C. Blackford,* for appellee.

MEHAFFY, J. The appellee was engaged in the construction of a new warehouse or express building at Hoxie, Arkansas, for the American Railway Express Company. The appellant was one of the employees of Raines, the contractor. On the 12th day of May, 1930, while the employees were engaged in doing excavation work at the place where the defendant was to erect the warehouse, appellant was injured, and he brings this suit to recover damages for said injury.

The employees had excavated a place about three feet wide, four feet deep, and the length of the building site. There was a concrete slab about three feet high and about eight inches thick extending out into the excavated place. This slab had to be broken off and removed. The appellant and four other employees were directed to get into the excavated place and break the concrete slab with a piece of railway rail which was about nine feet long and very heavy. They undertook to break the slab by punching against it with the end of the rail. While the plaintiff was in the excavated place assisting in breaking the slab, it broke, fell toward plaintiff and the other employees, and plaintiff, attempting to get out of the way of the slab as it fell, jumped back and struck an iron crowbar which had been put across the ditch behind appellant. The appellant did not know the bar had been put across the ditch, and it prevented him from getting out of the way of the concrete slab as it fell, and the slab fell on his leg and foot and injured him. The appellant alleged that the appellee was negligent in failing to furnish a safe tool and appliance with which to perform the work, and also that appellee was negligent in putting the crowbar where it was, thereby preventing appellant's

escape from the falling concrete. The appellant also alleged that Hamilton, who it was alleged placed the bar across the ditch, was a vice-principal, and failed to warn appellant of the danger caused by the bar being there.

The appellee answered, denying all the material allegations of the complaint, and alleged that appellant was guilty of contributory negligence, and that he assumed the risk.

Appellant testified, in substance, that they had excavated a ditch for the foundation of the building, which ditch was about three feet wide and shoulder deep; that the concrete ran all the way in the ditch on one side, and that they had taken all of it out except about two and a half or three feet, which was sticking out into the ditch which had to be broken off; the slab was about 3½ feet tall and eight inches thick; that Hamilton, who was the foreman and in charge of the work, told employees to get into the ditch and break the concrete; that appellant and four other employees went into the ditch under Hamilton's orders to break the slab; they had a regular railroad rail about 9 or 10 feet long with which to break the slab, and they broke it by jabbing the end of the rail against the slab; that Hamilton told them to do this. Some of the workmen were on one side of the rail and some on the other side. Appellant was nearest the slab. When they started to break the slab, there was nothing to prevent his jumping back; that he knew there was nothing behind him because he had just walked through the ditch. They used the rail by catching hold on it and swinging it, and punching against the slab with the end of it; that, when the slab broke, it fell over toward him, and he jumped backward in order to get out of the way of it, and, as he jumped back, he struck the crowbar which had been placed across the ditch, and, if, this crowbar had not been there, he would have gotten out of the way by jumping back. He did not know who put the crowbar there and did not know it was there. When the concrete broke it fell on his foot and leg and injured him. This was not

the first time that he had used a rail, but it was the first time he had used it in that way. The bar was about 3½ feet behind him, and he was facing the slab. There was nothing to prevent his seeing it if he had been looking, but he was watching the slab. He did not think there was any danger in punching the slab, and thought if it broke he could get out of the way; he did not think the slab would fall, but thought that they would crack it up and take the crowbars and pry it loose, but it broke all at once and fell on him. The crowbar was not on the ground but was in the ditch. There was a caved-off place on one side of the ditch, and the end of the crowbar was lying in that place and the other end jabbed into the wall.

William McNees, another employee, testified to substantially the same facts as the appellant, except he testified that the crowbar was across the ditch before they started to work, and that Mosley was between the crowbar and the concrete when it broke. This witness also testified that the crowbar was to hold the rail up, and that they all knew it was there, but Mosley, being in front, may not have known. All the employees were jammed up against one another. He knew of nothing to keep Mosley from seeing the bar; that when Hamilton handed the bar down he told them what to do with it, but he did not know whether Mosley heard him or not; the employees put the crowbar in first and the steel rail on top of it.

T. L. Mosley, son of appellant, testified to substantially the same facts as appellant except that he said the crowbar was put in after the appellant started breaking the concrete; that it was placed there by Jack Hamilton, the foreman; that the rail did not rest on the crowbar.

At the close of the testimony the court directed a verdict in favor of appellee, and judgment was entered accordingly. This appeal is prosecuted to reverse said judgment.

In testing the correctness of the verdict which was directed to be returned in favor of appellee, we must give the testimony its strongest probative force in favor

of the appellant in determining whether or not there was any negligence shown by the evidence. If there was any substantial evidence tending to show negligence on the part of the appellee resulting in injury to appellant, it would be the duty of the trial court to submit the question of negligence to the jury. It is the province of the jury to pass upon the credibility of witnesses and the weight to be given to their testimony. *McLeod* v. *Des Arc Oil Mill Co.*, 131 Ark. 594, 190 S. W. 932; *Sou. Gro. Co.* v. *Bush*, 131 Ark. 153, 198 S. W. 136; *Vaughan* v. *Hinkle*, 131 Ark. 197, 198 S. W. 105; *Bennett* v. *Buckeye Cotton Oil Co.*, 132 Ark. 381, 200 S. W. 993; *Beach* v. *Eureka Traction Co.*, 135 Ark. 542, 203 S. W. 834; *Kirby* v. *Wooten*, 132 Ark. 441, 201 S. W. 115; *Scott* v. *Robertson*, 145 Ark. 408, 224 S. W. 746; *Brotherhood of R. R. Trainmen* v. *Merideth*, 146 Ark. 140, 225 S. W. 337; *Ark. Mining Co.* v. *Eaton*, 172 Ark. 323, 288 S. W. 399.

The master owes the servant the duty to exercise reasonable care in furnishing a safe place to work and safe tools and appliances. Appellant, however, concedes that he cannot recover on the theory that appellee failed to furnish safe tools and appliances, but he contends that the master was negligent solely on the ground that the foreman placed or caused to be placed a short distance behind appellant while he was in a ditch only about three feet wide and approximately six feet deep, a crowbar across the ditch in such a manner as to block and prevent appellant's escape from the concrete after being broken, which was certain to fall toward him, and that the master therefore failed to furnish him a safe place to work.

The master is not only bound to exercise reasonable care to furnish a safe place to work, but the servant has a right to assume that the master has performed his duty. It is, however, also thoroughly established by the decisions of this court that the master is presumed to have performed his duty, and the servant cannot recover for an injury unless he shows that the master was guilty of negligence and that the negligence of the master

caused his injury. The master is liable for the consequences of his negligence, but he is not an insurer of the employee's safety.

As we have said, the only negligence relied on is placing a crowbar across the ditch. The appellant himself testified that he did not know who put the crowbar there. Therefore his testimony fails to show any negligence on the part of the master.

William McNees, a witness for the appellant, testified that Hamilton, the foreman, handed the crowbar down from the bank, and that it was placed in a jog on one wall and rested on the other wall, but he testified very positively that it was placed there before they started breaking the concrete, and he did not know whether Mosley knew it or not, but there was nothing to keep Mosley from seeing it. This witness testified that the crowbar was put there for the steel rail that they were using to rest on. The steel rail was a railroad rail 9 or 10 feet long and very heavy. There is nothing therefore in McNees' testimony tending to show any negligence on the part of the foreman.

T. L. Mosley, a son of the appellant, testified that, when they got in the ditch, the rail was lying on the bank, and that the crowbar was put across the ditch by Hamilton, the foreman, when they were in the ditch. He said they were down there hammering on the concrete, and the crowbar was put in while they were hammering, and that the rail did not rest on the crowbar. It therefore appears that T. L. Mosley, son of the appellant, is the only witness who testified that Hamilton put the crowbar in the ditch after the employees got into the ditch and began to hammer on the concrete.

If Hamilton did what young Mosley says he did, was he guilty of negligence? Negligence is the doing of something that a man of ordinary prudence would not do under the same circumstances or the failure to do something which a man of ordinary prudence would have done under the circumstances.

There were four laborers in the ditch besides the appellant. None of them, however, testified except McNess and young Mosley. They saw the crowbar there, and made no complaint about it, and evidently did not think there was any danger from it. If young Mosley had thought there was any danger, he certainly would have notified his father. It was put there, according to McNees' testimony, who was called by the plaintiff, for the purpose of holding the rail or letting the rail rest on it, and the appellant himself testifies that he did not think there was any danger in punching at the slab, and thought if it broke he could get out of the way, but he also said that they had been working there 4 or 5 days and that he thought that they might do like they had been doing. They had broken and removed all of the concrete except this one piece, and in breaking it, according to appellant's testimony, it would crack up, and they would then take the crowbars and pry it loose so that they could handle it. He said the crowbar was in the ditch about three feet high.

Witness knew as much about how to break and remove the concrete as anybody; there was nothing there that he could not see, and, while there was an unfortunate accident, we do not think the evidence shows any negligence.

It is not sufficient for a servant to show that he was injured and that the injury resulted from failure to furnish a safe place to work or defect in machinery, but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises. *Bryant Lumber Co.* v. *Stastney,* 87 Ark. 321, 112 S. W. 740; *St. L. I. M. & S. R. Co.* v. *Gaines,* 46 Ark. 555; *Graysonia-Nashville Lbr. Co.* v. *Whitesell,* 100 Ark. 422, 140 S. W. 592; *K. C. Sou. Ry. Co.* v. *Cook,* 100 Ark. 467, 140 S. W. 579; *Wheeler* v. *Ellis, ante* p. 133; *Rice & Holiman* v. *Henderson, ante* p. 355.

There is no evidence in this case tending to show that the master was guilty of negligence.

The judgment is affirmed.

Mr. Justice KIRBY dissents.

ALASKA LUMBER COMPANY *v.* SPURLIN.

Opinion delivered April 6, 1931.

[redacted]

S. Hubert Mayes and *Buzbee, Pugh & Harrison,* for appellant.

J. H. Lookadoo, for appellee.

McHANEY, J. Appellee received painful and permanent injuries while in the employ of appellant, for which he sued and recovered judgment for $2,500, under the following state of facts: Appellant operates a sawmill in Clark County. Appellee and others, including one Dickson, were skidding logs out of the woods to the roadway, where they were loaded on trucks and hauled to the mill. This was accomplished by appellee and the others with teams of mules hitched to a log by means of tongs or grab hooks and dragging them to the desired loading place. Appellee, who was driving one team and said Dickson another, had just hooked onto a log when Dickson's team, located from 30 to 50 yards distant, through the woods, (neither being able to see the other and not aware of their proximity) became unruly, ran astride a bush or sapling, which angered him, causing him to speak to his team in a loud and unusual tone of voice to "get out of there" and to slash them. It is alleged and testified to by appellee that this loud and unusual tone of voice and slashing or whipping of Dickson, caused his (appellee's) team to break away, jerked the

log to which he had hitched against another small log near it which knocked the end of the latter log against his leg, breaking both bones.

Appellant assigns and relies upon only one alleged error of the trial court—refusal to direct a verdict in its favor at its request. This assignment of error must be sustained. A mule is a domestic animal which has been said to be "without pride of ancestry or hope of posterity." Although faithful beasts of burden, when properly trained, as the proof shows these to be, whether under the saddle or in the harness, yet all persons who have had experience with them are familiar with their contrary and perverse nature and disposition at times. It is said that Balaam, Joseph and the Christ had occasion to use them in ancient times. It is a matter of common knowledge that mules will occasionally take a notion to walk or run away, and, although they may do some damage, they rarely hurt themselves. Speaking of the perverse nature of mules relative to their kicking habits, the Court of Appeals of Kentucky, in *Consolidative Coal Co.* v. *Pratt,* 169 Ky. 494, 184 S. W. 369, said: "The kicking propensity of the mule is a matter of common knowledge and has been the subject of comment from the earliest time. It is almost as universally recognized as the fact that a duck will swim or a cat will scratch. However, a duck cannot indulge his propensity without water, and, ordinarily, a cat will not scratch unless irritated or attacked. But the mule requires no particular setting for the exercise of his high prerogative."

In this case there is no allegation or proof that the master, appellant, furnished appellee a vicious or unruly team. The proof is to the contrary, that the team was tractable. Assuming for the sake of argument, that Dickson spoke to his mules in a loud tone of voice and whipped them when they became unruly, yet the fact is, he was 30 to 50 yards from appellee, could not see him, and did not know he was there and did not know he was hurt until he saw others taking him out. He therefore

could not have anticipated that his actions were likely to cause any damage to another, and neither could the master. As said by this court in *Wisconsin & Arkansas Lumber Co.* v. *Scott,* 153 Ark. 65, 230 S. W. 391: "To constitute actionable negligence, there must be negligence and injury resulting as the proximate cause of it. Proximate cause has been defined as a cause from which a person of ordinary experience and sagacity could foresee that the result might probably ensue." In *Daugherty* v. *Southern Cotton Oil Co.*, 138 Ark. 329, 211 S. W. 278, 4 A. L. R. 1431, it was held that the company was not liable for the blowing of a whistle about 40 feet from the street, causing a horse to run away and do damage to the plaintiff because "the whistle was blown in the ordinary way for a useful purpose in the conduct of appellee's business." In this case Dickson spoke in an unusually loud tone of voice, having become angry at the team for getting astride a bush, and struck them with a whip or switch, but for a useful purpose in the conduct of appellant's business.

Appellee cites the case of *Mississippi River Fuel Corp.* v. *Morris, ante* p. 207, but that case is not in point. There the whipping of the team was the immediate cause of the injury. Here Dickson's team caused no damage to appellee by being slashed. It was appellee's own team that did the damage and was the immediate or proximate cause thereof.

The result is that appellant was not guilty of any actionable negligence, and the court should have directed a verdict at its request.

Reversed and dismissed.

WILLIAMSON & WILLIAMS *v.* CATES.

Opinion delivered April 6, 1931.

Buzbee, Pugh & Harrison, for appellant.

W. A. Bates and *Sam T. & Tom Poe,* and *Donald Poe,* for appellee.

BUTLER, J. The appellee sustained an injury to one of his eyes while in the employ of Williamson & Williams, a partnership, which destroyed the sight in one eye and seriously impaired that of the other. He brought suit to recover damages on the theory that the injury was the proximate result of the negligence of his employers in failing to furnish safe tools with which to perform his work, in failing to warn him of unexpected and dangerous acts on the part of a vice-principal, which acts resulted in the injury; and in failing to protect him while he was engaged in his work, and in failing to furnish a safe place in which to perform such work.

At the conclusion of the introduction of the testimony, the appellants moved the court to peremptorily instruct the jury to return a verdict in their favor. This the court refused to do and submitted the case to the jury on instructions which are conceded to be correct if the peremptory instruction was properly refused. The jury found in favor of the appellee in a sum which is also conceded not to have been excessive.

The only question raised on this appeal is as to whether or not the appellants were entitled to a peremp-

tory instruction directing the jury to find a verdict in their favor. The evidence introduced on the part of the appellee tended to establish the following state of case:

Appellants were a partnership, engaged in the construction of a bridge across Fourche River in Scott County, Arkansas, with Roy Benson as the foreman in charge of the work. Appellee is a farmer and also a carpenter, farming being his principal occupation and carpenter work the business he follows in the intervals between the crop seasons. Some few days before the appellee's injury, he was employed by Benson to assist in the construction of the bridge across Fourche River. A day or two later Benson employed one John Mitchell, who was given charge of the workmen in a gravel pit and as to these employees acted as a subforeman under Benson. On the day before the occurrence out of which this litigation arose, Benson accompanied by Mitchell located the site of a road from the gravel pit to the bridge. The road was designed as a way over which to transport gravel from the pit to the bridge, the two being separated by a short distance. The route selected was where an old road ran in which a number of bushes had grown up. Benson directed Mitchell to cut out these bushes close to the ground, and, on the morning of the appellee's injury, told the appellee to go with Mitchell and help him cut the bushes. Mitchell took one John Redding and the appellee and began cutting on one side of a clump of bushes. They had two new axes, both of which had been used only about two hours in the gravel pit, but which were dull. Two of the three workmen would use the axes and the third would move the bushes as they were cut. They would exchange work so that each would cut for a while. Among the bushes to be cut were about fifteen black locust sprouts from one inch in diameter to as large as a man's arm. Just before the injury to the appellee, Redding had been sent by Mitchell to the tool box for some purpose, and during his absence the appellee was cutting down a thorn bush on one side

of the road and Mitchell was cutting toward the other side a few feet away. One of the bushes cut fell so that one of its thorns penetrated appellee's eye.

The evidence, viewed in the light most favorable to the appellee, tends to show that the bush or limb which caused the injury was cut by Mitchell and fell toward the appellee while he was engaged in his work. At the time they were preparing to cut the bushes the appellee called Mitchell's attention to the fact that the axes were dull, and suggested that they be sharpened and asked Mitchell if he had a file. Mitchell replied that there were some files in his car, but that they didn't have time to get them.

From this evidence it is apparent that appellee's allegation of negligence in failing to furnish a safe place in, and tools with, which to work cannot be sustained. The appellee is a farmer, and Mitchell had also worked as a farmer, and such work as they were then engaged in was that of the usual and customary farm life, such as required no skill or experience; the place where the work was to be performed had no latent dangers connected with it, and the danger, if any, was as apparent to the appellee as to any one else. In fact, we fail to see where there was any danger except those unforeseen and unusual perils to which we are subjected at all times and places. The axes were simple tools such as men engaged in appellee's occupation are accustomed to use from boyhood, and the fact that they were dull could in no wise contribute to the happening of the injury, for that was occasioned by the falling of a brush, and the mere fact that it was severed with a dull axe instead of a sharp one could make no difference. As we have seen, appellee must have had knowledge of the use and construction of the axes, as he appears to have been a man of ordinary intelligence. Therefore, there was no duty resting upon the appellants to exercise ordinary care in the selection of the axes, for they were simple tools in ordinary use. *Railway Co.* v. *Kelton,* 55 Ark. 483, 18 S. W. 933; *Mark-*

ham v. *Three States Lumber Co.,* 88 Ark. 29, 113 S. W. 357; *Fordyce Lumber Co.* v. *Lynn,* 108 Ark. 377, 158 S. W. 501, 47 L. R. A. (N. S.) 270; *Royal* v. *White Oil Corporation,* 160 Ark. 467, 254 S. W. 819.

If there is any negligence in this case, it was that of John Mitchell while engaged in cutting the bushes in question for which appellee insists that the appellants are responsible on the theory that Mitchell was for the time being the foreman of appellants under whose direction he was working and for whose negligence the appellants are liable. In support of this contention, the appellee argues that the directions were given to him by Benson to report to Mitchell for work, and that, while engaged in the performance of such work, Mitchell was his boss. The most that the evidence shows as to the orders and directions given by Mitchell to the appellee is that Mitchell showed him the place at which he was to work and the character of work to be done, namely, to cut down bushes in an old roadway. Mitchell did not show the appellee how to cut them, for appellee knew this as well as Mitchell himself; nor does the evidence show that the injury occurred because of any direction given on the part of Mitchell as to how appellee should perform his work. Therefore, the injury was not the result of the failure of any duty on the part of Mitchell as the representative of the appellants. The negligence, if any, was the failure of Mitchell to use ordinary care in the performance of work of the same nature as that in which the appellee was at the same time engaged, the execution of which was for a common purpose, *i. e.,* the clearing of the road. In the prosecution of this work Mitchell was but the fellow-servant of appellee.

The facts of the cases cited by the appellee to support his contention that there was a failure of duty on the part of appellants in failing to furnish him safe tools with which, and a safe place in which, to do his work are entirely dissimilar from the facts of the instant case and have no application for the reason that there is no negligence shown except perhaps that of the fellow-serv-

ant. Such being the case, the injury to the appellee was one for which the appellants are not liable. *Graham* v. *Thrall,* 95 Ark. 560, 129 S. W. 532; *Ry. Co.* v. *Torrey,* 58 Ark. 217, 24 S. W. 244; *Walsh* v. *Eubanks, ante* p. 34, 34 S. W. (2d) p. 762.

The court erred in its refusal to grant appellants' prayer for a peremptory instruction. The case is therefore reversed, and the cause dismissed.

CAMDEN GAS CORPORATION *v.* CAMDEN.

Opinion delivered April 6, 1931.

Robinson, House & Moses, for appellant.

Haynie, Parks & Westfall and *Gaughan, Sifford, Godwin & Gaughan,* for appellee.

PER CURIAM. It has always been the practice of this court to permit the parties, at any time before final decision, to supply omitted portions of the record which have not been brought up on appeal and which are essential to the correct decision of the case. It has also become the established rule of the court, where it has

acquired jurisdiction of the case on appeal by the filing of a certified copy of the judgment or decree in the case within the time prescribed by statute, to allow appellant to perfect the record within a reasonable time.

We do not think that § 2 of act 327 of the Acts of 1923, providing that an appeal may be taken from the decision of the circuit court in cases like this, but that the transcript must be lodged with the clerk of the Supreme Court within sixty days from the date of final judgment, has the effect to change the rule heretofore adopted. The court has uniformly held that the statutory time for appealing is jurisdictional. *Sample* v. *Manning,* 168 Ark. 122, 269 S. W. 55, and cases cited; *Caudle* v. *Turner,* 179 Ark. 337, 15 S. W. (2d) 978; and *Bank of El Paso* v. *Neal,* 181 Ark. 788, 27 S. W. (2d) 1024.

The transcript is nothing but a certified copy of the record in the court below, and we still adhere to our established rule that an imperfect record may be supplied after the expiration of the statutory period where it is done within a reasonable time. *Bell* v. *Rice, ante* p. 105. The statute under consideration does not provide that a perfect transcript or record must be lodged with the clerk of this court within 60 days.

When we consider the size of the record, together with the time asked to perfect the record and the other circumstances surrounding the appeal, as shown by the orders heretofore made by the court, we do not think an unreasonable time has been taken in perfecting the transcript; and the motion to dismiss the appeal or affirm the judgment on that account will be overruled.

McGILL *v.* MILLER.

Opinion delivered April 6, 1931.

Atkins & Stewart, for appellant McGill; *Cockrill & Armistead,* for appellant Gazette Publishing Co.

King & Whatley and *McKay & Smith,* for appellee.

SMITH, J. In March, 1930, a cause was tried in the Lafayette Circuit Court, wherein the administrator of the estate of J. W. Miller sought to recover upon a policy of insurance which had been issued to his intestate. The controlling question in the case was the one of fact whether the insured had committed suicide. The insurance company, in support of its plea that the insured had died by his own hand, offered testimony tending to show the involved condition of the insured's affairs as sheriff of the county and his depression on that account. Certain letters were read in evidence which the deceased

wrote immediately before his death which were addressed to a woman under the name of Miss Trussell. Portions of these letters are set out in the opinion of this court rendered upon the appeal from the judgment of the trial court in that case. *Home Life Ins. Co.* v. *Miller,* 182 Ark. 901, 33 S. W. (2d) 1102.

In one of these letters addressed to Miss Trussell the writer accused two citizens of the county of dishonest conduct towards him, and he charged his daughter Georgia with lack of concern and sympathy for his distress. These letters were read in evidence at the trial, a report of which was sent to the Arkansas Gazette at Little Rock by S. D. McGill, its local correspondent. In the report of the trial as it appeared in the Gazette, it was recited that Miller, the insured, had charged the two men above referred to and his daughter Georgia with having robbed him. The letters contained no such charge as to his daughter, and the testimony leaves in doubt the question whether the mistake was made by McGill in his report of the trial or by the "rewrite editor" in the Gazette office.

The article containing the false charge that Miller had accused his daughter of robbing him was published in the Gazette on March 26, 1930, and on June 25 thereafter this suit was filed in the Lafayette Circuit Court to recover damages, both compensatory and punitive. The Gazette and McGill, its correspondent, were both made parties defendant to this suit. On July 23, 1930, a news item was published on the first page of the Gazette in which the error in the article of March 26 was pointed out and regret expressed for its publication.

After filing the complaint summons was served on the Gazette in Little Rock, Pulaski County, the county of its domicile, and a return was made by the sheriff of Lafayette County upon the summons to McGill which recited that it had been served "by delivering a true copy of same to Mrs. S. D. McGill at the usual place of abode of the within named S. D. McGill—she being a member of his household and above 16 years of age."

Motions to quash the service were filed by both the Gazette and McGill, the point being raised in each motion that McGill was not a resident of Lafayette County, and, inasmuch as the Gazette had its domicile in Pulaski County, there was no authority to maintain the suit in Lafayette County.

Upon the hearing of these motions McGill testified as follows. He had resided in Lafayette County until the latter part of March, 1930, at which time he removed to Little Rock, where he had since resided and had been living for about three months before the institution of the suit. He had obtained permanent employment in Little Rock, and expected to continue to make that city his home. Prior to his removal to Little Rock he had resided in Lafayette County since 1902, and he served as a member of the jury at the March term of the court. He owned a home in Lafayette County, where his wife still resided, but the home in that county was for sale, and his wife was only living there until the house could be sold. He left Lafayette County with the intention of making Little Rock his permanent home in March, and was living in Little Rock when the copy of the summons was served on his wife in June, and his residence in Little Rock had continued to the time of the trial in August, 1930. McGill further testified in the most unequivocal manner that when he left Lafayette County it was with the intention of becoming a resident of Pulaski County, and that intention had been carried into effect, although his wife and youngest child were still living in Lafayette County and would continue to do so until his home there was sold.

McGill admitted that after his removal from Lafayette County he had paid the taxes assessed against him in that county before his removal, but this, of course, was a proper thing for him to do, even though there had been no question about the change of his residence. He also stated that, if he had been in Lafayette County at the time of the election, he would have voted there, but he was not in that county when the election was held, and he did not vote there, but did vote at the election in Pulaski

County. He did not vote for any candidate for county offices, but in that connection stated he had been in the county for only six months.

The court overruled the motions to quash the service, and the case of *DuVal* v. *Johnson,* 39 Ark. 182, is relied upon to sustain that ruling. That was a case of substituted service, the summons having been served at the usual place of abode upon the wife of a defendant who had left the State. It was there said that it would be difficult to formulate distinct definitions of "residence" and "usual place of abode," and that one temporarily absent from his residence or usual place of abode might be served by leaving a copy of the summons with some member of his family of sufficient legal age living at the residence or usual place of abode of the resident who was temporarily absent. The facts in that case were that the summons was served in 1856, and a judgment was rendered thereon in 1861, and the proceeding to vacate the judgment was not instituted until 1875. It is recited in the opinion that the judgment defendant went to California in 1854, and had returned in 1857, "without any intention whatever to change his residence." The defendant in that case never questioned the sufficiency of the service, and it was raised by his children after his death.

We are, therefore, of the opinion that the DuVal case, *supra,* is not controlling here, for the court there stated the fact to be that the defendant left this State without any intention of changing his residence, and service upon a member of his family at his usual place of abode was therefore in conformity with the statute of this State.

Here, however, the facts which we have recited are undisputed, there being no testimony whatever upon this question except that of McGill, and the conclusion to be deduced therefrom is one of law, and we are therefore not bound by the finding of the trial court that the service was sufficient. The sufficiency of testimony to support even the verdict of a jury, where the testimony is undis-

puted, is a question of law for the court. *Catlett* v. *Ry.*, 57 Ark. 461, 21 S. W. 1062; *Pine Bluff Heading Co.* v. *Bock,* 163 Ark. 237, 259 S. W. 408.

The law of this feature of the case is well settled, and is to the following effect. One's usual place of abode, in its ordinary acceptation and in the sense used by the statute, means the place where a person lives or has his home, that is, his fixed permanent home; the place to which he has—whenever he is absent—the intention of returning.

At § 6 of the chapter on Domicile in 9 R. C. L., p. 542, it is said: "The general rule is that domicile is changed from one place to another, or one State to another, only by the abandonment by a person of his first place of domicile with the intention not to return, and by taking up his residence in another place with the intention of permanently residing in that place. In other words, to effect a change of residence or domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last acquired residence a permanent home; and the acts of the person must correspond with such purpose."

Applying these principles to the undisputed testimony in this case, we are of the opinion that McGill was a resident of Pulaski County, and not of Lafayette County, at the time of the service upon his wife in the latter county, and that such service upon him was therefore insufficient, and, this being true, it necessarily follows that the service upon the Gazette in Pulaski County was insufficient to require it to appear and answer in the Lafayette Circuit Court.

McGill testified that he left Lafayette County three months before the institution of this suit, and that he removed to Pulaski County, where he had obtained permanent employment, with the intention of residing there permanently, and that he was attempting to sell his former home in Lafayette County, and intended to re-

move his family to Pulaski County as soon as a sale was effected, and in the meantime he had established a place of abode at an address which he stated in Little Rock.

It must be remembered that a man has the absolute and unqualified right to change his place of abode when he pleases, for any reason which prompts him so to do, and that he does change his place of abode when he removes from one place, with the intention of abandoning it as his place of abode, to another place, where he expects to abide, without having the intention of returning to the place from which he removed.

In the case of *Smith* v. *Union County,* 178 Ark. 540, 11 S. W. (2d) 455, it was held that the personal property of an attorney who was residing in Union County and practicing law there should be assessed for taxation in that county, rather than in another county where he also had a law office and a residence which he called his home. In so holding we said: "Residence, as used in § 9890, Crawford & Moses' Digest" [which section provides that every person 'shall list the real property of which he is the owner, situated in the county in which he resides, the personal property of which he is the owner, * * *, whether in or out of said county or State,'] means the place of actual abode, and not an established domicile or home to which one expects to return and occupy at some future time."

We conclude therefore that the circuit court of Lafayette County did not acquire jurisdiction of this cause of action, and that the service should be quashed and the cause of action dismissed, and it is so ordered. *Fidelity Mutual Life Ins. Co.* v. *Price,* 180 Ark. 214, 20 S. W. (2d) 874.

HART, C. J., MEHAFFY and BUTLER, JJ., concur in reversal, but dissent from judgment of dismissal.

MEHAFFY, J., (dissenting). Mr. Chief Justice HART, Mr. Justice BUTLER and the writer agree that the case should be reversed and remanded for the error of the trial court in refusing to admit certain testimony, but

we do not agree with the majority in holding that the case should be dismissed. Mr. McGill testified that he had moved to Little Rock the latter part of March, 1930, but he also testified that he owned his home in Lafayette County and that he had lived in Lafayette County for about 28 years; that his family was still living in the home in Lafayette County not only at the time of the service of the summons but also at the time of the trial. He also testified that his family continued to live in Lewisville, Lafayette County, until he could sell his home.

According to his testimony, he did not intend to move his family to Little Rock until he could sell his home. He served on the jury in Lafayette County in March, 1930. He testified at the time he was taken on the jury that he was a citizen of Lafayette County. He testified that he had decided in the early part of the year to move to Little Rock. If he had contemplated moving away from a home where he had lived for 28 years, is it not reasonable and probable that some member of the jury with whom he served would have known about it and would have been called to testify?

So far as the evidence shows none of his neighbors nor any other person ever heard of his intention to move. There is no evidence that he ever told any one. There is no evidence that he offered his home for sale or that he advertised it for sale or that he arranged with or spoke to any real estate agent or other person to try to sell his home.

He says he voted in Pulaski County after he came to Little Rock, but he voted for State officers only. He did not vote for county officers. He testified that, if he had been in Lafayette County, he would have voted there. I think his vote in Pulaski County may be explained by saying that many citizens think they have a right to vote for the State officers anywhere they may be in the State.

The majority opinion states that he testified that he had not lived in Pulaski County six months when he voted there. He did not state this, however, as an explana-

tion of why he voted for State officers only. He had said nothing about this, but the appellant's attorney asked him after he had testified that he voted for State officers in Pulaski County and would have voted in Lafayette County if he had been there: "If he had lived in Pulaski County six months when he voted?" And he said "No"; but he was not asked if that was the reason he voted for State officers only. No one testified on this question but appellant McGill.

The only question is the intention and good faith of McGill. We recently said: "According to the testimony introduced by appellant, which must be regarded as disputed on account of the interest of the witnesses testifying in the result, and on account of the contradictory circumstances, etc." *Walker* v. *Eller,* 178 Ark. 183, 10 S. W. (2d) 14.

"It may be said to be a general rule that where ar unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established, and a verdict directed based on such evidence. But this rule is subject to many exceptions, and where the witness is interested in the result of the suit or facts are shown that might bias his testimony, or from which an inference may be drawn unfavorable to his testimony or against the facts testified to by him, then the case should go to the jury." *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764; *Oyler* v. *Simple,* 163 Ark. 620, 260 S. W. 744; *American Ry. Express Co.* v. *H. Rouw Co.,* 174 Ark. 6, 294 S. W. 416; *Nelson* v. *Mo. Pac. R. Co.,* 172 Ark. 1053, 291 S. W. 66; *Gibson Oil Co.* v. *Sherry,* 172 Ark. 947, 291 S. W. 66; *Poinsett Lumber Mfg. Co.* v. *Traxler,* 118 Ark. 128, 125 S. W. 522; *Paragould & M. Rd. Co.* v. *Smith,* 93 Ark. 224, 124 S. W. 776; *St. L. Sw. Ry. Co.* v. *Trotter,* 89 Ark. 273, 116 S. W. 227; *Hankinson Lynn Gas, etc., Co.,* 175 Mass. 271, 56 S. W. 604;

Bank of British North America v. *Delafield,* 81 N. Y. 410, 27 N. E. 797.

"A well connected train of circumstances is as cogent of the existence of a fact as any array of direct evidence, and frequently outweighs opposing direct testimony." 23 C. J., p. 48.

There is of course no dispute about McGill being interested in the result of the suit. He was a defendant and was sued for $35,000 damages. Authorities above hold that, if he was interested in the result of the suit, his testimony must be regarded as disputed, that it is a question of fact for the jury. Not only was Mr. McGill interested, but the circumstances at least tend to show that he had not abandoned his home in Lewisville. Before the statute permitting parties to suits to testify, the intention and good faith of a party could only be proved by circumstances. Since the enactment of the statute the party may testify as to his intention, but his testimony is regarded as disputed. That is, it is a question of fact for the jury. In the very nature of things it is impossible to contradict by direct testimony the statement of a witness as to his intention or good faith. The testimony of an interested party as to his intention or good faith, although uncontradicted, is not conclusive, and, if inconsistent with his conduct, may be rejected. 10 R. C. L. 1107; *Shepherd* v. *Morgan,* 108 N. Y. S. 379.

The majority opinion says that the case of *DuVal* v. *Johnson,* 39 Ark. 182, is not controlling here "for the court there stated the fact to be that the defendant left this State without any intention of changing his residence." Johnson went to California in April, 1854, and returned in August, 1857. He was gone more than three years. The summons in that case was served at his residence in Sebastian County, Arkansas. It is true that the court said that defendant left this State without any intention of changing his residence, but it also said: "There might perhaps be something serious in this objection, if he had taken his whole family away, and closed

the house, or rented it to a neighbor, and the notice had been affixed to the door or otherwise left there."

If Mr. McGill had taken his family with him to Little Rock and advertised his home for sale, or placed a "For Sale" sign on the house and had conducted himself in such a manner that the fact of his intention to change his residence would have been known to his neighbors, we would have a very different question. It would still, however, be a question of fact.

The opinion of the majority says that whether McGill had changed his residence is a question of law, and for that reason this court is not bound by the trial court's decision. It may be conceded that, if it is a question of law and not a question of fact, we would not be bound by the decision of the trial court. I think the declaration of the majority is in direct conflict with every former decision of this court on this question. In the limited time I have had I have been unable to find any decision of this court that supports the declaration of the majority that this is a question of law, and none are cited in the opinion. The majority opinion cites 9 R. C. L. 542 on the question of intent to change domicile. In the same volume, page 556, the question of evidence is discussed. It is there said: "The determination of domicile, it has been said, is usually a mixed question of law and fact, while the question as to residence is one of fact alone." 9 R. C. L. 557.

In the case of *DuVal* v. *Johnson, supra,* the court held that residence and usual place of abode meant the same thing. Therefore the question of one's usual place of abode is a question of fact alone. If it is a question of fact, and I think, under all authorities including our own decisions, it is, then the finding of the trial judge is conclusive.

There is an unbroken line of decisions of the court to the effect that the testimony of a party to a suit is not to be considered as uncontradicted and also that the finding of the trial judge on questions of fact is as conclusive

as the finding of a jury. The following are a few of the cases so holding: *Vinson* v. *Wooten,* 163 Ark. 170, 259 S. W. 366; *Creasey Grocery Corp.* v. *So. Mercantile Co.,* 169 Ark. 1046, 277 S. W. 513; *Staggs* v. *Joseph,* 158 Ark. 133, 249 S. W. 566; *St. L. S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339; *Little River Co.* v. *Buron,* 165 Ark. 335, 265 S. W. 61; *Cody* v. *Pack,* 135 Ark. 445, 205 S. W. 819; *Matthews* v. *Clay County,* 125 Ark. 136, 188 S. W. 564; *Jones* v. *Glidewell,* 53 Ark. 161, 13 S. W. 723, 7 L. R. A. 831; *Schuman* v. *Sanderson,* 73 Ark. 187, 83 S. W. 940. There are many other decisions of this court to the same effect, and I know of none to the contrary. It is not a question of what we believe or what we would find. The finding of the trial judge is conclusive here.

The trial judge sees the witness, observes the demeanor of the witness on the stand, his willingness or unwillingness to testify, and has many opportunities to judge the credibility of the witness that this court does not have. The trial judge must take all these things into consideration, as well as the interest of the witness in the result of the lawsuit, in passing upon the credibility of the witness and the weight to be given to his testimony.

I think we are bound by the finding of the trial judge, and that the case should be remanded for a new trial.

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

AMERICAN INSURANCE COMPANY OF NEWARK, NEW JERSEY, *v.* DUTTON.

Opinion delivered March 30, 1931.

[redacted]

Beloit Taylor, for appellant.

R. C. Waldron and *Cole & Poindexter,* for appellee.

PER CURIAM. Counsel for appellee move to dismiss the appeal or to affirm the judgment of the circuit court because the court adjourned without passing on the motion for a new trial and there is no error apparent on the face of the record.

The record shows that the court adjourned for the term without acting on the motion for a new trial. When an appeal is taken from a judgment and the trial court adjourns without acting upon and overruling the motion for new trial, nothing is brought before the court for review except the pleadings, verdict and judgment; and if the pleadings and verdict authorized the judgment rendered, it will be affirmed without regard to the rulings of the court at the trial further than they appear in the judgment. *Young* v. *King,* 33 Ark. 745; *Kearney* v. *Moose,* 37 Ark. 37; and *Scroggins* v. *Hammett Grocer Co.,* 66 Ark. 183, 49 S. W. 820.

This was a suit on an insurance policy for $1,200, and there was a verdict and judgment against appellant for that amount. The court also allowed appellee an attorney's fee of $200, and there is nothing in the record to show that this amount was excessive. *Security Insurance Company of New Haven* v. *Smith, ante* p. 254; and *Union Central Life Ins. Co.* v. *Mendenhall, ante* p. 25.

It follows that the judgment must be affirmed.

OPINION ON REHEARING.

PER CURIAM. Counsel for appellant in its motion for a rehearing claims that the court did not take into consideration a clause of the insurance policy which is set

out in the brief on the motion on rehearing. We do not deem it necessary to set out this provision of the policy, for, under our settled rules of practice, we cannot consider it. It is true that the policy was made an exhibit to the complaint, but this court has uniformly held that in actions at law exhibits to the complaint can only be used as explanatory of the allegations of the complaint and not for the purpose of contradicting them. *Abbott* v. *Rowan,* 33 Ark. 593; *Bouldin* v. *Jennings,* 92 Ark. 299, 122 S. W. 639; *Louisiana Northwest Rd. Co.* v. *McMorrella,* 170 Ark. 291, 282 S. W. 6; and *Lester* v. *Thomas,* 171 Ark. 351, 295 S. W. 717.

The complaint in the present case contains a specific allegation that the defendant delivered to plaintiff its insurance policy in the sum of $1,200, wherein said defendant agreed to indemnify plaintiff against loss by fire for a period of five years from the date of the policy on a dwelling house and household goods; that the dwelling house and household goods of the value of $1,200 were totally destroyed by fire. Judgment is asked by plaintiff against the defendant in the sum of $1,200, for the statutory penalty and for attorney's fee. The judgment rendered does not contain any recitation of the facts upon which it is based. There was a verdict in favor of the plaintiff against the defendant in the sum of $1,200. Judgment was rendered in favor of plaintiff against the defendant for the sum of $1,200 with costs. The judgment then contains the following recital: "and, it appearing that the failure and refusal of the defendant to pay the amount due on said policy was vexatious and inexcusable, it is further ordered that in addition to the above $1,200, defendant pay a penalty of 12 per cent. and an attorney fee to the plaintiff in the sum of $200, etc."

As pointed out in our original opinion, on account of the failure of the plaintiff to have the court rule on its motion for a new trial, we can only consider errors apparent from the face of the record and the judgment itself. We find no error on the face of the record in the applica-

tion of the settled rule of law governing cases of this kind, as pointed out in our original opinion and in this additional opinion. Therefore, the motion must be denied.

TAYLOR *v.* WHALEY.

Opinion delivered April 6, 1931.

S. M. Casey, J. Paul Ward and *Shields M. Goodwin,* for appellant.

Coleman & Reeder and *W. K. Ruddell,* for appellee.

W. S. Atkins and *Lemley & Lemley,* and *Carrigan & Monroe, amici curiae.*

HUMPHREYS, J. Appellees instituted this suit against the Citizens' Bank & Trust Company of Batesville as the real party defendant, and the North Arkansas Bank of Batesville and the Home Accident Insurance Company of Little Rock as nominal parties defendant, to recover from said Citizens' Bank & Trust Company $28,906.18, alleging that said sum was funds belonging to Independence County and held by said bank under an unlawful and fraudulent agreement between the two banks, whereby, at the biennial letting of the county funds in conformity to the county depository laws by the county court, they conspired together to submit only one bid and obtain the use of the public funds at a reduced rate of interest on daily balances in the name of the North Arkansas Bank and then divide the funds. It also al-

leged that the North Arkansas Bank and its bondsmen, the Home Accident Insurance Company, had become insolvent, but that the Arkansas Bank & Trust Company, by virtue of said unlawful conspiracy, had in its possession said sum belonging to said county and its political subdivisions, for which amount appellees prayed judgment against said bank.

The Citizens' Bank & Trust Company filed a separate answer admitting that it had $28,906.18 deposited in the name of the North Arkansas Bank, the designated county depository, but denying that it received or held same by virtue of an unlawful agreement between it and the North Arkansas Bank to stifle or freeze competitive bidding at the biennial letting of the county funds in conformity to county depository laws, and, in order to protect itself, paid said amount into the court registry for proper disbursement under order of the court.

Appellant herein, Bank Commissioner in charge of the assets of the defunct North Arkansas Bank, filed an intervention, by permission of the court, denying the alleged conspiracy of the two banks to obtain the use of the county money at a reduced rate of interest by chilling the bidding at the letting and denying appellees' claim to the preference, even though such conspiracy existed.

The case was submitted to the court upon the pleadings and testimony adduced by the respective parties, which resulted in a finding and decree against appellant, from which is this appeal.

The trial court found that the funds in question had been wrongfully and unlawfully let to the North Arkansas Bank through a conspiracy between the two banks in bidding for said funds and by it wrongfully and unlawfully left in the Citizens' Bank & Trust Company, and, based upon said finding, adjudged that the funds never became assets of the North Arkansas Bank. This adjudication was contrary to the rule announced by this court in the case of *Talley* v. *State,* 121 Ark. 4, 180 S. W. 330, and reiterated in the cases of *School District* v. *Massie,* 170 Ark. 222, 279 S. W. 993, and *Rainwater* v. *Davis,*

172 Ark. 538, 289 S. W. 471, to the effect that a deposit of public funds in an incorporated bank constitutes a general deposit as well as the relationship of debtor and creditor between the bank and the beneficial depositor, but that, in case such funds are acquired by the bank unlawfully and wrongfully, the beneficial depositor would be entitled to recover same in preference to general creditors of the bank. This rule of preference, however, was abrogated by act 107 of the Acts of the General Assembly of 1927, providing for the distribution of the entire assets of an insolvent State bank, in which act all claimants are classified either as secured, prior, or general creditors. The act provides that the beneficiary of an express trust in writing, signed by the bank, as distinguished from a constructive trust, a resulting trust, or a trust *ex maleficio,* shall have preference of trust funds over general creditors. The act also contains the following provision:

"All creditors not in this section hereinbefore classed as secured or prior creditors of said bank, including the State of Arkansas and any of its subdivisions, shall be general creditors thereof."

The plain letter of the statute, therefore, precludes the State and its subdivisions from claiming any of the assets of a defunct bank as a trust fund except when they are beneficiaries of an express trust evidenced by writing and signed by the bank.

Under our construction of act 107 of the Acts of the General Assembly of 1927, it is unnecessary for us to decide in the instant case whether the funds in question were lawfully or unlawfully deposited in the North Arkansas Bank and by it lawfully or unlawfully deposited in the Citizens' Bank & Trust Company. The county and its subdivisions do not claim said funds by virtue of a written express trust signed by the bank.

For the reasons indicated, the decree is reversed, and the cause remanded with directions to adjudge the funds to appellant.

MEHAFFY, J., dissents.

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

Opinion delivered April 13, 1931.

Partain & Agee and *G. L. Grant,* for appellant.

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

HART, C. J., (after stating the facts). It is sought to uphold the judgment upon the authority of *National Liberty Insurance Company* v. *Trattner,* 173 Ark. 480, 292 S. W. 677, and *Davis* v. *Farmers' Co-operative Equity Co.,* 262 U. S. 312, 43 S. Ct. 556.

In the case first cited, this court held that, under our Constitution and statutes relating to foreign corporations doing business in the State and providing for service of process on the Insurance Commissioner in actions against foreign insurance corporations, an insurance corporation of another State can not be sued in Arkansas on a contract of insurance made in another State with a resident of that State covering property located therein. The court recognized the general rule that where a foreign corporation consents, on coming into a State to do business, service on a designated State officer shall be a valid service on the company in all actions relating to any business done by the company while in the State, but said that it does not extend to business transacted in another State with persons living outside of this

State; and we construed our statute to extend only to business done by the foreign corporation in this State and held that the statute did not operate to give service on such foreign corporation in suits relating to business transacted by it in another State with persons living there. In other words, the court held that the statutory service upon a State official or agent of a foreign corporation amounted to an agreement between the State and the foreign corporation for the benefit of the citizens of the State having business with the corporation, and that it did not relate to business transacted by the corporation in other States with people living there.

In the last case cited, the Supreme Court of the United States said that the statute compelled every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the State, although it did not operate any kind of railroad in the State. The statute did not limit the jurisdiction to suits arising out of business transacted in the State of Minnesota, but made the service on the agent sufficient for business transacted outside of the State with nonresidents of the State. The court recognized in that case that, ordinarily, effective administration of justice did not require that a foreign corporation should submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owned nor operated a railroad, and in which the plaintiff did not reside. Hence the court said that such general submission to suit unreasonably obstructed and unduly burdened interstate commerce.

In the instant case, the facts are essentially different. The defendant owns and operates a line of railroad in this State, and has voluntarily placed agents here in the conduct of its business who are authorized to receive service of summons under our statute. It has become in all essential respects a domestic corporation, in so far as transacting business in this State is concerned. The

right of action to the plaintiff was transitory, and it is not a question whether the laws of the State of Arkansas have any extraterritorial force.

In *St. Louis & San Francisco Railway Company* v. *Brown,* 62 Ark. 254, 35 S. W. 225, it was held that a nonresident may sue a domestic corporation in the courts of this State on a transitory cause of action arising under a statute of another State, where such statute does not conflict with the public policy of this State; and the fact that there is a similar statute in this State is evidence that the statute in question is not against public policy.

In *St. Louis, Iron Mountain & Southern Railway Company* v. *Haist,* 71 Ark. 258, 72 S. W. 893, 100 Am. St. 65, it was held that a section of the Civil Code of Louisiana giving to a minor child the right to recover for the wrongful killing of its parents creates a cause of action of a transitory nature which is similar to that created by our statute and may be enforced in this State. The plaintiff in that case was a minor residing in the State of Nebraska and brought suit to recover damages for the negligent killing of her father in the State of Louisiana. There, as here, the railroad sued had become a domestic corporation by operating a part of its line of railroad in this State and by becoming amenable to the laws of this State.

Again, in *Kansas City Southern Railway Company* v. *Ingram,* 80 Ark. 269, 97 S. W. 55, an action against a railroad company for killing stock in the Indian Territory was held to be transitory in nature and might be enforced wherever jurisdiction might be had of the defendant company.

In *St. Louis-San Francisco Railroad Company* v. *Coy,* 113 Ark. 265, 168 S. W. 1106, the plaintiff, as in the instant case, alleged in his complaint that he was a citizen and resident of the State of Missouri, and that he was negligently injured by the defendant on its switch-tracks in the State of Missouri. There, as here, the plaintiff brought suit in Crawford Circuit Court, and it

was held that, the injury having occurred in the State of Missouri, the laws of that State govern as to the liability; but the remedy to recover damages on account of the injury must be pursued according to the laws of the State of Arkansas, where the suit was brought.

The same general rule was recognized and applied in the case of an action based on negligence in the shipment of freight in *American Railway Express Company* v. *H. Rouw Company,* 173 Ark. 810, 294 S. W. 401, where it was held that a transitory action is not required to be brought in a State where the contract was entered into or performed. The court further held that a foreign corporation, doing business in the State and having a designated agent on whom process may be served, may be sued in any county in the State by serving process on the agent outside the county in which the suit is brought.

So, too, in *Texarkana & Fort Smith Railway Company* v. *Adcock,* 149 Ark. 110, 231 S. W. 866, it was held that an action for personal injuries is transitory and may be brought in a State other than that in which it arose.

The distinction between the two classes of cases is clearly stated by the Supreme Court of Massachusetts in *Reynolds* v. *M. K. & T. Ry. Co.,* 228 Mass. 584, 117 N. E. 913; affirmed by the United States Supreme Court in 255 U. S. 565, 41 S. Ct. 446, 65 L. Ed. 788, upon the authority of *St. L. S. W. Ry. Co.* v. *Alexander,* 227 U. S. 218, 33 S. Ct. 245, 57 L. Ed. 486.

It is next insisted that the judgment must be affirmed because there is no bill of exceptions. This was not necessary. We have copied the judgment in our statement of facts; and by reference to it it will be seen that it recites all the facts upon which the court based its opinion. This court has uniformly held that no bill of exceptions is necessary where the judgment of the lower court, reciting the facts upon which it is based, shows error on its

face. *Hisey* v. *Sloan,* 180 Ark. 797, 22 S. W. (2d) 1005, and cases cited.

It follows that the court erred in quashing the service of summons upon the defendants; and for that error, the judgment must be reversed, and the cause will be remanded with directions to overrule the motion to quash service of summons, and for further proceedings according to law and not inconsistent with this opinion.

CAIN *v.* STATE.

Opinion delivered April 13, 1931

J. H. O'Neal, Sheffield & Coates, Winstead Johnson and *S. S. Hargraves,* for appellant.

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

HART, C. J. G. O. Cain prosecutes this appeal to reverse a judgment of conviction against him for the crime of accessory before the fact for assault with intent to kill, charged to have been committed by advising and encouraging O. H. Lindsey to shoot W. N. Gregory with the intent to kill and murder him.

It is first insisted that the judgment should be reversed because the special term, at which Cain was indicted and convicted, was not called in the manner prescribed by statute. The jurisdictional requirements in calling a special term are: that the person to be tried is confined in jail upon a criminal charge; that the holding of the special term shall not interfere with any other court to be held by the same judge; that the special term shall not be held within twenty days of a regular term of the court; and that the order calling the term of court shall be made out and signed by the judge and entered on the records of the court. Crawford & Moses' Digest, § 2218 *et seq.;* and *Sease* v. *State,* 155 Ark. 130, 244 S. W. 450.

The order of the circuit judge calling the special term in the instant case was filed with the clerk of the circuit court on the first day of October, 1930, and was entered of record by him. The special term was called for October 20, 1930, but it is insisted that the record does not contain an affirmative recital that notice was served on the prosecuting attorney ten days before the commencement of such special term as provided by § 2220 of the Digest. The statute does not require that the record should show that the notice was given to the prosecuting attorney, but the court will presume that it was given unless the contrary was shown. *Dixon* v. *State,* 29 Ark. 165; and *Hill* v. *State,* 100 Ark. 373, 140 S. W. 576.

As we have just seen, the order for the special term was filed with the clerk of the court in ample time to have had the notice required by statute served upon the prosecuting attorney. The main object of giving the notice is to enable the prosecuting attorney to be present at the special term of the court. The record in the present case shows that the prosecuting attorney signed the indictment which was returned against Cain at the special term and that he was present and conducted the trial for the State at said special term. Therefore, we hold that this assignment of error is not well taken.

It is next contended that the judgment should be reversed because the court erred in refusing the defendant a change of venue. Section 3087 of the Digest provides that any criminal cause pending in any circuit court may be removed to the circuit court of another county whenever it shall appear in the manner hereinafter prescribed that the minds of the inhabitants of the county in which the case is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein. Section 3088 provides that the order of removal shall be made upon the petition of the defendant, verified by affidavit, supported by the affidavits of two credible persons who are qualified electors, actual inhabitants of the county, and not related to the defendant in any way.

It is only in special cases that this court will reverse the decision of the trial court as to change of venue. The reason is that the question whether the minds of the inhabitants are so prejudiced against the defendant that a fair and impartial trial cannot be had in that county is of necessity one of opinion, and, as such, addresses itself to the sound discretion of the trial court who occupies a much better position than we do to judge of the credibility of the supporting affiants to the prejudice existing against the defendant which will prevent him receiving a fair trial. *Adams* v. *State,* 179 Ark. 1047, 20 S. W. (2d) 130.

There were three supporting affiants to the petition of the defendant for a change of venue. One of them

stated that he did not know anything about the sentiment of the inhabitants of the county as to their prejudice against the defendant. He thought that he was signing an affidavit for the change of venue for a man who was jointly charged with the defendant. Another supporting affiant testified that he did not know anything about the prejudice against the defendant except in Augusta Township, and did not know anything about the sentiments for or against the defendant in the remainder of the Northern District of Woodruff County. If it be conceded that the remaining affiant was a credible person, a question which we do not decide, the court did not err in refusing to grant a change of venue because there were not two supporting affiants as required by statute.

The next assignment of error relates to the admission of evidence against the defendant. Counsel for the defendant do not specifically set out this testimony, but it relates to the declaration of O. H. Lindsey and another person who the evidence shows to have conspired with the defendant to perpetrate the crime for which the defendant was tried and convicted. It is well settled that any act or declaration made by one of two conspirators in furtherance of the conspiracy, although in the other's absence, may be shown in evidence against him, *Lesieurs* v. *State,* 170 Ark. 560, 280 S. W. 9, and cases cited. All of the testimony complained of by the defendant was concerning the acts and declarations of his co-conspirators in furtherance of their concerted plan to extort money from W. N. Gregory or to take his life.

It is next insisted that the court erred in giving instruction No. 2 at the request of the State, which, it is contended, is in conflict with instruction No. 4, given at the request of the defendant. The two instructions read as follows:

"Instruction No. 2. You are instructed if you believe from the evidence in this case beyond a reasonable doubt that the defendant, G. O. Cain, and O. H. Lindsey did combine and agree to obtain money from W. N.

Gregory by force or intimidation, and that the said O. H. Lindsey, while acting in pursuance of said combine and agreement and while proceeding according to the common plan of the two, did assault the said W. N. Gregory with intent to kill him, at a time when the defendant, G. O. Cain, was not actually aiding and abetting the said O. H. Lindsey, you will find the defendant guilty as charged in the indictment."

"Instruction No. 4. You are instructed that before the defendant, Cain, can be convicted you must believe from the evidence beyond a reasonable doubt that there was a specific definite agreement between the defendant, Cain, and O. H. Lindsey to commit the specific crime alleged in the indictment, that Cain advised or encouraged such act on the part of Lindsey, in the Northern District of Woodruff County, Arkansas, and that Lindsey proceeded in accordance with said specific common plan and attempted to kill said Gregory as alleged in the indictment."

A comparison of the language used in the two instructions will show that they are in harmony with each other and not conflicting in any sense of the word. Instruction No. 2 makes the guilt of the defendant depend upon his acting in pursuance of a combine and agreement with O. H. Lindsey for the latter to assault W. N. Gregory with intent to kill him. Instruction No. 4 tells the jury that there must have been a definite agreement between him and Lindsey to commit the specific crime alleged in the indictment, and that Cain advised and encouraged Lindsey to proceed in compliance with the common plan when he attempted to kill Gregory. Hence we hold that this assignment of error was not well taken.

It is next contended that the court erred in its rulings with regard to receiving the verdict. The jury returned a verdict finding the defendant guilty as charged in the indictment and fixed his punishment at five years in the penitentiary. Whereupon the court amended the verdict so that it reads as follows:

"We, the jury, find the defendant guilty of accessory before the fact of assault with intent to kill as charged in the indictment and fix his punishment at 5 years in the penitentiary."

The court then read the verdict as modified to the jury; and each juror, after his name was called by the clerk, was asked if this was his verdict, and each one answered that it was. As said in *Gilchrist* v. *State*, 100 Ark. 330, 140 S. W. 260, to hold that this was reversible error would be to put form above substance. Each member of the jury answered that the amended verdict was his own. The indictment returned against the defendant was for the crime of accessory before the fact for assault with intent to kill, charged to have been committed in advising and encouraging O. H. Lindsey to kill W. N. Gregory. There can be no doubt by comparing the original verdict with the one amended by the court that the jury intended to find the defendant guilty of the crime of accessory before the fact of assault with intent to kill. Therefore, we hold this assignment of error is not well taken.

The most serious question in the case is whether or not there was sufficient corroboration of the testimony of O. H. Lindsey to warrant the jury in finding the defendant guilty; and, in determining this assignment of error, we have carefully considered the whole testimony, although we shall attempt to set out here only the substance of it. According to the testimony of W. N. Gregory, he lived in Augusta, Arkansas, and on Sunday night about eight o'clock on the 21st day of September, 1930, he was sitting with members of his family on his front porch when O. H. Lindsey came up to the steps and told him that he wanted to talk to him privately. Gregory was well acquainted with Lindsey, and on the night before had refused to lend him $150. On the Sunday night in question, however, Gregory went out and took a seat in the car with Lindsey; and, after refusing to go to a private place with him, Lindsey demanded of Gregory $25,000. Gregory refused to let him have it.

Lindsey asked Gregory if his young son hadn't gone to the air school in Little Rock and received a telephone call from some one a few nights before. Gregory said that he did not know anything about this, but Lindsey said that it was true. Lindsey then told Gregory that he was going to have $25,000. Gregory refused to let him have it. Lindsey pulled out a pistol and threatened Gregory with it. Gregory tried to distract his attention by talking to him. Gregory did distract Lindsey's attention, so that he turned the gun to one side a little, and Gregory then grabbed the cylinder in his hand and threw the pistol towards the front of the car. Lindsey shot one time, and Gregory pushed him out of the car and jumped on him and scuffled with him. Gregory's wife and others came up and assisted him in arresting Lindsey who was then carried to jail. On the Friday before the assault, Gregory, who had just returned from Little Rock, drove out to the airport at Augusta and there watched his son fly his airplane. When Gregory started to leave the airport, some one stopped him and asked him if his name was Gregory. The man said he would like to have a talk with Gregory; that he knew something that would be of interest to him. The man asked Gregory if he had a boy in Little Rock in the air school, and, upon receiving an affirmative answer, said that he got a 'phone call, didn't he. Gregory replied that he did. The man then said that he knew where the 'phone call came from. He said further: "It's a blackmail. I know of a blackmail plot against you." Gregory asked what it would cost him. The man replied: "Well, it is for $100,000, and I think $5,000 ought to be plenty." Gregory asked him what about $2,500. The man replied, "No, that wouldn't do, there might be a killing in it somehow," and he had to have more money to get out of the way. The man then made an appointment with Gregory to meet him at the office of an attorney in Memphis a few days thereafter. The man was at the time unknown to Gregory, but he recognized the defendant as the man with whom he had the conversation.

O. H. Lindsey turned State's evidence and related in detail how the defendant, G. O. Cain and Thomas McCloud and himself had formed the plan somewhere in Mississippi during the summer of 1929 to extort a large sum of money from W. N. Gregory. Pursuant to this plan, the parties conferred together at various times which resulted in them meeting at Searcy, Arkansas, where Lindsey had opened a barber shop and planning to obtain money from W. N. Gregory of Augusta. They first formed the plan of kidnapping the son of W. N. Gregory, who was a student at the airport in Little Rock. Lindsey became intoxicated while they were in Little Rock, and this plan fell through. They next met in Woodruff County, Arkansas, and devised a plan whereby Lindsey was to make a demand upon Gregory at his home in Augusta for $25,000, and, if he refused, to kill him. Lindsey specifically stated that the defendant and others told him to go down there to Augusta and make Gregory sign the check or to kill him. Lindsey testified that it was a definite understanding between the defendant and himself and their associates that they were to kill Gregory if he did not pay as required.

The evidence of other witnesses tended to show that the defendant had registered at the Hotel Mayfair in Searcy, as testified to by Lindsey, and that he was in this State for several days in company with Lindsey before the assault was committed by Lindsey. After Lindsey was arrested, he made a confession, and the defendant was arrested in Memphis.

After they were on the train in Arkansas, the deputy sheriff told Cain about the newspaper account of the assault. Cain asked the deputy sheriff if he had one of the papers on the train and remarked that Lindsey had squealed. The deputy sheriff said that Lindsey had told the whole thing. Cain then said, "You didn't tell me that in Memphis."

Lindsey told in detail of the circumstances leading up to the assault, and the jury was warranted in finding that it was a part of their plan to

extort a large sum of money from W. N. Gregory at Augusta, Arkansas, or to kill him upon his refusal to pay them. There was a definite and concerted plan participated in by Lindsey, Cain, and Thomas McCloud to commit the crime in question. We think the fact that Lindsey and the defendant were in company with each other for several days before the commission of the crime, coupled with the admission of the defendant to the deputy sheriff that Lindsey had squealed, and the further fact that Gregory testified that a few days before the assault was made on him by Lindsey a man whom he identified as the defendant approached him at the airport in Augusta and told him that there was a plan on foot to blackmail him and thereby secure from him a large sum of money, was sufficient corroboration of the testimony of Lindsey as required by our statute. *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995.

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

MOSS *v.* STATE.

Opinion delivered April 13, 1931.

C. T. Bloodworth and *O. T. Ward,* for appellant.

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

SMITH, J. This appeal is from a judgment of the Clay Circuit Court, Eastern District, sentencing appel-

lant to a term in the State penitentiary for selling intoxicating liquor. A reversal is asked upon two grounds, first, the insufficiency of the evidence, and, second, the admission of certain testimony alleged to be incompetent.

The first assignment of error is disposed of when it is said that Richard Benson, a barber in Rector, testified that on Christmas day, a year before the trial, which occurred at the January, 1931, term of the court, he bought from the defendant, at the defendant's home in Rector, a half-pint of whiskey, for which he paid the defendant 75 cents.

The testimony the admission of which is assigned as error is to the following effect. G. N. Deniston, the marshal of the city of Rector, testified that he had searched the home of defendant under the authority of search warrants, and on one occasion found a pint of liquor in a tea-kettle, and on another some empty bottles which had once contained beer.

It is insisted that the admission of this testimony is error, for the reason that it was not shown when the searches were made, and that they may, therefore, have been made at a time so remote from the alleged sale as to have no bearing upon that transaction. The defendant admitted that he had no occupation, and that he had only lived in Rector for about two years. The alleged sale was made December 25, 1929, and the trial was had in January, 1931, so that the searches, whenever made, were made within less than a year of the date of the sale.

The prosecuting attorney should have interrogated the marshal as to the dates of the searches, and the court should not have admitted testimony showing what was found as a result of the searches unless it had been shown that the searches were so related to the sale in point of time as to have some probative bearing upon the question as to whether the defendant had liquor for sale at about the time of the alleged sale. But, while this showing was not directly made, as it should have been, it was indirectly made in the testimony above recited to the effect that appellant had lived in Rector for only

about two years, and he was tried in January, 1931, for an offense alleged to have been committed on December 25, 1929, and a search of appellant's house at any time prior to the date of the alleged sale would be within a year thereof, and we are unable to say that it is so remote in point of time as to have no probative value. We are of the opinion, therefore, that no prejudicial error was committed in admitting this testimony, and, as no other error is assigned, the judgment must be affirmed, and it is so ordered.

STANDARD OIL COMPANY OF LOUISIANA *v.* DUMAS.

Opinion delivered April 13, 1931.

T. M. Milling and *Gaughan, Sifford, Godwin & Gaughan,* for appellant.

McNalley & Sellers, for appellee.

SMITH, J. On November 17, 1928, a suit was filed in the Union Circuit Court by the next friend of Medford Dumas, an infant six years of age, to recover damages to compensate a personal injury which he had sustained.

The cause was removed to the Federal District Court, where a demurrer to the complaint was heard and sustained, and the following order entered:

"The demurrer of the defendant to the complaint of the plaintiff in the above entitled cause having been argued by counsel and submitted, the court, being well and sufficiently advised in the premises, doth sustain said demurrer.

"Whereupon plaintiffs, by leave of court, enter a voluntary nonsuit herein without prejudice, and upon the entry of said nonsuit it is by the court ordered that said cause be and the same is hereby dismissed without prejudice, and that the defendant have and recover of and from the plaintiff all costs by the defendant in this behalf laid out and expended, for which execution may issue."

Thereafter, and within one year from the dismissal of the first suit, the plaintiff brought this action in the Union Circuit Court, based upon the same injury but containing allegations of negligence somewhat amplified, wherein the prayer for damages was reduced to $3,000. To this last suit the defendant therein interposed a plea of *res judicata,* based upon the order of the court set out above. This plea was overruled, and there was a trial before a jury, which resulted in a verdict and judgment for the plaintiff, from which is this appeal. For the reversal of this judgment it is insisted that the plea of *res judicata* should have been sustained, and that a demurrer to the complaint should also have been sustained, and that the testimony is insufficient to support the verdict.

We think the plea of *res judicata* was properly overruled. It is true the demurrer to the complaint was sustained by the learned judge of the Federal District Court, but it is true also that the plaintiff did not stand upon the sufficiency of his complaint. On the contrary, he obtained leave of the court to enter a voluntary nonsuit without prejudice, and the cause was thereupon dismissed without prejudice to another action. In other

words, while the court did find that the demurrer should be sustained, the court permitted a voluntary nonsuit to be taken, and the judgment of the court was that the cause be dismissed because the nonsuit had been taken, and that without prejudice.

At § 1204 of the chapter on Judgments, 34 C. J. 786, subtitle "Voluntary Dismissal or Discontinuance," it is said: "A voluntary discontinuance of a cause by plaintiff, or the dismissal of the action on his motion, does not as a rule amount to a judgment on the merits, and therefore will not bar a new action on the same subject-matter, especially if expressed to be without prejudice; and the same rule applies to the voluntary dismissal of a cross-bill, petition in intervention, or equitable defense. But an entry on the record that the debt has been paid and the suit ended is a bar to another action on the same debt.

"*Time of dismissal.* Even after the sustaining of a demurrer to the declaration or complaint, plaintiff may voluntarily dismiss his action, and, if he does so, the dismissal will not bar a new suit."

The allegations of the complaint are to the following effect. On October 7, 1927, the defendant, for the purpose of making and repairing tools and equipment used in the production of oil and gas, maintained and operated a machine and blacksmith repair shop at Kenova, Union County, Arkansas. The shop was housed in a one-story frame structure, with corrugated metal sidings, and the equipment thereof consisted in part of forges, lathes, motors, drilling devices, and other machinery for repairing oil field equipment. In the front of said building were three large doors, which opened upon an open concrete floor or platform, which was on the same level or grade as the land surrounding it and was about twenty feet square. The limits or edges of the concrete floor or platform were unmarked, and there was nothing to indicate to pedestrians where the boundaries of the traveled way ceased and those of defendant's platform began.

The plaintiff and his mother and next friend lived directly opposite the shop and about 120 feet distant therefrom, and the intervening space was level and open to and used by the public generally as a driveway and passageway. On the west side of said machine shop and said concrete floor, and extending from the west wall and edge thereof was also an open passageway, used by the defendant and the public generally as a driveway.

There was no railing, bar or other structure about said open concrete floor to deter or prevent any one from passing along said traveled way.

The operation of the lathes, forges, drills, and revolving machinery, with their whirring noises and flying sparks was attractive to small children and lured them to the concrete floor for the purpose of playing with the machinery and watching the revolving machinery and the flying sparks within said shop, and was especially attractive and inviting to the plaintiff, Medford Dumas, all of which was known to the defendant.

Notwithstanding defendant knew of the attractiveness of the concrete floor to small children, it left a solid steel shaft, about 4½ inches in diameter and about 6 feet long, in a partially upright position, with one end resting upon the concrete floor and the other end leaning against the front wall of the shop. Because of the length of said shaft and the small diameter thereof and the leaning position in which it was placed, it required but little pressure to cause it to fall, which fact was, or should have been, known to the defendant, and when the infant, Medford Dumas, pressed against the shaft it fell upon and severely injured him.

The testimony sufficiently sustains the allegations of the complaint to support the finding that the defendant was negligent in the particulars alleged, if the allegations charged actionable negligence, and this is the most serious question in the case.

In sustaining the demurrer to the complaint, which contained the allegations set out above but somewhat

less amplified, the learned judge of the Federal District Court filed an able opinion in which he gave his reasons for that action, and among the cases cited by him as requiring that holding was the case of *United Zinc & Chemical Co.* v. *V. Britt,* 258 U. S. 268, 66 L. Ed. 615, 42 Sup. Ct. Rep. 299, 36 A. L. R. 28.

The opinion in that case was written by Mr. Justice Holmes, but there was a dissenting opinion written by Mr. Justice Clarke, in which Chief Justice Taft and Mr. Justice Day concurred, and there is a most exhaustive annotation of the case, extending from pages 34 to page 294 in 36 A. L. R. The division in the authorities is pointed out by Justice Clarke in his dissenting opinion, and is accentuated in the countless cases cited in the annotator's note, *supra.*

The learned district judge, was, of course, bound by the majority opinion in a manner that we are not, and we do not follow the majority opinion, as he was required to do, for the reason that the minority opinion more nearly accords with the decisions of this court on the subject.

In the case of *Central Coal & Coke Co.* v. *Porter,* 170 Ark. 498, 280 S. W. 12, the Van Britt case *supra* was cited as being conclusive of the question there raised. We there said: "In the case of *United Zinc & Chemical Co.* v. *Britt,* 258 U. S. 266, the court applied the rule 'as to attractive nuisances' in such manner as to withdraw its protection from children who were not attracted upon the land of another by the nuisance itself," and the reasoning of our Porter case shows our unwillingness to follow that rule. We there adhered to the rule announced in our earlier cases, that of *Nashville Lumber Co.* v. *Busbee,* 100 Ark. 76, 139 S. W. 301, being one of them. In this last cited case, at page 91 it is said:

"The doctrine (attractive nuisance) was recognized and approved by this court in *Brinkley Car Co.* v. *Cooper,* 60 Ark. 545, 31 S. W. 154, where Judge RIDDICK, speaking for the court, said:

"'The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon, but he is liable for injuries to children trespassing upon his private grounds when it is known to him that they are accustomed to go upon it, and that from the particular nature and exposed and open condition of something thereon, which is attractive to children, he ought reasonably to anticipate such injury to children as that which actually occurs.' See same case in 70 Ark. 235, 67 S. W. 752. (*Brinkley Car Co.* v. *Cooper.*) Again in quite a recent case, *St. Louis-San Francisco Ry. Co.* v. *Williams,* 98 Ark. 72, 135 S. W. 804, 33 L. R. A. (N. S.) 94, the Chief Justice, speaking for the court, after stating the general rule as to trespassers, says: 'What is known as the doctrine of the "turntable cases" forms an exception to the rule.' And then he succinctly state the rule of the 'turntable cases' as follows: 'Where an owner permits to remain unguarded on his premises something dangerous which is attractive to children and from which an injury may reasonably be anticipated," he may be liable; quoting from *Brinkley Car Co.* v. *Cooper,* as set out above. Under the doctrine of *Lynch* v. *Nordin,* or the doctrine of the 'turntable cases,' it was for the jury to determine whether the machinery was dangerous and known to be such because it was attractive to and known to be frequented by children, and whether the appellant was guilty of negligence in leaving the machinery uncovered and unprotected. 'Whether or not premises are sufficiently attractive to entice children into danger, and to suggest to the defendant the probability of accident, is a matter to be determined by the jury.' 29 Cyc. 636; *Brinkley Car Co.* v. *Cooper, supra.*"

Under the testimony sustaining the allegations of the complaint, the jury could have found that the injured child was too young to understand and avoid the danger; that the defendant had reason to anticipate the presence of the child because of the attractiveness of the place to

children; that there was the likelihood of an accident from the leaning and insecure position of the shaft; and that a reasonably prudent person would not have so placed the shaft under the circumstances.

These issues of fact were submitted to the jury under instructions which are not complained of except that it is insisted that, under the undisputed evidence, there was no question for the jury. We think, however, that a case was made for the jury, and, as no error appears, the judgment must be affirmed, and it is so ordered.

O'BERG *v.* BANK OF SULPHUR SPRINGS.

Opinion delivered April 13, 1931.

Rice & Dickson, for appellant.

Vol T. Lindsey, for appellee.

HUMPHREYS, J. This suit was instituted in the chancery court of Benton County by appellee against W. T. Armstrong and Nina Armstrong to foreclose two past-due mortgages upon a certain forty-acre tract of land in said county, one for $1,100 of date February 14, 1929, and one for $200 of date March 19, 1929, executed by the Armstrongs to it, in which appellants were made parties defendant because they were asserting a lien thereon under a mortgage of date July 31, 1928, executed by the Armstrongs to them to secure the payment of the purchase money for said forty-acre tract. It was alleged

that appellants released their mortgage lien for the purchase money by the execution of a release deed to the Armstrongs on the 12th day of February, 1929.

Appellants filed an answer and cross-complaint denying that they had released the mortgage lien for the purchase money due them, and alleging that the release deed referred to in appellee's complaint was stolen from them by W. T. Armstrong and placed on record without their authority.

The cause was submitted to the court upon the pleadings and testimony adduced by the parties, resulting in a finding that appellee's mortgage liens were superior to appellant's mortgage lien on the said forty-acre tract, and a decree of foreclosure and order of sale to satisfy same, from which is this appeal.

The facts reflected by the record material to the issue involved on this appeal are as follows:

On July 31, 1928, appellant sold a forty-acre farm near Sulphur Springs in Benton County, Arkansas, to W. T. Armstrong and his wife Nina M. Armstrong, for $2,350 and took a mortgage thereon to secure the payment of the purchase money. On February 12, 1929, W. T. Armstrong prepared a mortgage to appellants on the 400-acre tract of land he owned in Oklahoma to secure said indebtedness and a release deed from appellants to him releasing their mortgage on the Benton County forty in Arkansas and proceeded to the home of appellants near Chelsea in Oklahoma for the purpose of exchanging the mortgage on the Oklahoma land for the release of the mortgage on the Arkansas land. Appellants agreed to the proposal if W. T. Armstrong would furnish an abstract showing good title to the Oklahoma land and would have the mortgage on the Oklahoma land recorded and mailed to them. In order to accomplish the purposes without delay, appellants went to Chelsea with the Armstrongs and executed a release deed to the Arkansas land. They then returned to appellants' home where appellants handed W. T. Armstrong a long

envelope containing the mortgage on the Arkansas land and the release deed they had executed for comparison of the land description to see that the release deed correctly described same. In making the inspection, Armstrong spread the original mortgage and the release deed out on the table with his other papers, and, when he returned the envelope, failed to inclose therein the original mortgage and release deed. Appellants put the envelope away thinking the original mortgage and release deed were in same for safe keeping until W. T. Armstrong should record and return the mortgage and abstract on the Oklahoma land. In looking for some other papers five or six days thereafter, appellants discovered that the original mortgage and release deed on the Arkansas land was not in the envelope. They wrote to the clerk of Benton County and ascertained that Armstrong had recorded the release deed to the Arkansas land, which he had stolen from them, and had mortgaged the land to appellee for $1,100. The mortgage to appellee was executed and filed on February 14, 1929. Appellants then went to see Armstrong, and he promised to get the mortgage on the Oklahoma land and send to them at an early date. On March 19, thereafter, the Armstrongs borrowed $200 additional from appellee and gave it a second mortgage on the Arkansas land to secure the payment of same. W. T. Armstrong never sent the mortgage and abstract to the Oklahoma property to appellants.

According to the facts thus stated, appellants voluntarily delivered the original mortgage to the land to W. T. Armstrong for comparison of the description contained therein. When the envelope containing them was handed back, appellants neglected to examine the contents thereof. Had they examined the contents, they would have discovered that the original mortgage and release deed had been retained or stolen by Armstrong. Their failure to make the examination placed it in the power of Armstrong to have the release deed recorded

and sell or mortgage same to a third party as unincumbered property.

This court is committed to the doctrine that "where two parties to a fraudulent transaction are equally innocent, and the loss must fall upon one, it should fall upon the one who, in law, most facilitated the fraud. *Cureton* v. *Farmers' State Bank,* 147 Ark. 312, 227 S. W. 423; *Mo. Pac. Ry. Co.* v. *M. M. Cohn Co.,* 164 Ark. 335, 261 S. W. 895. It is said by Mr. Jones in his work upon Mortgages, 7th Ed., vol. 2, p. 568, p. 967, that: "If the mortgagee is in any way responsible for the mortgage being released of record or if the release of record is produced through the neglect, incaution, credulity or misplaced confidence of the mortgagee, a different rule will govern in determining the equities between the mortgagee and one who has innocently dealt with the property in the belief that the mortgage is satisfied. In such case the mortgagee is estopped in equity from asserting the priority of his mortgage. Such is the case when the mortgagee has permitted the mortgagor to have the custody of the mortgage whereby the latter was enabled to produce it for cancellation on the record."

Appellants, by an act of negligence on their part, placed it within the power of Armstrong to dispose of the property to a third party under the belief that the mortgage was satisfied. They did this without compulsion, and their neglect in obtaining a return of the release deed brings the case clearly within the rule announced above.

No error appearing, the decree is affirmed.

KATZENBERG *v.* KATZENBERG.

Opinion delivered April 13, 1931.

[redacted]

Partain & Agee and *G. L. Grant,* for appellant.

Fred S. Armstrong, for appellee.

HUMPHREYS, J. This appeal involves the single question of whether a married woman may sue her husband for an injury received through his negligence. The complaint alleges that appellant was riding in an automobile being driven by appellee, her husband, and, through negligent operation thereof, he drove it off the highway, turned it over, and pinned appellant underneath it, thereby seriously and permanently injuring and damaging her.

Appellee filed a demurrer to the complaint upon the ground that appellant was without capacity to sue and that the facts stated in the complaint failed to constitute a cause of action.

The demurrer was sustained, and the complaint dismissed over appellant's objection and exception.

The statute relied upon by appellant as a basis for her action is act 159 of the Acts of the General Assembly of 1915, entitled "An act to remove the disability of married women in the State of Arkansas," as amended by § 5577 of Crawford & Moses' Digest, which reads as follows:

"Every married woman and every woman who may in the future become married shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all the laws of this State as though she were a *feme sole;* provided, it is expressly declared to be the intention of this act to remove all statutory liabilities of mar-

ried women as well as common-law disabilities, such as disability to act as executrix or as administratrix as provided by § 6 of Kirby's Digest, and all other statutory disabilities."

This court ruled in the case of *Fitzpatrick* v. *Owens,* 124 Ark. 167, 186 S. W. 832, following the construction of the Supreme Courts of Connecticut and Oklahoma of statutes not so broad and comprehensive as our statute of 1915, that the purpose and intent of act 159 of the Acts of the General Assembly of 1915 was to complete the work of emancipation of married women so that they might enjoy all the rights in law and equity accorded a *feme sole,* and that in respect to those rights they may even sue their husbands for torts. The Fitzpatrick case was cited with approval by the North Carolina and Wisconsin Supreme Courts in construing their respective statutes removing statutory and common-law restrictions imposed upon married women. *Roberts* v. *Roberts,* 185 N. C. 566, 118 S. E. 9, 29 A. L. R. 1479; *Wait* v. *Pierce,* 191 Wis. 202, 209 N. W. 475, 48 A. L. R. 276. Appellee argues that in the Fitzpatrick case the rule applies to willful torts only, but no such distinction appears in the decision or the statute construed. If an inference could be drawn that, under the statute of 1915 and the rule announced in the Fitzpatrick case, *supra,* a married woman could not sue her husband for damages resulting from involuntary acts of negligence, certainly it cannot be said any statutory or common-law restrictions prevent her from bringing such a suit after the amendatory act of 1919 emancipating a married woman from all disabilities was passed. Under both the act of 1915 and 1919, married women became wholly independent of the doctrine of marital unity. They can now enter into marriage contracts without fear of their property or personal rights being lawfully abridged by an antagonistic public policy.

On account of the error indicated, the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

HART, C. J., (dissenting). Judge BUTLER and I think that basing the majority opinion on *Fitzpatrick* v. *Owens,* 124 Ark. 167, 186 S. W. 832, is an apt illustration of the adage that reasoning by analogy is oftentimes dangerous. By the common-law the husband and wife were deemed to be one person, and no suit at law of any character could be maintained by one against the other. *Countz* v. *Markling,* 30 Ark. 17; and *Peters* v. *Peters,* 156 Cal. 32, 103 Pac. 219; 23 L. R. A. (N. S.) 699.

The husband, however, was liable in equity in certain cases to the wife where he was attempting to defraud her in her property right; and he was also liable to punishment criminally for a felonious assault upon her.

In *Fitzpatrick* v. *Owens,* 124 Ark. 167, 186 S. W. 832, the question presented was as to the liability of the husband for a felonious assault upon his wife, resulting in her death. The husband was held liable on the ground that our Married Woman's Act gave her the right in a civil action to damages, since she already had the right to have her husband punished criminally. In other words, at the time the statute was enacted, it was illegal for a husband to assault his wife; and the Married Woman's Act gave her a remedy to sue at law where before her only remedy was to have her husband arrested and punished criminally. His act was just as illegal before as after the passage of the act; and the act gave her a civil remedy where she had none before.

We do not think the act, as construed in that case, is broad enough to allow the wife the right to maintain an action against the husband for negligence merely. As said in *Newton* v. *Weber,* 194 N. Y. Supp. 113, the maintenance of an action of this character, unless the sole purpose be a raid upon an insurance company, would not add to conjugal happiness and unison, which it is the policy of the law to further and to promote. That this view is in accord with the weight of authority may be seen from reference to 6 A. L. R. 1038; 29 A. L. R. at 1492, and 33 A. L. R. at 1406.

The common-law incidents of marriage are swept away by express statutes only; and the common-law unity of husband and wife still exists in this State except in so far as expressly changed by statute. *Kies* v. *Young,* 64 Ark. 381, 42 S. W. 669, 62 Am. St. Rep. 198; and *Parrish* v. *Parrish,* 151 Ark. 161, 235 S. W. 792. Broad as our statute is, as already construed, we do not think that it was the intention of the Legislature, as expressed in the Married Woman's Act, to give her the right to sue her husband with whom she is living in lawful wedlock for a negligent tort committed by him, such as the one under consideration in this case. Therefore, we respectfully dissent.

MILLER *v.* MONCRIEF.

Opinion delivered April 13, 1931.

J. M. Brice, for appellant.

G. W. Botts, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in refusing to retransfer the cause to the chancery court and in the refusal to give certain instructions requested.

The undisputed testimony shows that appellee had refused to surrender the $1,000 note that was claimed to be a part of the consideration, and also that she had brought suit thereon and recovered judgment therefor in a court of competent jurisdiction against appellant from which no appeal was taken, and that, as a defense in that suit, appellant here alleged the note was paid or satisfied by this conveyance. The court properly held this matter *res judicata* upon the plea setting it up, and declined to submit the question to the jury.

Of course, appellant could not recover damages for breach of or refusal to perform the contract for personal service, such damages being altogether remote and speculative, as well as any damage for breach of partnership agreement alleged to be a part of the unexpressed consideration for the deed, and no error was committed in the court's refusal to give the instruction requested on that point. Certainly appellant could not collect damages for value of improvements put upon the lands conveyed by the deed long after the conveyance was made and appellee had refused and declined to carry out the partnership agreement, and it is not even claimed that such improvements or the value thereof was any part of the unexpressed consideration for the deed or conveyance of the lands. The improvements were made upon the lands long after appellant had conveyed them and without any agreement for repayment of their value to him and any right on his part to expect such repayment under the circumstances of this case.

Since there were no questions for determination of exclusively equitable cognizance, no error was committed in transferring the cause to the circuit court for trial upon the questions of fact by a jury. Upon the whole record, the majority is of opinion that no errors were committed, and that the judgment must be affirmed. It is so ordered.

LITTLE ROCK BRANCH OF FEDERAL RESERVE BANK OF ST. LOUIS *v.* TAYLOR.

Opinion delivered April 13, 1931.

James G. McConkey and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Robinson, House & Moses, for appellee.

KIRBY, J., (after stating the facts). It is well-established law that a bank receiving a draft for collection merely is the agent of the remitter, drawer or forwarding bank, and takes no title to the paper or the proceeds when collected, but holds same in trust until remitted. *Darragh Company* v. *Goodman,* 124 Ark. 532, 187 S. W. 673.

It is also true that no lack of diligence was shown by appellant bank in handling the items by sending the checks for collection direct to the bank on which they were drawn, nor in said drawee bank in charging the amounts of said checks against the account of the drawer thereof. *Rainwater* v. *Federal Reserve Bank,* 172 Ark. 631, 290 S. W. 69; *Lister* v. *First National Bank of Van Buren,* 181 Ark. 140, 25 S. W. (2d) 26.

The forwarding of the amount of the checks collected by the Bank of Bauxite to the appellant, the sending bank, of its check on its correspondent bank in Little Rock, the American Exchange Trust Company, did not constitute a payment of the money collected, since the correspondent bank had closed its doors before presentation of the checks in due time as did the collecting bank, both of which were insolvent and not able to re-open at the end of the five days of suspension allowed by law and were taken charge of by the Bank Commissioner. It is insisted therefore that under the statute, act 107 of 1927, p. 298, that, since the Bank of Bauxite, on which the checks were drawn, had made the collection by charging the amount of said checks against the account of its customer or depositor, the drawer, and had forwarded its

check or draft therefor against its correspondent bank at Little Rock, and had returned and surrendered the paid checks to the drawer thereof prior to the Bank Commissioner's taking charge, he could not reverse the entries upon the books of the bank as to the collections made and return the checks to the bank sending them for collection and that, therefore, the transaction was completed, and the collecting bank's claim for priority of payment must be sustained, since it cannot be extinguished by the reversal of the entries on the bank's books and the return by the collecting bank of the checks.

The statute provides: "A prior creditor shall be: * * * (7) The owner of a remittance of the said bank, the proceeds of a collection made by said bank by honoring a check or other order upon itself, or by a charge against the account of its depositor, although the said collection has not had a distinctive identity in the hands of said bank, has not actually increased its cash assets, and has resulted in merely shifting its liability upon its books from one of its creditors to another or new creditor, in instances where the said remittance has been presented with due diligence for payment to said bank or its drawee and is not paid, and where the instrument collected cannot be returned by the Commissioner to the person who had transmitted the same to said bank for collection, the said instrument having been surrendered by said bank upon its collection in such manner prior to the Commissioner taking charge, it being hereby made the duty of said Commissioner to reverse the entries upon the books of said bank as to all collections made in such manner in all instances where the said unpaid remittance has been so presented with due diligence and where the said instrument remains in said bank unsurrendered, by which said reversal of entries the said instrument shall be deemed to be from its inception unpaid, and thereupon the said Commissioner shall return the said instrument to the person who had transmitted the same to said bank, which return shall be in extinguishment to the extent thereof of the said remittance. * * *" Act 107 of 1927.

It is true that this statute provides that all creditors of a bank of which the commissioner has taken charge are classifiable, etc., and where the instrument collected cannot be returned by the commissioner to the person who transmitted the same for collection, the said instrument having been surrendered by said bank upon its collection in said manner "prior to the Commissioner taking charge," etc., but the majority is of opinion that the act of insolvency by the bank in suspension of payment of checks on demand for the alleged protection of the stockholders and creditors without reopening the bank at the end of the time of suspension and the Bank Commissioner's taking actual charge thereof is sufficient within the meaning of the act, and his authority relates back and begins from the time of the suspension of payment or act of insolvency, so far as the right to make reversal of entries upon the books as to the showing of collections made against depositors during such suspension, and certainly that, since the bank should not have surrendered these checks after charging off the amount thereof against the account of its depositor during the period of suspension of payment of checks, its having done so could not deprive the Bank Commissioner of the right to reverse the entries on the bank's books about the collections to show the checks uncollected. The checks having been wrongfully surrendered and returned to the drawer without any intent, it is true, of in any way conducing to a preference of the claim for payment or constituting it a priority, it could not have such effect. The Bank Commissioner therefore was authorized to reverse the book entries showing the payment of this claim, and, the checks having been wrongfully returned to the drawer, no payment thereof was constituted, and the drawer still remains liable therefor.

The decree is affirmed accordingly.

Mr. Justice Smith dissents.

KING *v.* GOODE.

Opinion delivered April 13, 1931.

[redacted]

W. P. Smith, George T. Humphries and *Cole & Poindexter,* for appellant.

W. A. Jackson, W. E. Beloate, Jr., and *W. E. Beloate,* for appellee.

MEHAFFY, J. Appellee brought this suit in the circuit court of Sharp County against the appellant for a breach of marriage contract.

The appellant answered denying that he had ever promised to marry appellee, and denied all the material allegations in her complaint.

The evidence is voluminous, and it is unnecessary to set it out here, but we have carefully considered the entire evidence tending to show promise of marriage and have reached the conclusion that there was sufficient evidence to submit this question to the jury. The evidence is not very definite, and most of it relates to the conduct of appellant with reference to his management of appellee's business and affairs as attorney, but she testifies that he promised to marry her, naming the time and place where the promise was made.

Numerous letters written by the parties were introduced in evidence, and none of them, either appellant's or appellee's, indicated any promise of marriage at all;

still the credibility of witnesses and weight to be given to testimony is a question for the jury, and we think there was substantial evidence to submit this question to the jury.

Appellee testified that she was forty years old, the mother of four children living, the oldest one being nearly twenty-one years old; that she employed D. L. King, the appellant, after her husband's death, to look after the interests of the estate and defend and save the home and to represent her and her children in certain litigation. She testified that there was no date set for the marriage, but that it was to be when appellant got all her matters straightened out, property in shape, etc.

Her testimony as to the appellant's breach of the contract is also indefinite. When asked why she did not marry him, she said that he came down there some time after the promise and commenced demanding payment for the money he had put up for them, and before that he said nothing to her about it, and she had been making repairs on the place and paying taxes, and when she told him she did not have the money he said he would take the land. She was then asked if he made known to her that he would not marry her, and she said, "Yes, sir; he made it very plain to me that he no longer loved me, and that he would no longer look after my interests."

When appellee was asked when Senator King refused to marry her, she said: "When he came down there and said he was going to take our farm and everything we had from us and put us out." She was then asked, "Did you broach the subject of marriage at that time to him?" She answered: "No, sir; indeed not, after he had told me what he was going to do." She was then asked; "You did not want him to marry you?" and she answered, "Not if he did not want me; his actions and statements showed clearly that he did not intend to marry me." She further stated that at the time she married Mr. Goode, Senator King had not told her that he was not going to marry her. She said that he said he was

going to take the farm and all that they had and put them out, but that she did not discuss marriage with him.

It therefore appears from appellee's own evidence that the appellant never did refuse to marry her; that they never discussed the subject; but she claims that, because he wanted to take her property after having paid a judgment of $7,000, that was a breach of his promise of marriage. However, if his conduct and what he said about the property could be treated as a refusal to marry, her evidence and conduct shows that she acquiesced in it. She stated that she did not want to marry him if he did want to marry her. She never requested him to carry out his promise to marry her, never discussed it with him, and she further testified that at the time she married Mr. Goode appellant had never told her he was not going to marry her. She also testified that a short time after this she married Mr. Goode, although the things that she said were to be done before she and appellant were to be married had not been done, and she had never requested appellant to marry her and never discussed the marriage with him.

She married Mr. Goode on the 12th of August, not a great while after she says the appellant told her he was going to take her property. She testified that the appellant came to see her two days before she married Mr. Goode and furnished her money to buy some land. She told him she had to spend what money she had on account of sickness, and that she was borrowing it from her mother, and she says he told her there was no use to do that, and that he had the money ready for her. Now this, according to her own testimony, was only two days before she married Mr. Goode, and the relations of appellee and appellant were such that he was still visiting her and furnishing her money, and he had never refused to marry her.

Evidently when he wanted her to pay back what he had advanced, she concluded that she did not want to marry him.

An agreement to marry, like any other contract or agreement, may be dissolved or rescinded by the mutual consent of the parties; and where one party seeks to repudiate the promise, the consent of the other party may be inferred from circumstances indicating an evident intention to abandon the contract. 2 Black on Rescission & Cancellation 937; 9 C. J. 331; *Dean* v. *Skiff,* 128 Mass. 174; *Kellett* v. *Robie,* 99 Wis. 303, 74 N. W. 781; *Mabin* v. *Webster,* 129 Ind. 430, 28 N. E. 863; *Shellenberger* v. *Blake,* 67 Ind. 75.

We do not deem it necessary to set out or call attention to the evidence, a great portion of which was with reference to property and with reference to the conduct of appellant in the management of appellee's property. We have set out the substance of all the evidence tending to show a breach of the promise by appellant and appellee's acquiescence or agreement to the rescission.

We have reached the conclusion that, if there was a contract made and violated by appellant, the evidence conclusively shows that it was rescinded by mutual agreement.

The judgment will therefore be reversed, and, since it appears that the case was fully developed, it will be dismissed.

GAGE *v.* CHASTAIN.

Opinion delivered April 13, 1931.

[redacted]

[redacted]

Evans & Evans and *T. A. Pettigrew,* for appellant.

D. L. Ford and *Hardin & Barton,* for appellee.

BUTLER, J., (after stating the facts). It is admitted that the deed executed to Colvard was without consideration and merely for the purpose of placing the legal title to the property in B. A. Gage, it being her contention that the conveyance to her was to carry into effect a pre-existing agreement by which her husband was to convey the property to her, the consideration being an advance made by her to him of $1,450 and the interest her son, E. Gage, had therein, which had been previously given by him to her. The appellee contends that the deeds vesting legal title in B. A. Gage were colorable and executed with the intent to defraud him and prevent the collection of his debt.

After hearing the testimony in the case the chancellor found in effect that the transaction was such as alleged by the appellee, and the question now is, was his finding and judgment against the preponderance of the testimony? The answer to that question renders it unnecessary to discuss other questions raised as these become unimportant.

Certainly, it is true that an embarrassed debtor may convey his property to one of his creditors in satisfaction of a debt, even though the effect of the conveyance would defeat the remainder of his creditors in the collection of their debt. The case of *Baker* v. *Gowers,* 180 Ark. 1110,

25 S. W. (2d) 438, and the cases therein cited are conclusive on this question, but, in order for the conveyance to be upheld, it must be made in good faith and for a valid and subsisting indebtedness; and, where the value of the property is not out of proportion to the debt, such transaction is not fraudulent. It is also the rule, however, that conveyances made to near relatives of an embarrassed debtor are looked on with suspicion and scrutinized with care, and when they are voluntary they are *prima facie* fraudulent and become conclusive as to existing creditors when the embarrassment of the debtor proceeds to that point where he is insolvent. *Smith* v. *Wheat, ante* p. 149, and cases therein cited.

Applying these principles to the testimony in the case at bar, we have reached the conclusion that the decision of the trial court holding that the conveyance was colorable and in fraud of the rights of the appellee was not against the preponderance of, but is sustained by, the evidence. Appellee and her husband and son all testified that the appellee advanced $1,450 as a loan to R. Gage, her husband. This alleged transaction, however, occurred in 1923, if at all, and none of the witnesses testified with any degree of particularity as to the source from which she derived the money. The general statement only is made that she earned it selling vegetables, milk and butter, and that she had some property in Texas. How much property or the nature of it is not shown, nor what disposition, if any, was made of it. Appellee's son testified that appellee kept her money in the Bank of Ozark, but no canceled checks were introduced in evidence nor any contemporaneous memoranda tending to corroborate the testimony of the witnesses. The evidence is to the effect that at the time of the construction of the building on the lot in question the means of R. Gage were ample for that purpose. He had paid $1,550 for the lot, and in his application for the last loan he secured he gave the value of the property as improved at $6,500. Therefore he expended not more than $5,000 on the property. He paid $2,200 for his home, and he had in cash when he

purchased the lot the sum of $2,000, and from the proceeds of the loan and the sale of a farm he obtained $7,500—in all $9,500. The total value of the business property as improved and his home was $8,700. There was therefore no necessity for the alleged loan from the appellee to her husband. Appellee also claimed that her son, E. Gage, had an interest in the property, variously estimated at from twelve to sixteen hundred dollars, which he gave her by letter written from California, in 1924. E. Gage testified that $500 of this was for work done by him on the building and $75 in cash which he had paid for equipment in the garage, but in the letter relied on by the appellee, there was no specific statement as to any interest he had or claimed in the property itself. He and his father had been in the garage business located in the building which necessarily needed equipment, and it is likely such equipment was purchased by the partnership of Gage & Son. The statement in the letter is: "I don't think I will be able to finish paying out my part of the garage, so I will give my part to you, which is about $1,200." It is significant that when Mrs. Gage first filed her intervention the sole claim made as to the consideration of the conveyance to her was the alleged loan of $1,450 made in 1923, and it was not until several months after that claim was made by amendment to the intervention of an interest by reason of the gift from her son. He was then married, and is not shown to have had any source of income while engaged in business with his father except from the business itself, out of which he testified he lived. No claim was ever made by him for an interest in the property, and he permitted his father to deal with it as his own.

This case is quite different from that of *Baker* v. *Gowers, supra,* relied on by the appellant, for in that case it was conclusively shown that the grantee in the deed alleged to be fraudulent was a person of large means and had advanced money to assist her grantor in the conduct of his business for which the canceled checks were exhibited and notes were given to evidence the different

amounts borrowed, all of these contemporaneous with the loan of the money, which did not long precede the conveyance of the property. It was also shown that the value of the property conveyed was much less than the debts due her. In the instant case, as we have seen, there is no evidence of any contemporaneous writing evidencing the transaction in any way or that the appellee had the means to enable her to make the alleged loan. She permitted her husband for more than five years from the time he first made the purchase of the lot to deal with it as his own, and a few weeks before the conveyance to her he had made an application for a loan in which he stated that he was the sole owner of the property, and just a few days before the execution of the deed to her she had signed and acknowledged the relinquishment of dower in the property, her husband mortgaging it to secure the loan for which application had been made; also, it was not until suit against R. Gage became imminent that the conveyance was made, and up until that time no claim for interest in the property had been made. These all were circumstances tending to cast doubt upon the *bona fides* of the transaction, and no effort was made to explain the same except the general statements heretofore mentioned. The trial court had a right to regard these circumstances as against the appellant, for, where the circumstances under which a transfer of property by a debtor is made are suspicious, the failure to give explanatory evidence is a badge of fraud. *Miller* v. *Jones,* 32 Ark. 337; *Burke* v. *Napoleon, etc.*, 134 Ark. 580, 202 S. W. 827; *Gallup* v. *St., etc., Ry. Co.,* 140 Ark. 347, 215 S. W. 586; *Ramey* v. *Fletcher,* 176 Ark. 196, 2 S. W. (2d) 84.

When all the attendant circumstances are considered, we think the chancellor properly found that there was no consideration passing between R. Gage and the appellee for the conveyance of the property, and that the transaction should be treated as a voluntary conveyance. The evidence preponderates that, when the conveyance was made to appellee, R. Gage had no other property out of which his debts could be met except forty acres of land

which sold for $55. It is doubtful in whose name is the homestead. Gage testified that the title was in him, and the appellee testified that it was in her, but whether in one or the other would make no difference in this case, for it could not be reached under execution. These circumstances were sufficient to justify the chancellor in his finding that the transaction was fraudulent. *Norton* v. *McNutt,* 55 Ark. 59, 17 S. W. 362; *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913; *Crampton* v. *Schaap,* 56 Ark. 253, 19 S. W. 669; *Smith* v. *Wheat, ante* p. 149.

It follows that the decree of the trial court dismissing the intervention for want of equity and canceling the appellee's deeds was correct, and it is therefore affirmed.

FEDERAL LAND BANK OF ST. LOUIS, MISSOURI, *v.* BLACKSHEAR.

Opinion delivered April 20, 1931.

E. H. Tharp and *J. R. Crocker,* for appellant.

W. P. Smith and *O. C. Blackford,* for appellee.

HART, C. J. This was an appeal by J. T. Blackshear from a decree of the chancery court postponing the sale of mortgaged premises under a decree of foreclosure for eleven months and thirty days. The Federal Land Bank of St. Louis, Missouri, filed a suit in equity against J. T. Blackshear and others to foreclose a mortgage of $1,800 on a tract of land in Lawrence County, Arkansas. The mortgage was duly acknowledged and recorded, and was in the usual form of mortgages provided for under the

provisions of the Federal Farm Loan Act, 12 USCA, § 771. The proceedings for foreclosure were had and carried on according to the usual chancery practice. A decree of foreclosure was in due time entered of record. Judgment was rendered in favor of the plaintiff against the defendants for the amount of the mortgage indebtedness, together with the accrued interest. The decree recites, among other things: "That, if said sum of money and interest thereon, as herein adjudged to be due plaintiff, shall not be paid within eleven months and thirty days from this date, together with all costs of suit herein adjudged to be paid by said defendants, * * * the commissioner of this court hereinafter named is ordered to sell said lands," etc.

The only error relied upon for a reversal of the decree is that the time allowed by the court to the mortgagor to pay the mortgage indebtedness before a sale could be had under the foreclosure decree was unreasonable.

According to the usual chancery practice, a sale of the mortgaged premises is directed to be made by a commissioner appointed for that purpose if the mortgage indebtedness is not paid within a limited time fixed by the court which, according to the chancery practice, does not usually exceed six months, or at any rate does not extend beyond the beginning of the next term of the court. Daniell's Chancery Pleading & Practice, (6th ed.) vol. 2, * pages 999 and 1000, and * page 1266. *Ib.* (8th ed.), vol. 2, page 1230.

A reasonable time in cases like this has been recognized by the Supreme Court of the United States to be ninety days or six months, or until the next term of the court, in the discretion of the court. *Howell* v. *Western Railroad Co.,* 94 U. S. 463.

In the application of this well-established rule in equity to the present case, we are of the opinion that the time allowed by the chancery court within which to pay the mortgage indebtedness after the decree of foreclosure

was unreasonable and is calculated to disturb the equity practice in cases like this. Therefore the decree will be reversed, and the cause will be remanded with directions to the chancery court to fix a period of time for the payment of the mortgage indebtedness before the land is advertised for sale in harmony with the equity practice laid down in this opinion and for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

SCOTT *v.* CARNES.

Opinion delivered April 20, 1931.

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C. M. Martin and *H. G. Wade,* for appellant.

L. B. Smead and *Gaughan, Sifford, Godwin & Gaughan,* for appellee.

HART, C. J., (after stating the facts). Appellee seeks to uphold the decree in this case upon the authority of *Cramer* v. *Remmel,* 132 Ark. 158, 200 S. W. 811, on the ground that he is a *bona fide* purchaser for value without notice of the land in question. The evidence introduced by appellee shows clearly that he is a purchaser for value in good faith of the land in question. This much is conceded by counsel for appellant, but it is strongly insisted that appellee had notice of the rights and equities of appellant.

Where a purchaser shows that he has paid a valuable consideration in good faith, the burden of showing that he purchased with notice is on the one alleging it or who relies on the notice to defeat the claim of *bona fide* purchaser. *Osceola Land Co.* v. *Chicago Mill & Lumber Co.,* 84 Ark. 1, 103 S. W. 609; and *Oil Fields Corporation* v. *Dashko,* 173 Ark. 533, 294 S. W. 25.

Since appellant relies on notice, actual or constructive, to defeat the claim of appellee as a *bona fide* purchaser, it devolved upon her to show that appellee had notice. It was shown by appellant that she had received a deed to a one-half interest in the land from Rogers, the owner of it in 1911, but the deed was never acknowledged or recorded until after the present suit was instituted. Appellant resided on the land at the time the deed was executed to her and moved into a house on the part of the land claimed by her in this suit in 1915 and has resided there ever since. Rogers, who executed the deed to her, resided in a smaller house near the one in which she lived.

Appellant invoked the rule that possession by a person under a deed, though unrecorded, is notice of his rights and interest in the property. The reason is that actual possession is evidence of some title in the possessor and puts the subsequent purchaser or mortgagee on notice as to the title which the occupant holds and claims in the property. Hence it is said, that actual, visible and exclusive possession is notice to the world of

the title and interest of the possessor in the property, and it is incumbent upon the subsequent purchaser or mortgagee to make diligent inquiry to learn the nature and interest of the claim of such possessor; and if he does not do so, notice will be imputed to him. *American Building & Loan Assn.* v. *Warren,* 101 Ark. 163, 141 S. W. 765; and *Naill* v. *Kirby,* 162 Ark. 140, 257 S. W. 735. Many other cases in support of the rule might be cited, but it is too well-settled in this State to need any further citation of authorities.

We do not think, however, that the general rule has any application under the facts of this case. In all the cases on the question, it is said that the possession of land which will impart notice of title thereto must be adverse, exclusive, unequivocal, and must be inconsistent with the claim of any other person. The possession must be sufficiently distinct and unequivocal so as to put the purchaser on his guard and such notice that is not likely to be misunderstood or misconstrued. *Townsend* v. *Little,* 109 U. S. 504, 3 S. Ct. 357.

Tested by this well-settled rule, it is plain that the physical occupancy by appellant was not such possession as to put a purchaser on inquiry and charge him with constructive notice. In February, 1911, W. L. Rogers, who had been the owner of the land for many years, executed a deed to Eller Scott to an undivided one-half interest in the land. Rogers was a white man and Eller Scott a negro woman who had lived on his farm for many years. In *Walden* v. *Williams,* 128 Ark. 5, 193 S. W. 71, the court said that, in order that actual occupancy be constructive notice of ownership, it must be apparently exclusive. Otherwise, the possession is presumed to follow the true title, and those who deal with the owner of the record title are warranted in treating him as being the exclusive owner. There, as here, the parties owned the land as tenants in common, and both occupied the land. The court said that the occupancy, being a joint one, was referable to the owner of the record title, and

that the purchaser for value was not charged with constructive notice of the adverse interest of the tenant in common who had no record title. Among the cases cited is *Roderick* v. *McMeekin,* 204 Ill. 625, 68 N. E. 473. In that case the court said:

"The mortgagee had a right to suppose, not only that he (mortgagor) was the owner because the record showed him to be the owner, but that he was in possession because he was using the money paid to him by her to build the house. If it be a fact that Mrs. Roderick (claiming a joint interest with her brother) was upon the premises setting out shrubbery or superintending the construction of the cellar, or cleaning the windows, her possession, as indicated by such acts, cannot be regarded as anything more than a joint possession with her brother. Possession to be notice must be not only open and visible, but exclusive. A possession, which is held jointly with another person, is not such a possession as is exclusive, or operates as notice, or to excite inquiry."

So, in the present case, the mortgagee had a right to deal with Rogers, the mortgagor, as the exclusive owner of the land because he had the record title to it. The fact that appellant had lived on the land for many years and had borne him three children did not make it the duty of the mortgagee to go to her and inquire what interest she had in the land. The mortgagee did ask his lawyer if she could be considered Rogers' common-law wife; and, when he was informed that she could not, he made no further inquiry about the matter. He had a right to assume that she was merely living on the farm of Rogers and illegally cohabiting with him as she had been doing for many years. There was nothing whatever that would make it the duty of appellee to make any inquiries as to whether Rogers had executed to her a deed to any interest in the land. After Rogers had executed a deed to her to a one-half interest in the land, they held it as tenants in common, and Eller Scott had no exclusive or apparently exclusive possession of

the land because Rogers continued to reside upon it and manage it as he had done before.

This brings us to the question of whether or not appellee had actual notice of the rights of appellant in the land. Here the burden was upon appellant to show such notice, and whatever was sufficient to put appellee on inquiry amounts to notice of such inquiry would lead to a knowledge of the facts by the exercise of ordinary diligence. *Richards* v. *Billingslea,* 170 Ark. 1100, 282 S. W. 985, and cases cited.

The chancellor found the general issue in favor of appellee, and it cannot be said that his finding is against the preponderance of the evidence. The testimony on the question of actual notice is in irreconcilable conflict. On the one hand, Eller Scott testified in positive terms that when Dr. Wooldridge and his associates took the option contract on the land, he came to see her and she told him that she had a deed to an undivided one-half interest in the land. The land was situated within a mile of Camden, and Dr. Wooldridge testified that soon after the option contract was executed Eller Scott told him of her interest in the land. He then went back to town and told his associates in the option contracts, Luther Ellison and appellee Carnes, what Eller Scott had said to him about having a deed to an undivided one-half interest in the land. Both Carnes and Ellison denied that Dr. Wooldridge told them that he had received information that Eller Scott had an undivided one-half interest in the land by deed which she had received from W. L. Rogers. Carnes acted for Mrs. Umsted when she took the mortgage on the land and when she received the deed to it from Rogers. His knowledge would then be imputed to his principal. While he might be considered an interested person, Ellison was not. He had no interest whatever in the transaction. The transaction with Mrs. Umsted and Rogers was not based upon the option contract at all. Carnes simply acted as agent for Mrs. Umsted in the matter and subsequently obtained

a deed from her to the property. The option contract was not considered in the transaction at all. As we have just seen, the testimony on the question of actual knowledge was in direct conflict, and the chancellor was justified in finding for appellee on this point.

It is insisted, however, that the attendant circumstances turned the scale in favor of appellant. It is pointed out that Carnes knew that appellant had been living on the land for many years with Rogers and had borne him three children. This is true, and the further fact is that, at the time of the transaction, appellee asked if the signature of Eller Scott should not be obtained to the mortgage given to Mrs. Umsted by Rogers on the ground that she might be considered the common-law wife of Rogers. He was informed by his lawyers that the negro woman could not be the common-law wife or any other kind of wife of a white man in this State, and that her signature to the mortgage was not necessary. We do not think that it was his duty to inquire any further. Her actual occupancy of a house on the premises was not such possession as to put a purchaser on inquiry as to whether she had acquired an interest in the property by purchase or deed or gift. On the contrary, her occupancy was calculated to mislead a mortgagee. He would attribute her occupancy of the premises to the fact that she was living there in order to be near Rogers and illegally cohabit with him.

The option contract from W. L. Rogers to W. B. Wooldridge, J. S. Carnes, and Luther Ellison is dated January 14, 1927, and recites that it is subject to the rights of Mrs. Edna Umsted and other named parties under a certain deed of trust executed on the same day. According to the testimony of Dr. W. B. Wooldridge, he went to see Eller Scott as a physician shortly after the option contract was executed, and while at her house told her about the option they had to sell the land, and she then told him about her deed. When he got back to town, he told Carnes and Ellison what she had said about hav-

ing the deed. In another part of his testimony Dr. Wooldridge said that he did not know anything about the deed to Eller Scott until she told him about it on the occasion when he was at her house. The chancellor might have found from his testimony that Carnes did not know about the deed from W. L. Rogers to Eller Scott until after the mortgage to Mrs. Umsted and other persons had been executed. Carnes obtained title from Mrs. Umsted, and he acquired whatever title she had.

It follows that the decree will be affirmed.

POE *v.* WALKER.

Opinion delivered April 20, 1931.

Charles B. Thweatt and *Tom Poe,* for appellant.

Carmichael & Hendricks, for appellee.

SMITH, J. Suits were brought by the American Southern Trust Company, hereinafter referred to as the bank, against Sam T. and Tom Poe to recover on notes executed by them to the bank's order, and to foreclose deeds of trust securing the notes, which were consolidated and heard together. The execution of the notes was admitted, and the defendants alleged their willingness to pay the balance due on them after proper credits were allowed, and the extent and value of these credits was the controlling question in the trial of the case in the court below.

The defendants practiced law as partners, and had been previously employed by the bank as attorneys. Sam T. Poe, the senior member of the law firm, was also employed by the bank in connection with loans made by the bank to certain farmers engaged in the culture of rice. This latter employment was by the day, and Sam Poe was paid $25 per day when so employed. So much of Sam Poe's time was required in connection with the loans to the rice farmers that a new contract was made between him and the bank, which was evidenced by the following letter:

"Little Rock, Arkansas, February 17, 1925.

"Dear Mr. Poe:

"Mr. Hicks informs me that he has made a deal with you on a basis of $7,200 per year starting with the

first of January, and as we have already paid you $650 we have today credited your account with $250, bringing your salary up the close of business the 14th, and each pay day hereafter your account will be credited with $300," signed by the cashier of the bank.

The parties operated under the contract evidenced by this letter during the remainder of the year 1925, and, without any additional contract, continued their relations until June 14, 1926, at which time it was terminated, and the principal question in the case is the one of fact whether the contract was then rescinded and terminated by the mutual consent of the parties or by the act of the bank in wrongfully discharging Poe.

In addition to his salary, Poe was allowed an expense account, and a disagreement arose between Hicks, a vice president of the bank, and Poe concerning the account. Hicks contended that improper and excessive expense charges were being made, although no attempt was made at the trial from which this appeal comes to sustain that contention. On the contrary, it was disclaimed that excessive items of expense had been charged. But it is certain there was such a controversy, and we think it also certain that, during the discussion of that controversy on June 14, 1926, Poe became angered and said that if his services were not satisfactory he would resign, and Hicks said the services had ceased to be satisfactory, and the offered resignation was accepted. It is equally as certain that after reflection Poe repented his haste and anger, for on the next day he wrote a letter in which he proposed to resume his relation as an employee, but this offer was not accepted.

By way of a set-off against the demands of the bank, it was alleged that Sam Poe was entitled to a credit to the extent of the balance of the 1926 salary, inasmuch as Poe had been unable to obtain other similar employment during the remainder of that year. It was also alleged that the law firm of which Sam and Tom Poe were members had been employed by the bank to make certain collections, and that this employment was apart

from and had no relation to the annual employment of Sam Poe, and credit for these professional services was prayed.

The court below allowed the claim for salary for only the month of June, but allowed the attorney's fees substantially as claimed. This finding of fact appears to have been made on February 17, 1930, but no notation thereof in writing was made upon any court record until May 9, 1930, at which time a decree was entered conforming to this finding, in which the court adjudged the balance due the bank after all proper credits had been allowed, and a foreclosure of the deeds of trust securing this balance was decreed, and from this decree the Poes have appealed, and the bank has prayed a cross-appeal. The transcript on the appeal was filed in this court on November 8, 1930.

It is also made to appear that subsequent to the rendition of the decree here appealed from the commissioner of the court who had been appointed for that purpose sold the property, under the authority of the decree of foreclosure, on September 5, 1930, and at this sale McDonald Poe, a member of the Poe law firm but not a party to the suit, bid the total amount of the debt, interest and costs, and became the purchaser of the property at said sale. The decree required the purchaser to execute bond, but the purchaser at the sale and his security declined to execute the bond until the bank had credited upon the decree an item of $1,250.

It is first insisted by the bank for the dismissal of the appeal that it was not taken in time, and, second, that an appeal from the decree could not be prosecuted for the reason that benefits under it had been accepted.

We do not think the appeal should be dismissed for either of the reasons assigned for that action. While it does appear that the cause was submitted to and heard by the court on February 17, 1930, at which time the court's finding on the facts was indicated, yet it also appears that no memorandum was made in the order

book or judge's docket or on any other record of the Pulaski Chancery Court showing a final disposition of the case and the relief granted until May 9, 1930, when the decree to be entered was approved by the presiding judge and entered of record.

It is required by § 2140, Crawford & Moses' Digest, that appeals and writs of error shall be prosecuted within six months next after the rendition of the judgment, order or decree sought to be reviewed, and this statute was construed in the case of *Chatfield* v. *Jarrett,* 108 Ark. 523, 158 S. W. 146, to mean that the time for appeal begins to run from the date of the rendition or pronouncement of the judgment, order or decree, and not from the entry thereof upon the records of the court. But by § 6276, Crawford & Moses' Digest, it is provided that "the judgment must be entered on the order book, and specify clearly the relief granted or other determination of the action." In the recent case of *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44, we said that: "There are authorities to the contrary, but we hold that, when a decision has been reached, announced by the court and sufficient memorandum on the chancery docket to show a final settlement of the case, it is a final judgment although it has not been spread in full upon the record." Here the first written memorandum prepared or authorized by the presiding judge was written May 9, 1930, and, as the appeal was perfected within six months of that date, we hold that it was taken within the time required by § 2140, Crawford & Moses' Digest.

We are also of the opinion that the appellants are not barred from prosecuting this appeal for the reason that they have accepted benefits under the decree appealed from. This insistence is based upon two circumstances. The first is that, subsequent to the rendition of the decree appealed from, the bank paid the Poes $1,250, which was indorsed as a credit upon the judgment. But it also appears that this item of $1,250 was for a fee which had become due after the rendition of the decree and which was not involved in the litigation.

If this fee had not been credited upon the judgment, it would have been paid in cash by the bank to the Poes, and this without regard to the decision of the questions involved in this appeal. The appellants do not by this appeal question the correctness of the sum adjudged to be due by them to the bank. This they must pay in any event. They only insist that the court did not allow them sufficient credits, and, as the $1,250 fee became due after the rendition of the judgment here appealed from, it is not inconsistent for an appeal to be prosecuted from the judgment, although the $1,250 credit has been indorsed upon it.

The second insistence is that, having purchased the property decreed to be sold at a price equal to the total amount of the debt, interest and all costs, there can be no appeal. It is not seriously questioned that McDonald Poe bid in the property at the foreclosure sale for the benefit of Sam T. Poe, and it is also conceded that the bid, which was secured by a bond given by McDonald Poe, equals the entire debt and interest, together with all the costs, but this does not bar the Poes from prosecuting the appeal. They were unable to give the supersedeas bond required by the statute, and adopted this method of protecting their equity in the property ordered to be sold. This they had the right to do without waiving the right to appeal from the decree under the authority of which the property had been sold.

At § 47, chapter Appeal and Error, 2 R. C. L., page 65, it is said: "As a general rule, however, one against whom a judgment or decree for a sum of money has been rendered does not, by voluntarily paying or satisfying it, waive or lose his right to review it upon a writ of error or appeal unless such payment or satisfaction was by way of compromise or with an agreement not to pursue an appeal or writ of error. This rule has been placed upon the ground that one against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice, and it

is difficult to conceive how his payment of the judgment can give rise to any estoppel against seeking to avoid it for error. The better view accordingly is that, though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of the right to appeal."

We conclude, therefore, that the case is before us properly for a decision upon its merits.

We think that the appellant Sam Poe is correct in his contention that his employment was by the year. The letter to him from the cashier of the bank under date February 17, 1925, set out above, expressly states that Poe had been employed for the year 1925, at an annual salary of $7,200, payable in semi-monthly installments, and, without additional understanding or agreement, the parties continued to operate under this contract until in June, 1926, up to which time the semi-monthly payments were regularly made as they had been during the year 1925.

In the instant case, as in the case of *Moline Lumber Co.* v. *Harrison,* 128 Ark. 260, 194 S. W. 25, 11 A. L. R. 466, there was no proof of custom or usage with reference to the period of employment for this character of service, and we must therefore construe this letter to determine whether it constituted a contract for a period of service for a year, or was merely an employment at will. We reviewed the authorities, to which we must look for aid in the construction of this letter, in the Moline Lumber Co. case, *supra,* and the division in the authorities was there stated, but we concluded that "* * * the weight of authority is declared to be in favor of the rule that a hiring at so much a year, month or week is, in the absence of any other consideration impairing the force of the circumstances, sufficient to sustain a finding that the hiring was for that period."

We conclude, therefore, that Poe was employed by the year, and not at will, and, as he was permitted to

enter upon a second year without additional contract, the presumption is that he did so under a renewal or extension of the original contract. Our Moline Lumber Company case is annotated in 11 A. L. R. 466, the annotator's note extending from page 469 to page 486.

But, while Poe's contractual rights are referable to the letter quoted, there is no reason why that contract may not have been rescinded, and we have concluded that it was rescinded. This was no doubt done in anger, but it was nevertheless done. A disagreement had arisen between Poe and Hicks, as the representative of the bank. Hicks thought that Poe's expense account was excessive, and, while he may have been mistaken as to the grounds upon which he had reached this conclusion, he had become dissatisfied with Poe's services, and he so advised Poe, who stated that if his services were not satisfactory he would quit, and this statement of Poe was evidently considered a resignation and treated as such. There can be no question about the sufficiency of the consideration to support the rescission. Poe's agreement to represent the bank in the matter of the farm loans was a sufficient consideration to support the contract on the part of the bank to pay him $7,200 a year for that service, and the release of Poe from this obligation was a sufficient consideration to support the rescission of the contract. It is, no doubt, true that in the discussion of their differences both Poe and Hicks had become somewhat irritated at each other, but this is no reason for setting aside a valid contract, executed by competent parties, upon a sufficient consideration, nor does the fact that Poe, upon further reflection, decided to withdraw his resignation, affect the case. The resignation had been tendered and accepted, and the contract was therefore at an end.

Upon the question of the attorney's fees, which is raised by the cross-appeal, it may be said that the undisputed testimony shows that the services were actually rendered, and the compensation was fixed upon a

quantum meruit basis, there being no express contract as to the amount of the compensation, and we are unable to say that the finding of the chancellor is contrary to the preponderance of the evidence.

One of the cases in which the Poes claimed and were allowed a fee is referred to as the Murray C. Smith case. In this case a fee of $250 was claimed for the recovery of certain real estate. When the bank failed to pay the fee charged in this case, the Poes sued and recovered judgment for the amount thereof, and caused the land which they had recovered to be sold under an execution, and they became the purchasers at the execution sale. But the Poes assert that they were only attempting to collect the fee, and that they have no intention of trying to acquire the title to the land against the bank if their fee is allowed. The court below treated the title as being in the bank and allowed the fee, thus, in effect, treating the judgment of the circuit court and the sale thereunder as a nullity. This action appears to accord with the equities of the case.

Upon the whole case, we are unable to say that any of the findings of fact upon which the decree was based are contrary to the preponderance of the evidence, and the decree must therefore be affirmed, and it is so ordered.

HART, C. J., and HUMPHREYS, J., dissent.

WASHINGTON *v.* STATE.

Opinion delivered April 20, 1931.

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

HUMPHREYS, J. Appellant was indicted, tried, and convicted in the circuit court of Hempstead County for unlawfully selling or being interested in the sale of intoxicating liquor, and, as a punishment therefor, was adjudged to serve a term of one year in the State Penitentiary, from which judgment an appeal has been duly prosecuted to this court.

No abstract or brief has been filed on behalf of appellant, but, the conviction being for a felony, it is incumbent upon this court to explore the record to ascertain whether any reversible error was committed in the trial of the cause.

A careful examination of the record reflects that the issue of whether appellant was interested in the sale of a pint of whiskey to Porter McClary on or about the 8th day of April, 1930, was submitted to the jury for decision under correct instructions. The jury was specifically and clearly instructed to acquit appellant if he represented Porter McClary in the purchase of the whiskey and should only convict him in case he was the agent of or assisting the seller in the sale thereof. This was a correct declaration of the law as announced in the case of *Ellis* v. *State,* 133 Ark. 540, 202 S. W. 702, and the cases cited therein.

We also find from an examination of the record that the sufficiency of the evidence to support the verdict and judgment was raised in the motion for a new trial, which motion was overruled by the court.

The evidence introduced by the State was of a substantial nature and ample to sustain the verdict and consequent judgment of conviction. Porter McClary testified for the State, in substance, that he went to the

store of appellant on or about the eighth day of April, 1930, to buy some whiskey; that he told appellant he wanted to buy some whiskey and was directed by him to go down the road and overtake George Linton and bring him back to the store; that he did so, and upon Linton's return, appellant conversed with him; that Linton then went across the road into the woods and, after he had done so, witness paid appellant $1.25 for the whiskey; that witness returned to his car and found a pint of whiskey in a fruit jar.

It is true that appellant denied selling or being interested in the sale of the whiskey to McClary, but this denial did not necessarily work his acquittal. It simply presented a disputed question of fact for determination of the jury under the decisions cited above. The testimony of McClary was of a substantial nature and sufficient, if believed, to sustain the conviction of appellant.

No error appearing, the judgment is affirmed.

CHEVROLET MOTOR COMPANY *v.* LANDERS CHEVROLET COMPANY.

Opinion delivered April 20, 1931.

[redacted]

[redacted]

Barber & Henry and *Troy W. Lewis,* for appellant.

KIRBY, J., (after stating the facts). The statute authorizes the circuit court to issue writs of certiorari (§ 3237, Crawford & Moses' Digest); but in *Baskins* v. *Wylds,* 39 Ark. 347, this court said:

"The writ of certiorari cannot be used by the circuit courts, in the exercise of their appellate powers and superintending control over inferior courts, for the mere correction of errors, as a substitute for appeal, but when it appears upon the face of the record of the inferior court that it has no jurisdiction of the subject-matter, or of the person, its judgment may be quashed, on certiorari, by the circuit court." See also *Miller* v. *McCullough,* 21 Ark. 426; *Burgett* v. *Apperson,* 52 Ark. 213, 12 S. W. 559; *Knight* v. *Creswell,* 82 Ark. 330, 101 S. W. 754, 118 Am. St. Rep. 74; *Beal-Doyle D. G. Co.* v. *Odd Fellows,* 109 Ark. 77, 158 S. W. 955.

Our statutes provide how service of summons may be had upon corporations created by the laws of this State, and where such actions may be brought. Sections 1147, 1152 and 1171, Crawford & Moses' Digest.

The record herein shows appellant is a corporation created by the laws of this State, having its principal office or place of business in Little Rock, Pulaski County, Arkansas, in which its chief officers also reside; and that it does not keep or maintain in Fulton County, where this suit was brought, "a branch office or any other place of business," and had no such office or place of business in that county at the time service was attempted to be made.

Appellant appeared specially for the purpose and moved to quash the service of summons, but the court overruled its motion and rendered judgment by default against it. These facts are all alleged in the petition

for certiorari, to which a general demurrer was filed and also an answer admitting appellant was a domestic corporation with its principal place of business in Little Rock, Pulaski County, Arkansas.

The court in passing upon the petition appeared to think that, if the court had jurisdiction of the subject-matter, then the only question for determination was the sufficiency of the summons, expressing the view that if the summons was insufficient even, appellant's remedy would be by appeal and not certiorari, and denied the petition and affirmed the judgment.

This holding was erroneous, since appellant had the right to resort to the remedy of certiorari provided by the statute in such cases for the relief of void judgments, and was not compelled to appeal from such judgment, since under our holdings such appeal, without regard to the result of the determination, would enter its appearance to the suit. Since the record shows the justice acquired no jurisdiction to hear and determine the cause on the service of summons, it should have quashed the service and dismissed the suit upon appellant's motion duly made.

The judgment rendered without service upon appellant company was void, and the circuit court erred in not so holding upon appellant's petition for certiorari and quashing such judgment. The judgment is accordingly reversed, and the cause remanded with directions to the circuit court to quash the judgment of the justice court against appellant company, being void for want of proper service. It is so ordered.

PARHAM *v.* PARKER.

Opinion delivered April 20, 1931.

Reinberger & Reinberger, for appellant.

Elmo Carl-Lee, for appellee.

MEHAFFY, J. The appellant, Parham Construction Company, was engaged in the construction of a bridge on which appellee was working. The construction company is owned by J. E. Parham, an individual, and is not a corporation. The work was about one or one and one-half miles from Augusta, Arkansas, and the appellant agreed to convey employees, including appellee, to and from Augusta to the place of work. The regular driver of the truck which carried the employees from Augusta to their work and back had been disabled for two or three days, and another employee was driving the truck.

It is alleged that the truck was overloaded and stuck in the road, and that appellee and other employees were compelled to unload and extricate the bus by hand, and that the bus ran over plaintiff's right foot and struck his knee, injuring him. There is no controversy about the extent of the injury or the amount of the verdict. Therefore it is unnecessary to set out the evidence as to the extent of the injury.

Carl C. Richardson testified that he was employed as labor foreman and rigger for appellant, and had been for the last six years. He drove the truck from the job to Augusta at the request of some workmen. On the way the truck stalled and some of the men got out, among them Parker. The driver had not been driving more than a day or two and was doing this because the driver was sick. Saw three men put appellee in the truck and brought him on to town and took him home. Saw Parker back at work on December 30. The injury occurred on November 18. The truck was a 1½-ton Ford; it had stalled two or three times before that; it stalled every time they passed this particular place. Parker had been riding the truck two days, and it was for the convenience of the workmen. There was no agreement to carry them back and forth. Does not know how Parker was injured. No one asked or instructed Parker to get on the truck. Witness had been driving a truck for two years. No one told the workmen to get out and shove; they did it of their own free will. After the accident Parker said he had hung his foot in a wire and that threw him under the truck. Knew nothing about whether there was an agreement to haul Parker. The truck may have been overloaded; maybe twenty-five men. The engine did not have ordinary power; could not say what was wrong with the truck. This was the first or second day witness had driven this truck on this job. He testified that he just knew when a truck was running, but did not know what was the matter with it; that was out of his line of business. All he knew was that it was not

doing its work as it should. Parker said he tried to get on but hung his foot on a wire. They had been unloading at this place for the past week. The truck belonged to Parham or the company.

G. C. Parker, the appellee, testified that he is now working for the Austin Bridge Company, but worked for the appellant the past year; had made an agreement with W. H. Thomas, superintendent for appellant, for transportation before he was employed. There were about twenty-five men on the truck the night of November 18; it stalled, and the men walked through. After that, with the men shoving, the truck started, and appellee held on uphill and started to get on and his foot struck something, possibly a wire, and he was jerked under the truck. His right foot caught in the wire and the truck ran over it. Witness then testified about the extent of his injury and loss of time and said he was off duty at the time of the accident. Considered the truck a matter of convenience, was not compelled to ride on it. Saw the truck before entering and saw that it was overloaded, but did not know it was overloaded at the time as he did not know the capacity of the truck until after the injury. When truck stopped, some one said to shove it, but no one in authority told him to. He helped shove so as to speed up journey home for the workmen. Ran along side truck and tried to get on while it was moving. Did this voluntarily and caught foot on something in road. Some of the workmen used their own cars and some walked back and forth.

The appellant, J. E. Parham, testified that he made no agreement with appellee to transport him to and from work, and no one had authority to make such agreement. He furnished a truck for the workmen.

The above is the substance of all the evidence as to the injury and how it occurred. There was a verdict and judgment for appellee, and this appeal is prosecuted to reverse said judgment.

The appellant contends that there is no substantial evidence to support the verdict. Negligence on the part of the master is essential to his liability for injury sustained by the servant. He is not an insurer of his servant's safety. He is liable only for the consequences of his negligence, and, before there can be a recovery by an injured servant, the servant must show that the master owed him a duty which he failed to perform, and that such failure was the proximate cause of the injury. The test as to whether the master was guilty of negligence is whether he did what a person of ordinary prudence would have done under the circumstances. Negligence means the doing of something that a person of ordinary prudence would not do, or the failure to do something which a person of ordinary prudence would do under the circumstances. The presumption is that the master was not guilty of negligence, and the burden is upon the injured servant to prove the negligence of the master, and that such negligence was the proximate cause of the injury. When tested by these rules, does the evidence show that the master was guilty of negligence?

The undisputed evidence shows that at this particular place the truck had been stalling for several days. There was nothing about the overloading of the truck that appellee did not know as well as any one. It is true he says that he did not know the capacity until after the injury, but he did know how many people were on the truck, and he did know that it had been stalling at this place. The master was certainly not guilty of negligence in furnishing a truck to transport the workmen, and there is no evidence that the master was guilty of any negligence in any respect.

The appellee, however, contends that the master was guilty of negligence in employing an incompetent driver and cites and relies on the case of *Duff* v. *Ayers,* 156 Ark. 17, 246 S. W. 508.

In that case, however, the driver was a boy nine or ten years old, and the court said it was a question for

the jury to determine whether or not the appellee in that case assumed the risk because he continued in the employment with an inexperienced fellow-servant with a knowledge of his inexperience and with an appreciation of the danger. One employing a boy that young, of course, knows of his youth and inexperience, and whether or not the employment of one that age and inexperience is negligence is a question for the jury.

"The fact that the delinquent servant was a minor is an important, though not decisive element in determining his competency. Its evidential weight depends upon the character of the work to be done, the servant's previous experience, and his actual knowledge." Labatt's Master and Servant, vol. 3, 2881.

Whenever there is any substantial evidence of the negligence of the master in the employment of a fellow-servant, the master's negligence is a question for the jury. But the master is not liable for an injury to a servant unless there is some evidence of negligence of the master.

In this case the regular driver of the truck was sick, and at the time of the accident the truck was being driven by Carl C. Richardson. The undisputed proof shows that Richardson had driven a truck in 1920 at Bauxite, Arkansas, and that he had had at least two years' experience in driving a truck. It is true he said he did not know what was wrong with the truck. He was evidently not a mechanic, and was not employed as a mechanic, but there is no negligence in employing a person to drive a truck who had had two years' experience, and when there is no evidence tending to show either that he was incompetent or that there was any reason known to the master indicating his incompetency. There is nothing to submit to the jury.

The master in this case, not being a corporation, is not liable to a servant who has been injured by the negligence of a fellow-servant, unless the evidence shows that the master himself was guilty of some negligence.

It is contended in this case that the master was negligent in employing an incompetent or unskillful driver, but, as we have already said, there is no evidence tending to show that the driver was inefficient and no evidence of any negligence of the master. Of course, the evidence shows that this was probably the second time this driver had driven this truck, but it would make no difference if it were the first time if he had had two years' experience in driving a truck. The master would not be guilty of negligence in employing him unless he knew something that would indicate the incompetency of the servant. *L. R. & S. F. R. Co.* v. *Duffie,* 35 Ark. 602; *Fones* v. *Phillips,* 39 Ark. 17, 43 Am. Rep. 264.

This injury occurred when the appellee attempted to get back on the truck while it was moving, and his foot was caught in a wire, causing it to be run over by the truck. It was an unfortunate accident for which no one was liable.

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

WINFREE *v.* JONES.

Opinion delivered April 20, 1931.

Reed & Beard and *O. E. Williams,* for appellant.

Chas. A. Walls, for appellee.

MEHAFFY, J. The parties to this suit inherited the lands sought to be partitioned or sold, and the appellees filed complaint in partition in the Lonoke Chancery Court in which suit they sought to have the land divided into four parts, which would be held by the heirs of the four brothers and sisters of Governor James P. Eagle as tenants in common.

The appellants filed a demurrer, answer, and cross-complaint in which they asked for a partition of said lands, and, in event they could not be divided in kind among the twenty-eight heirs according to their respective interests, that said lands be sold and the proceeds divided, and that in the meantime a receiver be appointed to take charge of said lands, and that he be authorized to rent the same and otherwise protect said property during the pendency of this action.

The chancellor entered a decree for partition and appointed commissioners who reported that the lands could not be divided in kind without great prejudice to the owners. They reported that there were twenty-eight heirs at law owning interests in said lands, and that these interests ranged from one-forty-eighth to one-sixteenth and that it was impossible to divide said lands in kind, and the commissioners recommended that said lands be sold and the proceeds distributed.

The court thereupon ordered the land sold and appointed a commissioner to sell same and fixed the date of sale for November 14, 1930. The lands were duly advertised for sale as required by law, and on the 10th of November, 1930, the appellees filed a petition to postpone the sale of said lands and on said date an order was made postponing the sale indefinitely.

On November 17, 1930, the appellants insisted that the lands be sold, and the court ordered the same to be sold on December 27, 1930. Proper notice was given and

the lands were sold in accordance with the provisions of the decree, on that date.

R. S. Long, Joe P. Eagle and R. S. Boyd became the purchasers of certain tracts of said lands. On January 2, 1930, the purchasers having filed bonds to secure the payment of the purchase money, and the commissioner having reported the sale, the appellees filed exceptions to the report of sale and asked that the same be not confirmed upon the ground that the price bid for said lands was so grossly inadequate as to shock the conscience of any court.

After hearing the evidence, the court held that the prices bid for said lands were so grossly inadequate as to shock the conscience and ordered the sales set aside and continued until further orders and that the receivership be continued, the court theretofore having appointed a receiver.

The court recited in its decree that it was stated in open court by one of the parties interested that, if the court would order said lands to be sold, he would see that the same brought their fair market value, and that some of the lands were worth as high as $75 per acre. The decree further recites that it was under these conditions that the land was ordered sold, and the court expressly stated to all parties interested at the time that it would not approve any sale unless the land brought its fair market value. The court further stated and recited in the decree that the prices at which some of the lands were sold were so grossly inadequate as to shock the conscience of a court of equity. The court further stated and recited in the decree that the land was being sold for the purpose of partition, and that there was no incumbrance, mortgage, or lien against said land and no pressing reason why the same should be sold under existing conditions, and that it would work an irreparable injury upon substantially all the heirs at law who are interested in said lands if said sale is permitted to stand. The case is here on appeal.

Appellants first contend that the court's finding is against the preponderance of the evidence and is an abuse of discretion. Several witnesses testified as to the value of the land and also testified that the reason that the lands did not sell for a higher price was the condition of the country caused by drouth, bank failures, and general depression, and that the conditions were such that people who wanted to buy could not get the money with which to buy and the finding of the chancellor, we think, that the price was grossly inadequate is not against the preponderance of the evidence.

The next contention of the appellants and the one chiefly relied on for reversal is that inadequacy of price, however gross, is not sufficient ground to set aside a judicial sale unless it be so gross and unreasonable as to indicate misconduct, fraud, and unfairness.

R. S. Boyd testified that he was one of the heirs and familiar with the lands; that the 100-acre tract, with more than 55 acres cleared, brought $2,000; that this land had rented the year before for $6 an acre. There were a little more than 44 acres of uncleared land and 32 acres in timber. He testified that the east one-half of section 2 contains 259 34/100 acres with 122 acres cleared. This tract sold for $1,500 and had rented that year for more than $6 an acre. He testified about the 116 acres, that it sold for $5.80 an acre; that it was very valuable land, but not in cultivation. The testimony of this witness as to other lands was substantially the same. He testified that the 75 acres along the pike this side of W. K. Oldham's home and 40 acres just back of his home was as good as any land in the upper rich woods and that under conditions now it would be cheap at $75 an acre.

This witness testified that he bid in a tract of land for Mrs. R. S. Boyd at about one-half its value; that in 1919 he sold 487 acres of timbered land for $150 an acre. He testified that the reason the land did not sell for its value was the condition of the times, and that it would have brought more any time in the past 10 years. He

said he knew that some of the parties interested were depending on the protection of the court and on the report that they had it would bring its value. He said neither land nor anything else is bringing a big price now. He further said that this land did not owe a dollar in the world, and that there was no reason to sell it.

W. K. Oldham testified to substantially the same with reference to the price that the land brought and the condition of the country, and he said he did not think that any land forced on the market at the present time would bring anything like its market value because nobody is prepared to take care of it except a few people. He said that he supposed you could not sell land at all now for cash because of the financial depression. If the land had been put up any time within the past 10 years, it would have brought from $70 to $100 an acre except right since this depression. He knew of no reason that kept anybody from bidding except that they did not have the money and could not get it.

R. G. Kirk, Mrs. Prude Barton, Mrs. Rose Sullivan, Mr. W. M. McCrary, and Mr. John C. Bradford all testified as to the low price the land brought and to the general depression and inability of people to buy.

Mr. Joe P. Eagle testified that, if the land had sold on the 14th, it would have brought more money because there were some twenty banks that failed that day, and he said the half had not been told, and that something like 100 banks in Arkansas have gone broke, and that banks are failing all the time. Mr. Eagle was one of the purchasers, but he testified that any of them or all of them were welcome to take his bid.

The condition of the country is not only shown by the evidence, but it is a matter of common knowledge that many banks failed about the time of the sale, some insurance companies failed, and the country was suffering from the worst drouth we had ever had, and it was not only impossible for many people to get money, but thousands of people had to have assistance in order to live.

While there is no evidence or no claim of fraud, the inadequacy of the price for which the land sold, together with the financial depression, justified the court in refusing to confirm the sale and in setting aside the sale. There was no market value for land at the time of the sale. As one of the witnesses said, you could not sell land at all for cash.

Appellants cite numerous cases of this court in support of their contention that, in the absence of fraud and unfairness, mere inadequacy of price, however gross, will not invalidate the sale. In the instant case there is not only inadequacy of price, but it would be manifestly inequitable and unfair to confirm a sale for a grossly inadequate price when the sale was made at such a time that there was no market, and when the condition of the country was such, because of bank failures and drouth, that no one could obtain the money with which to buy. This court has always held that the trial court has and may exercise discretion in either confirming or rejecting judicial sales. This discretion however, must be exercised according to fixed rules and not arbitrarily.

It cannot be said that the chancellor in this case exercised his discretion arbitrarily, but from the recitals in the decree the chancellor evidently would not have ordered the sale if it had not been stated in open court by one of the heirs interested that, if the court would order the said lands sold, he would see that same brought their fair market value, and that some of the lands were worth as high as $75 per acre. It was under these conditions that the lands were ordered sold.

Under the conditions that existed at the time the sale was made, it is impossible to suppose that the property would bring anything like its fair value and inadequacy of price, together with fraud, unfairness, or any other unforeseen circumstances, which make it impossible to sell the lands at anything like a fair value, justifies the chancery court in refusing to confirm the sale. No one could foresee the bank failures and the financial distress following same.

In the case of *Kirkland* v. *Texas Express Co.*, the Supreme Court of Mississippi held that the prevalence of yellow fever at adjacent places and at a time when the entire county was under quarantine, justified the setting aside of the sale. *Kirkland* v. *Texas Express Co.*, 57 Miss. 316.

The Minnesota Supreme Court said: "Under the circumstances and especially in view of the fact satisfactorily established to the court that exceptional financial stringency prevailing at the time, and which paralyzed real estate sales, prevented a sale at a reasonable price, the court, in its discretion, refused to confirm the sale, and ordered a resale. The statute contemplates that the liens shall be extinguished if a sale is made, and does not permit a sale to be ordered unless it is reasonably probable that the property will sell for enough to pay off such liens and the costs of sale. The court judged that it would be inequitable to allow the sale to stand, and we cannot say that there was any abuse of discretion in refusing its confirmation." *Johnson* v. *Avery*, 60 Minn. 262, 57 N. W. 217.

The Supreme Court of Minnesota in the above case affirmed the decision of the lower court in refusing to confirm the sale, and the same case came before the Supreme Court of Minnesota again about two years later. This last appeal was from an order of the lower court confirming the sale, and the Supreme Court of Minnesota said: "But where as in this case inadequacy of price bid combines with other matters in the case fully justifying an inference that the sale was unfair and grossly injurious to the rights of the various owners, the sale should not be confirmed. We think the learned judge, usually so careful, must have overlooked some of the salient points in the case and erred in confirming the referee's report of the sale. Such order is therefore reversed." *Johnson* v. *Avery*, 60 Minn. 262, 62 N. W. 283, 51 Am. St. Rep. 529.

The Alabama Supreme Court held that inadequacy of price combined with the yellow fever epidemic afforded ample reason for setting aside the sale. *Littell* v. *Zuntz,* 2 Ala. 256, 36 Am. Dec. 415.

In this case there are no liens on the lands, no debts to be paid, but the sale is for the purpose of dividing the proceeds among the heirs. The financial stringency and distress at the time of the sale destroyed the market value for lands and prevented persons who might want to purchase from being able to obtain the money, and we think the chancellor was justified in setting aside the sale.

The decree is affirmed.

AMERICAN EXCHANGE TRUST COMPANY *v.* GATES.

Opinion delivered April 27, 1931.

Carmichael & Hendricks, for appellant.

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

SMITH, J. This appeal involves the question whether the collateral heirs of a deceased person have an exemption in any amount, and, if so, to what amount, from the payment of inheritance taxes on property which they have taken by "transfer" from such deceased per-

son, a transfer being defined in the Inheritance Tax law as any method whereby one acquires title to the property of a deceased person. Subdivision (4), § 10,217, Crawford & Moses' Digest.

The question involved can only be determined by a consideration and construction of §§ 10,221 and 10,222, Crawford & Moses' Digest, and the acts amendatory thereof; said sections being a part of the chapter on Taxation—subtitle Inheritance Taxes—Crawford & Moses' Digest.

Section 10,221, Crawford & Moses' Digest, has the caption, "Exemptions," and consists of four paragraphs. Paragraph (1) exempts charitable and similar transfers. Paragraph (2) exempts property of the clear value of three thousand dollars transferred to a widow or a minor child of the decedent, and "* * * one thousand dollars transferred to each of the persons described in § 10,222, * * *." Paragraph (3) exempts property of the clear value of five hundred dollars transferred to any person or corporation other than the persons described in § 10,222. Paragraph (4) provides when the tax shall be paid in full without exemption.

The exemptions allowed by § 10,221, Crawford & Moses' Digest, may therefore be summarized by saying that the widow and minor child of a decedent were allowed $3,000, and transferees described in § 10,222 were each allowed $1,000, and all other persons or corporations other than the persons described in § 10,222 were allowed $500.

Section 10,222, Crawford & Moses' Digest, bears the title, "Primary rates," and consists of two paragraphs. Paragraph (1) provides that the rate of taxation on all taxable values not in excess of five thousand dollars are, for convenience, termed "primary rates," and shall be as follows: Upon a taxable transfer to any father, mother, husband, wife, child, brother or sister, and certain others, at the rate of one per cent.

Paragraph (2) of § 10,222 reads as follows: "Upon a transfer, taxable under this act, of property or any beneficial interest therein of an amount in excess of the exemptions provided for in subdivision three of § 10,221, and not in excess of $5,000, to any person or corporation, other than those enumerated in subdivision one, of this section, the tax shall be at the rate of four per cent. of the clear value of such interest in such property."

Section 10,222, Crawford & Moses' Digest, was amended by act 438 of the Acts of 1923 (General Acts 1923, page 384). Paragraph (1) was amended in a respect unimportant in the decision of the question now before us.

A new paragraph was added and numbered (2), which fixed the primary rate of brothers and sisters, of both the whole and the half blood, at two per cent.

Paragraph (2) of § 10,222 was slightly amended and re-enacted as paragraph (3) of the amendatory act of 1923, and, as it there appears, reads as follows: "Upon a transfer, taxable under this act, of property or any beneficial interest therein of an amount in excess of the exemptions provided for in subdivision 3 of § 10,221, and not in excess of five thousand dollars, to any person, corporation, other than those enumerated in subdivisions one and two of this section, the tax shall be at the rate of four per cent. of the clear value of such interest in such property."

At the 1929 session of the General Assembly Act 106 was passed, entitled, "An Act to amend the Inheritance Tax Law of the State of Arkansas," vol. 1, Acts 1929, page 526, and §§ 10,221 and 10,222, Crawford & Moses' Digest, were both amended by the Amendatory Act of 1929.

Paragraph (1) of § 10,221, Crawford & Moses' Digest, was re-enacted without change.

Paragraph (2) was amended to read as follows: "(2) Property of the clear market value of six thousand dollars transferred to the widow of the decedent, whether by dower or otherwise, of four thousand dollars

transferred to a minor child of the decedent, and of two thousand dollars transferred to each of the persons described in § 10,222 shall be exempt."

Paragraphs (3) and (4) of § 10,221, Crawford & Moses' Digest, were omitted.

The amendatory act of 1929 amended § 10,222, Crawford & Moses' Digest, in the following particulars. Paragraph (1) was amended slightly in a particular unimportant here. Paragraphs (2) and (3) were amended to read as follows:

"(2) Upon the transfer taxable under this act of property or any beneficial interest therein, of an amount not in excess of five thousand dollars to any brother or sister, including the brother or sister of the half blood, the tax shall be at the rate of two per cent. of the clear value of such interest in such property.

"(3) Upon a transfer, taxable under this act, of property or any beneficial interest therein of an amount not in excess of five thousand dollars, to any person, corporation, other than those enumerated in subdivision (1) and (2) of this section the tax shall be at the rate of four per cent. of the clear value of such interest in such property."

The probate court originally, and the circuit court on appeal, denied the claim of the collateral heirs to any exemption, and this appeal questions that construction of the statutes set out herein.

The claim of exemption is based upon paragraph (2) of the Amendatory Act of 1929 as it amends § 10,221, Crawford & Moses' Digest, which reads as follows: "* * *, and of two thousand dollars transferred to each of the persons described in § 10,222 shall be exempt."

The portion of the act of 1929 last quoted allows an exemption of two thousand dollars transferred to each of the persons described in § 10,222, and the question for decision is, therefore, whether collateral heirs are persons described in § 10,222, and, if not, who are such persons.

The contention of the collateral heirs is that they and all other transferees have an exemption of two thousand dollars because they are persons described in § 10,222, as amended by the act of 1929. If this is true, the General Assembly has adopted a most involved method of allowing an exemption which might have been granted in language so simple that no doubt could arise, and has also increased the exemption of such persons from five hundred dollars, originally allowed by paragraph (3) of § 10,221, which paragraph, as we have stated, was omitted from the subsequent legislation, to two thousand dollars.

But we think there is no such exemption. It is to be remembered that § 10,221 deals with exemptions, and § 10,222 with primary rates. Amended § 10,221 allows the widow an exemption of six thousand dollars, and each minor child an exemption of four thousand dollars, and the persons referred to in amended § 10,222 are each allowed an exemption of two thousand dollars. Who are these persons? The persons referred to are enumerated in paragraphs (1) and (2) of the section. Paragraph (1) names father, mother, or other lineal descendants, or husband, wife, child, wife or widow of a son, or the husband of a daughter, certain adopted children, or any lineal descendant born in lawful wedlock. All the persons here described have a preferential rate of one per cent. on any transfer to them not in excess of five thousand dollars. The other persons described in § 10,222 are mentioned in paragraph (2), and these are brothers and sisters, both of the whole and the half blood; they also have a preferential rate of two per cent.

No other persons are described in the amended § 10,222, but all other persons, whether of the blood of the decedent or not, as well as any corporation which acquires property by any kind of a transfer, pay tax thereon at the rate of four per cent. This is the basic or primary rate applicable to valuations of five thousand dollars, or less, such as the estate here involved.

All persons not described in paragraphs (1) and (2) who, or corporations which, pay anything (not being exempt from all taxes under paragraph (1) of § 10,221, pay at the primary rate of four per cent. Two classes of persons are described in § 10,222 who pay this tax but do not pay at this rate. The first class are those mentioned in paragraph (1) who pay at the rate of one per cent. The other class are those mentioned in paragraph (2) who pay at the rate of two per cent. The persons mentioned in paragraphs (1) and (2) are the only persons described. All other persons are undescribed, and these persons, and all corporations, pay the basic rate of four per cent., without benefit of any exemption.

We are re-enforced in this conclusion by a consideration of the fact that paragraph (2) of § 10,221, Crawford & Moses' Digest, was amended and carried into the amendatory act of 1929, while paragraph (3) of § 10,221 was omitted from the amendatory act of 1929. Paragraph (2) of § 10,221 allowed an exemption to a widow and minor child of three thousand dollars each, and of a thousand dollars to each of the persons described in § 10,222. Section 10,222 described certain persons, and referred to others without description, and to this latter class there was allowed by paragraph (3) of § 10,221 an exemption of five hundred dollars. This paragraph (3) of § 10,221 was omitted in the amendatory legislation, and the persons who had not been otherwise described remained without description. Those persons, and all corporations, pay the basic or primary rate of four per cent., without deduction for exemptions.

This construction of the statute results in holding that only those persons are allowed exemptions who are described in paragraphs (1) and (2) of § 10,222, Crawford & Moses' Digest, as amended by the act of 1929, *supra,* these being the persons to whom an exemption of two thousand dollars each was allowed by paragraph (2) of § 10,221, Crawford & Moses' Digest, as amended by the act of 1929, *supra.*

The judgment of the court below is in accordance with this construction of the statute, and it is therefore affirmed.

SPRINGFIELD LIFE INSURANCE COMPANY *v.* SLAUGHTER.

Opinion delivered April 27, 1931.

Duty & Duty and *Brewer & Cracraft,* for appellant.

Jo M. Walker, for appellee.

HUMPHREYS, J. This appeal is an appeal from a judgment for $500, statutory penalty and attorney's fee recovered by appellees against appellant in the circuit court of Phillips County upon a life insurance policy issued on June 27, 1931, to Sam Butler, in which appellees were the beneficiaries. When the testimony in the trial court had been concluded, appellant requested an instructed verdict in its favor, which the court refused, over its objection and exception.

Appellant contends that the trial court erred in refusing to peremptorily instruct a verdict for it, and requests a reversal of the judgment for that reason.

The policy sued upon contained the following provision:

"This policy is issued in consideration of the application of the insured which is made a part of this contract, a copy of which is attached hereto, etc."

The application, made a part of the contract, contained the following questions, answers, and provisions:

"Are you in good health? If not, state facts fully. Yes.

"Have you ever had or do you now have any of the following diseases? Dropsy—No.

"All the statements as to my physical condition, age, nationality and occupation are true and correct and are made to enable me to obtain life insurance in the Springfield Life Insurance Company. I further covenant and warrant that I have read each of the foregoing questions and answers before signing my name to this application and each of said answers are full, complete and true in every particular and are only statements and answers upon which this application for insurance is made.

"I further agree that if it should develop that I have misrepresented any material fact covered by the above interrogatories or failed to make full disclosures of any material fact, the policy shall be null and void.

"The applicant assumes the entire burden of making full disclosures and true statements and revelations as to his bodily condition and history and of fully informing himself with reference thereto before signing and delivering this application; and further expressly agrees that no lack of knowledge with reference thereto shall to any extent whatsoever excuse him from any error or misrepresentation made herein."

The provisions of the policy set out above clearly made the answers relating to the health of the insured warranties and not mere representations. They were in the nature of an absolute agreement and not statements of belief. This construction of the contract leaves only one question to be determined here, and that is whether the undisputed evidence reflects that the insured was in bad health when the application for the policy was made. The undisputed testimony discloses that the insured was in bad health and had been for a long time when he applied for the policy. He was suffering from dropsy at the time he made the application and died

therefrom within two months after the policy was delivered to him. Based upon these facts, the trial court should have granted appellant's request for an instructed verdict and dismissed appellees' complaint.

On account of the error indicated, the judgment is reversed, and the complaint of appellees is dismissed.

STANDARD ACCIDENT INSURANCE COMPANY *v.* PHILPOT CONSTRUCTION COMPANY.

Opinion delivered April 27, 1931.

[redacted]

[redacted]

Moore, Gray & Burrow and *Everett B. Gibson, Jr.*, for appellant.

Harry T. Wooldridge, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the law does not warrant the taxing of an attorney's fee and judgment for 12 per cent. damages upon the recovery of a judgment against the insurer upon a policy of liability insurance, and its contention must be sustained.

The statute (§ 6155, Crawford & Moses' Digest) provides: "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 therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fees to be taxed by the court where the same is heard on original action, by appeal or otherwise and to be taxed up as a part of the costs therein and collected as other costs are or may be by law collected."

This statute is highly penal, and should not be held to apply to any loss or insurance company not therein expressly named; as was said in *Home Fire Insurance Co.* v. *Stancell,* 94 Ark. 578, 127 S. W. 966, where it was held it did not apply to cases for loss caused by cyclone

and for which a cyclone insurance company was liable. In *National Union Fire Ins. Co.* v. *Crabtree,* 151 Ark. 561, 237 S. W. 97, the court reversing the judgment of a lower court allowing plaintiff to recover penalties and attorneys' fees on an automobile theft policy, said: "The court erred, however, in rendering judgment for penalty and attorney's fees. The imposition of penalties and attorney's fees is limited to suits against fire, life, health and accident insurance companies, and the statute does not apply to a suit for loss caused by theft under that kind of insurance. Crawford & Moses' Digest, § 6155. We held, in the case of *Home Fire Ins. Co.* v. *Stancell,* 94 Ark. 578 [127 S. W. 966], that the statute, being penal, should not be held to apply except in cases falling within its particular terms. We decided in that case that the statute did not apply to a loss caused by a cyclone under a policy of insurance against that character of loss."

The court has also held that the attorney's fees and penalty provided by the statute could not be recovered under a policy of tornado insurance issued by a fire insurance company. *National Union Fire Ins. Co.* v. *Henry,* 181 Ark. 637, 27 S. W. (2d) 786. See also *Mears Mining Co.* v. *Maryland Casualty Co.,* 162 Mo. App. 178, 144 S. W. 883; *Western Indemnity Co. Free and Accepted Masons of Texas,* (Tex.) 198 S. W. 1092; *Ocean Accident and Guaranty Corporation* v. *Northern Texas Traction Co.,* (Tex.) 224 S. W. 212.

Only 4 kinds of insurance companies are included in said statute, fire, life, health, or accident insurance companies, and it makes no provision for the allowance of damages and attorney's fees where the loss is caused or claimed under any other kind of policy of insurance. Liability insurance, of the kind provided for in the policy issued by appellant company to appellee company, is a distinct and important line of insurance and was already well developed when the statute was passed, and, since it was not named therein, such companies or the company issuing the policies of insurance is not liable

to the holder of the policy in case of loss for the damages and attorney's fees allowed by said statute.

The authority of our cases *supra* are not impaired by the decisions in *Springfield Mutual Assn.* v. *Atnip,* 169 Ark. 968, 279 S. W. 15; and *Illinois Banker's Life Assn.* v. *Mann,* 158 Ark. 425, 250 S. W. 887, both suits are life insurance contracts relied on by appellee. The language of the court in the last case construing such statute being: "This apparently includes all insurance companies, and does include all companies except those exempted by other legislation from the operation of that section," which obviously means "all insurance companies" named in said statute (§ 6155, Crawford & Moses' Digest) or issuing contracts or policies of insurance of the class or kind issued by such designated companies, and these cases relate especially to whether the companies issuing such insurance as that named in such statute had been exempted from the provisions and operation thereof by statute later enacted exempting fraternal insurance societies from such penalties; and certainly the court erred in allowing the recovery of damages and attorney's fees herein on the judgment upon suit brought for an attorney's fee earned and agreed to be paid for the defense of any suit based upon such policy of insurance upon which there was no recovery.

The majority is of opinion that there is sufficient testimony to support the judgment for recovery of the fee by appellee for defense of the Strobel suit against it, since appellant company agreed to pay the expenses thereof. It was not bound to defend the suit or to the payment of damages under its policy for the injury to Miss Strobel, since its liability was conditioned against and expressly limited by the policy to exclude liability for any such injury.

For the error of the court in allowing the recovery of damages and attorney's fees on the amount appellant was liable to the payment for under its agreement with appellee to defend the Strobel suit against it, the judg-

ment must be modified and reduced in said sum and amount, and, as modified, will be affirmed. It is so ordered.

BUTLER, J., concurs in the judgment only.

FIRST NATIONAL BANK OF FT. SMITH *v.* MARRE.

Opinion delivered April 27, 1931.

Daily & Woods, for appellant.

Warner & Warner, for appellee.

BUTLER, J. This litigation involves the construction of the will of Antonio Marre which was properly executed and duly probated upon the death of the testator. After making certain specific bequests, the fifth paragraph of the will is as follows:

"5. I give, devise and bequeath all the residue of my estate, real, personal and mixed, of which I may die seized or possessed, or to which I may at the time of my death be entitled, to my son, Louis Marre, and my daugh-

ters, Rosa Marre Fleming and Cecile Marre, in equal parts. I fully realize that all of the bequests and gifts above made are subject to the dower interest of my wife, Marie Marre, which dower rights will fully provide for her."

The sixth paragraph of the will contained the direction that the bequests provided for in paragraph No. 5 should be paid to the beneficiaries in ten equal installments, and that the real estate should not be sold until twenty years after the death of the testator. Provision was made for the management of the property by the executor during these times with authority to invest the property, and for payment of the net interest arising from the investments each twelve months and for the rents accruing from the real estate, payable every three months in equal shares to the beneficiaries.

The seventh paragraph provided that, should the specific bequests made for any reason fail, they were to become a part of the residuary estate and be disposed of as provided in paragraph No. 6 of the will.

By the eighth paragraph the appellant was nominated as executor with power of sale of the personal property for the purpose of payment of debts, reinvestment and distribution. The power with reference to the real estate is given in the following language: "And this same authority is given my said executor to sell, lease or otherwise dispose of the real estate belonging to my estate, at the time designated for the sale of the real estate, in paragraph six of this, my will, and when said real estate is sold the proceeds shall be distributed at once as provided in said paragraph six of my will."

The ninth and last paragraph is as follows: "Ninth: After my said estate has been duly administered, as required by law, I hereby direct that my said executor, the First National Bank of Fort Smith, Arkansas, retain control of the residue of my said estate, both real and personal, as trustee, and administer the same in the manner, time and form hereinbefore set out in this, my will."

It is the contention of the appellant that this will created a valid trust in it. From an adverse decree of the trial court, it has appealed, and that question is the only one presented here for our decision. The appellant invokes the well-settled rule that, in construing the provisions of a will, the intention of the maker is first to be ascertained, and, when not at variance with recognized rules of law, must govern. The intention of the testator must be gathered from all parts of the will, and such construction be given as best comports with the purposes and objects of the testator and as will least conflict. *Parker* v. *Wilson,* 98 Ark. 553, 136 S. W. 981.

The appellant contends that the trust sought to be created was an active trust, and, although there was not an express grant of the estate to the trustee by which the legal title would vest in it, such title would be implied. With this contention we agree. Appellant's counsel cite as authority for their contention Perry on Trusts (4th Ed.), par. 313 *et seq.* The doctrine of the text we recognize, but it is only in those cases where a valid active trust is created that the title impliedly vests in the trustee to enable him to carry out the purposes of the trust. As suggested by the appellant, it is the duty of the court to ascertain and effectuate the intention of the testator, but this rule is subject to an important qualification, namely, that the intention must not be at variance with recognized rules of law; and, when it is so found, the attempt by the testator to carry this intention into effect will prove abortive. The effect of the fifth paragraph of the will was to make an absolute gift of the personal property of the testator to the beneficiaries and a devise to them of the real estate in fee simple. By subsequent paragraphs, an attempt was made to limit the use and to defer the acquisition of the property theretofore given outright and to create a trust to effectuate these limitations. This was repugnant to the absolute disposition of the property before made and in violation of the well-settled rule that, where an absolute gift or devise is made, a subsequent attempt in the will to limit the possession,

enjoyment or disposition of the property is void. Immediately upon the death of the testator the property vested absolutely in the beneficiaries, and as a necessary incident to the ownership, they became entitled to the immediate possession and enjoyment of the property with the right of present alienation. This rule was recognized by our court at an early date and has since been consistently adhered to. "If a testator gives property absolutely in the first instance to a legatee, he cannot afterwards subject it to any limitation or provision whatever." *Moody* v. *Walker*, 3 Ark. 147-187. In *Letzkus* v. *Nothwang*, 170 Ark. 403, 279 S. W. 1006, the testator, in paragraph No. 3 of his will, made provision that "any and all other property of which I may die possessed, real, personal and mixed, I give to my said sons, David Henry Nothwang and Frederick Nothwang, share and share alike." By paragraph No. 4 following an attempt is made to limit the estate theretofore conveyed by prohibiting the mortgaging or sale of the property until after ten years from the death of the testator, and that the income only from the personal property be used by the beneficiaries. This limitation the court held void on the ground that the will of the testator devised a fee simple estate to his sons which vested at his death, and the attempt to deprive this estate of alienability is void. In passing upon this question, the court said: "The devise was not to trustees, but was direct to the devisees named, and we think there can be no question but that the title vested in them immediately upon the death of the testator. Necessarily so, for the title could not have been in any one except the devisees after the death of the testator, and the provisions that these devisees should not sell, mortgage or incumber the property devised to them for a period of ten years after the title had vested in them is a condition subsequent, and is void because it is repugnant to the estate conveyed."

As in that case, so in this. The devise was not to trustees, but direct to the devisees named, the title neces-

sarily vested in them immediately upon the death of the testator and the limitation over, being inconsistent with the necessary incidents to the estate conveyed, is unenforcible. The appellant, while recognizing the soundness of the views expressed in these cases and others cited by counsel for appellee, seeks to distinguish these cases from the case at bar because in none of them was there a will involved where the testator had created, or attempted to create, a trust as in the instant case. This distinction we hold to be immaterial, for it is unimportant how the limitation on an estate already conveyed is attempted to be imposed; it is the limitation that has no binding force and the manner or method by which it is sought to be imposed is of no moment.

The wills construed in the cases of *Holcomb* v. *Palmer,* 106 Maine 17, 75 Atl. 324, and *Webb* v. *Hayden,* 166 Mo. 39, 65 S. W. 760, relied on by the appellant as supporting its contention, are wholly unlike the one under consideration. In the first case the residuary clause is as follows: "I give, bequeath and devise all the rest and remainder of my estate to such of my children who may outlive me, share and share alike, but I will that the portion which would fall to my son, Clinton, shall be held in trust for him by my son, Francis, to be used for his comfort and necessities according to the discretion of my said son." The court said: "The position of the plaintiff is that the first part of this clause gave an absolute estate in fee to the five children, all of whom survived the mother, and that the last clause attempting to put the share of Clinton in the hands of Francis in trust was an attempt to cut down this absolute fee and therefore repugnant and void." In holding against this contention, the court further said: "After making numerous specific bequests, she gathers together all her remaining property and gives it equally to her five children, share and share alike, but at the same time and in the same sentence that she gives four their share outright, she gives the fifth his share in trust, making his brother the trustee. There is no attempt on her part to make any gift or devise over, but the whole

estate passes out of her, absolutely as to the four-fifths, in trust as to the one-fifth."

In the case of *Webb* v. *Hayden, supra,* the language of the will construed is as follows: "I give, devise and bequeath to my son, Ernest Webb, the sum of $10,000, said sum to be held by my executrix, hereinafter named, in trust until my said son arrives at the age of twenty-one, and then given to him." It will be seen that the residuary clause in this case is almost identical with that considered in the case of *Holcomb* v. *Palmer,* for in the same sentence and essentially a part of the devise the trust is created, and in neither case is there a subsequent attempt to limit an absolute estate already devised, as in the case at bar.

In the case of *Snedeker* v. *Congdon,* 58 N. Y. Supp. 885, the will construed is similar in effect to the one under consideration here, the material parts of which are as follows: "I give to my said brother and sister the use, interest and income of personal property during their joint lives and the life of the survivor. Subject to such life estate, I give the principal of the rest, residue and remainder of my property and estate to my five nephews and nieces." In a subsequent paragraph a trust is sought to be created in that part of the estate going to one of the nieces, Enriquita Emma, daughter of a deceased brother of the testator. That paragraph is as follows: "To Enriquita Emma, daughter of my said brother, deceased, now wife of Winfield Scott Shrigley, of Valparaiso, Chili, one-fifth part of such property, but it is my will, and I hereby direct, that such part shall be paid to and held in trust by her brothers to apply to same and such parts thereof as they may deem proper to the separate use of their sister." After disposing of certain questions raised which have no relevancy to the question at issue here, the court said: "We now come to the question of the validity and effect of the trust created in the share of Mrs. Shrigley, considered apart from the previous provisions of the will. We first find an absolute and present gift to this defendant, subject

only to the previous life estates. This gift is followed by a direction that the share be paid to, and held in trust by, her brothers, 'to apply the same and such parts thereof as they may deem proper to the separate use of their sister.' It is contended that this limitation imposed on the gift to Mrs. Shrigley is repugnant to the gift, and therefore void. Such is our judgment." Referring to other cases in support of its judgment, the court further said: "In *Josselyn* v. *Josselyn,* 9 Sim. 63, the testator gave his residuary estate unto his cousin, and ordered his executors to invest the same and pay the principal to the legatee on his attaining the age of 24 years. It was held that, as the interest of the legatee was absolute, he was entitled to the principal of his share when he became of the age of 21 years, notwithstanding the direction of the will to the contrary. In *Saunders* v. *Vautier,* 14 Beav. 115, and in *Rocke* v. *Rocke,* 9 Beav. 66, exactly the same rule was held. In *Re Young's Settlement,* 18 Beav. 199, the testator gave his estate to trustees to divide between his two children when they arrived at the age of 25, their several shares to vest at 21, or upon marriage. He directed that his daughter's share should, on her marriage, be settled upon her, but that until marriage she should only receive the income. The daughter, after arriving at the age of 21 years, remained unmarried. It was held that she was entitled to payment of the property. As the absolute ownership of this share is in Mrs. Shrigley, and she has therefore an absolute power of disposition, she is also entitled to the immediate possession of the fund." See also *Vaughan* v. *Wise,* 152 N. C. 31, 67 S. E. 33; *Keating* v. *McAdoo,* 180 Pa. St. 5, 36 Atl. 18; *Bank of Charleston* v. *Dowling,* 52 S. C. 345, 29 S. E. 78; *Wilmoth* v. *Wilmoth,* 34 W. Va. 426, 12 S. E. 731.

The law favors the early vesting of estates, and, if a will is susceptible of a double construction, by one of which the estate becomes vested and by the other the vesting is postponed, the first construction will be adopted, even though it might have been the intention of

the testator to limit its present enjoyment where that intention, if executed, would overthrow a legal principle. So in this case, it having been seen that by paragraph No. 5 of the will the beneficiaries became vested at the death of the testator in the estate devised, the subsequent attempt to limit its enjoyment must be held void. "The title to property, once given away, cannot be regained by the hand that gave it. Notwithstanding this rule sometimes appears to operate harshly in defeating the probable intention of the testator, which is presumed to be the goal of judicial construction, its observance has been deemed safer than one which, for want of strictness, would be attended in its application with all sorts and shades of doubt and uncertainty."

It is our conclusion that the decree of the trial court was in accordance with the principles herein announced, and it must therefore be affirmed.

NATHAN SPECIAL SCHOOL DISTRICT NO. 4 *v.* BULLOCK SPRINGS SPECIAL SCHOOL DISTRICT NO. 36.

Opinion delivered April 27, 1931.

Tom Kidd, for appellant.

Jas. S. McConnell and *J. M. Jackson,* for appellee.

BUTLER, J. On April 5, 1930, there was a petition filed with the county board of education of Pike County for the consolidation of Nathan Special School District No. 4 with Bullock Springs Special School District No. 36. A short time after the filing of the petition, notices signed by four of the petitioners were posted by the sheriff in the manner provided by law and more than thirty days before May 24, 1930, on which day the hearing of the petition was to be held. The school board made the order of consolidation, from which there was an appeal to the circuit court where the case was heard upon the petition, the remonstrance filed before the county board of education, and the testimony of a number of witnesses. The court found in favor of the remonstrance, from which judgment is this appeal.

It was contended by remonstrants before the county board of education, and before the circuit court on appeal, (1) that no proper notice had been given of the proposed consolidation, in that the notice posted was signed by four only of those who had signed the petition, and that said notice should have been signed by all of the petitioners; (2) that the petition was not signed by a majority of the electors in the territory affected; (3) that the county board of education had no jurisdiction to hear and determine the petition because a part of the territory affected was situated in Howard County.

The trial court properly held that the notice was sufficient and properly given. The only purpose which the notice serves is to inform those interested of the nature and effect of the proceeding and the date upon which it would be submitted for a hearing. Those of the petitioners who sign the notice do so for themselves and all the other signers.

The court did not pass upon the question whether the petitions were signed by a majority of the electors, but ruled that those who signed it might not, after the petition was filed, arbitrarily withdraw their names therefrom.

Act No. 156, Acts 1927, authorized the county board of education of any county to change the boundary lines of school districts within the county, and it was under this act that the petitions were filed and the board acted. Under the provisions of act No. 12 of the Acts of 1929, amending § 8858 of Crawford & Moses' Digest, where it is proposed to consolidate school districts adjoining but lying in more than one county, it is necessary for the board of education of both counties to act by ordering an election. None of the provisions of that act were complied with.

The trial court found the facts to be that Bullock Springs Special School District No. 36 sought to be annexed to Nathan Special, in Pike County, lay partly in Pike County and partly in Howard County, and, since the present proceeding was not attempted to be made in compliance with the provisions of act No. 12 of the Acts of 1929, the order for consolidation was improvidently made and void.

The sole question is whether or not such finding of fact was warranted. It appears from the evidence in the case that Bullock Springs Special School District, as originally formed, lay wholly in Pike County. Prior to 1918 certain patrons in Howard County transferred to the Bullock Springs District in Pike County because the territory in which they lived was not accessible to the school in the district in Howard County. This territory comprised about two sections of land and is called in this controversy "the Howard strip." From time to time controversies arose between Bullock Springs Special School District and the school authorities in Howard County regarding the right of those residing in Howard County strip to send their children to the school in Bullock Springs Special School District, but during all

of the time the children continued to attend the school in that district. In order to compensate the district the authorities in the school district in Howard County, in which the children resided, paid to the Bullock Springs Special School District certain sums of money, and at other times the property in the Howard County strip was assessed as in Bullock Springs Special School District and the taxes paid to the credit of that district. It is certain that the patrons in the Howard County strip transferred to Bullock Springs Special School District, but it is not clear just what other proceedings were had. However, it is apparent that the situation was not altogether satisfactory, and about the year 1920, or a year or two later, there was an attempt made to detach the Howard County strip from the School District in Howard County and to consolidate it with Bullock Springs Special School District. A petition was circulated in Howard County in the territory affected and presented to the school board of that county, and a like petition was also circulated in Pike County and presented to the school board of that county.

There is no evidence that the school boards of either county took any formal action on the petitions or made any order with respect thereto. It seems that on the advice of one of the prominent citizens the patrons residing in the Howard County strip sent their children to school and paid their taxes in Bullock Springs Special School District and said nothing further about their differences. This continued until the time of the filing of the petition in this proceeding, one or more of the electors in the Howard County strip being elected on the school board of Bullock Springs Special School District and taking part in the management of the school affairs.

From these facts the learned trial judge concluded that "the territory known as the 'Howard County strip' and the Bullock Springs Special School District No. 36 were formed into a special school district and recognized as such by the school authorities of both counties. The

proceedings under which the district was formed are irregular, but these irregularities were cured by act No. 156 of the Acts of 1927," and he cites the case of *Allen* v. *Harmony Grove Consolidated School District No. 19,* 175 Ark. 212, 298 S. W. 997, in support of the conclusion reached. It is very evident that for all practical purposes the Howard County strip was treated as a part of Bullock Springs Special School District, but it was not annexed or consolidated therewith, for, as we have seen, there was never any order made by the school board of either county to that effect. Therefore, there was no act or proceeding done or had by said county boards to be ratified and rendered valid by act No. 156 of the Acts of 1927. That part of the act relevant to the question is as follows: "Any and all acts and proceedings heretofore done and had by the county boards of education are hereby ratified and declared valid."

In *Allen* v. *Harmony Grove, supra,* the county board of education made an order consolidating two certain districts, and this court held that this order was erroneously made for certain reasons given in the opinion, but that the effect of that part of act No. 156 quoted above was to render valid the irregular order made. In the instant case, however, there was no order made, and consequently there was nothing to render valid. Therefore all the territory of Bullock Special and of Nathan Special is situated in Pike County, and the board of education of said county was authorized to make the order annexing the two districts, and the order made must be upheld, if a majority of the qualified electors within the territory affected signed the petitions. The judgment of the court below must therefore be reversed, and the cause remanded for a determination of the question.

We deem it proper in this connection to say that the action of the trial court in refusing to allow certain signers of the consolidation petition to have their names removed from the petition was correct. The petition

had already been filed and something more than a mere change of mind would be necessary before they would be permitted to withdraw their names. Before the filing of a petition, a signer would be privileged to have his name taken from the petition as a matter of right, but after the filing of the petition this could be done only where the signature had been procured by some improper method by which the signer was deceived and a fraud perpetrated upon him. *Williams* v. *Citizens,* 40 Ark. 290; *McCullough* v. *Blackwell,* 51 Ark. 164, 10 S. W. 259; *Bordwell* v. *Dills,* 70 Ark. 175, 66 S. W. 646. Thus stood the law at the time of this proceeding.

For the error indicated the judgment is reversed, and the cause remanded for further proceedings in conformity to law and not inconsistent with this opinion.

MARKET PRODUCE COMPANY *v.* HOLLAND.

Opinion delivered May 4, 1931.

R. S. Dunn, for appellant.

Williams & Williams, for appellee.

SMITH, J. This litigation arose out of the sale of twenty-five cases of eggs to appellant by appellee, which were delivered at Mansfield, Arkansas, and carried by appellant therefrom in a truck to Shreveport, Louisiana, a distance of 230 miles. This trip was made on a very hot day, over a road in which there were several detours, and when the eggs reached Shreveport and were there inspected many of them were in bad condition. When appellant discovered the unsalable condition of many of

the eggs, he called appellee over the long distance telephone, and the parties discussed the condition of the eggs, but they differ as to the settlement arrived at in their conversation over the telephone.

At the trial from which this appeal comes, appellee testified that the eggs were in good condition when delivered at Mansfield, while appellant testified that the condition of the eggs when they reached Shreveport was such as to demonstrate that their condition was bad when they were delivered at Mansfield. This issue of fact was submitted to the jury and is concluded by the jury's verdict.

The eggs were sold at $5.75 per case, which made the contract price for the entire 25 cases $143.75, and suit was brought for this amount, less a credit of $66.26, and from a judgment for that amount is this appeal.

After the telephone conversation, and pursuant to it, as appellant contends, a statement of the condition of the eggs, as disclosed by this inspection, was prepared, which reads as follows:

"237 Doz. No. 1 eggs at $5.75 per case	$45.42
193 Doz. No. 2 eggs at $3.25 per case	20.84
318 Doz. Rotts	.....
Total	$66.26"

This statement was attached to a check, upon the upper left-hand corner of which this notation was printed, in small type:

> "This check is in settlement of the following account, if incorrect please return without alteration."

Appellee, plaintiff below, testified that he did not read this notation, but he did not deny knowing that the check had been tendered in full settlement of the account for the eggs.

After receiving this statement, with the check attached, appellee sent appellant a telegram reading as follows:

"I am returning you check and drafting in full as per agreement, letter following."

But appellee did not return the check, as the telegram stated. On the contrary, he consulted his attorney, who advised him to cash the check and sue for the balance due on the eggs, and this he did. This advice was upon the assumption that appellee had delivered the eggs of the quality contracted for at Mansfield, and that there was no *bona fide* controversy as to the amount due.

But there was a controversy about the amount due, and, while the verdict of the jury reflects that appellant was wrong in its contention, the fact remains that there was a controversy. The telephone conversation, the telegram, and the fact that appellee advised with his attorney before cashing the check, are conclusive of that fact.

We have therefore the case of a party who contends that he owed a certain amount, and no more, and who furnished a statement of the account owing to the other party in accordance with his contention, and, in satisfaction of this disputed account, attached thereto a check as payment in full. After wiring appellant that the check would not be accepted as payment, appellee cashed it and gave credit for the amount thereof on the account as he contended it should be stated. This he could not do. He had the option of accepting the check as tendered, or of returning it as he stated in his telegram that he had done, and when, under these circumstances, the check was cashed and its proceeds appropriated, appellee estopped himself from denying that the account had been paid in full.

Our leading case on the effect of the acceptance of a sum less than the amount claimed in settlement of a disputed account is that of *Barham* v. *Bank of Delight*, 94 Ark. 158, 126 S. W. 394, 27 L. R. A. (N. S.) 439, where it was said: "It is true that, in order to constitute an accord and satisfaction, it is necessary that the offer of the payment should be made by one party in full satisfaction of the demand, and should be accepted as such by the other. But when the claim is disputed and unliquidated,

and a less amount than is demanded is offered in full payment, the question as to whether the creditor in such case does so agree to accept the amount offered in full satisfaction of his demand is a mixed question of law and fact. If the offer or tender is accompanied by declarations and acts so as to amount to a condition that, if the creditor accepts the amount offered, it must be in satisfaction of his demand, and the creditor understands therefrom that, if he takes it subject to that condition, then an acceptance by the creditor will estop him from denying that he has agreed to accept the amount in full payment of his demand. His action in accepting the tender under such conditions will speak, and his words of protest only will not avail him."

The doctrine of that case has been reaffirmed and followed in numerous subsequent cases. *Barham* v. *Kizzia,* 100 Ark. 251, 140 S. W. 6; *Cunningham* v. *Rauch-Darragh,* 98 Ark. 269, 135 S. W. 831; *Emerson* v. *Stevens Grocer Co.,* 95 Ark. 421, 130 S. W. 541; *Pekin Cooperage Co.* v. *Gibbs,* 114 Ark. 559, 170 S. W. 574; *Longstreth* v. *Halter,* 122 Ark. 212, 183 S. W. 177; *Mosaic Templars* v. *Austin,* 126 Ark. 327, 190 S. W. 571; *O'Leary* v. *Keith,* 134 Ark. 36, 250 S. W. 518; *Beeson* v. *Brewer,* 158 Ark. 512, 250 S. W. 518; *American Ins. Union* v. *Wilson,* 172 Ark. 841, 291 S. W. 417.

We conclude therefore that under the undisputed evidence in this case the verdict should have been directed in appellant's favor, and for the error in not so doing the judgment in appellee's favor will be reversed, and the cause dismissed. It is so ordered.

KERBY *v.* FEILD.

Opinion delivered April 6, 1931.

Carmichael & Hendricks and *R. P. Taylor,* for appellant.

J. A. Watkins, for appellee.

HART, C. J. Appellant prosecutes this appeal to reverse a decree of the chancery court refusing to declare

certain deeds, absolute in form, to be mortgages, and to allow him to redeem from same, and to declare certain tracts of said real estate to be held in trust by appellee for appellant; and also to reverse a decree settling an account between the parties extending over several years.

Appellant became contractor for a road improvement district in Saline County, Arkansas, and appellee became surety on his bond. They had litigation with the road district for the collection of certificates of indebtedness issued by said road district to appellant, which extended over a period of several years. The association between the parties led to the transactions involved in this suit.

A master was appointed to state an account between the parties. Voluminous testimony was taken on both sides, and it would unduly extend the opinion to set it out *in extenso*. For the sake of brevity and of clarity, we shall follow the lines of the brief of appellant and discuss the several transactions separately and shall only set out the substance of the evidence on each point as it impressed us after a careful consideration of the whole matter. Three tracts of real estate are involved in the chancery suit which are termed, respectively, the Cabot farm, the Ferndale Apartments, and the McAlmont place. On the accounting branch of the case, the principal items relate to the road certificates assigned by appellant to appellee, the attorney's fees alleged to be due from appellee to appellant, and charges against appellant for livestock on the Cabot farm.

According to the allegations of the complaint of appellant, in December, 1922, he owed C. W. Watson and the Union Trust Company something over $6,000, on the purchase price of 400 acres of land in Lonoke County, Arkansas. On the 31st day of January, 1922, C. W. Watson and J. P. Kerby executed an agreement relating to this tract of land. The agreement recited that it was conditioned on the setting aside of the order of sale of a bank in St. Louis against Watson and Kerby and the reinstatement of the loan to the bank secured by a mort-

gage on the land. Kerby agreed to give a warranty deed to Watson to the land, and Watson agreed to give Kerby an option to repurchase at any time on or before December 15, 1922, upon the conditions set out in the agreement. The instrument was duly signed and acknowledged on the 31st day of January, 1922. Kerby failed to comply with the terms of the agreement and made a verbal agreement with Watson and Feild for the execution of a deed by the former to the latter which was to be considered as a mortgage for the security of the indebtedness of Kerby. According to the evidence given by Kerby, the rents on the place were worth $1,000 per year. Kerby considered his interest in the farm worth $15,000. Kerby considered that he had complied with the condition of the contract and redeemed the property when he persuaded Feild to pay his indebtedness to Watson and allowed him to receive an absolute deed from Watson. There was a verbal understanding at the time of the execution of the deed from Watson to Feild on December 8, 1922, that Kerby should be allowed to repurchase the land upon the payment of the indebtedness to Watson which had been paid by Feild. Feild was his client, and had financed several deals for him, and Kerby, on that account, had absolute confidence in him. He kept the deed in his possession and never had it recorded. Feild never demanded possession of the deed until about a year ago. Other witnesses testified that at various times they had heard Feild make a statement about Kerby having an interest in the farm.

O. B. Feild was a witness for himself. According to his testimony, Kerby had no interest in the Cabot farm. Kerby interested him in the purchase of the farm from Watson, and it was understood that the deed should be executed from Watson to Feild because Kerby was not able to carry out his contract with Watson. Kerby did not withhold the deed from Watson to Feild from record because he had any interest in the property. Kerby told Feild that he would have the deed recorded, and Feild supposed that he had done so until the present

litigation came up. The Cabot farm was in road district litigation and was heavily assessed for betterments. The taxes, including the betterments, amounted to more than the crops raised on the place were worth.

According to the testimony of C. W. Watson, he conveyed the Cabot farm to Kerby in 1918 or 1919. Early in 1922 he learned that the land was delinquent for taxes, and also that Kerby had failed to pay an installment of interest due to a bank in St. Louis, and that a foreclosure suit was imminent. Watson paid all the taxes, rents, and interest due on the mortgage on the land with the understanding that Kerby would reconvey the land to him. At the same time, he signed a written agreement permitting Kerby to redeem the land, which he failed to do. After Kerby failed to redeem the land, he interested Feild in the matter; and the latter took over all the indebtedness in consideration that Watson should execute a deed to Feild or Kerby, but he recollects that Feild became the owner and was to receive the deed.

Counsel for appellant rely on the case of *Dicken* v. *Simpson,* 117 Ark. 304, 174 S. W. 1154, where it was held that when a deed not absolute on its face and a contract, drawn contemporaneously, when construed together, do not show a sale, the proof, in order to show that a mortgage was intended, need not be as clear and unequivocal as when the deed is absolute on its face. We do not think that case is applicable.

It is not disputed that Watson executed a written contract whereby Kerby was allowed to repurchase or redeem the land by the payment of the indebtedness due on it to Watson in December, 1922.

According to the testimony of Kerby he failed to carry out his contract, and he then entered into a verbal contract whereby Watson was to execute a deed to the land to Feild, and that Feild entered into a verbal agreement with Kerby to allow him to redeem or to repurchase the land upon the payment to Feild of the amount of the indebtedness which Feild had assumed and paid to Watson for Kerby. Appellee testified to the contrary.

Pursuant to this contract, in December, 1922, Watson executed a deed to the land called the Cabot farm to Feild. This calls for an application of the established rule in this State that a court of equity will treat a deed absolute in form as a mortgage when executed for a loan of money or as security for a debt. The court looks beyond the terms of the instrument to the real transaction and will give effect to the actual contract of the parties. The evidence that the instrument was intended only to secure a debt and operate only as a mortgage must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail. Since the equity upon which the court acts arises from the general character of the transaction, any evidence, written or oral, tending to show this, is admissible. *Hays* v. *Emerson,* 75 Ark. 554, 87 S. W. 1027; *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023; *Nail* v. *Kirby,* 162 Ark. 140, 257 S. W. 735; *Matthews* v. *Stevens,* 163 Ark. 157, 259 S. W. 736; *Bolden* v. *Grayson,* 167 Ark. 180, 266 S. W. 975; and *Bailey* v. *Frank,* 170 Ark. 610, 280 S. W. 663.

Tested by this rule, which is well settled here as elsewhere, we do not think that appellant has established his case with that clear, unequivocal, and convincing testimony that the law requires. Kerby was given every opportunity by Watson to redeem the land before it was conveyed to Feild. It seems that Feild only became interested in the land because of his association with Kerby in other matters, and it does not appear that Kerby ever had or offered to pay him what the undisputed evidence shows that Feild had paid out on the land. Therefore, we think the chancellor was justified in holding against Kerby on what is called the Cabot farm.

The complaint of appellant alleges that on May 24, 1923, he caused to be transferred to Feild three lots in Ferndale Addition to Little Rock, worth $10,000, which were encumbered to the amount of $2,400. The complaint alleges that said property was to be held in trust

for appellant, and that he had the beneficial ownership in it. Feild admitted that the property was conveyed to him, but denied that it was of the value claimed by appellant. He alleges that the revenue of the property has not been sufficient to pay taxes, interest, insurance and upkeep. Appellee further alleges that, if appellant will pay the amount of money which he has expended on the property, he is ready and willing to reconvey it to him.

According to the testimony of Kerby, his equity in the property is worth $7,500. There was an indebtedness of $2,400 against the property, and Feild took over the property for Kerby and borrowed $2,500 to pay on the purchase price. Kerby later made payments on the indebtedness which reduced it to $1,700. He is corroborated by the testimony of George Spencer. The latter testified that he understood at the time the property was conveyed to Feild that he was taking the property over for Kerby. He knew that Kerby and Feild had been closely associated in business for several years.

According to the testimony of Feild, he took over the property for about $2,400 and put out $900 in repairs. He borrowed $2,500 on it. There was no understanding, when he bought the property, that he was buying it for Kerby; and Kerby had never offered to pay him any money that he had put into it. He was solicited to buy the property for a whole year. Spencer had a mortgage on the property; it was a losing proposition. The holders of the mortgage indebtedness had foreclosed their liens on the property.

In order to constitute a resulting trust, the purchase money or a specified part of it must have been paid by another or secured by another at the same time, or previously to the purchase, and must be a part of the transaction. In other words, the trust results from the original transaction at the time it takes place and at no other time, and it is founded upon the actual payment of money and upon no other ground. *Red Bud Realty Co.* v. *South,* 96 Ark. 281, 131 S. W. 340; and *Reeves* v. *Reeves,* 165

Ark. 505, 264 S. W. 979. This rule is so well settled in this State that no further citation of authorities to support it or reasons for its adoption need be discussed.

In the application of it to the facts of this case, it cannot be said that the chancellor erred in holding in favor of appellee.

The testimony to establish a resulting trust must be clear, satisfactory, and convincing. *Stacy* v. *Stacy,* 175 Ark. 763, 300 S. W. 437. There was no part of the purchase money of the Ferndale Apartments paid by appellant before or at the time of the conveyance to appellee. Appellee offered to convey the property to appellant at any time that he would reimburse him for the amount paid for it. This, together with the other circumstances attending the transaction, tended to show that appellee gave full value for it. At any rate, appellant has not offered to comply with the terms upon which he might repurchase the property. No useful purpose would be served by decreeing that the beneficial ownership was in appellant when he is refusing to carry out the terms upon which he claims the beneficial ownership. In other words, he could in no event have the legal title vested in him without reimbursing appellee for the amount paid out for appellant by him in the purchase of the Ferndale Apartments.

The complaint of appellant alleges that on April 18, 1924, he purchased from W. B. Smith certain lands in Pulaski County, known as the McAlmont place, which Feild was to assist in buying. Appellant alleges that the wife of appellee Feild holds this tract of land in trust for appellant. Appellee alleges that he was persuaded by appellant to execute a bond for the purchase money of this tract of land at a foreclosure sale, and that appellant was unable to pay the purchase price. On this account the commissioner's deed was executed to the wife of appellee, and full value was paid for the land. Appellee alleges that he paid $16,000 for the McAlmont place, and that appellant has no interest therein.

According to the testimony of appellant, his equity in the place is worth $4,000. A mortgage was foreclosed on the property which was bid in by the son of appellant. Feild signed the purchase money bond. Later, the title was taken in the name of wife of appellee, and appellee agreed to hold the same in trust for appellant. They had an understanding that the land should be held in trust for appellant. This agreement was a verbal one.

According to the evidence for appellee, the purchase of the McAlmont place in the name of his wife was not for the benefit of appellant. The purchase price has been paid, and appellant has no interest in it. Appellant's son bid in the property at the foreclosure sale, and appellee signed his bond for the purchase money. Appellant and his son were unable to pay the purchase money, and appellee took over the property.

The chancellor found this issue in favor of appellee; and, under the rule announced above, it cannot be said that he erred in so doing. In no sense can it be said that a resulting trust was established by appellant by clear, satisfactory, and convincing evidence.

We now come to the accounting between appellant and appellee which may be divided into three general heads, being amounts claimed by appellant from appellee on road certificates; for attorney's fees; and for the value of live stock charged against appellant on account of the Watson mortgage, which appellant claims should have been charged against appellee.

Appellant claims that on December 15, 1923, he turned over to appellee road improvement district certificates of the par value of $10,894.85, which had been issued to him for construction work by a road district in Saline County. Appellant alleges that these certificates were turned over by him to appellee as collateral security for an indebtedness which appellant owed appellee. Appellee averred that appellant had assigned these certificates to him absolutely for the considera-

tion of $7,915.67. The contract of assignment, which was executed in December, 1923, reads as follows:

"I, J. P. Kerby, * * * for and in consideration of $7,915.67 to me in hand paid by O. B. Feild * * * do by these presents sell, assign and convey to the said O. B. Feild, his heirs and assigns, any and all claims against Road Imp. Dist. No. 4, * * * and am transferring all amounts due or to become due from said Road Imp. Dist. No. 4, Saline County, Ark., to said O. B. Feild in order to secure the above amount in cash or loan. In the event that the said O. B. Feild shall, from any cause fail to collect and receive the above amount assigned, then I give him, his agents or assigns, the right to collect for any amount that may hereafter be due me from said Road Imp. Dist., Saline County, or from any other person, corporation or firm."

According to the testimony of J. P. Kerby, on December 15, 1923, he turned over to appellee, as collateral security, road certificates of the par value of $10,894.85. These road certificates had been issued to him for construction work by a road district in Saline County, Arkansas, and were worth par. It was not the intention of the parties to assign the road certificates absolutely, but they were assigned by appellant to appellee as collateral security for an indebtedness owed by the former to the latter. The assignment was made because Feild was trying to negotiate the certificates, and the assignment would enable him to show his right to do so. On April 18, 1924, before the present litigation began, appellant said that he submitted to appellee an account concerning their business transactions in which he charged him with the road warrants at par and that appellee made no objection to any item in the statement.

According to the testimony of appellee, appellant was indebted to him in an amount of something over $14,000. Appellee had signed the bond of appellant on some road construction work in Saline County, and the indebtedness grew out of appellee signing that bond for

appellant. In part settlement of his indebtedness, appellee agreed with appellant to credit him with $7,915.67 for the $10,894.85 in road certificates. Appellee could not dispose of these road certificates or use them as collateral until they were validated by litigation, which was something over two years later. At the time the certificates were assigned by appellant to appellee, the latter had been trying to negotiate them to third parties. The best price offered was seventy-five cents on the dollar with the indorsement of appellee on the certificates. The agreement whereby the certificates were assigned by appellant to appellee was not intended to be as collateral security, but it was intended to be an absolute assignment. Litigation lasting over a course of several years was pending between the road improvement district and appellant as contractor and appellee as surety on his contractor's bond, and the road district certificates were not regarded of much value until this litigation was determined. Under these circumstances, it cannot be said that the finding of the chancellor in favor of appellee was against the weight of the evidence.

The oral testimony of the parties did not fall under the ban of the well known rule that parol evidence is not allowed to contradict or vary a written instrument. This rule is only applied when the parol evidence tends to vary or contradict the language used in the instrument. *Pugh* v. *Davis*, 96 U. S. 332. Here the evidence did not tend to vary the language of the written assignment, but only tended to explain the terms of it which were ambiguous. Therefore we hold that there was no reversible error on the part of the chancellor in finding for appellee on this item.

It is next insisted that the court erred in not allowing the appellant attorney's fees in the sum of $8,400.

According to the testimony of appellant, he served appellee as attorney from May, 1920. to July, 1927, and his services were worth $1,200 a year. He testified that appellee for the consideration of $200 had signed his

bond as contractor for the Saline County road district. There were twenty-one cases in the municipal court at Little Rock and two cases in the circuit court growing out of the fact that appellee had signed the bond, and appellant appeared in his defense in all the cases. He did other work in the road litigation which he testified to in detail. Appellant also testified as to other suits in which he appeared for appellee. The testimony of several attorneys was also adduced by appellant in which they stated that they had offices near that of appellant and that, judging from the number of times they saw appellee going in and coming out of appellant's office, his services were well worth $1,200 a year. Appellee was a witness for himself. According to his testimony, he never received any compensation for signing the contractor's bond for appellant, but that he soon became involved in litigation with the road district because he had signed the contractor's bond for appellant. His visits to the offices of appellant were almost daily, but all of them were in the interest of the road litigation which was for the benefit of appellant and incidentally to him because he was surety on the contractor's bond of appellant. He testified that the other legal services performed by appellant for him were in small matters and were of but little value. On this branch of the case, the court allowed attorney's fees to appellant in the sum of $3,545.66. We do not think that it can be said that the chancellor's finding in this respect was against the weight of the evidence. It is true that several attorneys testified that, considering the frequent and almost daily visits of appellee to office of appellant, his services were worth the sum of $1,200 a year, but, when we consider that perhaps all of these visits were in the interest of appellant as principal and appellee merely as surety on his contractor's bond, we do not think that the court erred in allowing appellant as attorney's fees $3,545.66, instead of $8,400, as claimed by him.

It is next insisted that the court erred in charging appellant in stating the account between him and appel-

lee with the value of certain live stock in a chattel mortgage given by appellant to Watson. Here again the testimony of the parties is in irreconcilable conflict. The undisputed evidence shows that there was a mortgage given by appellant to Watson on certain personal property which was on the Cabot farm. According to the testimony of appellant, this personal property was not included in the deed from Watson to appellee and was not to be accounted for by him. On the other hand, according to the testimony of Watson, he never released his mortgage on the personal property on the Cabot farm, and it was intended by him that the personal property included in the mortgage should go to appellant or appellee in the deed to the farm. Watson stated that he did not remember whether he made the deed to appellant or to appellee, but does recollect that the personal property was to be included in the grant of the land. The undisputed evidence shows that the deed was made to appellee, and appellee corroborated the testimony of Watson to the effect that the personal property in the mortgage was to go with the purchase of the land. The chancellor found this issue in favor of appellee, and it can not be said that his finding in this respect is contrary to the preponderance of the evidence.

We have carefully considered the evidence in the case and the findings of the chancellor based upon the exceptions made to the master's report. We are of the opinion that the finding of the chancellor was correct, and the decree will be affirmed.

SELLERS *v.* BOWIE.

Opinion delivered April 6, 1931.

[redacted]

H. G. Wade, for appellant.

Haynie, Parks & Westfall, for appellee.

KIRBY, J. This suit was begun in the justice court for enforcing a landlord's lien for rent against the crop produced by appellant upon certain lands.

The affidavit was made by one H. H. Bowie, who brought the suit as "agent for the Bilcie Yancy estate," and was in form of the affidavit required by the statute in such cases. A bond was given as required for general attachments, and either a general attachment or an order for delivery was issued and levied upon the property. The pleadings at first did not contain the name of appellant, but were later amended to do so. Ed Sellers, appellant, executed a bond to discharge the attachment, agreeing to perform the judgment of the court, with H. H. Wade and A. J. Watts as sureties and retained possession of the cotton. He also filed a motion to quash the writ in the justice court, which later was renewed by him on appeal in the circuit court and overruled. The affidavit was treated as amended before the trial in the justice court changing the agency of the plaintiff H. H. Bowie to show that he was "the agent of the heirs of Dilcie Yancy," rather than of her estate. The death of Bowie was later suggested, and the suit continued in the name of the real parties in interest.

The circuit court rendered judgment against appellant, Sellers, and the bondsmen from which appellant only prosecutes this appeal.

Only two assignments of error are urged for reversal; first that appellees, having failed to file in the first instance the bond required for specific attachments under the landlord's lien statute and not having filed the

affidavit required for the issuance of a general attachment, were entitled to neither a specific nor a general attachment, and that the court erred in not so holding and quashing the writ.

The pleadings and affidavit were so amended as could be and was done to include the name of appellant before the trial. *Rogers* v. *Cooper,* 33 Ark. 406; § 565, Crawford & Moses' Digest. See also *O'Donnell* v. *Magnolia Petroleum Co.,* 163 Ark. 357, 258 S. W. 981; *Hurley* v. *Bryan,* 160 Ark. 277, 254 S. W. 694.

There was a writ issued for enforcement of the lien after bond made, and upon the levy of which the bond to discharge the attachment was given. There is no contention made that the amount sued for and claimed as rent due had been paid or was not due, nor that the order of attachment or writ issued was not properly executed against the property, upon which the lien was sought to be enforced, and it is conceded that the bond to perform the judgment of the court was given, the attachment discharged, and the property upon which the writ had been levied restored to the possession of the appellant.

Upon the execution of this bond the attached property was retained by appellant, and it is not disputed either that the grounds for the attachment did not exist or that the amount claimed to be due, and for which the attachment was issued, was not owed by appellant, as the jury found, and the obligors of the bond became bound to pay the judgment recovered in the action. *Ferguson* v. *Glidewell,* 48 Ark. 195, 28 S. W. 711.

Proper affidavit for attachment against the specific property for enforcement of the lien was made, and there was no levy or attempted levy of the writ made against any other or the general property of appellant, as was done in the case of *Edwards* v. *Cooper,* 28 Ark. 466, which has no application here.

Affirmed.

BURNETT *v.* MODERN WOODMEN OF AMERICA.

Opinion delivered April 20, 1931.

Coulter & Coulter, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

SMITH, J. This cause was tried in the court below upon an agreed statement of facts, and it appears therefrom that the Modern Woodmen of America, a fraternal beneficiary society, organized under the laws of the State of Illinois, issued a benefit certificate to Jud Watson in 1921, payable, upon the death of the insured, to his uncle, R. P. Burnett.

The monthly assessments were regularly paid until April, 1930, in March, 1922, Watson, the insured, left the State and went to Oklahoma, where he was last heard from directly in 1923. The subordinate lodge at Beebe, of which Watson was a member, knew of his disappearance, but accepted assessments and dues from Burnett, the beneficiary, until April, 1930, at which time demand was made upon the insurer for the payment of the face of the benefit certificate. Liability was denied, however, because of § 78 of the by-laws of the insurance order, which provides that no presumption of death shall arise

from disappearance which does not continue for a period equal to the life expectancy of the insured.

The briefs of opposing counsel contain an interesting discussion of the validity of this by-law, it being insisted by the plaintiff that it is void, as being contrary to § 4111, Crawford & Moses' Digest. This section reads as follows: "Any person absenting himself beyond the limits of this State for five years successively shall be presumed to be dead, in any case in which his death may come in question, unless proof be made that he was alive within that time."

We do not decide the question of the validity of the by-law, quoted above, for the reason that the statute, which we have also quoted, does not apply under the facts of this case.

Exhibited with the agreed statement of facts was the correspondence between the plaintiff beneficiary and the insurance order. One of these letters reads as follows:

"Beebe, Ark., 7/30/26

"Mr. Truman:

"Dear Neighbor and Sir: In answer to yours just received in regards to neighbor Jud Watson will say that he lef hear 4 years ago this past March, and that was the last time I have seen or hear of him only through a woman here. She said she heard from him about one year later, and that he was in Tulsa, Oklahoma, and that he was going under the name of Jack Mete. His reason for leaving hear was a woman trouble, and he gave some bad c'ks, not enough to amount to anything, in regard to his war business. He enlisted here with Company B at Beebe, Ark. I can't at this time give you Major, but can later if necessary, Co. B Infantry 153; can't say whather or not he was caring any war insurance, but think he was as the bonas bill was about all he would talk about. Now in my last letter to you I tol you that he had one sister living in England, Arkansas, but I failed to give you her name, her name is Magie Jackson. She gets her mail at England, Arkansas, Rout

1. The last I seen or heard of him was when he lef hear, and he was working for me at that time as delivery boy and helper in store, so any information you can give me in locating him will be appreciated. With kind regards, will close.

"Respectfully,

"R. P. Burnett."

A reply to this letter was written, which reads as follows:

"Warsaw, Illinois, August 2, 1926.

"Mr. R. P. Burnett,

"Beebe, Arkansas.

"Dear Sir:

"Yours of July 30th regarding Jud Watson received. You say that you heard through a woman that she heard from him about one year after he disappeared, which would have been three years ago. That he was then in Tulsa, going under the name of Jack, and I am not able to make out the last name. Is it Metz? Will you please give them the name and address of this woman, or, if she is in Beebe, find out from her how she came to hear from him, whether or not it was by letter or otherwise.

"I enclose an envelope for your reply.

"Yours truly,

"Truman Plantz, General Attorney."

Indorsed upon this reply and as an answer to the questions which it contained was the following notation:

"Answer this woman died about one and one-half years ago, and the reason she come to hear from him he was courting her, and after he left he corresponded with her, and he gived his name as Jack Metz.

"Respectfully,

"R. P. Burnett."

The case of *Wilks* v. *Mutual Aid Union,* 135 Ark. 112, 204 S. W. 599, was one in which the beneficiary in a membership certificate or policy of insurance sought to recover thereunder upon the presumption of death which

§ 4111, Crawford & Moses' Digest, creates in the cases to which it applies. We there said:

"The phraseology of the statute is somewhat ambiguous, but the trial court correctly interpreted its meaning in its instruction No. 2. 'Any person' as used in this statute means any person who is a resident of this State, and who absents himself from his home or residence beyond the limits of the State for a period of five successive years and who has not been heard from by near relatives, friends, or neighbors, those who would naturally make inquiry concerning his whereabouts and who would most likely receive communication from him and be in position to know whether or not he was living. If he has not been heard from by these or others, his death will be presumed unless there is proof to the contrary.

"In view of the nomadic habits of H. M. Wilks, as disclosed by the evidence, it cannot be said as a matter of law that he had anything like a permanent home or residence in this State. It was a question for the jury, under the evidence adduced, as to whether or not H. M. Wilks was a resident of the State in the first place, and in the second place as to whether or not, if a resident, he had been absent from the State for a period of five successive years without being heard from by those who would most likely hear from him."

The statute, as thus construed, applies only to residents of the State, and does not apply to a resident who had ceased to be such at the time of his final disappearance. The purport of the correspondence, set out above, is that the insured had ceased to be a resident of this State and had become a resident of Oklahoma. It was recited that his reason for leaving this State was "a woman trouble," and that "he gave some bad c'ks." These circumstances fully sustain the contention of the insurance order that the insured did not have anything like a permanent home or residence in this State, and that the statute therefore did not apply.

There was therefore no sufficient proof of death, and the cause was properly dismissed, and that judgment must be affirmed, and it is so ordered.

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

Opinion delivered April 20, 1931.

[redacted]

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

Hal L. Norwood, Attorney General, *Pat Mehaffy,* Assistant, *Hugh U. Williamson, Pace & Davis,* and *Tom W. Campbell,* for appellee.

KIRBY, J., (after stating the facts). The statutes providing fees for prosecuting attorneys in misdemeanor cases read as follows:

"Prosecuting attorneys, when present and prosecuting cases, either in person, or by his deputy in justice court:

For each judgment obtained on complaint, information or otherwise, in the name of the State or any county ..... $ 5

For each conviction on indictment, presentment or information for misdemeanor or breach of the peace $10

* * * Prosecuting attorney shall be entitled to the same fees for prosecuting in cases of misdemeanors before justices of the peace as in the circuit court." Section 4571, Crawford & Moses' Digest.

"Upon the affirmance of a judgment on the appeal of the defendant, an attorney's fee of twenty dollars to be paid to the prosecuting attorney shall be taxed as part of the costs of the appeal." Section 3429, Crawford & Moses' Digest.

The statutes also provide for consolidation of causes of action, rules concerning the proceedings therein and the costs to be recovered. Sections 1080-81 and -82, Crawford & Moses' Digest.

It is conceded that the prosecuting attorney is entitled to a fee of $10 in each of the two hundred cases filed in the justice court, although they were consolidated and disposed of at one hearing. It is insisted, however, that on appeal to the circuit court the cases were regularly consolidated, and that the prosecuting attorney, if entitled to any fee for the prosecution at all, was only entitled to a fee of $10 as for the prosecution of one case. The circuit court found, however, that the appeals had been taken and transcripts in each of the 200 cases filed and separately docketed in the circuit court, and the majority is of opinion that within the authority of *Goad* v. *State,* 73 Ark. 458, 84 S. W. 638, the prosecuting attorney was entitled to a fee of $10 for his services in each of such cases there. It is true that in that case the prosecution was begun by the deputy in filing information in

the justice court, but necessarily he was acting as the representative of and for the prosecuting attorney, and the court in affirming that case held that the double fee allowed the prosecuting officers in such cases was designed and operated as a part of the punishment. No error was therefore committed in overruling the motion to retax the costs in the circuit court.

Appellant's contention that the court erred in taxing any but one fee of $20 for the prosecuting attorney upon the affirmance of the judgment upon the appeal of the case to the Supreme Court must be sustained. The cases in the circuit court could be consolidated for trial under the statute, and this was done, as appears from the judgment therein, which recites that the defendant prayed an appeal to the Supreme Court, which was granted, and "this cause having been heard with like causes, all of which are identical with the informations filed in this case, it is by the court further ordered that but one bill of exceptions be prepared, presented and filed herein." In accordance with this direction, but one case was appealed, and one transcript filed in the Supreme Court and one judgment of affirmance upon the appeal made in *St. Louis-San Francisco Railway Co.* v. *State, supra.* The statute only authorized the taxation of one fee of $20 to be paid to the prosecuting attorney as part of the costs upon the affirmance of such judgment on appeal. The statutes have been so construed in the *per curiam* opinion by our own court in *Ashcraft* v. *State,* 141 Ark. 361, 222 S. W. 326, where the prosecuting attorney was held entitled to a single fee upon the affirmance of a judgment in the Supreme Court, and not to a separate fee for each of the convictions in the judgment affirmed.

It is strongly urged that the construction of the statute by the court in said opinion was wrong, and the case should be overruled; but, as said there, the prosecuting attorney is not required to follow up appeals in criminal cases and services performed in that regard are

voluntary, the Attorney General alone being required to represent the State in causes pending in the Supreme Court; and the statute only allows the prosecuting attorneys a docket fee on each judgment of affirmance of misdemeanor cases in the Supreme Court not for services performed, however, since none are required of that officer.

We do not review cases cited from other jurisdictions construing similar statutes, our own court having construed the statute under consideration, without regard to whether another or different construction should have been placed upon it, and we decline to reconsider the matter, finding no sufficient justification therefor.

It follows that the court erred in not granting the motion to retax the costs to the allowance of only one fee of $20 for the prosecuting attorney for the judgment of affirmance in the Supreme Court, and its erroneous judgment allowing a fee of $20 in 200 cases must be modified accordingly and as modified will be affirmed. It is so ordered.

Justices HUMPHREYS, MEHAFFY and MCHANEY dissent as to modification.

ARKANSAS TAX COMMISSION *v.* CRITTENDEN COUNTY.

Opinion delivered April 27, 1931.

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

A. B. Shafer, for appellee.

HART, C. J., (after stating the facts). This appeal involves the correctness of the assessment made by the Arkansas Tax Commission of the railroad of the St. Louis-San Francisco Railway Company, which is an interstate railroad, having a part of its line in the State of Arkansas. Prior to the year 1929, said railway company used a bridge crossing the Mississippi River from the Arkansas side to Memphis, belonging to the Kansas City & Memphis Railway & Bridge Company. While belonging to said bridge company, the Arkansas Tax Commission assessed the taxes to said bridge company. On September 1, 1929, said bridge company having sold the bridge to said St. Louis-San Francisco Railway Company, the Arkansas Tax Commission assessed it as a part of the line of railroad of said railway company, and there has been no separate assessment of the bridge to said bridge company or to said railway company. The question in the case is whether said bridge across the Mississippi River can be separated from the balance of the line of railway of the St. Louis-San Francisco Railway Company and separately assessed for the purpose of taxation and subjected to a different tax rate. In making the assessment of the property of said railway company, the Arkansas Tax Commission followed what it conceived to be the requirements of act 129 of the Acts of 1927, and adopted the general rule of assessing railroad property as a unit substantially as it had heretofore been followed in this State.

Section 5, article 16, of the Constitution of 1874 provides that the value of property for taxation shall be ascertained in such manner as the General Assembly shall direct, making the assessment equal and uniform. By article 17, § 1, of the Constitution, all railroads are declared to be public highways, but the public are entitled to use them upon the condition of paying toll.

The Legislature is not allowed to discriminate between different classes of property in the imposition of taxes. The only discrimination with which it is vested is in the ascertainment of values so as to make the assessment equal and uniform throughout the State. Therefore, the Legislature has the power to classify railroad property as a separate class for purposes of taxation, and this is necessary from the inherent nature of the property. When the entire line of railroad is assessed as a unit, the constitutional requirement of equality and uniformity then presses the burden of taxation upon the whole mass alike, and prevents the possibility of legislative action oppressing one part for the benefit of the rest, or favoring one at the expense of the others. *Little Rock & Fort Smith Ry.* v. *Worthen,* 46 Ark. 312.

In the case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Worthen,* 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374, the court expressly held, that under article 16, § 5, of the Constitution, the Legislature has power to classify property for purposes of taxation and to provide for the valuation of different classes by different methods. It was further held that the separate classification of railway property for taxation and its assessment by an instrumentality different from that employed in the valuation of other property are justified by its peculiar nature and uses. Upon the subject the court said:

"From the peculiar nature of railroad property, its dissimilarity in use and value from the mass of other property, and its continuous extent through different localities, it is commonly regarded by the State that it cannot, in justice to the owners, be as fairly and uniformly valued by the numerous local instrumentalities provided for assessing other property, as by a State board created for the purpose. The industry of the Attorney General has furnished us references to the statutes of a large number of States showing that the practice of assessment of railways as units by State boards is almost universal."

In *Railway* v. *Williams,* 53 Ark. 58, 13 S. W. 796, it was held that, where a bridge corporation owning a railway toll-bridge grants the use thereof for a period of its corporate existence to a railway company, preserving its corporate franchise and the right to contract with other parties for the use of the bridge, the bridge should be assessed by the county assessor as the property of the bridge company, and not by the State Board of Railway Commissioners as the property of the railway company. In that case, however, the court said that bridges which are on the line of the railway and are railway property are to be assessed as an integral part of the railway. The court said that they fall within the exclusive jurisdiction of the State board, and the increased revenue which is derived from the railroad on account of them is allocated to the several counties through which the railroad runs. This comes from the legislative policy of taxing each railroad as a unit. The court recognized that the question depends upon the ownership of the bridge. If it be railway property used in connection with the operation of a railroad, it is then assessable as railroad property.

This rule has been adopted by the Court of Appeals of Kentucky in *Board of Equalization* v. *Louisville & Nashville Rd. Co.,* 139 Ky. 386, 109 S. W. 303, where it was held that, where a railroad owned and maintained a bridge as a part of its railroad system, such bridge was assessable for taxation by the railroad commissioner and not by the local authorities of the county in which it was located. To the same effect see *State of Missouri* v. *La. & Missouri River Rd. Co.,* 196 Mo. 523, 94 S. W. 279; and *Pittsburgh, etc., Ry. Co.* v. *Backus,* 154 U. S. 430, 14 S. Ct. 1114. In the latter case the court said:

"When a road runs through two States, it is, as seen, helpful in determining the value of that part within one State to know the value of the road as a whole. It is not stated in this statute that, when the value of a road running in two states is ascertained, the value of that within the State of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but

only that total amount of stock and indebtedness shall be presented for consideration by the State board. Nevertheless, it is ordinarily true that, when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair. Thus, in State Railroad Tax Cases, [92 U. S.] on page 608, it was said:

" 'It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.' "

It is claimed, however, that this rule has been changed by the act of the Legislature of 1927, referred to above. See Acts of 1927, p. 400. This act created the Arkansas Tax Commission and defined its powers and duties. The act contains thirty-seven sections; and among the numerous regulations set out is one in § 16, which provides that, in the case of all corporations and other associations, the commission shall take into consideration the value of all the property as a unit whether all or only a part of it is in the State.

Section 22 of the act is the particular section relied upon by appellees to change the rule above announced. It reads as follows:

"The commission shall assign or apportion the assessed value of the property of all persons, firms, companies, co-partnerships, associations and corporations, which it is required to assess, in the following manner:

"There shall be deducted from the true market or actual value of the entire property, tangible and intangible, ascertained as in this act provided, the true market or actual value, as ascertained from the information furnished by report, or otherwise, of all real and personal property of such company not used in its business as a public utility, and the remainder shall be treated as the

true market or actual value of all its property, tangible or intangible, actually used or employed in its public utility business.

"The commission shall then ascertain and fix the value of the total utility operating property, tangible and intangible, in this State, by taking such proportion of the true market or actual value of the entire operating property, tangible and intangible, of such company, actually used in its public utility business, as its total lines within and without this State, or as its total receipts or income from operation both within this State bear to its total receipts or income from operation, both within and without this State, or by using such other recognized method, or combination of methods, as will, in the judgment of the commission, result in a just and equitable apportionment to this State of its due proportion of the value of the total utility operating property.

"When the value of the total utility operating property, tangible and intangible, in this State has been determined; or when the property and operations of such company is wholly within this State, there shall be assigned or apportioned to the several counties, towns, school districts and other taxing districts through or in which such company operates the value of all real estate and all tangible personal property which had a fixed situs therein on the first day of January of the current tax year; and the remaining part of the assessment, if any, shall be assigned or apportioned among the several taxing districts in proportion to the value of the tangible property assigned or apportioned thereto. Provided, that the value assigned to rolling stock of street, suburban or interurban railroad, railroad and bus line companies shall be apportioned among the several counties, towns and school districts through or in which such company operates in proportion to the mileage operated therein, and provided further, that the value of the personal property of any express or sleeping car company shall be apportioned among the several counties, towns and school dis-

tricts through or in which such company operates in proportion to the mileage operated therein."

It is earnestly insisted that the latter part of the section, which provides that, when the value of the total utility operating property in this State has been determined, there shall be apportioned to the several counties, towns, school districts and other taxing districts, through or in which such company operates, the value of all real estate and all tangible personal property of a fixed situs. It is claimed that rolling stock is the only element of value apportioned upon a mileage basis, and that the bridge has a fixed situs and should be apportioned to the school district and other taxing districts in which it is situated. They say that it possesses a local value easily determinable; and that, by the method of assessment used by the Tax Commission, they have refused to apportion such value to the taxing district where the bridge is located.

We do not agree with this contention. In the first place, statutes are to be construed with reference to the public policy they are designed to accomplish. *Harris* v. *State,* 169 Ark. 627, 276 S. W. 361; *Miller* v. *Tatum,* 170 Ark. 152, 279 S. W. 1002; and *Turner* v. *Ederington,* 170 Ark. 1155, 282 S. W. 1000. In the last case cited, it was said that the intention of a statute is to be collected either from the words, the context, the subject-matter, the effects and consequences, or from the spirit and reason of the law, and from other acts *in pari materia.*

This is but another way of expressing a well-settled rule of statutory construction which leads to the same conclusion; and that is, that uncertain or ambiguous words of a statute should always be construed so as, if possible, to produce a reasonable and just result. *State ex rel.* v. *Louisiana & M. R. R. Co.,* 215 Mo. 479, 114 S. W. 956.

Under our Constitution and laws, a railroad company could not acquire a bridge except for railroad use. When a bridge was purchased by the railroad company and used by it for the purpose of operating its trains on the tracks laid across the bridge, then the bridge became

a part of the line of the railroad, and was to be assessed according to the mileage rule. The value of the bridge would be taken into consideration by the Arkansas Tax Commission as one of the elements which go to make up the total market value of the railroad; and when the total value is divided by the number of miles the railroad is in length, the value of the bridge is equally distributed along the entire length of the railroad. Then, when the railroad company pays its taxes, each county and taxing district through which it passes receives its proportional part of the taxes, instead of allocating the entire taxes assessed against it to the county in which the bridge is located. It is apparent that, if the bridge is to be only used for railroad purposes, it has no intrinsic or commercial value apart from being used as so much of the line of railroad. When the bridge was purchased by the railroad company, it became an integral part of the railroad, and, as such, should be assessed as a part of it and not as a separate and independent structure by the local authorities. It is manifest from the statute that it was the intention of the lawmakers to classify railroads separately for the purposes of taxation and to have them assessed by the Arkansas Tax Commission, instead of by the local authorities in the counties through which the line of railroad extends in this State. No equality or uniformity in taxation, such as is required by our Constitution, would be obtained if the bridges across navigable streams are to be assessed by the local authorities or if the taxes are to be apportioned by them instead of being valued as a unit by the Arkansas Tax Commission and apportioned by it according to the mileage in the various counties through which the railroad extends.

We are of the opinion that the statute, when construed as a whole, intended that the property of railroads reasonably necessary to be used, and in fact used, in the performance of its duty to the public, as a public carrier, is an entirety, and that bridges which become an integral part of the railway are not to be separated for the purpose of taxation. Therefore we think that the Arkansas

Tax Commission properly assessed the railroad as a unit, and that this included the bridge in question across the Mississippi River, and that the Commission also properly apportioned the taxes according to mileage, including the valuation of the bridge as an integral part of the railroad.

It follows that the court erred in overruling the demurrer to the petition. For that error the judgment will be reversed, and the cause will be remanded with directions to the court to sustain the demurrer and for further proceedings according to law and not inconsistent with this opinion.

HOME BUILDING & SAVINGS ASSOCIATION *v.* SHOTWELL.

Opinion delivered April 27, 1931.

Hardin & Barton, for appellant.

A. M. Dobbs and *Pryor & Pryor,* for appellee.

HART, C. J., (after stating the facts). When a *bona fide* sale of land is intended, the vendor may charge a much higher price for his property on a credit than he would have done for cash for the element of lending and borrowing money is absent from the transaction; but if the sale is not *bona fide,* and there is an intent under its form, by excess of price, to receive more than lawful interest, the transaction will be usurious. *Heytle* v. *Logan,* 1 A. K. Marsh (Ky.) 529; *Quackenbos* v. *Sayer,* 62 N. Y. 344; *Barr* v. *Collier,* 54 Ala. 39; *Collier* v. *Barr,* 64 Ala. 543; and *Ford* v. *Hancock,* 36 Ark. 248. Our later decision have adhered to this rule and have been applied according to the facts in the particular case. *Tillar* v. *Cleveland,* 47 Ark. 287, 1 S. W. 516; *Ellenbogen* v. *Griffey,*

55 Ark. 268, 18 S. W. 126; *Blake Bros.* v. *Askew & Brummett,* 112 Ark. 514, 166 S. W. 965; *Smith* v. *Kauffman,* 145 Ark. 548, 224 S. W. 978; and *Edwards* v. *Wiley,* 150 Ark. 480, 235 S. W. 54.

In this connection, it may be stated that parol evidence is admissible to show that the contract, although legal upon its face, was in fact an illegal agreement or cover for usury. Otherwise the very purpose of the law in forbidding the taking of usury under any kind of trick would be defeated. *Houghton* v. *Burden,* 228 U. S. 161, 33 S. Ct. 491; *Tillar* v. *Cleveland,* 47 Ark. 291, 1 S. W. 516; and *Roe* v. *Kiser,* 62 Ark. 92, 34 S. W. 534, 54 Am.

In *Ellenbogen* v. *Griffey,* 55 Ark. 268, 18 S. W. 126, the court, speaking through Mr. Justice Hemingway, said:

"In a *bona fide* sale of land or chattels usury cannot enter, for the element of lending and borrowing is absent; but, if the sale is a mere device to cover a loan and exact excessive interest, it will not be protected by its false cover. *Davis* v. *Garr,* [6 N. Y. 124] 55 Am. Dec. 387, 393, and cases cited; *Struthers* v. *Drexel,* 122 U. S. 487 [7 S. Ct. 1293]. In the cases in this court relied upon by appellee, the transactions were found to be in fact loans of money, put in the form of sales to evade the statutes against usury; and the court held that they were usurious loans, and that the false color given them could not defeat the statute. *Ford* v. *Hancock,* 36 Ark. 248; *Driver* v. *Driver,* 46 Ark. 50; *Tillar* v. *Cleveland,* 47 Ark. 291, [1 S. W. 516]."

This court has uniformly recognized that borrowing and lending money is indispensable to constitute usury; but that, no matter what the form of the contract may be, no device or shift intended to evade the usury laws will be upheld. The court has also recognized that, while an exhorbitant price will not of itself constitute usury, yet it is a circumstance to be considered in determining whether the transaction was a *bona fide* sale of property or was intended for a cover for usury. It has been frequently judicially stated that one of the most

usual forms of usury is a pretended sale of goods or other property.

It seems to us that the transaction in question was a buying of land at an exhorbitant price to obtain a loan, and was therefore usurious. Shotwell wished to buy the lots in controversy; and Norman, who was the agent of his father-in-law, the owner of the lots, was authorized to sell them for $650 and was willing to sell them for that price. Webb represented a real estate loan company and arranged that Shotwell should execute a note to his company for $1,200 before he would lend him the money. Shotwell never got any of the $1,200, and it was not intended that he should get any of it. The plaintiff in this case and the company represented by Webb occupy the same offices and had the same president. It was never intended that the plaintiff should furnish any one $1,200. They only agreed to furnish to Norman, the agent of the owner of the property, $650, which was his price for it. $500 of this was paid in cash, and $150 of it was the purchase price of a second-hand automobile which was owned by the Commercial Loan & Investment Company, whose agent Webb was.

As was stated in the case of *Jones* v. *Phillips,* 135 Ark. 578, 206 S. W. 40, usury laws are enacted to protect the weak and necessitous from oppression; and the lender of money, by no device or deception, is allowed to deceive the borrower so as to conceal the fact that he is taking usury. When the real transaction is a loan of money, and the lender attempts to receive from the borrower more than the amount actually advanced, no matter under what pretext, it contravenes the policy of our usury law, and such contract can not be enforced. As aptly said in *Heytle* v. *Logan,* 1 A. K. Marsh (Ky.) 529: "In the language of Lord Mansfield on a like occasion, it may be truly said, 'it is impossible to wink so hard as not to see,' what was expected by this contract—that its end was more interest on the money advanced than the law authorized."

Under the facts stated in the record, we are of the opinion that the chancellor was justified in finding that the real transaction was the borrowing and lending of money, and that the contract contemplated a greater charge of interest than allowed by law, and that it was a mere device or shift to avoid our usury laws. It follows that the decree will be affirmed.

TAYLOR *v.* CORNING BANK & TRUST COMPANY.

Opinion delivered April 27, 1931.

Sam Rorex and *Nat R. Hughes,* for appellant.

Oliver & Oliver, Edward B. Downie and *Shields M. Goodwin,* for appellee.

MEHAFFY, J. This action was begun in the Pulaski Chancery Court by the Corning Bank & Trust Company against Walter E. Taylor, Bank Commissioner in charge of the American Exchange Trust Company, an insolvent banking institution. The appellee asked that its claim against the American Exchange Trust Company be decreed to be a prior claim to the extent of $32,365.70 and paid in full with interest at two per cent., and that the balance of petitioner's claim in the sum of $11,667.30 be ordered to be allowed as a general claim.

The American Exchange Trust Company became insolvent on November 17, 1930, and five days thereafter Walter E. Taylor, State Bank Commissioner, took charge of its affairs. Corning Bank & Trust Company became insolvent about the same time, and its assets were later purchased from the Bank Commissioner by appellee, the Corning Bank & Trust Company.

Corning Bank & Trust Company had been a customer of the American Exchange Trust Company for a number of years. Between November 1, 1930, and November 5, 1930, the Corning Bank & Trust Company sent to the American Exchange Trust Company certain drafts amounting to approximately $32,000. These drafts with bills of lading attached were sent for collection and credit, and the American Exchange Trust Company credited the Corning Bank & Trust Company with the amount "subject to final payment" and forwarded the drafts to South Carolina and Alabama for collection.

On the 7th of November the Corning Bank & Trust Company wrote a letter to the American Exchange Trust Company as follows:

"November 7th, 1930

"American Exchange Trust Co.,
"Little Rock, Ark.

"Attention Mr. J. J. McGrath.

"Gentlemen: All drafts with bills of lading attached that are now in transit and all that are forwarded to your bank in the future are for collection only. Kindly advise us by wire as fast as these items are paid that we may advise you disposition of the funds.

"Yours very truly,

"Cashier."

The American Exchange Trust Company, when it received the drafts, gave credit to the Corning Bank & Trust Company subject to final payment and immediately sent the drafts to other banks for collection and credit. All drafts were paid to the collecting banks, and bills of lading surrendered before the failure of the American Bank. The drafts in question were drafts of the Clay County Cotton Company upon W. A. Handley Manufacturing Company of Roanoke, Alabama, and Cooper & Griffin of Greenville, South Carolina.

The appellant answered and denied that any part of appellee's claim should be decreed as a prior or preferred claim and alleged that appellee had only a general claim against the American Exchange Trust Company. All these claims were collected by the collecting banks and were afterwards received by the American Exchange Trust Company.

After the letter of November 7 was written the president of the Corning Bank & Trust Company called Mr. Covey, who was in charge of country bank connections for the American Exchange Trust Company by telephone, and also Mr. McGrath, and told them as soon as the drafts were paid to wire the Corning Bank & Trust Company and they would give instructions as to how to dispose of the funds collected. On the 12th of November the president of the Corning Bank & Trust Company again called Mr. Covey and informed him that as soon as the items had been paid to inform them so

they might instruct the American Exchange Trust Company as to the disposition of the funds as soon as they were collected.

The cashier of the Corning Bank & Trust Company produced a carbon copy of the letter which had been written on the 7th of November and he testified that he placed the letter in an envelope, properly addressed, to the American Exchange Trust Company, Little Rock, Arkansas, sealed the letter, stamped it with United States postage stamp, and deposited it in the United States Post Office at Corning. The envelope had return card on it but was never returned.

On November 14, 1930, the American Exchange Trust Company charged the Corning Bank & Trust Company $5.44, being the cost of collecting W. A. Handley Mfg. Co. draft and forwarded a memorandum of the charge to the Corning Bank & Trust Company on that date.

It appears from the books of the American Exchange Trust Company that this charge was made by it on the 14th. On the 10th of November the American Exchange Trust Company charged the Corning Bank & Trust Company with $4.01, cost of collecting draft at Roanoke, Alabama, and on the 12th of November a charge was made of $3.14 for collecting another draft.

Beall Hempstead, vice-president of the American Exchange Trust Company, testified to receiving the drafts sent by the Corning Bank & Trust Company, and that they were notified by the bank at Atlanta, Georgia, on the 13th of the collection of certain drafts and by the bank at Charlotte, N. C., on the 12th of November as to certain other drafts, and all the amounts in controversy here were received by the appellant.

This witness also testified that he had looked through the files and had been unable to find the letter of November 7, and had no record of receiving such letter. Before these transactions, this witness testified that the American Exchange Trust Company had been giving the Corning Bank & Trust Company credit for items sent like

these, and that they were subject to check immediately upon giving credit, just like any other open account. When the drafts were collected at Charlotte, N. C., they were credited to the Union Trust Company of Cleveland, Ohio, and by it were credited to the American Exchange Trust Company. All of these drafts were paid before the insolvency of the American Exchange Trust Company. The American Exchange Trust Company suspended on November 15, 1930, and five days thereafter it was placed in the hands of the State Bank Commissioner.

This witness testified also if the bank had received the letter of November 7 the bank would make the items just collection items. If one wanted an item for collection, it was charged to his account and entered for collection if it had been previously credited to his account. It was admitted that the Corning Bank & Trust Company had several thousand dollars to its credit in excess of the amount of these drafts, and this condition continued from the 5th of November until the bank closed.

They were not obligated to pay this amount until the drafts were collected. If a depositor deposited an item for collection, they would not permit checking against it.

Mr. McGrath was the head of the collection department and had direct charge of these items. Shortly after the bank closed, it was discovered that McGrath had absconded with some of the bank's money.

The material facts are practically undisputed. There is no dispute about the fact that the drafts mentioned in appellee's petition with bill of lading attached were sent to the American Exchange Trust Company for collection and credit. Although there is some conflict in the authorities, the general rule is that the title to commercial paper received for collection by a bank and forwarded to its correspondent in the usual course of business does not vest in the bank to which the paper is sent, but remains in the sending bank until the collection has been made. After the collection is made, then the relation of debtor and creditor exists. Before collection,

however, if loss occurred, it would be borne by the sending bank and not the bank to which the papers were sent. Prior to collection the relation of principal and agent exists.

After these drafts were sent, the appellee proved that the letter above referred to was written and mailed to the American Exchange Trust Company.

"The rule is well settled that, if a letter is properly mailed, it is presumed that it reached the party to whom it was addressed and was received by him in the due course of mail." *Southern Engine & Boiler Works* v. *Vaughan,* 98 Ark. 388, 135 S. W. 913, Ann. Cas. 1912D, 1062.

"Where a letter has been properly mailed, the law raises a presumption that it was duly received by the person to whom it was addressed, but as was said by the Supreme Court of the United States in *Rosenthal* v. Walker, 111 U. S. 193 [4 S. Ct. 386], 'the presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty.' As was declared by our court in *Planters' Ins. Co.* v. *Green,* 72 Ark. 305, 80 S. W. 151, 'the presumption, in the absence of evidence to the contrary, is that it was received, but this presumption may be rebutted.' " *Bluthenthal* v. *Atkinson,* 93 Ark. 252, 124 S. W. 510.

The rule is well established that, if a letter is properly mailed, it is presumed that it reached the party to whom it was addressed and was received by him in the due course of mail. This presumption may be rebutted, but, if not rebutted, it is sufficient to support a finding that the letter was received.

In this case the undisputed evidence shows that the letter was mailed. It was directed "The attention of Mr. McGrath." Mr. McGrath did not testify. The evidence shows that he had taken some of the bank's money and absconded, but was, at the time this case was tried, in the Hospital for Nervous Diseases. Mr. Hempstead testified that J. J. McGrath was in charge of the collec-

tion department of the American Bank and he was informed that he was in the Hospital for Nervous Diseases.

The evidence also shows that Mr. McGrath had committed some forgeries, and that some of the letters were blurred so that the persons in charge of the bank could not tell what they meant, and they telephoned to the Corning Bank for information.

Mr. Hempstead, one of the vice-presidents of the bank, stated that he had looked through the files and could not find any such letter as the one mailed on the 7th. He said that, if they had received the letter, they would immediately have charged the drafts back to the account and handled it as a collection.

The evidence also showed that some of the letters had been lost. In addition to the letter, Corning Bank officials testified that they telephoned on different occasions to officers of the American Exchange Trust Company, giving practically the same instructions that were given in the letter, and this testimony is undisputed. When the Corning Bank changed its instructions, the American Exchange Trust Company was then the agent of the Corning Bank & Trust Company for collection, and it was its duty to notify the Corning Bank in accordance with instructions, and it was not, and never thereafter became, the owner of the paper or the proceeds.

Appellant calls attention to numerous authorities by this court. It has said: "It is likewise well established that a bank receiving a draft for collection merely is the agent of the remitter, drawer or forwarding bank, and takes no title to the paper or the proceeds when collected, but holds same in trust for remitting." *Darragh Co.* v. *Goodman,* 124 Ark. 532, 187 S. W. 673; *Rainwater* v. *Fed. Reserve Bank of St. Louis,* 172 Ark. 631, 290 S. W. 69.

Act 107 of the Acts of 1927 provides in substance among other things that the owner of the proceeds of a collection, when said collection was paid in cash, thereby increasing the assets of the bank, has preference.

Here the Corning Bank, as we have already said, was the owner of the proceeds of the collection. The collection was paid in cash. It increased the assets of the bank. The bank at the time the remittance was sent to it, and at all times thereafter until the Bank Commissioner took charge, had on deposit to the credit of the Corning Bank sums in excess of the amount of these drafts, and had, when the bank closed, between $200,000 and $300,000 cash in the bank.

Appellant cites and relies on the cases of *Hawaiian Pineapple Co.* v. *Brown,* 69 Mont. 140, 220 Pac. 1114 and *California Packing Corp.* v. *McClintick,* 75 Mont. 72, 241 Pac. 1077, and says that these cases announce the correct rules as follows:

"1. That the transaction created relation of principal and agent, not creditor and debtor, between itself and the bank, so that the bank would be deemed to hold the amount collected from the company in trust for the plaintiff as beneficiary.

"2. That by the transaction the assets of the banks were augmented.

"3. Ability to trace the trust funds into the possession of the bank."

Under the evidence in this case the relation of principal and agent, and not of creditor and debtor, existed. The undisputed proof shows that by the transaction the assets of the American Exchange Trust Company were augmented. The undisputed evidence also shows that the funds were traced into the hands of appellant.

Appellant, however, contends that the relationship of debtor and creditor could not have been changed without the consent of the American Bank because the account of the Corning Bank would have been overdrawn almost $12,000.

The evidence, as well as the stipulation of counsel, shows this contention to be incorrect. As to whether the letter of November 7 was written and received by the American Exchange Trust Company changing the di-

rections, was a question of fact, and the finding of the chancellor is sustained by the evidence.

Appellant contends that after this letter, or after it was claimed to have been written, other items were sent by the Corning Bank in the usual way and the proceeds placed to the credit of the Corning Bank by its consent. The evidence, however, shows that the instructions contained in the letter above referred to applied to drafts with bills of lading attached, and that all of the items that were thereafter sent to be collected and credited were items that had no bills of lading attached.

The undisputed proof shows that the assets of the American Exchange Trust Company were increased and also shows that the proceeds of the collections of these drafts came to the American Bank.

The chancellor held that the claim for $32,365.70 was a preferred claim, and that of this amount $30,748.02 had been specifically identified in its original or traceable form as the property of the Corning Bank & Trust Company, and that it came into the hands of the Bank Commissioner, and it was ordered and decreed that this sum should be paid in full out of any assets of the American Exchange Trust Company available after the administration. It was also decreed that the $1,617.68 should be allowed as a preferred claim, but, appellee having failed to identify this amount in its original or traceable form, coming into the hands of the Commissioner, it should be paid on the basis as other like prior claims. It was also decreed that $11,667.30 be allowed as a general claim.

The finding of the chancellor on the questions of fact are supported by the preponderance of the evidence, and the decree is affirmed.

WALD *v.* STATE.

Opinion delivered May 4, 1931.

[redacted]

Cochran & Arnett, for appellant.

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

HART, C. J. Ben Wald prosecutes this appeal to reverse a judgment of conviction against him for manufacturing ardent, vinous, spirituous and fermented liquors.

Wayne Cook, city marshal of Paris, Logan County, Arkansas, and Tobe Riley were witnesses for the State. According to their testimony, they went with the sheriff of Logan County to the house of Ben Wald in the Northern District of Logan County and made a search for intoxicating liquor. They found one bottle of home brew, about two gallons of some kind of fruit juice fermenting in a five-gallon crock, which smelled like intoxicating liquor. They also found a keg hidden in the grass which smelled as if intoxicating liquor had been in it. The sheriff took the fruit jar full of fruit juice, and a bottle capper, and carried them home with him. Before the day of trial, the sheriff had died; and the town marshal went to his house and brought a fruit jar full of some kind of liquor which was exhibited to the jury. Both of the witnesses testified that the fruit jar looked like the one the sheriff brought back at the time he made the raid on the defendant's house. They testified that it smelled like intoxicating liquor.

It is earnestly insisted by counsel for the defendant that the court erred in allowing the jar of liquor to be exhibited to the jury because it had not been properly identified as the jar of liquor or fruit juice which had been taken by the sheriff from the defendant's house, and in this contention we think counsel is correct. In prosecutions for violations of the liquor laws, liquors which are found on the premises of the defendant are admissible in evidence, if properly identified as having been in the possession of the accused. 16 C. J., par. 1229, page 620. Before the evidence is admissible, the container with the liquor in it must be identified and traced to the defendant. If the identification of the fruit jar with the liquor in it had been complete, as being the one captured in the raid on the defendant's house, then the action of the court in allowing it to be exhibited to the jury would be correct.

In *Oliver* v. *State,* 120 Ark. 188, 179 S. W. 366, it was held that in a criminal prosecution for burglary, it was error to admit in evidence a knife alleged to have been taken from the defendant when it was not identified by any witness as being the one taken from the person of the defendant when he was arrested. In that case a deputy sheriff of the county in which the defendant was tried testified that, when he went into another county where the defendant had been arrested, the sheriff of that county told him in the defendant's presence that he had taken a pocket knife from the defendant's person at the time of making his arrest and would send it to him later through the mail. He testified that the defendant had since asked him whether the sheriff had sent the knife. The deputy sheriff was then permitted to exhibit to the jury a pocket knife which he testified was sent to him by mail from the sheriff of the county in which the defendant had been arrested. This court said that the trial court erred in admitting the testimony, and that the error was prejudicial. It was said that error was committed by the admission of the knife in evidence before the jury since it was not identified by any witness as being the knife

which was taken from the person of the defendant when he was arrested. It was elsewhere stated in the opinion that the fact that the sheriff had told the witness in the defendant's presence that he had taken a knife from his person and would send it to him was not an identification of the knife as the one taken from the person of the defendant when he was arrested.

The same rule was recognized by the court in *Whaley* v. *Vannatta,* 77 Ark. 238, 91 S. W. 191, 7 Ann. Cas. 228. In that case, in an action to recover the price of hay sold, where the defendant claimed that the hay was of a grade inferior to that required by the contract, it was held not to be erroneous to refuse to permit him to exhibit to the jury two bales of hay, in the absence of evidence identifying such bales as the bales of hay purchased by him from the plaintiff.

In both the cases cited, the evidence tending to identify the article which was offered in evidence was as strong if not stronger than the evidence of identification introduced in the present case. Because the identification of the fruit jar containing liquor was not sufficient to show that it was the jar of liquor taken from the defendant's house, the court erred in allowing it to be submitted to the jury as evidence in this case. The evidence was necessarily prejudicial to the defendant because the jury might have found from the appearance and smell of the liquor that it was intoxicating liquor. Hence the jury, from the appearance and smell of the liquor, in connection with the other evidence, might have found the defendant guilty, when in truth and in fact the liquor in the fruit jar which was exhibited to the jury was not identified as the jar of liquor which had been taken by the sheriff from the defendant's house. The mere fact that the town marshal went to the sheriff's house and got a fruit jar of liquor was not sufficient to identify it as being the one taken from the defendant's house. It is a matter of common knowledge that all fruit jars look alike; and in the absence of evidence identifying the fruit jar and the liquor in it as being that taken from the defendant's

house, it must be held that the court committed reversible error in allowing it to be introduced in evidence. For this error, the judgment must be reversed; and the cause will be remanded for a new trial.

NEW HOME SEWING MACHINE COMPANY *v.* WESTMORELAND.

Opinion delivered May 4, 1931.

George F. Hartje, for appellant.

J. C. & Wm. J. Clark, for appellee.

MEHAFFY, J. This suit was begun by appellant, a Massachusetts corporation, in the Faulkner Circuit Court. It alleged that on October 19, 1928, it delivered to the appellees, W. W. Westmoreland and Priddy Westmoreland, various goods, wares, and merchandise purchased by them, of the value of $571.95; that no part of said indebtedness had been paid, and that it was long

past due. It prayed judgment against appellees in the sum of $571.95, together with interest and costs.

Appellees filed answer in which they denied that they purchased any goods, wares, or merchandise, and denied that they were indebted to appellant in any sum whatever. They alleged that about October 19, 1929, they were negotiating with one Bert H. Hower, agent of appellant, for the conditional purchase of certain sewing machines of the value of $558; that they had made out an order for said machines but had not delivered said order and were not to deliver same until a resale contract was entered into; that the said Bert H. Hower, while the appellees were absent from their place of business, took said order without their knowledge or consent and sent same to appellant. They had not delivered the order to the agent nor authorized any person to deliver same to him nor the appellant; that Hower, after having procured said order, immediately left the city and did not leave with appellees a copy of the resale contract which was to be executed by appellant before the order for said goods was to be delivered. They alleged that appellants obtained possession of said order through fraud, and that they are not bound thereon. They further alleged that the appellant, having obtained said order through fraud, shipped the machines to appellees; that they had notified appellant to take up the machines, and they are now holding said machines subject to the order of appellant. They asked that appellant's complaint be dismissed, and that they have judgment for storage of said machines and costs.

The order introduced in evidence contained the following: "The undersigned agrees that the New Home sewing machines above described and all the New Home sewing machines purchased hereafter will be sold only at retail, and will not be sold below the established retail prices, unless allowance is made for old machine, or discount made for cash. It is understood that no conditions agreed to by any salesman or agent and not embodied herein will be in any way binding on the New Home Sew-

ing Machine Company, and it is understood and agreed that the New Home Sewing Machine Company shall not be in any way liable under any separate or collateral agreement made between the undersigned and its salesman."

Immediately under this paragraph were the signatures of the appellees and the salesman, Bert H. Hower.

According to the deposition of C. Haile, the credit and collection manager of appellant, all orders go to the desk of witness for acceptance or rejection, and he received the above order from the Westmorelands on October 23, 1928; the order was sent in by Bert Hower, who was soliciting wholesale orders in the State of Arkansas; the order appeared to be regular, and he put his O. K. on it, sent it to the shipping department, and the eleven machines were shipped to appellees; the terms of sale were two per cent. for cash within thirty days, *net* sixty days, or the privilege of settlement by notes, due three, six, and nine months after date; that the order was signed by the appellees. The order above set out was the basis for the sale of the goods and constituted the only terms and conditions of the sale.

The soliciting agent was not authorized to make agreement aside from the terms and conditions contained in the order; if he made any other agreement, it was not authorized. Witness had no knowledge that any change was made in the regular contract, and if there had been any the machine would not have been shipped; the machines had not been paid for, and the sum of $571.95 was past due.

Several letters written by the parties were introduced in evidence. Appellees claimed that they bought the machines on condition of guaranteed resale. The agent was not authorized to make any verbal agreement or other agreement outside of the original order; he was merely an order-taker; he could not bind the company in any kind of an agreement without submitting the agreement in writing to the company and having it accepted

by the company. He was a special agent, not a general one.

The agent is not now in the employ of appellant, and witness does not know where he is. Witness testified that he was familiar with the market value of the machines, and the price for which they were sold was the fair market value. The company had never, in the knowledge of the witness, done business in Arkansas other than solicit orders on a wholesale basis; had never maintained an office in Arkansas. Witness had no personal knowledge of the transaction that took place when the contract was signed, and did not know what was said.

Priddy Westmoreland, one of the partners of Westmoreland & Son, testified that the appellees never purchased outright any sewing machines from the appellant; that he signed the contract or order introduced by appellant, but that did not express the agreement reached by the parties; that he signed the order and left the store to go to lunch; left the agent in his office to fill out the contract, and he said he would do that and leave it on witness' desk. The contracts were not filled out as agreed upon. The agreement above the signature was not in accordance with the copy left with witness. That clause was not in the contract. The contract introduced is not now as it was when he left it in the office; the clause was marked out by the agent. Mr. Hower, the agent, was not authorized to make the contract out of the office. Witness was not present when the agent had finished filling out the contract, but had gone to lunch. The agent came to the store in the early morning with his resale agreement and explained how it would be handled and how the resales were to be paid and how much net profit there would be, etc.

Witness told agent that he would under no circumstances consider buying any machine outright, and the agent told him not to worry, they had a good resales crew. Does not have copy of resale contract, and had not seen it since the agent left. The agent left and did not leave a copy of the resale contract. The prior resale contract

was not canceled by the company, but was canceled by Westmoreland & Son.

Witness wrote the company that the machines were here subject to its orders, and they are still held subject to appellant's disposal and have never been uncrated; did not agree to pay for the machines on three, six and nine months, and did not authorize the agent to write anything on the face of the contract to show that it was to be paid on that basis. That was written without appellee's knowledge or consent. The clause just above the signatures of appellees was to be stricken out. Under the resales contract, appellant was to send a crew of salesmen to sell the machines. The agent was to fill out the contract and leave a copy on witness' desk, but he did not do so; did not deliver agent the original contract and was not in the store but gone to lunch when agent took the contract. The only agreement made was upon the resale contract. The clause just above appellee's signature was struck out of the copy left on witness' desk, and there was no agreement in it as to the terms, and no agreement to be paid in three, six and nine months.

Witness testified that the terms were written in by the agent without authority after it was signed.

Mr. Ligon testified that he heard the conversation about the contract, and his testimony on this was substantially the same as Westmoreland's.

Bert H. Hower, the agent, did not testify.

There was a verdict and judgment for the appellees, and appellant prosecutes this appeal.

Appellant first contends that the court erred in refusing appellant's request for a peremptory instruction, and contends that there was no testimony authorizing the court to submit the case to the jury. This argument is based on the fact that the appellees signed the order introduced in evidence. The appellant says that the appellees admit the delivery of the contract to the salesman. They do not, however, admit its delivery for the purpose of being forwarded to appellant, but the undis-

puted proof shows that it was not delivered, and that the contract was not completed when the agent, in the absence of appellees, and without their knowledge or consent, took the order and left the city and sent the order to the appellant.

The evidence of the appellees shows that they refused to buy machines outright, but that the agent struck out the statement immediately above the signatures in one copy and agreed to strike it out in the other, and this evidence also shows that the agent had a resales contract, and was to fill that out, and that they left these orders and agreements on their desks when they went to lunch with the agreement and understanding that the agent would strike out the paragraph immediately above the signatures of appellees on the order and fill out the resales contract, but he left appellee's place of business while they were absent, took the resales contract with him, and did not strike out the paragraph that he had agreed to strike out. There is no question about the authority of the agent.

The appellees do not contend that the agent had any authority to make any contract and the evidence shows that he was merely an order-taker and had no authority to bind the appellant by any contract, and the question of the agency or the extent of his authority is not involved. The only question involved is whether the appellees entered into the contract sued on or whether the agent took it without their knowledge or consent before the terms were agreed upon and inserted the words and figures that appellees testified were inserted after they signed the order.

The court instructed the jury as follows: "The jury is instructed that, if you find from the testimony that the agent of the sewing machine company took this contract from the place of business of the defendants without their knowledge or consent before the terms of said contract were agreed upon between the parties and inserted the words and figures in the contract complained of by defendants, then in that event the defendants would

not be bound by the contract unless he later, by his words or acts, ratified it."

This, we think, clearly stated the issues to the jury. This court recently said: "According to the allegations of the answer and the proof made by the defendants, the traveling representative of the plaintiff was trusted to reduce the contract for the purchase of the goods to writing, and he was bound to do it truly. In such cases this court has recognized that, where the party who was trusted to write the contract omits some of its terms, or inserts provisions not agreed to by the parties, such conduct constitutes fraud and makes the contract void." *Pictorial Review Co.* v. *Rosen,* 171 Ark. 719, 285 S. W. 385; *Barton-Parker Mfg. Co.* v. *Taylor,* 78 Ark. 586, 94 S. W. 713; *Main* v. *Oliver,* 88 Ark. 383; *Wm. Brooks Medicine Co.* v. *Jeffries,* 94 Ark. 575, 114 S. W. 917, 129 Am. St. Rep. 110; *White Sewing Machine Co.* v. *Atkinson & Son,* 126 Ark. 204, 190 S. W. 111; *J. C. Case Threshing Machine Co.* v. *S. W. Veneer Co.,* 135 Ark. 607, 205 S. W. 978; *Standard Sewing Machine Co.* v. *Rainwater,* 146 Ark. 81, 225 S. W. 326.

The decision of *Pictorial Review Co.* v. *Rosen, supra,* is controlling here.

It is next contended by appellant that the court erred in the admission of certain testimony.

The rule is well established that oral testimony can not be admitted for the purpose of varying or contradicting the terms of a written contract, but this order did not become a contract according to the evidence of appellees, because the paragraph was to be stricken out, and also because other things not agreed to were added to it. It was not delivered, but left on the desk of appellees, and the evidence shows that the agent, without authority, took it, failed to strike out the paragraph, and without authority inserted terms not agreed to.

The testimony of both Westmoreland and Ligon was clearly admissible, not as contradicting a written contract, but to show that no contract was ever made.

The court clearly and fairly submitted the issue to the jury on the instructions given and committed no error in refusing the instructions offered by appellant. All of appellant's instructions are with reference to the agent's actual or apparent authority, and, as these questions are not involved in the case, the court correctly refused to give them.

As to whether the contract was made or not was a question of fact properly submitted to the jury, and the verdict of the jury, where there is substantial evidence to support it, will not be set aside on appeal.

If the appellees' evidence is true, as the jury must have found, no contract was ever entered into. This court does not pass on the credibility of the witnesses nor the weight to be given to their testimony.

Since there was substantial evidence to support the verdict, the judgment will be affirmed.

STANDARD OIL COMPANY OF LOUISIANA *v.* GILLER.

Opinion delivered May 4, 1931.

T. M. Milling, and *Gaughan, Sifford, Godwin & Gaughan,* for appellant.

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

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Union County, Second Division, cancelling an oil and gas lease on the undeveloped portion of the southwest quarter of the southeast quarter of section 11, township 16 south, range 15 west, in said county, upon the south half and the northeast quarter of said 40-acre tract on the ground that appellant had failed to explore, develop and produce oil therefrom. Appellant acquired the lease on the forty-acre tract from the Humble Oil & Refining Company, which acquired same by assignment from J. R. Crawford, the original lessee from appellant of a 440-acre tract in a body, of which this 40-acre tract was and is a part. J. R. Crawford acquired the lease on the whole tract in the year 1922 for the consideration of $12,500 cash, $22,500 from the sale of one-half of the first oil produced, and thereafter an equal one-eighth part of all oil produced and saved from said premises and one-eighth of the net proceeds of the gas used off of said premises or marketed by the lessee.

This court is firmly committed to the doctrine that, in any oil and gas lease in which royalties constitute the chief consideration, an implied covenant exists on the part of the lessee to explore the property with reasonable diligence, so as to produce oil and gas in paying quantities upon the entire tract. Especially is this true after either or both commodities has or have been discovered on any part of the tract. The reason is that oil and gas are of a wandering and vagrant character in

their natural state. *Mansfield Gas. Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837; *Mansfield Gas Co.* v. *Park Hill,* 114 Ark. 419, 169 S. W. 957; *Mauney* v. *Miller,* 150 Ark. 161, 234 S. W. 498; *Murdock* v. *Sure Oil Co.,* 171 Ark. 161, 283 S. W. 4; *Hughes* v. *Cordell,* 174 Ark. 757, 296 S. W. 735; *Drummond* v. *Alphin,* 176 Ark. 1052, 4 S. W. (2d) 942; *Ezzell* v. *Oil Association, Inc.,* 180 Ark. 802, 22 S. W. (2d) 1015. In the case of *Ezzell* v. *Oil Associates, supra,* this court formulated a rule as a guide for the lessee in the performance of his implied covenant to explore, develop, and produce oil and gas upon the leased premises, and, in doing so, used the following language:

"Of course, due deference should be given to the judgment of the lessee as operator to determine how many wells should be drilled, but he must use sound judgment in the matter and cannot act arbitrarily. He must deal with the leased premises so as to promote the interest of both parties and to protect their mutual interests. He must act for the mutual advantage and proceed for both of them, and must not consider his own interest wholly or for the most part. He must perform the contract so as to further the original purpose and intention of the parties."

It appears from the record herein without dispute that the Humble Oil & Refining Company drilled one well in the northwest corner of the forty-acre tract in June, 1924, which initially produced ninety barrels of oil per day and is still producing eighteen or twenty barrels per day; that 108,931.56 barrels of oil altogether had been produced from the well at the time of the trial, of the value of $94,206.38, one-eighth of which had been paid to appellee as royalty; that, although appellee requested it to drill additional wells thereon, it assigned the lease to appellant on the 29th day of June, 1929, without having done so; that, after the assignment of the lease to appellant, appellee made three written demands and several oral requests to its officers to drill additional wells, even threatening to bring suit for abandonment of

the lease unless it would do so; that appellant refused to comply with the demands and requests of appellee and told her to bring the suit for abandonment if she wanted to. The record also discloses by a preponderance of the testimony that in the Smackover Oil Field, in which the forty-acre tract covered by the lease is located, one well will drain the oil from only ten acres surrounding it, and it is impossible for one well in the corner of a forty-acre tract to produce all the oil therefrom; that the probabilities are oil will be found in commercial quantities under the entire tract if explored.

In the light of this testimony, the duty clearly rested upon appellant, under the rule announced in the Ezzell case, *supra,* to make further exploration in order to discover and produce the oil on the entire tract. It refused to proceed with further exploration or development and thereby forfeited or abandoned its privilege to do so.

Appellant contends, however, that, in view of the large production of oil from other lands contained in the 440-acre tract, transferred to various assignees, no part of the 440-acre tract should be treated as forfeited and abandoned for failure to explore and develop same. There might be merit in the contention if appellant had been the assignee of the lease upon the whole tract and if it had drilled all the producing wells thereon. It appears from the record that several assignees of the various parts of the 440-acre tract had drilled twenty-six wells, twenty-five of which had produced, at the time of the trial, $180,000 in royalties for appellee. We do not understand that appellant can justify his failure to carry out the implied covenants in the lease on account of the large recoveries of oil from certain parts of the land assigned to others. This identical question has been decided against appellant's contention by the Court of Appeals of Texas in the following cases: *Cox* v. *Sinclair Gulf Oil Co.,* (Tex.) 265 S. W. 196; *Sinclair Oil & Gas Co.* v. *Bryan,* (Tex.) 291 S. W. 692; *Fisher* v. *Crescent Oil Co.,* (Tex.) 178 S. W. 905. In deciding this point, the Court of Appeals of Texas said:

"If an oil and gas lease covering several tracts is assigned to different assignees, and the assignee of one tract obtains production, and the lessee and other assignees benefit thereby, each from that time must depend on his own conduct and acts of exploration and drilling for a compliance with the implied covenants, and can receive no help from the other segregated owners if he has failed to perform the measure of development required of him."

We think the rule thus announced a just and reasonable rule and should be applied to the facts in the instant case.

No error appearing, the decree of the chancellor is in all things affirmed.

KIRBY, J., dissents.

CAMPBELL *v.* ARKANSAS STATE HIGHWAY COMMISSION.

Opinion delivered May 11, 1931.

W. H. Bengel, for appellant.

Hal L. Norwood, Attorney General, and *Claude Duty,* Assistant, for appellee.

HART, C. J., (after stating the facts). The right of eminent domain in the premises is conceded in the Arkansas Highway Commission, but it is insisted that this right is and must, under our Constitution, be subordinate to the right of the property owners to be first compensated for the damages to their property by the construction of the bridge and the approaches thereto. Their claim is based upon the guaranty given by § 22 of the Bill of Rights of our present Constitution, which provides that private property shall not be taken, appropriated, or damaged for public use, without just compensation therefor. It is claimed that under it, whether the property is taken or not, if it has been damaged by reason of the construction or operation of any improvements made for the use of the public, the owner may recover whatever damage the property has actually sustained. Under our decisions, the owner of property abutting upon a street or highway has an easement in such street or highway for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself; and any subsequent act by which that easement is substantially impaired for the benefit of the public is a damage to the lot itself within the meaning of the constitutional provision for which the owner is entitled to compensation. The reason is that its easement in the street or highway is incident to the lot itself, and any damage, whether by destruction or impairment, is a damage to the property owner and independent of any damage sustained by the public generally.

In *Hot Springs Railroad Co.* v. *Williams,* 45 Ark. 429, affirmed in 136 U. S. 121, 10 S. Ct. 955, it was held that the section of our Constitution above referred to makes a railroad company constructing its railroad in a public street under grant from the Legislature or municipality liable to owners of abutting land for consequential injuries to their land resulting from such improvement. The rule was re-affirmed in *Little Rock & Fort Smith Ry. Co.* v. *Greer,* 77 Ark. 387, 96 S. W. 129.

The same construction was placed upon the constitutional provision in *Dickerson* v. *Okolona,* 98 Ark. 206, 135 S. W. 863, 36 L. R. A. (N. S.) 1194, where the owner of property abutting on a street in a city or incorporated town was held entitled to recover compensation for damage done to his property in lowering the grade of the street.

In *Chicago* v. *Taylor,* 125 U. S. 161, 8 S. Ct. 820, it was held that, under the provision in the Constitution of the State of Illinois adopted in 1870 that "private property shall not be taken or damaged for public use without just compensation," a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character; whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential as in a diminution of its market value.

In *Pennsylvania Rd. Co.* v. *Miller,* 132 U. S. 75, 10 S. Ct. 34, in discussing a similar provision of a State Constitution, the court said:

"The provision contained in the Constitution of 1873 was merely a restraint upon the future exercise by the defendant of the right of eminent domain imparted to it by the State. By its terms, it imposes a restraint only upon corporations and individuals invested with the privilege of taking private property for public use, and extends the right to compensation, previously existing, for property taken, to compensation for property injured

or destroyed by the construction or enlargement of works, highways or improvements, made or constructed by such corporations or individuals. Such provision is eminently just, and is intended for the protection of the citizen, the value of whose property may be as effectually destroyed as if it were in fact taken and occupied. The imposition of such a liability is of the same import as the imposition of a liability for damages for injuries causing death, which result from negligence, upon corporations which had not been previously subjected by their charters to such liability."

The rule was applied without any discussion or review of the authorities in *Donaghey* v. *Lincoln,* 171 Ark. 1042, 287 S. W. 407.

In the case at bar, although the injuries are consequential, they are to the *corpus* of the plaintiff's property. The demurrer admits that the injuries resulted from the construction of the bridge and the approaches thereto as they now are. In specific terms, it is alleged that the right of ingress and egress to the plaintiff's property was interfered with by the change in the grade of the highway and the construction of the bridge and the approaches thereto. It is alleged that the grade of the highway was changed so that the bridge and the approaches thereto are higher than the plaintiff's house and thereby obstructs the free course of light and air thereto. We do not think the plaintiff, however, should recover anything for noise, dust and matters of that sort, which, in varying form, are incidents to living upon a public highway or street and, as such, must be borne by all owners of abutting property.

There is nothing in the contention that the Arkansas State Highway Commission could not be sued in this kind of action. *Arkansas State Highway Commission* v. *Dodge*, 181 Ark. 539, 26 S. W. (2d) 878. In that case, by a divided court, it was held that a suit by highway contractors against the State Highway Commission for the amount due under a highway construction contract could

be maintained. Varying reasons were given by the majority of the court for so holding, but that becomes immaterial in this case. It matters not whether the State Highway Commission be considered a corporate entity or as an administrative agency of the State in the present case. As we have already seen, the bridge was constructed by the State Highway Commission under an act of the Legislature; and, when so constructed, it became a part of the public highway with which it connects, and the bridge and its approaches form a part of such highway. When the grade of the highway was raised by the construction of the bridge and its approaches to the damage of the lots of abutting owners, such act brought the case within the guaranty of the clause of the Constitution above referred to. Neither the State nor any of its agencies is exempt from the constitutional guaranty that private property shall not be taken or damaged for public use without just compensation therefor.

It is true that the Arkansas State Highway Commission did not institute condemnation proceedings against the property owners, but the property owners had a right to maintain this action. It was a remedy given them under the common law for a trespass or injury to their real estate. The right existed under the provision of the Constitution; and where the statutes provides no adequate remedy, it may be enforced by an action for damages. *County of Chester* v. *Brower,* 117 Pa. 647, 12 Atl. 577, 2 Am. St. 713; and *Swift & Co.* v. *Newport News,* 105 Va. 108, 3 L. R. A. (N. S.) 404, 52 S. E. 821. In the case last cited it was held that a constitutional provision that private property shall not be damaged for public use without compensation is self-executing, and the common law will furnish an appropriate remedy in the absence of one expressly given by Constitution or statute. This view is sustained by our own cases above cited, and is in harmony with the views expressed in them.

It follows that the judgment in each case will be reversed, and the cause remanded with directions to the circuit court to overrule the demurrer and for further proceedings according to law.

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

Opinion delivered May 11, 1931.

C. T. Carpenter, for petitioner.

C. D. Frierson, for respondent.

HART, C. J. This is an original application for a writ of mandamus by Harry A. Keith and Mamie Keith against A. H. Landers, sheriff of Poinsett County, Arkan-

sas, to compel him to levy an execution on certain real and personal property to satisfy a judgment rendered in this court in favor of petitioners against Drainage District No. 7 of Poinsett County in the sum of $3,200, with interest and costs.

The judgment was obtained under the provisions of § 22 of the Bill of Rights of our present Constitution, which provides that private property shall not be taken or damaged for public use without just compensation therefor. In the construction of this provision of the Constitution, this court has frequently held that the public, like a private person, must so use its own as not to injure another's property, and that any injury to the property of an individual which deprives him of the ordinary use of it, falls under the protection of the constitutional provision and entitles the property owner to compensation. *Keith* v. *Drainage District No. 7 of Poinsett County, ante* p. 384.

After the judgment had become final, upon the request of Keith, the clerk of this court issued an execution directed to the sheriff of Poinsett County, Arkansas, in which the drainage district was organized. Keith directed the sheriff to levy the execution upon certain personal property belonging to said drainage district, which consisted of a cabin boat, three motor boats, a Ford truck, a Ford coupe, a pile driver, and two drag lines, and certain office furniture, and also upon certain town lots belonging to said district. The sheriff refused to levy the execution on the ground that he had been informed that the property was exempt from execution under our statutes and laws.

All agree that, when the judgment of this court became final, it was the legal duty of the district to pay the judgment, but it is earnestly insisted by counsel for the sheriff and for the district that the only remedy available to collect the judgment was by a writ of mandamus to compel the drainage commissioners to levy an additional tax with which to pay the judgment. It is not to be

questioned but that this would be an appropriate remedy, but it is as little to be questioned that the Keiths, as judgment creditors, might by any appropriate method compel the payment of their judgment. This brings us to a consideration of the single proposition, whether or not an execution, levy, and sale of certain personal and real property of the district is a lawful method for the collection of the debt.

It is first insisted that the property is not subject to execution under the provisions of § 4274 of Crawford & Moses' Digest. The section provides that no property, real or personal, belonging to the State, or any county, city, town, borough or other public or municipal corporation, regularly incorporated according to law, shall be levied upon or sold by virtue of any execution.

In the opinion of a majority of the court, this section does not exempt the property from levy and sale under the execution in this case. The drainage district was organized under the laws of this State for the purpose of draining and leveeing the lands within the limits of the district. The district was not in any sense a county, city, town, or other public or municipal corporation within the meaning of the statute just referred to. The powers of the drainage district are derived directly from the Legislature; and, in exercising them, the board of commissioners of the district acts as the agent of the property owners whose interests are affected by the duties it performs. *Fitzgerald* v. *Walker,* 55 Ark. 148, 17 S. W. 702; and *Lewis* v. *Rieff,* 114 Ark. 366, 169 S. W. 1184.

The statute was directed to counties and municipal corporations which are local agencies of the State creating them, and they exercise such governmental powers as are conferred by statute. Their property necessary for the exercise of the powers conferred become part of the machinery of government, and to permit a creditor to seize and sell it to collect his debt would be to permit him in some degree to destroy the government itself. *Klein* v. *New Orleans,* 99 U. S. 149.

It is next insisted that the property belonging to an improvement district is devoted to public use and comes within the general rule that the property of a county, municipal corporation, or other corporation holding it for use for public purposes is not subject to sale under execution. This is a correct rule, when properly applied, but has no bearing on the issues herein presented. Under § 4270 of the Digest, in general, the real and personal property of a defendant under an execution upon any judgment may be levied upon and sold in satisfaction of the judgment. Under § 4287, if an officer who is required to levy an execution upon personal property, doubts whether it is subject to execution, he may give to the plaintiff therein notice that an indemnifying bond is required. In the case at bar, the notice required by this section of the statute was given by the sheriff to the plaintiff in the execution. The sheriff notified the plaintiff that he had been informed that the personal property was devoted to the public use for which the district had been organized. The truth of this depended upon the facts as they really existed; and it cannot be said, when the description of the property is considered, that the sheriff acted arbitrarily in refusing to levy the execution on the personal property without the indemnifying bond required by the statute. Hence no writ of mandamus should be awarded against him under the facts presented to require him to levy upon the personal property. *Mayfield Woolen Mills* v. *Lewis,* 89 Ark. 488, 117 S. W. 558, 16 Ann. Cas. 1041.

A different question, however, is presented as to the real estate. No indemnifying bond can be required under our statute before levying upon land. Crawford & Moses' Dig., § 4287, and *Smith* v. *Spradlin,* 136 Ark. 204, 206 S. W. 327. The record before us shows that the lands upon which the sheriff was required to levy the execution had been acquired by the drainage district in the foreclosure of drainage assessments upon lands situated in the district and subject to the lien thereof. It cannot be said

that such property is necessary to the exercise of the *quasi*-public functions which the drainage district was organized to carry out, and that it is necessarily protected from levy and sale by virtue of being owned by the drainage district. As we have already seen, after the compensation provided by our Constitution in favor of the owner of the land damaged became fixed by the judgment rendered in his favor against the drainage district, he had a vested right to such compensation, and payment might be enforced according to the statutes and laws of the State. Even if it should be held that all property of every kind belonging to the drainage district is presumptively for public use, this presumption is one of fact and may be overcome on proof that the district is holding it for other purposes, and that it is not needed or intended for use in carrying on the purposes for which the district was organized. In a case like this, if the property should be sold under execution and purchased by third persons, it would again become subject to the drainage and levee taxes just as other lands located within the district.

We do not think the case of *Fordyce* v. *Woman's Christian National Library Association,* 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485, applies. There the trust expressly limited the property to the use of the Library Association as a site for the building, and it could not be devoted to any other purpose. Under the express terms of the trust the property could not be sold by the trustees nor under execution sale without doing direct violation of the terms of the trust.

To carry the contention of the sheriff and of the drainage district to its last analysis, although the property required to be levied on was not needed and was not intended to be used for the purposes for which the district was organized, still it could not be sold in satisfaction of a judgment of a property owner whose property had been damaged for public use without a just equivalent being paid.

If the land claimed or owned by the drainage district is not necessary to its operation, the sheriff should be directed to sell it. Neither he nor the drainage district will be permitted to say that such accumulation of real estate, not used nor necessary for carrying out the public functions for which the drainage district was organized, may be made when that course may render inoperative the constitutional guaranty to the landowner for compensation for destruction or diminution of the value of his property. To illustrate, if land had been condemned for use as a right-of-way for the drainage or levee district, and such use should at any time be no longer required, then the land would revert to its original owner and could not be levied upon for the satisfaction of a judgment against the improvement district. Neither could a levy or sale of land used for right-of-way or other necessary public use be had while it was being actually devoted to that purpose. In the case at bar, however, this would be a question of fact which may, by a court of competent jurisdiction, be the subject-matter of inquiry and adjudged accordingly. In the opinion of the majority, lands acquired by the district at a sale for the enforcement of drainage and levee assessments and held by the district for resale, as provided by the statute, may be levied upon and sold in satisfaction of a debt of a judgment creditor.

The result of the views of the majority is that a writ of mandamus should not be directed to the sheriff to levy and sell upon execution the personal property involved in this proceeding; but the sheriff will be directed to levy upon and sell the real estate involved in this proceeding unless his right is assailed and determined adversely to him in a court of competent jurisdiction according to the principles of law announced and set out herein. Of course, the rights of third persons who may have claims to the property involved herein are not affected by this decision. It is so ordered.

SMITH, J., (dissenting). The sheriff was requested by the plaintiff, a judgment creditor of the defendant

drainage district, to levy an execution on certain personal property of the district, and also upon certain real estate to which the district had acquired title by the sale of the lands to it for the nonpayment of the improvement district taxes due and delinquent thereon. The majority hold that the lands of the district may be levied upon and sold, except the right-of-way, but that, as the personal property may or may not be exempt, the sheriff did not act arbitrarily in demanding an indemnifying bond before levying upon it. This holding, in my view of the law, demonstrates the error into which the majority have fallen in holding that any part of the plaintiff's judgment may be collected through an ordinary execution at law.

If any of the district's property may be sold under an execution, all of it may be. No proper distinction may be made between the right to sell the personal property and the real estate.

The majority hold, in effect, that the personal property is exempt from a sale under execution if the use of that property is necessary to the operation of the district's affairs and the discharge of its functions as such. But, if so, why?

By § 4274, Crawford & Moses' Digest it is provided that no property, real or personal, belonging to the State, or any county, city, town, borough or other public or municipal corporation shall be levied upon or sold by virtue of any execution.

Unless the drainage district is a corporation within the meaning of this section, its personal property, however indispensable to its business, is not exempt, and, if it is exempt, this is true only because it is such a corporation. But, if it is such a corporation, all of its property, both real and personal, is exempt from seizure and sale under an execution. It therefore appears illogical to say that the drainage district's real estate may be sold, but not its personal property, for if one class of

property is exempt from sale under execution, the other is also exempt.

The statute to which I have referred declares the public policy of the State to be that the administration of the affairs of a governmental agency shall not be disturbed by the levy of an execution upon its property. Such an agency is not exempt from the enforcement of payment of its debts and obligations, but this enforcement must be accomplished by other means than a sale of the agency's property under an execution. A receivership might be had, or the board of directors might be compelled by a mandamus to levy a larger per cent. of the betterments to be collected. *Faulkner Lake Drainage Dist.* v. *Williams*, 169 Ark. 592, 276 S. W. 604.

At § 105 of the chapter on Executions, 23 C. J. p. 355, the law is stated to be that whether the property of a municipal or other public corporation is subject to execution to satisfy judgments recovered against them is to be determined by the usage and purposes for which the property is held, and that property held for public uses is not subject to levy and sale under execution against such corporations, and that the rule also applies to funds in the hands of a public officer, and that taxes due to such corporations cannot be seized under execution by a creditor. An apparent exception to the rule is stated to be that, where a corporation owns in its proprietary, as distinguished from its public or governmental capacity, property not useful or used for a public purpose but for *quasi* private purposes may be seized and sold under execution, precisely as similar property of individuals may be seized and sold, but that the question whether property held as public property is necessary for the public use is a political, rather than a judicial, question. The notes to this text cite numerous cases, a number of these being annotated cases which fully support the text.

In the response of the drainage district it is made to appear that the personal property upon which the sheriff is asked to levy the execution, while of small value, is

indispensable to the district. The drainage district in question is probably the largest in the State, and embraces practically half of Poinsett County, and has issued about five million dollars in bonds. The sheriff is asked to levy upon the office furniture of the district, which is not expensive and would bring only a nominal sum if sold at public sale, yet this furniture is shown to be necessary to protect the valuable records of the district and is indispensable to its officers in the performance of their duties. As a part of the plan to control the flood waters of the St. Francis River, which runs through the district, locks were constructed, and are maintained, and certain tools which the sheriff is asked to levy upon are shown to be necessary for the operation and maintenance of the locks, which were installed under the authority of the War Department of the United States Government, and if the district is deprived of these simple, but essential, tools, the locks may not be operated and the navigability of the river will be interfered with and the most serious complications will arise. It is shown also that other personal property upon which the sheriff is asked to levy the execution is also indispensable to the proper functioning of the district.

In Sloan's Improvement Districts in Arkansas it is said, at § 17 of this excellent work, that improvement districts, whether municipal or non-municipal, are usually regarded as public *quasi* corporations, and at § 28 of the same work it is said that public policy forbids that the funds of public corporations or agencies should be diverted by garnishment from the purposes for which they were collected.

In the case of *Goyer Co.* v. *Williamson,* 107 Ark. 189, 154 S. W. 525, it was said: "The levee board was one created for public purposes and given certain powers and required to perform certain duties for the public good and was an agency for the government in fact for such purposes, and, as such, was not subject to garnishment at law. Upon the transfer of the suit to equity,

however, the allegations of the insolvency of the contractors and that appellee was without remedy at law, he could have subjected the funds in the hands of the levee board due the contractors to the payment of his debt within the doctrine heretofore announced in *Plummer* v. *School District,* 90 Ark. 236, 118 S. W. 1011." The doctrine of that case was reaffirmed in the cases of *Sallee* v. *Bank of Corning,* 134 Ark. 115, 203 S. W. 276, and *Bayou Meto Drainage Dist.* v. *Chapline,* 143 Ark. 453, 220 S. W. 807.

The same public policy which inhibits the seizure of funds of an improvement district under garnishment would appear to inhibit their seizure under an execution at law.

The lands of the district are funds of the district in legal effect. The district acquired these lands through the sale thereof to it for the nonpayment of the taxes due on the lands. They therefore represent taxes due the district.

In the case of *Chicago Mill & Lbr. Co.* v. *Drainage Dist. No. 17,* 172 Ark. 1059, 291 S. W. 810, the delinquency in tax payments were so great that it became necessary to levy a larger per cent. of the assessed betterments to enable the district to meet its maturing obligations of bonds and interest thereon, and certain taxpayers who were not delinquent resisted this action upon the ground that it constituted a discrimination against them, in that they were thereby required to pay an undue proportion of their assessed betterments. But in refusing to sustain that contention we said: "The contention of appellant, expressed in its second request, that the levy of the proposed rate would result in requiring it and other landowners who had paid and who continued to pay their taxes to bear a greater proportionate burden than that imposed upon the lands which were allowed to go delinquent, is answered in the Rowland case, *supra,* [170 Ark. 1168, 282 S. W. 990] and in that of *Arkansas-Louisiana Highway Imp. Dist.* v.

Pickens, 169 Ark. 603, 276 S. W. 355. It was pointed out in those cases that the lien of the district continued until the taxes were paid or until the lands themselves were acquired by the district through sales for the nonpayment of the taxes, and that, when the delinquent taxes were paid, they became available and should be used in paying the obligations of the district, and further that, if the lands were sold to the district and not redeemed, then the entire value of the lands to be realized by a sale thereof would be available for this purpose. So that, while a delay would be entailed in obtaining and applying revenues from the delinquent lands, these revenues would finally be obtained and applied, and thus no unequal burden would be imposed."

It would hardly be contended that taxes collected from lands in the district on deposit in the bank to the credit of the district could be levied upon by any process from a court of law. Yet in legal effect this is the character of the lands upon which the judgment creditor here seeks to have an execution levied. These lands represent taxes not yet converted into money, but the authority to so convert them by selling them exists and is imposed upon the directors of the drainage district by the Acts of the General Assembly under which the district is performing the functions for which it was created.

The taxes of the district, which are represented, in part, by the lands sold for the nonpayment of taxes, have been pledged to the holders of the bonds of the district, and the judgment creditor in the instant case should not, by this proceeding, be given this preference over the holders of these obligations of the district. *Kochtitzky v. Mercantile Trust Co.,* 16 Fed. (2d) 227; *Canal Const. Co. v. Federal Life Ins. Co.,* 21 Fed. (2d) 928.

The execution should not therefore be awarded, and I respectfully dissent from the judgment ordering it done.

BLANTON COMPANY OF DELAWARE *v.* BURKE.

Opinion delivered May 11, 1931.

Moore & Moore and *Daggett & Daggett,* for appellant.

A. M. Coates, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $600 rendered in the circuit court of Phillips County in a suit by appellee against appellant for a balance due him on an alleged contract of employment for a year, beginning July 15, 1928, and ending July 15, 1929. Appellee alleged that he was employed on the.....day of July, 1928, for the term of one year as manager of appellant's cotton seed department at a salary of $200 a month, and that he was discharged on the 15th day of April, 1929, in violation of the terms of the contract and was unable to procure employment elsewhere during the remainder of the term.

Appellant filed an answer admitting that appellee had been employed on the 15th day of July, 1928, under a verbal contract, but denying that the contract was for a year, and also pleaded in bar of the action the statute of frauds.

When the cross-examination of appellee had been completed, appellant moved the court for a continuance of the cause on the ground that appellee had testified to an oral contract of date July 20th, whereas he had

alleged and sought to recover upon an oral contract of date July 15, 1928, and, on account of the variation between the proof and the allegation, it was surprised. The court refused to continue the cause, and appellant contends that reversible error was committed in refusing to do so. We think not. The day on which the oral contract was actually made was alleged to have been entered into on the.....day of July, 1928. It was perfectly consistent with this allegation to prove that the contract was made on the 20th day of July, 1928, the day appellee began to work for appellant without any definite understanding as to the amount he was to receive or the length of time he was to work. Appellee testified that negotiations for employment to buy cotton seed for appellant had been pending for some time, and that he began to work for appellant on the 15th day of July, 1928, under a proposed agreement of $200 per month, but that no certain amount per month nor any definite time of employment was agreed upon until the 20th of July, 1928, at which time it was agreed between him and the representatives of the company that he should receive $200 a month for one year and a bonus at the expiration of the season. Appellant seems to have drawn the inference from the complaint that appellee would testify that the oral contract was made on a day prior to July 15th to take effect on the 15th of July, 1928, but such inference does not necessarily follow from the allegation.

According to the allegation in the complaint, it could as well have been made on a day in July subsequent to the 15th to relate back to the 15th. In any event, appellant was not prejudiced by the testimony as both representatives of appellant who made the contract with appellee were available as witnesses. They were the only ones that knew anything about the contract except appellee, so appellant needed no additional time to procure witnesses relative to the date the contract was made. The court correctly overruled appellant's motion for a continuance.

At the conclusion of the testimony, appellant requested the court to instruct a verdict for it upon the theory that under appellee's own testimony he entered into the performance of a contract on July 15th, 1928, for the period of one year, which had been verbally made prior to that time and hence void under the statute of frauds requiring such contracts to be in writing to be binding upon the parties thereto. Crawford & Moses' Dig., § 4862, 6th paragraph. Appellant would be correct in this contention if its interpretation of appellee's testimony were the only reasonable interpretation that could be placed upon it. Taking his testimony as a whole, just the opposite interpretation can be placed upon it. In addition to excerpts from his testimony quoted and relied upon by appellant in interpreting same, he also testified that he went to work for appellant on July 15, 1928, pursuant to negotiations in which neither the amount he was to receive nor the duration of the contract was definitely fixed, but that on the 20th day of July, 1928, it was verbally agreed between appellant's representatives and himself that the date of employment should begin as of date July 15, 1928, the day he had actually begun work, and continue for a year on a monthly drawing account of $200 per month and a bonus in addition in case the profits of the cotton oil company justified it. The jury accepted the latter statement of appellee as true, although it was not in perfect harmony with the statements quoted by appellant from his testimony. The discrepancies in it were partly due to confusion in failing to fully and completely understand the purport of the cross-examination propounded to him. Under the rule announced by this court in the case of *Blanton Company* v. *Stewart,* 182 Ark. 934. 33 S. W. (2d) 50, governing discrepancies in testimony of witnesses, appellee's testimony was not wholly and entirely discredited by the slight contradictions contained therein.

No error appearing, the judgment is affirmed.

PEOPLE'S BUILDING & LOAN ASSOCIATION *v.* LESLIE LUMBER COMPANY.

Opinion delivered May 11, 1931.

J. S. Utley and *T. M. Hooker,* for appellant.

Rowell & Alexander, for appellee.

MEHAFFY, J. The appellant, People's Building & Loan Association, on the 25th day of July, 1929, entered into a contract with J. G. Ish, Jr., to sell the west half of lot 4, block 31, in the city of Pine Bluff, Arkansas, for the sum of $20,000, $500 of which was paid in cash and a note executed for $19,500. There was a three-story brick building on the property which was known as the Arlington Hotel, and the contract included all furniture, fixtures and equipment within the building. The contract also provided that said J. G. Ish, Jr., should begin at once and complete within ninety days certain improve-

ments named and pay for all labor and material used in making said repairs. A further condition was that said Ish had deposited with the People's Building & Loan Association $500 in cash and a real estate gold bond for $1,000, payable July 30, 1938, said bond being secured by first mortgage on property in Chicago, Illinois. The bond and the $500 was pledged to guarantee the improvements mentioned should be made and paid for as stipulated in the contract. It was also provided in the contract that, if the said Ish failed to make the improvements and pay for the labor, the bond should be sold and the proceeds, together with the $500 cash pledged, should be applied as a credit on the note for $19,500.

The contract also contained the following provision: "It is expressly agreed that the party of the first part does not constitute or appoint the party of the second part its agent to make the repairs herein above listed, and that the party of the second part has no authority or right to place on said property or to subject said property to any lien for labor or material."

The contract provided that the title should be retained not only to the land and improvements to secure the payment of the purchase price, but the title was also retained to the furniture, fixtures, and equipment.

Either at the time the contract was made or some time thereafter, J. G. Ish, Jr., transferred and assigned his interest in the contract to Marietta Hotel, Inc., and he also, about the same time, entered into some sort of an agreement with Walter E. Parker. This arrangement, whatever it was, must have been made immediately after the contract was made with Ish.

W. W. Finch, secretary of the appellant, was asked: "When did you first know Parker in the deal?" He answered: "After Ish bought it I knew that Parker was doing the work for him. Ish would bring Parker up with him, and we had Parker sign the papers for the $3,000 loan with Ish as we thought he might have an interest in it."

On the 28th day of September, 1929, while the work was being done by Ish and Parker, the appellant required both Ish and Parker to execute a note and mortgage on the property for $3,000 to get money to pay for the improvements.

After the improvements had been made, the appellant brought suit in the Jefferson Chancery Court against Ish to foreclose on its original contract and against Ish and Parker to foreclose the mortgage given on the 28th of September, 1929, and each of the appellees was made a party defendant in plaintiff's original suit. Plaintiff alleged in its complaint that the Leslie Lumber Company and C. A. Smith, the appellees, had caused to be filed in the office of the clerk of the circuit court of Jefferson County on January 20, 1930, an account, and that each of them claimed a materialman's lien on the property covered by plaintiff's vendor's lien and mortgage.

Each of the appellees was served with process, and the appellant in its suit denied that either of them had any lien against the property, but, if they did have a lien, it was subordinate to its lien, both its vendor's lien and mortgage lien, and prayed for a decree holding its liens prior and paramount to the claims or liens of the appellees.

Each of the appellees, defendants in the original suit, filed an answer and cross-complaint against appellant and Ish and Parker.

The chancery court entered a decree in favor of appellant against Ish on its claim for a vendor's lien and against Ish and Parker for the amount due under the note and mortgage and foreclosing the lien. The court further decreed that the Leslie Lumber Company and C. A. Smith, trading as Co-Operative Plumbing Company, have judgment against Ish and Parker, and that each of the appellees have a mechanic's lien which was prior and paramount to any liens of the other parties to the suit, and that, out of the first proceeds from the sale of the real estate after the payment of costs of said sale

and commissioner's fee, the judgments of the Leslie Lumber Company and C. A. Smith be first paid.

The chancellor ordered the sale of the property, holding that the appellees' mechanic's liens were prior to appellant's lien, but did not give personal judgment against the appellant.

Appellant prosecutes this appeal to reverse said decree, and appellees prosecute a cross-appeal in which they seek to have personal judgment against appellant.

Appellant first contends that no summons was issued in the case and no service had on Ish and Parker, and therefore the court erred in giving personal judgment against Ish and Parker.

In the first place, Ish and Parker were made defendants in appellant's original suit, and a waiver of service of summons or other process was filed in the Jefferson Chancery Court on the 19th of October, 1930, long after the cross-complaints of appellees were filed. The record does not indicate who had the summons issued nor who filed the waiver in court. The cross-complaint of the Leslie Lumber Company was filed July 26, 1930, and the cross-complaint of Smith was filed July 23, 1930. While it appears that the waiver was signed by Ish on the 9th of July, and it also appears from the record that service of summons was accepted by Walter E. Parker and Willie S. Parker on July 1, 1930, they were not filed in court until the 17th of October, 1930.

If Ish and Parker were contractors, as the lower court held, they were necessary parties. Of course, if they were agents of appellant, they would not be necessary parties in a suit to foreclose the mechanic's liens.

Appellant calls attention to the cases of *Simpson* v. *J. W. Black Lumber Co.*, 114 Ark. 464, 172 S. W. 883; and *Cruce* v. *Mitchell,* 122 Ark. 141, 182 S. W. 530.

In the first case the court held that the contractor was a necessary party and should have been made co-defendant with the owners, because the owners would know nothing about what amount of materials had been fur-

nished nor how much material had gone into the improvements, and therefore he was a necessary party, both for his own and the owner's protection. In that case, however, the appellants demurred to the complaint for a defect of parties defendant, and the court overruled the demurrer, and the case went to trial without the contractor being made a party.

In the next case, *Cruce* v. *Mitchell, supra,* the court again held that the contractor was a necessary party.

This court, therefore, is committed to the doctrine that in suits to foreclose mechanic's liens the contractor is a necessary party. He should be made a party because the original contract for the improvements is made between the contractor and the owner. The other contract, that with materialmen, is made between the contractor and materialmen; the owner is not a party to it, and it is therefore necessary, in a suit to foreclose a mechanic's lien against the property of the owner, to make the contractor a party. The owner is not primarily liable, and it is necessary to make the contractor a party to prove the debt against him, show that the material went into the construction of the building, before the materialman is entitled to a lien against the owner's property, but the contractors here were made parties both in the original suit and in the cross-complaints filed by the materialmen. There is therefore no question here about defect of parties or a waiver of any such defect, but it is contended that the personal judgment against the contractors is erroneous because it is argued that they were never served with process. They were parties defendant in both suits and had entered their appearance in the suit. It is claimed that Ish is a nonresident, and that Parker was present in court when the case was tried.

The record does not show that Parker and Ish had been served with process, but it does not show that they had not been.

"The present litigation was initiated by the landowner at a time when the materialman could have come

into court and foreclosed their liens. The owner of the premises undertook to bring the contractor before the court, and procured an order enjoining the materialmen from instituting any suit against the owner or its property, looking to the foreclosure of their liens, and the whole matter should be settled in this litigation. The owner so tied the hands of the materialmen as to prevent any action outside of this litigation. It brought them into this litigation, and it does not lie in its mouth to say that they cannot obtain a judgment of foreclosure of their liens because they have not independently obtained a judgment against the contractor. They were enjoined from taking any steps looking to the foreclosure of their liens against the Realty Trust Company or its property. One of the necessary steps in a proceeding to foreclose that lien was to sue the contractor in an independent suit and obtain judgment, or to sue him concurrently with the owner of the premises. We therefore think that, by the voluntary action of the Realty Trust Company (the owner of the premises) requiring these materialmen to establish their liens in this litigation, it cannot contend that the contractor has not been personally served." *Mass. Bonding & Ins. Co.* v. *Realty Trust Co.*, 142 Ga. 499, 83 S. E. 210; 40 C. J. 412; *Peninsula Stone Co.* v. *Crane*, 226 Mich. 130, 197 N. W. 693.

In the instant case the appellant began the suit against the appellees and the contractors, brought them all into court, alleged that appellees were claiming mechanic's liens, and by the action of appellant they were required to litigate their claims in the suit brought by appellant with all the parties in court and it does not lie in its mouth to say that they cannot obtain a judgment of foreclosure of their liens because they have not obtained an independent judgment against the contractors, as was stated in the case above cited.

It is next contended by appellant that the ten days' notice required by the statute was not given, and it contends that this was jurisdictional. If the appellant had

no notice, and the appellees had brought an independent suit, they would fail because of not having given notice to the owner. It is necessary to give notice to the owner because there may be a lien fixed on its property, and the statute requires that, before this be done, a subcontractor or materialman must give the notice, but the purpose of this notice is to give the owner an opportunity to defend the action or to take whatever steps it may think proper after it receives notice of a claim of a lien; but notice in this case would be perfectly useless. The materialmen did not bring this suit; the appellant brought it, and made the materialmen parties defendants, and required them to litigate their claims in that suit. Of course, it would not be necessary in that suit to give them notice of claim, to litigate which appellant had brought them into court.

Notice required by our statute is for the sole benefit of the owner, but it cannot claim that it is entitled to notice of the very thing put in issue by its own pleadings, but the appellant had notice, its own pleading wherein it said: "These materialmen claim liens" shows it had notice. When a person knows a thing, he has notice thereof. No one needs notice of a thing he already knows. *St. L. S. F. R. Co.* v. *State,* 179 Ark. 1128, 20 S. W. (2d) 878; 20 R. C. L. 1263.

In discussing the question of notice this court has said: "There must, according to our previous decisions, be a substantial compliance with this statute unless the owner had, by contract or by waiver, or in some manner by his own conduct, estopped himself from insisting on such compliance." *Conway Lbr. Co.* v. *Hardin,* 119 Ark. 43, 177 S. W. 408.

Of course, notice in this case, after the appellant had brought suit alleging that the appellees claimed liens. would be entirely useless.

It is next contended by the appellant that the lien for the purchase money is superior to that of the materialmen. Appellant cites and relies on *Gunter* v. *Ludlam,* 155 Ark. 201, 244 S. W. 348. In that case, however, the owner

did not authorize any improvements and did not consent to the improvements being made, and the court said: "Appellants, having placed Ludlam in possession under a contract of sale, were in the attitude of vendors who had conveyed property and had accepted a mortgage back as security for the debt.

"The statute (C. & M. Dig., § 6911) gives priority to liens for labor or material only against other incumbrances created after the commencement of the improvement, and in effect subordinates the lien to prior incumbrances by way of mortgage or otherwise."

The contract for sale in the instant case expressly provided that the improvements should be made, and this was a part of the consideration. The appellant authorized the improvements itself, required them to be made, and according to its own testimony, knew that the improvements were being made and knew that Parker was doing the work.

Mr. Finch, the secretary of the appellant, testified that after Ish bought the place that he knew Parker was doing the work; that Ish brought Parker up with him and Parker signed the note and mortgage with Ish.

If a sale of the place had been made by appellant to Ish and no improvements authorized by the appellant, and the purchaser had thereafter made improvements without any authority from the vendor to do so, under the principal announced in *Gunter* v. *Ludlam, supra,* the vendor's lien would have been prior to the mechanic's liens; but when the owner contracts to sell the place and expressly requires the improvements to be made for its own benefit, it cannot then claim that its lien is superior to the lien of persons furnishing labor or material.

Appellant next calls attention to and relies on *Harvey* v. *Gay,* 42 N. J. L. 176. That case holds that the written consent, which under the lien law will bind the land of the owner for repairs contracted by the tenant, must be absolute in its terms. The relation of vendor and purchaser did not exist in that case, but the relation of

landlord and tenant existed. The New Jersey statute construed by the court in the above case expressly provides that if any building is erected by a tenant or persons other than the owner of the land, then the building and estate of such tenant only shall be subject to the lien created by the act unless such building be erected by the consent of the owner of such lands in writing.

The act also provides for the acknowledgment and recording of the writing consenting to the improvement.

There was, in the New Jersey case above cited, a consent to make the improvements, provided they should be at the expense of the owner, and the court held, as we have already stated, that the consent mentioned in the statute must be absolute.

It is contended, however, by appellant that the clause in the contract of purchase, that the purchaser shall make the improvements, pay for them, and that they shall not create any lien on the property of the owner, prevents a mechanic's lien on the property. This contract was between the vendor and vendee, or owner and contractor. The subcontractors were not parties to the agreement and knew nothing about it. When they furnished the material to the persons authorized and required by the owner to make the improvements, the statute created the lien, and the owner could not, by contract between itself and the purchasers, have the things done for which the statute gives a lien, and in the agreement abrogate the statute.

This court recently said: "Our statute gives subcontractors, laborers and materialmen a lien upon the improvement, and this is based upon the right of the implied agency of the original contractor to bind the owner's title. If the owner could give a mortgage to the principal contractor and thereby defeat the rights of subcontractors, laborers and materialmen, then we would have the case of the owner and the principal contractor making a contract which would have the effect of abrogating a statute lawfully enacted by the Legislature.

This could not be done." *Home Oil Co.* v. *Helton,* 179 Ark. 132, 14 S. W. (2d) 549.

"It is claimed that the authority of the vendee in such a contract to charge the interest of the vendor rests upon the principle of agency, and that this provision is a limitation upon the agency, and that the rights of everyone who furnishes labor or material are subject to this limitation. If this is so, it would be a very convenient way to repeal the provisions of the lien law. Such a stipulation cannot deprive of their rights under the statutes, persons not parties to it. It is the law which at once creates the authority to charge the land and defines its extent." *Malmgren* v. *Phinney,* 50 Minn. 457, 52 S. W. 915, 18 L. R. A. 753.

In construing a contract similar to the one in this case, the New York Court of Appeals said: "The stipulation in respect to the priority of liens did not destroy the owner's consent that the houses should be built, nor diminish its effect, nor did it lessen the absolute obligation resting upon the vendee to build them. It was not the design of the parties to accomplish any such results, but simply to circumvent the statute, and defeat the rights given by it to persons furnishing labor and materials for the work, which design could not be accomplished by such a stipulation as against persons not in privity with either of the parties to it who should, without notice of the stipulation, furnish labor or materials for the work." *Miller* v. *Mead,* 127 N. Y. 544, 28 N. E. 387, 13 L. R. A. 701.

The appellant in this case required the improvements to be made, and it could not, by a clause in the contract between it and the contractor, circumvent the statute and defeat the rights given by the statute to persons who furnished material to make the improvements. As between the owner and the contractor, the stipulation was, of course, binding, but it could not in this way abrogate the statute.

What we have said makes it unnecessary to discuss the question of agency.

The appellees prosecute a cross-appeal in which they seek personal judgment against the owner. They would be entitled to this, of course, if Ish and Parker were agents of the owner and had authority as such agents to purchase the material, but under the evidence in this case we think the relationship was that of owner and contractor, and not principal and agent.

It follows that the decree of the chancellor, both on appeal and cross-appeal, must be affirmed. It is so ordered.

Mr. Justice Kirby dissents.

Hannah *v.* State.

Opinion delivered May 25, 1931.

J. D. Shackleford, for appellant.

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

BUTLER, J. Appellant was convicted in the court below for the crime of murder in the first degree, and sentenced to imprisonment for life, from which verdict and judgment he has appealed. Appellant has assigned as error the insufficiency of the evidence to sustain the verdict, errors of the trial court in its failure to quash the indictment returned by the grand jury and in the selection of the petit jury, and in its refusal to give instruction No. 2, requested by the appellant, and in permitting the clothing of the deceased to be exhibited to the jury.

The testimony tended to establish the following state of facts: H. C. Van Dyke, the deceased, was a barber about sixty-three years of age whose home was in Kosciusko, Mississippi. A few days prior to the third day of January, 1931, he disappeared from Kosciusko and was discovered dead by the highway near Malvern with his head almost severed from his body, his pockets turned wrong side out, his shoes partly unfastened and his socks pulled down over the tops of his shoes. His body was identified by a card found on his person with his name and address thereon, and an investigation was made which resulted in the discovery of the car in which he had been traveling on the highway near Kosciusko with two flat tires and without any gasoline. Shortly after this the defendant was arrested. It was then discovered that the defendant had been employed by Van Dyke, on or about the Sunday preceding the discovery of the latter's body, to accompany Van Dyke on a trip through western Tennessee into Arkansas as the driver of the car; that at about the point where Van Dyke's

body was discovered the car was stopped for some purpose, and there Van Dyke had been killed by the defendant. When first arrested, the defendant denied knowing Van Dyke or ever having been in his company. Within a short time after this, however, he admitted that he had left Kosciusko with Van Dyke, but denied having killed him, and stated that Van Dyke had been attacked by some unknown persons, and that he had left in the car during the rencounter. In another statement made soon thereafter to the officers he admitted having killed Van Dyke and gave as a reason that he was defending himself at the time from an attack made on him.

It was shown that Van Dyke, during the journey, had made statements relative to having money in his possession, and a witness testified as to having seen some money under Van Dyke's sock, the witness being able to see sufficiently through the sock to distinguish it as money.

Apparently the first person who reached the scene of the killing after the happening stated that there was only one track or set of footsteps which led from the road to the edge of the embankment where the body lay and around the body and back to center of the road, and at that time the pockets of deceased's clothing were turned wrong side out, and the socks pulled down over the shoes, and that witness remained until the officers arrived when a search was made of the body and nothing of value discovered thereon except a cheap watch worth perhaps $1.50 or $2. Van Dyke had purchased some time in the afternoon or evening preceding the discovery of his body four fifteen cent bottles of vanilla extract, all of which he drank at intervals as he traveled. He was last seen alive about eight o'clock after dark on the evening of the third of January, and his dead body discovered early on the morning of the fourth. The defendant testified that during the night of the homicide Van Dyke had become intoxicated, as he had done frequently during the journey, but that he had shown no evidence of being quarrelsome; that where the killing occurred Van Dyke had the car

stopped and got out on the right and went behind the car, and that defendant got out on the left and told Van Dyke that he was going to leave him there and go no further with him; that Van Dyke told defendant if he tried to do this that he would kill defendant, and started at him with a razor; that he caught Van Dyke's arm and during the struggle he cut Van Dyke's throat because he believed Van Dyke was about to kill him and that he acted in self-defense; that he did not rob Van Dyke of any money, but admitted that he took a number of razors belonging to the dead man and returned with them in Van Dyke's car over the way they had previously come and traded them for gasoline.

The jury evidently did not believe the defendant's testimony, and we think the circumstances abundantly justify them in the conclusion reached that the defendant murdered the deceased and that the motive was robbery.

The grand jury convened, and the indictment in this case was returned while the defendant was confined in the jail of Hot Spring County, the indictment being returned on the 20th of January, 1931. The record shows that on the 21st of January, 1931, the defendant was arraigned in open court, and at that time was represented by an attorney who entered a plea of not guilty. The case was then continued and set for January 27, 1931, on which day the defendant, by his attorney, filed his motion to quash the indictment the grounds of the motion being that defendant was confined in jail at the time the grand jury was impaneled, that he was a negro, and that there were no negroes on the grand jury, and alleged that the failure to include negroes in the panel was a discrimination against the defendant on account of his race.

The court did not err in overruling this motion. No attempt was made to prove that negroes were excluded from the jury, and that none such had been selected because they were negroes, but the defendant rested on the allegation contained in his motion. This was not sufficient, for the allegation is one of fact, and must be de-

termined as any other fact in the case, and, in the absence of any showing to the contrary, it must be presumed that the jury commissioners made their selection in accordance with law. "The mere absence of negroes from the grand jury cannot of itself be considered as a sufficient showing to sustain the motion to quash. It must appear that the exclusion of negroes from the grand jury was brought about for the purpose solely of denying equal protection of the law to the defendant or his race on account of race or color." *Eastling* v. *State,* 69 Ark. 189, 62 S. W. 584; *Threet* v. *State,* 110 Ark. 152, 161 S. W. 189; *Jordan* v. *State,* 141 Ark. 504, 217 S. W. 788. To support his contention on the motion to quash the appellant has cited the cases of *James* v. *State,* 68 Ark. 464, 60 S. W. 29, and *Mallory* v. *State,* 141 Ark. 496, 217 S. W. 482. We have carefully read these cases, and find nothing in them in conflict with the rule announced above.

After two of the petit jurors had qualified and had been accepted by both the State and the defendant, the court permitted the State to peremptorily challenge them. The defendant made proper objection and exceptions and contends here on the authority of *Brewer* v. *State,* 72 Ark. 145, 78 S. W. 773; *Carr* v. *State,* 81 Ark. 589, 99 S. W. 831; *McGough* v. *State,* 113 Ark. 301, 167 S. W. 857; and *Dewein* v. *State,* 114 Ark. 472, 170 S. W. 582, that this action of the court was prejudicial error. These cases do not support the defendant in his contention, for there is no showing made that at this time the challenges of the defendant had been exhausted. This was a matter within the discretion of the court, and it must be shown that such discretion was abused or that the court acted arbitrarily. Here no such showing is made, and, instead of supporting the contention of the appellant, the cases above cited support the rule here announced.

In *Carr* v. *State, supra,* the court said: "Appellant says that the trial court erred in permitting the State to peremptorily challenge two jurors after they had been

examined and accepted as jurors in the case, but this was not error. It was lawful to do so." In *Dewein* v. *State, supra,* the court held that it was not error to permit the State to peremptorily challenge a juror after he had been accepted by both the State and the defendant, when the defendant had not exhausted all his peremptory challenges, and that the court, in the exercise of its discretion could permit the State to peremptorily challenge the juror after he was accepted on the jury. The court there cited *Carr* v. *State* and *McGough* v. *State, supra.*

The correct rule appears to be that, at any time during the impaneling of the jury, where the defendant has not exhausted his peremptory challenges, it is within the discretion of the trial court to permit the State to excuse peremptorily a juror already taken, but that, if the defendant has exhausted his peremptory challenges, the case will be otherwise.

Instruction No. 2, requested by the defendant, submitted to the jury the defendant's theory that he was acting in self-defense, and instructed the jury that he had the right, if attacked by another with a deadly weapon under such circumstances as to make it appear to him that his life was about to be taken, to stand his ground and defend himself. This instruction as drawn is criticized by the State as an inaccurate declaration of law, but, assuming that it was correct, we think there was no error committed in refusing to give it, for the reason that it was fully covered by other instructions given at the request of the defendant.

The last alleged error is the action of the court in permitting the clothing of the deceased to be exhibited to the jury after all of the evidence had been introduced. We have examined the transcript of the evidence, and we find that during the introduction of the testimony on the part of the State the clothing was offered in evidence. The defendant objected to its introduction at that time, and asked that it not be introduced then, stating, "I have no objection to their being exhibited at a later stage." To this the prosecuting attorney assented with

the statement that he would exhibit it later on. Therefore, if this evidence was introduced out of its proper order, it was an error invited by the defendant, of which he cannot now complain. There was a question as to the position in which the deceased was standing at the time he received the death stroke, and the blood on the clothing might have shed light on this question, and therefore the clothing was admissible in evidence.

On the whole case, we find no prejudicial error, and the judgment of the trial court must therefore be affirmed.

[redacted]

VAUGHAN *v.* SCREETON.

Opinion delivered May 11, 1931.

[redacted]

S. Brundidge, for appellant.
W. A. Leach, for appellee.

HUMPHREYS, J. The appeal in this case calls for a determination of two questions, namely: The validity of the execution sale and the correctness of the trial court's action in refusing to vacate the order confirming the commissioner's sale.

On the 15th day of November, 1929, appellees obtained a personal judgment against appellant for $17,818.08 on a promissory note and a decree of foreclosure and order of sale of certain real estate described in the deed of trust executed by him to them to secure the payment of same.

At the instance of appellees, an execution was issued on the judgment on the 27th day of January, 1930. The sheriff levied the execution upon 270 acres of land and lots 9, 10, 11, 12 in block 16 in Des Arc, all of which belonged to appellant; also upon 780 acres of land and lots 9 and 10 in block 72 in Des Arc, none of which belonged to appellant, and sold the property levied upon in bulk for $1,500 to appellees, who were the only bidders at the sale. Under the statute law of this State, an execution debtor is accorded the right to redeem his land within one year from the execution sale for the amount of the bid. Crawford & Moses' Dig., § 4329. To uphold the execution sale in the case at bar would result in a denial of this right because the property owned by him was not sold on a separate bid but in bulk with a large amount of other property which did not belong to him upon the single bid of $1,500. In order to have redeemed his own property from the sale, he would have been compelled to tender the whole amount of the bid, or $1,500, as there was no way to determine the amount bid for his part of the property. An execution creditor will not be permitted to thus burden and embarrass his judgment debtor in the exercise of his right to redeem.

We now proceed to a consideration of the trial court's action in refusing to vacate the order confirming the commissioner's sale under the decree of foreclosure. All the property described in the deed of trust was sold

by the commissioner named in the decree of foreclosure, notwithstanding a part thereof had been sold under said execution sale, in separate parcels, on the 3rd day of July, 1930, to appellees for the aggregate sum of $8,192.50. The sale was reported on the morning of the 5th day of August, 1930. Same was in all things approved and confirmed, immediately after which the court adjourned, and the judge left the city for his home. Appellant had employed an attorney to prepare exceptions to the sale and received them at 10:30 A. M. on the 5th of August, 1930. He would have received and filed them sooner had he not been in an automobile wreck on the night of the 4th of August. This wreck detained him, and he did not reach Des Arc until 10:30 on the morning of the 5th of August. He immediately called the clerk and was informed that the court had adjourned and the judge had gone home. Owing to this fact, he did not file the exceptions to the sale until August 13, 1930. The court met again in November and heard the motion to vacate the order confirming the sale upon the testimony adduced by both parties and overruled the motion, over appellant's objection and exception.

According to the decided weight of the testimony, the property was sold at a grossly inadequate price. Its value was in the neighborhood of $50,000 or $60,000, and it only brought $8,500. The fact that the title to part of the property was thus clouded may have been one reason why others did not bid on the property and why same sold for a grossly inadequate price. The sale should have been set aside for the reasons assigned.

Appellees argue that appellant was not diligent in filing his exceptions to the sale, but we think he was prevented from filing them sooner by an unavoidable casualty.

Appellees also argue that the decree of confirmation of the sale should not be overruled because court had adjourned until court in course at the time the exceptions were filed. It is true the court entered an order ad-

journing court in course on the 5th day of August, 1930, but the order was ineffective. In that chancery district it is provided by statute that court shall remain open at all times. This court said in the case of *Sanders* v. *McClintock,* 175 Ark. 633, 300 S. W. 408, that, "Under the act of 1923, as amended by the act of 1925, the term of chancery court in each county in the chancery district (referring to Chancery District No. 1, including Prairie County) continued until the arrival of the day designated by the statute for the beginning of another term of the same court for the same county. The evident purpose of the statute was to continue the term of court in each county from the beginning of the term until the opening of the next term in the same county." Under this ruling, the court had power over its decrees and might vacate, set aside, modify, and annul them at any and all times. The exceptions were not filed after, but before, the expiration of the term at which the sale was confirmed.

On account of the error indicated, the decree confirming the execution and commissioner's sales is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REX OIL CORPORATION *v.* CRANK.

Opinion delivered May 11, 1931.

A. T. Davies and *Reinberger & Reinberger,* for appellant.

Verne McMillen, Fred A. Snodgress, M. V. Moody and *Henry E. Spitzberg,* for appellee.

BUTLER, J. The casualty out of which this lawsuit has arisen occurred in this way: two young women were journeying from Little Rock to Hot Springs in a Ford coupe when they were met by one Evans, an employee of appellant corporation, traveling in a truck of the appellant and coming from the opposite direction. As Evans turned in the highway and while he was crossing the same for the purpose of driving to a nearby filling station, the Ford struck the truck about midway practically demolishing the car and seriously injuring its occupants. This suit was brought by them against the appellant corporation on the theory that Evans, the driver of the truck, was an employee of the appellant corporation and at that time engaged in the furtherance of its business; that, while so engaged, Evans carelessly turned in the highway immediately in front of the approaching Ford so as to cause the collision, the appellees themselves at the time being in the exercise of ordinary care.

It is conceded that, on the issues raised by the pleadings and the testimony in the case, the court fully and fairly declared the law except as contended by the appellant, in its failure to grant a peremptory instruction directing a verdict in favor of the appellant. The jury found for the plaintiffs, appellees here, in the sum of $5,500 for Ruth Crank and $5,000 for Irene Holcomb.

There are only two questions presented for our consideration on this appeal; first, the failure of the court to direct a verdict as requested by the appellant, and second, that the amounts of damage awarded were excessive. The testimony regarding the negligence of Evans, the driver of appellant's truck, and as to whether the appellees were exercising ordinary care at the time of the accident, is conflicting, but it is not seriously contended that the testimony was not sufficient to warrant the jury in finding that Evans was guilty of negligence. Indeed, we think the preponderance of the testimony establishes that fact, and that the appellees were not negligent themselves.

The principal contention and the one which has given us concern is that, while Evans might have been guilty of negligence at the time of the collision, the relation of master and servant between him and the appellant had been for the time suspended, and that, while the truck furnished him by the appellant was to aid him in the discharge of his duties, he was not so using it at the time of the collision, but for his own convenience and on a mission personal to himself and wholly disconnected from any service for his employer. It is the law of this jurisdiction, as settled in numerous decisions, that the master is responsible for the negligent act of his servant if such act occurs during the time the servant is engaged in the service of the master, although the act itself might have been unauthorized; but it is essential to the master's liability that the wrong complained of must have been occasioned by the negligent conduct of the servant who at the time was acting within the scope of his employment. An important exception to this rule is also found in numerous cases of this court, namely, that, although one may be a general servant of another, the master is not responsible for the negligent act of the servant where the latter steps aside from the discharge of his duty and engages in something entirely disconnected from the performance of services for his

master and of a nature purely personal to himself, even though the casualty may be the result of the negligent use of some instrumentality furnished the servant by the master for the conduct of his employment.

The rule and the exception are stated and fully discussed in *Sweeden* v. *Atkinson Improvement Co.*, 93 Ark. 397, 125 S. W. 439, 27 L. R. A. (N. S.) 124; *Healey* v. *Cockrill*, 133 Ark. 327, 202 S. W. 229, L. R. A. 1918 D, 115; and in the very recent cases of *Hunter* v. *First State Bank of Morrilton*, 181 Ark. 907, 28 S. W. (2d) 712, and *Mullins* v. *Ritchie Grocer Co.*, *ante* p. 218. In those cases numerous decisions of this and other courts are cited which fully state, explain and illustrate the rule. The difficulty lies in the application thereof, as there is no definite rule by which it can be said that the acts of a servant are within or without the scope of his employment, each case of necessity depending upon its own peculiar facts and circumstances.

It is admitted that Evans was in the general employ of the appellant corporation, and that the truck in which he was traveling was the property of appellant committed to the custody of Evans for use in the prosecution of his duties; but the evidence on which appellant relied in the court below as a warrant for the request for a directed verdict and for a reversal of the judgment is this: Evans testified that on the morning of the day on which the collision occurred he had wholly abandoned the service of the master and was pursuing his journey on a purely personal matter, using the truck solely for his own convenience, it being his purpose and mission to convey his wife and child to Pine Bluff where his wife's father and mother resided that she might spend the week-end in their company; that, as a companion on the trip to Pine Bluff and back to Hot Springs on the same night, another person was riding in the truck with Evans and family; that he had in mind no business for the appellant corporation or the performance of any such along the way or at Pine Bluff nor on the return trip was any contemplated; that, as he pursued his way, his child became

thirsty, and he turned from the right side of the highway, on which he was traveling at an ordinary rate of speed, crossing to the left for the purpose of procuring a drink of water for the child from a filling station opposite when the collision occurred.

The testimony of Evans regarding his purpose for the journey was corroborated by that of his wife and his companion. This was all the direct testimony adduced with regard to Evans' mission. It is the contention of the appellant that this testimony was undisputed, and therefore brings the case within the exception above stated. We are of the opinion, however, that such is not the case. The testimony given by Evans and those with him in the truck was the only direct evidence relative to his actions and his motivation, but there was certain other evidence, not direct but circumstantial, which, after careful consideration and analysis, we have concluded raised an issue of fact on this proposition. In the first place, as we have seen, it is admitted that Evans was in the general employ of the appellant. He had been in its employ for a number of years and by gradual stages had risen until at the time of the accident he had become the manager of appellant's business within a given territory. He had charge of a filling station in Hot Springs from which he sold, both wholesale and retail, the commodities of the appellant whose home office was in the city of Pine Bluff where he had been accustomed at times to transact business of the appellant with his superiors, and it was to that city that he was going at the time of the collision. Among his customers was one McAtee, into whose place of business he was in the act of turning when the accident took place. It was the duty of Evans to sell McAtee oil and gas and to collect therefor, and, while both McAtee and Evans testified that at that time McAtee owed nothing to be collected nor was Evans delivering to him any commodity, still the mere fact that Evans was directing his course to the place of business of a customer was a circumstance to be considered by the jury in determining

what was the purpose of Evans on that occasion. Before leaving Hot Springs on that morning, Evans had placed in charge of his filling station there one McDonough, who testified that Evans was his boss, and that he had been placed in charge of the station with the information conveyed to him by Evans that he was going over to Pine Bluff on business. In that conversation Evans did not make any specific statement with regard to the business or for whom it was to be transacted, but it is not shown that Evans was engaged in any other business than that of his employer, and the truck in which he left was one belonging to his employer which he used for the purpose of calling on the trade and seeing different people in regard to the business of the appellant. "The doctrine is settled in this State that, if the automobile causing the accident belongs to the defendant and is being operated at the time of the accident by one of the regular employees of the defendant, there is a reasonable inference that at such time he was acting within the scope of his employment and in the furtherance of his master's business." *Mullins* v. *Ritchie Grocer Co., supra.*

We see therefore that there was a *prima facie* case made out that Evans was in the conduct of the master's business, which case was supported by the statement made by him to McDonough that he was going to Pine Bluff on business and the further fact that he was in the act of stopping at the place of business of a customer at the time of the accident. These circumstances, which were established by the testimony, raised certain inferences of fact, and, this being so, it was the province of the jury to weigh these inferences of fact with the conflicting direct testimony and to say whether such direct testimony overcame the inferences of fact raised by the circumstances proved. The court below did not err in submitting the case to the jury, and there is evidence of a substantial nature tending to support its verdict.

The verdict was not excessive. Mrs. Ruth Crank was the owner of the Ford coupe which was worth on the

market before the collision from four to five hundred dollars and afterward was not worth in excess of $75 or $100. The evidence tended to show that Mrs. Crank's right leg was broken and a hole knocked in the knee of her left leg; one of her ribs on the left side was broken which affected the left mammary gland; a severe blow was received over her heart and other cuts and bruises suffered. She was taken to a hospital where her leg was put in a metal cast. It was swollen to almost double its size and kept in the metal cast until the swelling subsided and then put in a plaster of paris cast for several additional weeks. She was in the hospital for over a month, and from there removed to the house of a friend where she continued in bed for a long time. The hospital bill amounted to over $100 and the physicians' bills are yet unpaid. She still suffers from her injuries, being unable to walk and stand upon her feet without pain.

Mrs. Crank's companion, Irene Holcomb, had no bones broken, but was lacerated in many places, so much so that it required 82 stitches to sew up the cuts, and was confined in the hospital 20 days. Her back was wrenched, and it has continued to give her pain since the accident. Some of her front teeth were shattered and a jaw tooth broken off. The skin was cut from the hairline on the forehead downward in a U-shape through the eyebrow and torn from the skull, hanging down over her face. The skin was replaced in position, but it has left a large U-shaped scar with one eye weakened and the lid drooping out of its normal position, thus seriously disfiguring her. While the scar may improve in appearance, it will remain permanently, and the area on the head in the vicinity of the scar is numb because of the disturbance of the nerves in that locality.

These were two young women whose vocation was that of waitresses. Their work required them to be on their feet through long hours, and a material part of their earnings which averaged $25 a week was in the nature of tips. Both of them were unable to work for several

months, and, while it was in the testimony that the ability of Miss Holcomb to work would not perhaps be permanently impaired, it is reasonable to think that she might be unable to secure employment in as favorable location as she could before because of such disfigurement. Unquestionably the shock to the nervous system of both these women must have been very great, and, coupled with otherwise severe physical injuries, the pain they endured, mental anguish, loss of time, the nature and extent of their injuries, leads us to conclude that the verdicts awarded are not greatly out of proportion, if any, to the damages sustained.

Affirmed.

JAMES *v.* ECHOLS.

Opinion delivered May 18, 1931.

Wm. J. Clark, W. T. Price, Brundidge & Neelly and *Carmichael & Hendricks,* for appellants.

Bogle & Sharp, for appellee.

HART, C. J. This appeal involves the compensation which should be allowed D. H. Echols, as executor and trustee under the will of R. R. James, deceased, and the carrying charges and expenses which should be allowed him, and the interest on legacies which should be charged to him. The will of Dr. R. R. James was duly admitted to probate, and the Bank of Cotton Plant & Trust Company, the executor and trustee named in the will, was duly appointed and entered into the execution of the trust. Subsequently, the Bank of Cotton Plant & Trust Company became insolvent and was taken over by the State Bank Commissioner. D. H. Echols was appointed trustee in succession and proceeded to carry out the terms of the trust under the will.

The legatees named in the will questioned the power of the chancery court to appoint a new trustee upon the insolvency of the trustee named in the will. This court upheld the power of the chancery court, when properly exercised, to appoint a trustee in succession; and D. H. Echols, as such trustee, duly proceeded with the execution of the trust according to the terms of the will as he construed them. *Bieatt* v. *Echols,* 181 Ark. 235, 25 S. W. (2d) 431.

The principal issue raised by the appeal in this case is the proper construction of the 6th clause of the will which reads as follows:

"Sixth. After the death of my wife, Carrie L. James, I give, devise and bequeath unto the Bank of Cotton Plant & Trust Company, of Cotton Plant, Arkansas, as trustee, all the remainder of my estate of whatever kind, to be held in trust by the said Bank of Cotton

Plant & Trust Company for the uses and purposes hereinafter set forth.

"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 payment for its services in administering this trust. Second, to pay to the trustees of Galloway College fifteen per cent. of the said income; third, to pay to the trustee 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, 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 trustees 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 lifetime, or until the termination of said 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."

Echols filed his account in the chancery court in which he asked for 20 per cent. of the gross income of the estate as his compensation under the terms of the will. He was also allowed the sum of $297, which he paid out under the orders of the court for guarding property belonging to the estate at Eagle Pass, Texas. The estate consisted of a large amount of real and personal property. Appellants herein, who were legatees under the will, filed exceptions to the account of said trustee, and also asked that he be charged with interest on the amount of legacies due them because he had unduly postponed the payment of the same.

We are of the opinion that the court erred in allowing the trustee for his compensation twenty per cent. of the gross income annually derived from the estate. A gift of the income generally means a gift of the net income after deducting taxes and other expenses necessary to the preservation of the property from which the income is derived. This rule applies to gifts of income of either realty or personalty. 2 Page on Wills, (2d ed.) § 1026, pp. 1687-1688; *Rothschild* v. *Weinthal*, 191 Ind. 85, 17 A. L. R. 1377, 131 N. E. 917, 132 N. E. 687; *Johnson* v. *Johnson*, 164 Ky. 724, 176 S. W. 199; *Heard* v. *Read*, 169 Mass. 216, 47 N. E. 778; *Dickinson* v. *Henderson*, 122 Mich. 583, 81 N. W. 583; Dewey's Estate, 153 N. Y. 63, 46 N. E. 1039; *Spencer* v. *Spencer*, 219 N. Y. 459, Ann. Cas. 1918E 943, 114 N. E. 849; *Martin* v. *Kimball*, 86 N. J. Eq. 10, 96 Atl. 565; and *Stone* v. *Littlefield*, 151 Mass. 485, 24 N. E. 592. In these cases, the established rule is that, where the income from real estate is devised to the trustee to pay over to certain legatees, they are entitled only to the net income after the payment of taxes, repairs, and other expenses of administering the trust unless the will contains a provision to the contrary. Otherwise the principal of the estate would be exhausted ultimately in its self-support. So, it is said that a direction to trustees to pay certain named beneficiaries the income of the estate means what is left after paying taxes and other necessary and proper expenses incident to the care, preservation, and handling of the estate. Hence it is said that, unless the testator so states, a construction which would require a regular, annual diminution of the corpus of the estate and thus, through the mere lapse of time, ultimately destroy the income of the heirs, is not admissible.

We have only copied paragraph 6 of the will, and we are unable to find from it or from any other language used in the will any intention on the part of the testator to give to the legatees anything except a designated per cent. of the net income. The compensation given to the executor is fixed by the same paragraph, and

it is a well-known rule of construction that the meaning of a word is oftentimes derived from those accompanying it. There is nothing in the context of the sixth paragraph which would indicate that the testator intended that the twenty per cent. of income given to the trustee for administering the trust was used in any different sense from the word "income" in which a per cent. of the income is given to various legatees. Otherwise, as above stated, the amounts left to the various legatees to be paid out of the annual income of the estate would be gradually diminished and ultimately consumed in payment of services to the trustee if we should hold that he was to receive twenty per cent. of the gross income for his services in administering the trust.

In this connection it may be stated that when the trustee accepts the trust and qualifies and enters upon the discharge of his duties as such trustee, he accepts the trust upon the conditions named in it and is entitled to no other or greater compensation than the will allows. *Gordon, Executor,* v. *Greening,* 121 Ark. 617, 182 S. W. 272, and cases cited in note to 34 A. L. R. at page 918.

Inasmuch as the decree must be reversed because the chancery court erred in fixing the compensation of the trustee, it may also be stated for the future guidance of the court that the executor was entitled to credit for personal expenses necessarily and reasonably incurred by him in transacting the business of the estate; but he must prove the particular items of expense and cannot claim the amounts of a gross sum without a specification of particular items. He would be entitled only to traveling expenses *bona fide* incurred, and such other expenses as must necessarily be incurred in the care and management of the estate. All expenses of this kind are regarded as expenses of administration. *Holland* v. *Doke,* 135 Ark. 372, 205 S. W. 648; and *Scroggins* v. *Osborn Company,* 181 Ark. 424, 26 S. W. (2d) 95.

It is next insisted that the court erred in allowing the trustee the sum of $297 for a night watchman for guarding certain property belonging to the estate at

Eagle Pass, Texas. This sum was paid out by the trustee under orders of the court, and there is nothing whatever in the record tending to show that it was not a proper allowance made to the executor in the preservation and care of the estate, and it was properly allowed as expense of administration.

It is next insisted that the trustee should be charged with interest at the legal rate on the various amounts which should have been paid to the legatees. The estate consisted mainly of farm lands and other property which provided an annual income in varying amounts. In the very nature of things, the net income could be arrived at only at the end of the year by deducting taxes and other carrying charges in the preservation and management of the estate from the gross income received by the trustee. Until the net income was fixed, the trustee could not tell what amounts should be paid to the legatees. When it became fixed, it would become his duty to pay the same over to the various legatees. It does not appear certainly from the record herein whether the trustee failed to pay the annual income to the legatees and held it until the succeeding year. If he distributed out the income annually, he should not be charged with interest; otherwise he should be charged with interest at the legal rate of six per cent. unless it is made to appear to the court that he did not do so until he obtained a construction of the will by the chancery court in order to ascertain whether he should be entitled to twenty per cent. of the gross or net income for his services rendered and whether the legatees should receive the net income after deducting taxes, costs of administering the trust, and other proper expenses of administration. *Dyer* v. *Jacoway,* 50 Ark. 217, 6 S. W. 902; and *Jacoway* v. *Hall,* 67 Ark. 340, 55 S. W. 12.

The result of our views is that the decree must be reversed, and the cause will be remanded with directions to the chancery court to state the account of the trustee in accordance with this opinion and for further proceed-

ings in accordance with the principles of equity. It is so ordered.

[redacted]

RAINES *v.* BOLICK.

RAINES *v.* MEYER.

Opinion delivered July 13, 1931.

[redacted]

Wallace Townsend, for appellant.

Carmichael & Hendricks, A. L. Rotenberry, H. M. Jacoway and *Lee Miles*, for appellee.

SMITH, J. It was stipulated by the parties to this litigation in the trial of the causes in the court below as follows: Mabelvale Road Improvement District No. 29 of Pulaski County, Arkansas, was organized under the provisions of act 126 of the Acts of 1923 (General Acts 1923, p. 84), and the commissioners of the district assessed the benefits of the proposed improvement against the lands therein, and, after so doing, entered into a contract with Pulaski County, through C. P. Newton, the judge of the county court, for the construction of the improvement, and certain work was done under this contract. Judge Newton was succeeded in office by Judge W. F. Sibeck, who refused to carry out the contract made by his predecessor unless the district would pay $20,000 more than the contract price of the work, which additional

sum was to be used in the construction of the necessary bridges in the district. Having refused to further comply with the contract except upon the condition stated, the county has waived its claim for compensation for the work done by it under the contract.

Litigation arose over the power of the commissioners of the district to issue and sell bonds to promote the improvement, and on March 9, 1931, this power was upheld in the opinion of this court delivered that day in the case of *Moreheart* v. *Mabelvale Road Imp. Dist. No. 29, ante* p. 411, but it has been stipulated by the parties in the instant case that this power had not been exercised.

At the 1931 session of the General Assembly an act was passed, which has been numbered 231 and which was approved by the Governor on March 26, 1931, which was entitled, "A bill for an act to be entitled 'An act to repeal Mabelvale Road District Number 29'." This act reads as follows:

"Be it enacted by the General Assembly of the State of Arkansas:

"Section 1. That Mabelvale Road District Number 29, Pulaski County, Arkansas, created by order of the Pulaski County Court on the 10th day of October, 1927, and recorded in county court record 42, page 203, of Pulaski County, be, and the same is, hereby repealed.

"Section 2. That all laws and parts of laws in conflict herewith be, and the same are, hereby repealed."

Upon the authority of this act certain landowners in the improvement district brought suit to restrain the commissioners of the district from further proceeding towards the construction of the proposed improvement, and they prayed that a receiver be appointed to wind up the district's affairs.

In the answer filed to this complaint it was alleged that the act of 1931 was void, but the court below held it was a valid enactment and abolished the district, and the commissioners were ordered to make a full and final report of all funds on hand, to the end that the district

might be dissolved and its affairs wound up, and the commissioners have prosecuted this appeal.

The question for decision is whether the act of 1931 violates Amendment No. 12 to the Constitution. This amendment reads as follows: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

In support of the decree of the court below upholding act 231 as valid and dissolving the district, the following argument is presented. Prior to the adoption of Amendment No. 12 the General Assembly had power to create improvement districts by special acts, and it had the power also to dissolve them. Since the adoption of the Amendment the General Assembly has been deprived of the power to create districts by special acts, but retains the power to abolish them. In the brief of learned counsel for the property owners who oppose the district and seek its dissolution it is insisted: "If the Legislature is vested with authority under Amendment No. 12, to repeal a road district or similar districts created by special act, it therefore has authority under said amendment to repeal any local district created upon petition. If the Legislature can create a road district, it therefore can repeal a road district, unless prevented by Amendment No. 12." Are counsel correct in this proposition?

What is the effect of amendment No. 12 upon the act of 1931? This amendment consists of two sentences, and contains two provisions. By the first sentence all future sessions of the General Assembly are inhibited from passing any local or special act. By the second any future General Assembly was authorized to repeal any local or special act.

It was held in the case of *Gregory* v. *Cockrell,* 179 Ark. 719, 18 S. W. (2d) 362, that the power to repeal a local act in its entirety conferred the right of partial repeal, even though the exercise of that power rendered a local act more local in its nature by making it apply to an even smaller portion of the State than it formerly

did. But the act which accomplished that result was a repealing act.

The caption of that act reads that it is "An act to repeal in part act No. 136 of the General Assembly of the State of Arkansas, approved February 17, 1921, entitled, 'An act to provide for a stock law and to regulate the operation of the same in Chicot County and all that part of Ashley County lying east of Bayou Bartholomew, Arkansas, and for other purposes,' so far as it is applicable to that part of Ashley County lying east of Bayou Bartholomew." The recitals in the body of the act conform to its caption and make clear the purpose that only a partial repeal was intended. It was provided "That this act shall not be construed so as to repeal or amend any part of said act 136 as it is applicable to any part of Chicot County."

It appears from both the majority and the dissenting opinions in the case of *Gregory* v. *Cockrell, supra,* that there was no question as to the intention of the General Assembly. The point of difference in the two opinions was whether the General Assembly had the power to do what it obviously intended. The intention of the General Assembly was there expressed to be to repeal a local law in part, and the law to be repealed in part was described by its number, by the date of its approval, and by its title, so that the legislative intent might certainly appear. There is in the act of 1931 an entire absence of any reference of any kind to any act of any number, date or title. It would appear therefore that in the passage of the act of 1931 there was no legislative intention to repeal any prior act, either general or special. Certainly, some of these methods of identification which are usually employed would have been employed had there been an intention to repeal an existing law, whether that law was general or special or local in its nature.

It was said in the Gregory case, *supra,* that the legislative power is the authority to make laws and to alter or repeal them, and it is just as elementary to say that the courts, in construing laws passed by the Legislature,

to ascertain the legislative intent, are limited to a consideration of the language which the Legislature has employed. We have therefore no authority, whatever the power of the Legislature may be, to say that a law has been repealed, because the power to repeal exists, where the Legislature has employed no language to indicate an intention to exercise that power.

Of course, the Legislature can repeal a local law. It can repeal either local or general laws, but there is nothing about the act of 1931 to indicate an intention to repeal the act of 1923, whether it be local or general. The question is not therefore what the Legislature may do, but is rather what the Legislature has done.

If the act of 1931 has repealed a law, either general or local, it is valid legislation, for the General Assembly has this power, but it has not exercised that power. On the contrary, the obvious purpose of the General Assembly by the act of 1931 is to abolish Mabelvale Road District No. 29 in Pulaski County, Arkansas, and to vacate the order of the Pulaski County court made on the 10th day of October, 1927, which order of court was recorded in county court record 42, page 203, and no other purpose is manifested. The General Assembly was content to exercise this power, and this power alone, without repealing the act under which the district had been organized, whether that act be general or local or special.

Without attempting to repeal any law, general or local, the General Assembly has passed an act, which is, itself, local or special. It has vacated a court proceeding which applied to a small part of a single county of the State. The act of 1931, by its express terms, applies only to the territory embraced in Mabelvale Road District No. 29, and not to any other portion of the State. It abolished the road district and does not purport to do anything else, and it does this without repealing the act under which the district was created. The act applies to a portion of the State, much less than the whole thereof, and must therefore be itself a local or a special act.

Conceding that the General Assembly had the power, in the absence of amendment No. 12, to enact this legislation, that amendment deprived it of the power, because the act of 1931 changes the relation of the property in the district to the district, and no other territory in the State has been affected, and this has been done without repealing or attempting to repeal any existing law, local or special or general. Nothing is done or attempted by the act of 1931 except to repeal or abolish an improvement district, which the parties have stipulated was organized under the provisions of the act of 1923 by an order of the county court, which is itself particularly described.

Had there been any intention to repeal the act of 1923, the simplest and easiest thing to do would have been to say so, but this was not done. The ordinary procedure to repeal a law, general or special, is to recite in the repealing act that a particular act, so described as to definitely and certainly identify it, is thereby repealed. But this was not done. No prior legislation, general or special, was definitely described or otherwise referred to in the act of 1931, and, as we have said, there has been no repeal of any law, but only an enactment changing the status of a small area to a general law. The act of 1931 is therefore a local or special act, within the inhibition of amendment No. 12, and is void for that reason.

The decree of the court below will therefore be reversed, and the cause will be remanded, with directions to enter a decree conforming to this opinion.

MERCHANTS' & PLANTERS' BANK & TRUST COMPANY *v.* USSERY.

Opinion delivered May 25, 1931.

Bridges, McGaughey & Bridges, for appellant.

E. W. Brockman, for appellee.

HART, C. J., (after stating the facts). The original decree was entered of record on May 9, 1930, which was a regular day of the April term of the Jefferson Chancery Court. The motion of the defendants to vacate the decree was filed on the 19th day of November, 1930, which was a day of the November term of said court. Acts of 1923, p. 376.

A court with terms fixed by law has no power to vacate a judgment or decree after the lapse of the term at which it was rendered except for causes named in § 6290 of Crawford & Moses' Digest. *Terry* v. *Logue,* 97 Ark. 314, 133 S. W. 1135; *Robinson* v. *Citizens' Bank of*

Pettigrew, 135 Ark. 308, 204 S. W. 615; *Feild* v. *Waters,* 148 Ark. 325, 229 S. W. 735; and *American Investment Co.* v. *Keenehan,* 172 Ark. 832, 291 S. W. 56.

Where a defendant was prevented, without any fault on his part, from appearing or making his defense to the action, his case comes fairly within the spirit of the seventh subdivision of § 6290 of Crawford & Moses' Digest. *Henton* v. *Euper,* 63 Ark. 323, 38 S. W. 517; and *Karnes* v. *Ramey,* 172 Ark. 125, 287 S. W. 743. In each of these cases, it was held that where a party was not served with summons and did not know of the pendency of the action in time to make a defense, his case falls within the seventh subdivision of the section which provides for vacating a final judgment or decree after the expiration of the term for unavoidable casualty or misfortune preventing the party from appearing or defending.

Mrs. Virginia Ussery does not allege that she was not served with summons but claims that her case falls within the seventh subdivision of the section above cited because one of her children told her that she would at once see counsel and advise her what defense he might make, and that she relied upon his promise to do so, and that he failed to carry out his promise. Her excuse was not sufficient. In the case of *Blackstad Mercantile Co.* v. *Bond,* 104 Ark. 45, 148 S. W. 262, the court said that negligence on the part of one's own attorney is not sufficient to justify setting aside a judgment. The reason is that when a party employs an attorney at law to defend his suit in the courts of the country, he presents him to the court as his accredited agent, and, as such, he must be concluded by any acts or omissions where no fraud or unfairness is made to appear. That principle controls here. Mrs. Virginia Ussery made her son her agent to procure counsel and conduct her defense to the action. He failed to do so, and she must be bound by his negligence or failure, which was not occasioned by any misleading conduct on the part of the opposing party or misleading statement made by any officer of the

court. Her failure to make a defense was due entirely to the negligence or omission of her own agent, and she must be bound by his misconduct. It was the duty of the defendant to keep herself informed of the progress of the case and obtain relief on the ground of unavoidable casualty under the statute, she must have shown that she was not guilty of negligence and cannot have relief if the taking of the decree against her appears to have been due to her own carelessness. *Trumbull* v. *Harris,* 114 Ark. 493, 170 S. W. 222.

As to the defendant, Cassie B. Ussery, but little need be said. The original decree finds, and the return of the sheriff of Jefferson County shows, that this defendant was duly served with summons in the manner prescribed by law. No denial of this fact is made by this defendant. He does not state or allege that any fraud was practiced on him nor that any unavoidable casualty prevented him from answering or making his defense to the original action. Therefore he does not even allege any ground for opening the decree under the provisions of § 6290 of the Digest.

We now come to the defendant, Sally Ussery Norwood. She alleges that she was not served with summons and sets up a defense to the original action. In an action to vacate a judgment rendered at a former term of court on the ground that there was no service of process, the burden of proof is upon the party asserting it because the officer's return of service is *prima facie* true. *Holman* v. *Lowrance,* 102 Ark. 252, 144 S. W. 190; and *Karnes* v. *Ramey,* 172 Ark. 125, 287 S. W. 743.

In this case, the return of service of summons by the sheriff in the original suit shows that the defendant, Sally Ussery Norwood, was duly served with summons in Jefferson County, Arkansas, on the 17th day of April, 1930, by having a true copy of the summons delivered to her by the sheriff. The return was filed with the clerk of the court on the 18th day of April 1930. A decree was

entered of record on May 9, 1930. It recites that service of summons was duly had on Sally Ussery Norwood by the sheriff serving her with summons in the manner prescribed by law. In the application to vacate the decree, this defendant contents herself with making her affidavit to the petition to vacate the decree. The burden was upon her to show that no service of summons was had on her, and we do not think that her affidavit merely was sufficient to overturn the return of the sheriff as to the service of summons, when considered in connection with the attendant circumstances in the case.

Therefore we hold that the court erred in vacating the original decree and in allowing the defendants to interpose a defense to the action. The order of the chancery court opening the decree rendered at the former term of the court will be reversed, and the cause will be remanded with directions to the chancery court to overrule the application of the defendants to vacate the decree under the provisions of § 6290 of Crawford & Moses' Digest.

It is so ordered.

FAULKNER COUNTY BOARD OF EDUCATION *v.* COMMON SCHOOL DISTRICT NO. 103.

Opinion delivered May 25, 1931.

J. Wendell Henry and *R. W. Robins,* for appellant.

C. A. Holland, for appellee.

SMITH, J. Electors residing in Rural Special School District Number 2, Common School District Number 37, Rural Special School District Number 49, Common School District Number 103, and Conway Special School District Number 1 petitioned the county board of education of Faulkner County, in which county all of said districts were located, pursuant to act 156 of the Acts of 1927 (page 549), to abolish the four districts first named and to consolidate them with the Conway district.

A remonstrance was filed by the directors of Common School District Number 103, but the prayer of the petition was granted by the board of education, from which order an appeal was duly prosecuted to the circuit court.

The practice upon such appeals is defined in the cases of *Board of Education of Van Buren County* v. *Suggs, ante* p. 535, and *School District No. 26* v. *School District No. 32,* 177 Ark. 497, 6 S. W. (2d) 826. See also *School District No. 14* v. *County Board of Education,* 177 Ark. 734, 7 S. W. (2d) 798.

Pursuant to the practice defined in the cases cited, the circuit court heard testimony and modified the order of the board of education by excluding district 103 from the consolidated district, which had been designated Conway Special School District Number 1, and from this order and judgment the Conway district and the board of education have appealed.

We think the court was in error in the order made. The consolidated district, as established by the circuit court, was not the district petitioned for and established by the board of education. The court should either have granted the prayer of the petition or have denied it entirely, and should not have adjudged that the consolidated district be established after excluding district 103. *Rural Special School District No. 21* v. *Common School District No. 87, ante* p. 329; *School District No. 26* v. *Baxter County Board of Education, ante* p. 295.

The judgment of the court below will therefore be reversed and the cause remanded, with directions to the circuit court to adjudge, upon the trial *de novo* which the statute contemplates, whether the district petitioned for shall be established, including all the five districts.

[redacted]

BOURLAND *v.* CARAWAY.

Opinion delivered May 25, 1931.

[redacted]

James B. McDonough, for appellant.

Partain & Agee, for appellee.

HUMPHREYS, J. This is an appeal from separate judgments obtained by appellees against appellant in actions for personal injuries received in an automobile collision, which causes were consolidated in the circuit

court of Crawford County for trial. The issue joined by the pleadings was whether appellees were injured by the negligent driving of appellant or through the negligent driving of appellee J. D. Caraway, with whom appellee Isham Burrow was riding as a guest.

When the jury was being impaneled to try the case, counsel for appellees was allowed, over the objection and exception of appellant, in order to ascertain whether any of them were interested, to propound to the jury upon their *voir dire* the following question:

"Any gentleman who may be called upon this jury, interested in any way, as an employee, agent, or stockholder in any liability insurance company for the protection against automobile accidents."

The collision occurred late in the evening on the 7th day of July, 1929, about half way between Alma and Van Buren, when appellant, who was driving west, turned from the north side of the road to the south side thereof to pass automobiles in front of him. He passed one and intended to pass another and return to the north side of the road but the automobiles in the line of traffic on the north side were too close together for him to do so, and observed appellees, who were traveling east on the south side of the road toward him, and in an effort to prevent the collision, he threw on his brakes and turned his car south or toward the ditch on the left in the hope that appellees might pass between his car and the traffic on the north side of the road. The road was only 24 feet wide, including shoulders on each side of the concrete, which was only 18 feet wide. When the brakes were applied, appellant's car skidded some 25 to 45 feet in an angling position across the road before it stopped, and, although appellees turned to the left in order to avoid striking appellant's car, they struck it near the door, and the impact threw all of them out onto the pavement, rendering them unconscious.

The record reflects that Burrow, in addition to being rendered unconscious for several hours, sustained three large gashes on his forehead, a cut beside his eye, which left scars, and bruises on his knee, arm, and shoulder; that sixteen months after the accident he suffered severe headaches and kidney trouble and that he lost 25 pounds, which he never regained; that he was unable to work at his occupation from the date of the injury until September 1st; that he expended $17.50 for hospital bills and $37 to the Cooper Clinic.

The record also reflects that, in addition to being rendered unconscious, J. D. Caraway sustained a cut on his forehead, which left a scar, cuts and bruises on his knee, and a gash across his shin bone; that his front teeth were knocked loose, and that he remained in the hospital for several days; that he expended over $100 for doctors and hospital bills; that he was unable to return to his work for 46 days; that the ligaments in his knee were permanently injured.

The jury awarded damages to Burrow in the sum of $2,000, and to Caraway in the sum of $1,200 for their respective injuries.

The testimony introduced on behalf of appellees tended to show that appellant was wholly to blame for the collision; whereas that introduced on behalf of appellant tended to show that the fault was entirely with appellees.

The first contention for a reversal of the judgment is that the court erred in permitting counsel for appellees to ask the jurors if any of them were interested in any liability insurance company for protection against automobile accidents. It is argued that the only purpose of asking the question was to leave a false impression upon the minds of the jurors that appellant was protected by insurance against the accident, so that they would the more readily return a verdict in favor of appellees. The argument is not supported by the record. In answer to

a question asked by the court, counsel for appellees stated that the question was propounded to obtain information. They were entitled to the information in order to intelligently exercise their right of challenge under the rule announced in the case of *Smith-Arkansas Traveler Co.* v. *Simmons,* 181 Ark. 1024, 28 S. W. (2d) 1052, and followed in the case of *Ellis and Lewis* v. *Warren,* 183 Ark. 613, 32 S. W. (2d) 167.

The second contention for a reversal of the judgment is that the court erred in giving each of nine instructions requested by appellees because they authorized a recovery without a finding of fact responsive to the declarations of law and responsibilities of drivers of automobiles required by the instructions. In other words, the instructions are assailed as being abstract or inherently wrong because not hypothetical. The instructions are not subject to such an attack and could not be unless they were without support in the evidence. Upon examination, we find that each of them was responsive to or touched upon some phase of the evidence. Correct declarations of law embodied in instructions are not abstract and inherently wrong simply because they do not require the jury to make a specific finding of fact before applying them. It was appellant's privilege to request that the instructions be amended so as to make them concrete and hypothetical, and, had he done so, it would have been error on the part of the court to refuse the request, but the appellant contented himself with making a general objection to each of the instructions. The law of negligence and contributory negligence was correctly declared and given by the court, so it cannot be said that the instructions were inherently wrong because they did not tell the jury that, before they could find for appellees, they must find that appellees themselves were in the exercise of due care. The undisputed fact is that the injuries resulted from the collision, and that the collision was the result of either the negligence of appellant or appellees; and, as the court correctly declared the law of negligence and contributory negligence, the instructions

were not inherently wrong because they failed to tell the jury that they could not find for appellees unless they found that appellant's negligence was the proximate cause of the injury.

The third and last contention for a reversal of the judgment is that the verdicts were excessive. The extent of their injuries are set out above and fully warrant a verdict in favor of J. D. Caraway for $1,200 and Isham Burrow for $2,000.

No error appearing, the judgment is affirmed.

SMITH *v.* NATIONAL LIFE & ACCIDENT COMPANY.

Opinion delivered June 1, 1931.

Smith & Fitzsimmons, for appellant.

Roy Penix, for appellee.

HART, C. J. Two separate actions were brought to recover upon policies of life insurance issued by the National Life & Accident Insurance Company upon the life of Helen Draper Green. The first suit was for $154, and the second was for $90. The defense was that the amount of the recovery should be reduced on account of an erroneous statement of the age of the insured, and the amount due under the true age of the insured was deposited in court to be tendered to the beneficiary.

By agreement of the parties, the two cases were consolidated, and the jury found, under instructions to which there were no objections, that Helen Draper Green gave her correct age of thirty-five years to the agent of the defendant company at the time of her application for insurance, instead of twenty-five years as stated in the application. The court rendered judgment against the defendant in favor of the plaintiff for the sum of $180, which was the amount that the premiums paid by the insured, Helen Draper Green, would have purchased for a person of the age of thirty-five years at the time of the application, and it was agreed between the parties that the insured, Helen Draper Green, was thirty-five years of age at the time of the application for insurance; and upon this appeal it is agreed that the only issue raised is as to the correctness of the ruling of the court in construing the clauses of the policies of life insurance in rendering the judgment above referred to.

The first policy contained a clause which reads as follows:

"If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age."

The second one contains a similar clause which reads as follows:

"In case of mistake or misstatement in the age the company will only be liable for the amount of benefits payable according to its table at the proper age."

Counsel for appellant rely upon the case of *Walker v. Illinois Bankers' Life Association,* 140 Ark. 192, 215 S. W. 598. In that case the policy contained a stipulation that, in the event of misstatement of age, the amount payable on the policy shall be such as the premium would have purchased at the correct age except where the true age was beyond the age limit at which insurance would have been granted by the association. In the latter case, the liability of the company was not to exceed the premium paid with four per cent interest. The age of fifty-

five years was fixed as the limit upon which policies would be issued by the company. In the application the agent stated Barger's age to be fifty-four years when in fact Barger was sixty-four years old. Barger did not read the policy and supposed that the agent had the right to issue it in accordance with the application which was written by the agent upon Barger correctly stating his age to him. There the court properly held that the insurance company was responsible for the conduct of its own agent, and that that part of the policy concerning the misstatement of age and providing that the amount to be recovered should be based upon the amount the premiums paid would have purchased at the correct age, has no application because the company had no authority to issue a policy upon the life of Barger at his correct age, because it was not authorized under its constitution and by-laws to issue policies upon the life of persons of that age. Consequently, the court held that the clause with regard to a misstatement of age had no application where the insured was over age and the policy had been procured by an agent of the company, who, by his own misstatement, had imposed on Barger and led him to believe that he had a valid policy.

In the very nature of things, it is manifest that clauses of the kind under consideration can only be applicable and enforceable when there is a valid and binding contract of insurance between the parties which has not been procured by fraud, and where there is only an innocent misstatement of age. This is made clear by the reasoning in the case of *Lincoln Reserve Life Insurance Co.* v. *Smith,* 134 Ark. 245, 203 S. W. 698. In that case, the clause in the policy provided that, if the age of the insured had been misstated, the amount payable thereunder should be such as the premiums paid would have purchased at the correct age, provided that age, at the time of the insurance, was not over sixty. There a full recovery of the amount of the policy was allowed, notwithstanding an innocent misrepresentation by the in-

sured that he was fifty-three instead of fifty-nine. The reason was that, in order to obtain the benefit of the provision in the clause, the insurer must show that there was a purchasable policy according to the plan adopted at the true age of the insured. The court said that, according to the terms of the policy, there was liability for the amount named in the policy unless it could be lessened so as to be reduced to such an amount of insurance as the premium paid would have purchased at the correct age; and, unless that premium would have purchased a policy for a less sum, the liability for the full amount continued. It was further said that it devolved upon the company, in order to obtain any advantage under this clause, to show that there was a purchasable policy at the true age of the insured, which the company failed to do. As stated by the court in that case, any other construction would nullify a provision concerning innocent misstatements of age where the true age of the insured exceeded the limit beyond which the company declined to write policies, and instead of giving the insured a policy for such a sum as the premium would have purchased at the correct age, it would result in giving him nothing at all.

Here the facts are essentially different. The age of the insured is stated in the application as twenty-five years, and the correct age of the insured at the time the application for insurance was made was thirty-five years of age. The parties agreed that that was the correct age of the insured at the time of the application for insurance, and the amount of insurance for which judgment was rendered according to the premiums paid was for a person thirty-five years of age. In other words, the recovery allowed by the court was based on the amount the premiums paid would have purchased at the correct age of the insured, which was thirty-five years.

The provision under consideration in each policy is substantially the same and provides that, if the age of the insured has been misstated, the amount payable under the policy shall be such as the premiums paid would have

purchased at the correct age. It is evident from the language used that the policy referred to a mistake of fact, or innocent misrepresentation of the age of the insured, and means that, in cases where the age of the insured shall have been understated by mistake, the amount of insurance will be reduced to the amount the premium would pay at the true age. This was precisely what was done in the present case. Therefore the judgment must be affirmed.

CARR *v.* MARYLAND CASUALTY COMPANY.

Opinion delivered June 1, 1931.

P. S. Seamans, for appellant.

Cockrill & Armistead and *Harry T. Wooldridge,* for appellee.

HUMPHREYS, J. This is an appeal from a purported decree rendered in the chancery court of Desha County dismissing appellant's complaint for the want of equity. Under rule 9 of this court adopted in aid of the dispatch of business, an appellant is required to file an abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to this court for decision. The abstract should contain full reference to the pages of the transcript. No effort has been made by appellant to comply with this rule; so, in order to understand the questions presented by the appeal, it would be necessary to explore the transcript. This court has consistently refused to explore transcripts to determine issues involved

on appeals because to do so would greatly retard the dispatch of business. Rule 9 is of long standing, reasonable, and wholesome, and, for that reason, has been rigidly enforced by this court. *Grimes* v. *McKee,* 162 Ark. 197, 258 S. W. 134. Should we depart from the rule, it would result in a congested condition of the docket in a very short time. The motion to affirm the decree for failure to comply with rule 9 must therefore be sustained.

Decree affirmed.

NEAL *v.* ARKOLA BAUXITE COMPANY.

Opinion delivered June 1, 1931.

N. A. McDaniel, Fred A. Isgrig and *Elmer Schoggen,* for appellant.

W. A. Utley, for appellee.

HUMPHREYS, J. This suit was brought by appellant, widow of Oabe Neal, against appellee, to recover damages in the sum of $25,000 on account of the death of her husband resulting from an injury received by him through the alleged negligence of appellee in operating a steam shovel with which it was excavating dirt from its bauxite mine in Saline County.

The defenses interposed to the complaint were a denial of negligence on its part, contributory negligence on the part of appellant, and that at the time of the injury deceased was in the employ of R. Y. Walker, who was engaged in excavating dirt for appellee as an independent contractor. The cause was submitted to the jury upon the pleadings, testimony introduced by the respective parties, and instructions of the court, which resulted in a verdict for appellee and a consequent judgment dismissing appellant's complaint, from which is this appeal.

The testimony was conflicting upon all the issues joined; so the questions for determination on this appeal turn on the correctness of the instructions submitting the issues.

Appellant contends for a reversal of the judgment upon the alleged ground that the court erred in admitting testimony upon the issue of whether R. Y. Walker was an independent contractor, claiming that the written contract between appellee and R. Y. Walker clearly reflects that he was an employee and not an independent contractor. We think the written contract is ambiguous in this respect, and that the testimony complained of tended to explain rather than contradict the written instrument.

Appellant also contends for a reversal of the judgment upon the alleged ground that the court erred in declaring the law applicable to the issues involved. The alleged egregious errors in instructing the jury consisted in giving appellant's requested instruction No. 2 and in modifying instruction No. 5, requested by appellant, and giving same in its deleted form.

Instruction No. 2, given at appellee's request, is as follows:

"The burden of proof in this case is upon the plaintiff to establish her right to recover in this action by a greater weight of the evidence. The law presumes that the defendant company was not guilty of any negligence whatever, and this presumption attends throughout the trial in favor of defendant and is of itself sufficient to

justify you in returning a verdict for the defendant unless such presumption is overcome by the evidence to the contrary. If you find that the greater weight of the evidence is in favor of the defendant, or if you find that it is evenly balanced as between the plaintiff and defendant, then in either event your verdict will be for the defendant."

Appellant made the specific objection to the instruction that it placed an undue burden on her as to proving the alleged negligence of appellee. According to the rule announced in the case of *Kirkpatrick* v. *American Railway Express Co.*, 177 Ark. 334, 6 S. W. (2d) 524, such an instruction erroneously imposes the burden of showing negligence analogous to the presumption of innocence which attends one accused of a crime, and, if given over specific objection, calls for a reversal of an adverse judgment.

Instruction No. 5, requested by appellant, is as follows:

"An independent contractor is one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own methods to accomplish it, and represents the will of the employer only as to the result of the work; unless such employer either exercised, or reserved the right to exercise, control over the work being done by such contractor or had the power to choose, direct or discharge the employees of such contractor. [So, in this case, you are instructed that the method by which compensation was paid for the work done is not conclusive as to the relationship of the parties, but the question as to whether or not Walker was an independent contractor must be determined by you from all the circumstances in proof.]"

The instruction in the form requested was a correct declaration of law as applied to the facts in the case. The court deleted the last sentence, the effect of which was to deprive appellant of his right to have the law de-

clared upon request with reference to the particular facts in the case.

On account of the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

SCOTTISH UNION & NATIONAL INSURANCE COMPANY *v.* WILSON.

Opinion delivered June 1, 1931.

A. H. Scott, for appellant.

Edward Gordon, for appellee.

MEHAFFY, J. Appellees are the only heirs at law of B. F. Wilson, deceased, and in their complaint alleged that they are the owners of the property involved in this suit. At the death of their father, the property was left to their mother for life, and the remainder to appellees. The mother died in January, 1928.

The property insured was a dwelling house on lots 8 and 9 in block 6, Irving's Addition to the city of Morrilton. On the 14th day of February, 1930, the property was insured by appellant in the sum of $800.

One of the clauses in the policy was as follows: "Permission is given for the premises to be vacant or unoccupied for a period not to exceed 60 days, either in any one policy year or consecutively at any one time."

The property was totally destroyed by fire on April 19, 1930. The building became vacant February 22, 1930. Appellees had executed a mortgage to the National Savings & Loan Association, and the appellant filed a demurrer to the complaint, stating that the National Savings & Loan Association was a necessary party, and thereafter the appellees filed an amendment to their complaint making the National Savings & Loan Association a party.

The appellant admitted issuing the policy and admitted that permission was given for the premises to remain vacant or unoccupied for a period of 60 days, but alleged that a rider had been attached to the policy under the terms of which appellant would not be liable for exceeding two-thirds of the amount of damage if the property was destroyed by fire during such vacancy. It therefore contends that it is not liable, but that it was liable for only two-thirds of the $800. The policy contained a mortgage clause payable to the National Savings & Loan Association.

There is no dispute about the property having been destroyed by fire, and it had not been vacant 60 days when so destroyed.

Appellant insists that the judgment should be reversed because the suit was originally begun by the heirs of B. F. Wilson, and the insurance policy was issued in the name of the estate of B. F. Wilson. It is insisted that the suit should have been brought by the administratrix and not by the heirs. The administratrix was made a party, and no objection was made by appellant to making

the administratrix a party, and no objection was made in the lower court on account of any defect of parties or improper parties.

Our statute provides: "The defendant may demur to the complaint where it appears on its face that the plaintiff has not legal capacity to sue." Crawford & Moses' Digest, § 1189.

The policy having been issued in the name of the estate, this defect, if it was a defect, appeared on the face of the complaint, but if it did not appear on the face of the complaint the statute also provides: "When any of the matters enumerated in § 1189 do not appear upon the face of the complaint, the objections may be taken by answer. If no such objection is taken either by demurrer or answer, the defendant shall be deemed to have waived the same except only the exception to the jurisdiction of the court over the subject of the action, and the objection that the complaint does not state facts sufficient to constitute a cause of action." Crawford & Moses' Digest, § 1192.

The appellant filed a demurrer to the complaint alleging that the property was mortgaged and that the National Savings and Loan Association was a proper party. There was no suggestion in this demurrer or in the answer that the appellees were not proper parties or that there was any defect other than that pointed out by the demurrer that the National Savings & Loan Association was a necessary party.

The statute provides: "The demurrer shall distinctly specify the grounds of objections to the complaint; unless it does so, it shall be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action." Crawford & Moses' Digest, § 1190.

It therefore does not appear either in appellant's demurrer or answer that there was any defect of parties, except that the mortgagee should be made a party.

The objection that appellees did not have legal capacity to sue must be made in the manner provided in

the statute. *Gaither Coal Company* v. *Le Clerch,* 182 Ark. 466, 31 S. W. (2d) 750; *Murphy* v. *Myar,* 95 Ark. 33, 128 S. W. 359, Ann. Cas. 1912A, 573; *Love* v. *Cahn,* 93 Ark. 215, 124 S. W. 259; *Ry. Co.* v. *Watson,* 97 Ark. 560, 134 S. W. 949; *Texarkana Gas & Electric Co.* v. *Orr,* 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30.

The objection, not having been made in the manner provided by statute, was waived. The appellees were interested in the suit, and, while they may not have been necessary parties, they were proper parties. If the objection had been made in the court below, appellees might have shown that they were the only parties in interest. At any rate, the objection, not having been made in the court below, must be deemed waived.

The appellant in its motion for new trial, among other things, stated: "The court erred in overruling defendant's motion to dismiss as the plaintiffs were not the proper parties in that the property belonged to the estate of B. F. Wilson, and said suit should have been filed in the name of the administratrix, and there was nothing before the court."

The record, however, does not show that appellant made any such motion, and it must have been made in the court below, even if the appellees had not been proper parties.

The appellant next contends that the court erred in holding that the rider was not effective, and that it does not bind the appellees. It is contended that to the policy was attached a two-thirds vacancy permit, and that the company, while admitting its liability for two-thirds of the $800, was not liable for anything in excess of that. This rider was sent to the mortgagee with a request to attach it to the policy. No such provision as this rider contained was in the original policy, but in the original policy permission for the property to be vacant or unoccupied for 60 days was given, and the company reserved the right to cancel this policy on 5 days' notice. The undisputed evidence shows that it never

gave any notice, and the undisputed evidence also shows that no one interested in this contract agreed with the insurance company that this rider should be attached. Mrs. Presley testified that she had a conversation with a representative of the appellant, but that he did not notify her anything about a vacancy clause. She stated she knew she had 60 days and he knew it, too. Mr. Hellum testified that he never did notify Mrs. Presley; that he never sent her a copy of the two-thirds vacancy clause, and that he did not give her any notice whatever. He testified that he attached the clause to his record only, but without notice to the assured. This witness testified that he discussed with Mrs. Presley the fact of the house being vacant, that he asked her once or twice if she had gotten a renter, and told her that he was going to have to attach the clause if the house was not occupied, but he says that he does not believe he told her unless it was occupied at once. But he told her if she did not get a renter he would have to attach it; but did not give her any notice and did not tell her when he would attach it. He testified that after that he asked her once or twice if she had gotten a renter, and still did not tell her that he was attaching the two-thirds vacancy clause.

It is contended by the appellant that the court's ruling that the rider was not effective and did not bind the plaintiff had the effect that the contract could not be modified. We do not agree with appellant in this contention. The ruling of the court was to the effect that the contract had not been modified. Of course, parties to a contract could modify it or cancel it or amend it in any way they might think proper. But the modification cannot be made by one party alone, but both parties must agree to the modification.

The undisputed evidence in this case shows that the insurance company alone agreed to the modification. It was plainly written in the policy that permission was given for the property to remain vacant 60 days. This was the contract that the parties made. This contract

all agreed to, and if the parties other than the insurance company had agreed to the modification, this modification would have been binding on them. We therefore do not think there was any evidence tending to show that there had been a modification of the contract.

It is contended by the appellant that the statute authorizing attorney's fees and damages is unconstitutional and void. This question, however, was not raised by appellant in the lower court and cannot be considered here.

The court did not err in directing a verdict, and the judgment is therefore affirmed.

SUTTON *v.* WEBB.

Opinion delivered June 1, 1931.

Joseph R. Brown and *James B. McDonough,* for appellant.

Hardin & Barton, for appellee.

KIRBY, J., (after stating the facts). It is first insisted that the court erred in permitting the jurors to be questioned on their *voir dire* as to whether any of them was connected, as employees or otherwise, with any insurance company writing automobile liability insurance. It being apparently the sole purpose in asking the question

to create a false impression upon the minds of the jurors that appellant was protected by insurance against damages from such injuries, so that they might the more readily render a verdict against him therefor. Counsel for appellee, however, had the right to inquire of the prospective jurors whether they were related to either of the parties and whether they had been in the employ of any insurance company writing liability insurance, in order to more intelligently exercise appellee's right of challenging the jurors, under the rule already announced by this court in *Bourland* v. *Caraway, ante* p. 851, and cases cited there.

Neither was error committed in the giving of certain instructions complained of, in which it was claimed that the jury was permitted thereby to find against appellant without consideration of appellee's alleged contributory negligence. There was no substantial testimony tending to show any contributory negligence on the part of appellee, nor warranting the jury's consideration of such issue; and the court also gave, at appellant's request, a correct instruction on contributory negligence, which was not in conflict with the other instructions as expounded.

The court's instruction on the measure of damages to appellee's car was not erroneous as contended by appellant. Appellant had attempted to have appellee's damaged car repaired and reconditioned, and showed the amount of the cost of such repair. The instruction complained of correctly declared the measure of damages to the car "would be the difference between its value before and after the accident, or after any repairs which the defendant placed on it," allowing the jury to take into consideration the cost, if any shown by the evidence, of repairing the car, "along with the other evidence in the case." This only allowed the jury to take into consideration the testimony about the necessary cost of reconditioning and repairing the car and to find, if the evidence warranted its doing so, any amount of damages more than the cost of the repairs made by appellant, and no

specific objection was made to the instruction, which, if not as clearly stated as might have been, would doubtless have been corrected to meet any objection on that account. The instruction is not in conflict with the law as announced in *Madison-Smith Cadillac Co.* v. *Wallace,* 181 Ark. 715, 27 S. W. (2d) 524.

There was no error in the giving of the instruction quoting the statute and showing the rate of speed allowed for driving motor vehicles on the highway, or on the wrong side thereof, since the jury was specifically directed that if they believed from the evidence that appellant violated the statutes referred to in the instructions, or either of them, "then you are instructed that such violation or violations, if any, are evidence of negligence and may be considered by the jury together with all the other facts and circumstances as disclosed by the evidence in the case in arriving at whether or not the defendant was guilty of negligence." The instruction only told the jury that the violation of these statutes, if shown, was only evidence of negligence that might be considered with all the other facts and circumstances as disclosed by the evidence in determining whether the defendant was guilty of negligence. *Herring* v. *Bollinger,* 181 Ark. 929, 29 S. W. (2d) 676.

Neither was error committed in the giving of the instruction numbered 9, relating to the measure of damages for pain and suffering of body and mind. *St. L., I. M. & S. Ry. Co.* v. *Dallas,* 93 Ark. 215, 124 S. W. 259; *Ward* v. *Blackwood,* 48 Ark. 407, 3 S. W. 624; and *Simms Oil Co.* v. *Durham,* 180 Ark. 366, 21 S. W. (2d) 861.

We are also of the opinion that the verdict is not excessive for the personal injuries shown to have been sustained by appellee, although the testimony does show that she suffered from arthritis, preventing to some extent the free and proper use of the injured arm, before the collision, but the jury could have found from the evidence that the injury was sufficient to have caused the impaired condition of the arm without regard to the

affliction which was not merely an aggravation thereof. Moreover, appellee was entitled to recover damages for the injury inflicted by appellant's negligence without regard to whether the damage might not have been so great but for the arthritis with which she was afflicted.

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

WILLIAMS *v.* STATE.

Opinion delivered May 18, 1931.

Geo. W. Emerson and *Dillon & Robinson,* for appellant.

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

SMITH, J. The undisputed testimony in this case shows that appellant, Virgil Williams, and another man shot Neil McDermott, a policeman, while they were engaged in robbing George Chance, and that nine days

later McDermott died from the effects of this wound. Upon his trial under an indictment charging him with the crime of murder committed in the perpetration of a robbery, appellant was convicted of murder in the first degree and given a sentence of death, and has prosecuted this appeal to reverse the judgment on account of the errors of the trial court in admitting certain incompetent testimony over his objection.

The State was permitted, over appellant's objection, to show that shortly before coming to Little Rock, the scene of the killing of McDermott, appellant had been confined in the penitentiary in Oklahoma, and that he came to Little Rock in a stolen car; that, shortly after reaching Little Rock he had robbed a drug store; he was arrested for this crime, confined in the county jail; that he escaped from the jail, and, in doing so, stole the pistol with which he later killed the officer who attempted to arrest him while robbing Chance.

There is no connection between these various crimes and the killing of McDermott, and the only, and the necessary, effect of this testimony was to show the desperate character of appellant as a confirmed criminal. There was no question as to the purpose for which appellant held up Chance, and that he robbed him, and that while still at the scene of the crime he killed the officer who attempted to arrest him. He was therefore guilty of murder in the first degree. *Clark* v. *State,* 169 Ark. 717, 276 S. W. 849; *Harris* v. *State,* 170 Ark. 1077, 282 S. W. 680; *Washington* v. *State,* 181 Ark. 1016, 28 S. W. (2d) 1055.

It is insisted by the State that, although the admission of the testimony as to the previous criminal conduct of appellant may have been erroneous, as having no relation to the killing of McDermott and not explanatory thereof, the error was not prejudicial, for the reason that the undisputed evidence shows that appellant was guilty of the crime for which he was convicted, and the jury could not, under the law, have returned any verdict except that of guilty as charged in the indictment.

The law is settled, indeed, is declared by the statute, that this court will not reverse except for an error prejudicial to the defendant, § 3014, C. & M. Digest. But it is also settled that evidence improperly admitted must be treated as prejudicial unless there be something to show that it was not. *Brock* v. *State,* 171 Ark. 282, 284 S. W. 10; *Moon* v. *State,* 161 Ark. 234, 255 S. W. 871; *Elder* v. *State,* 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220.

There appears to be no question but that the admission of the testimony showing the commission of other crimes having no relation to the robbery of Chance and the killing of the officer, and not explanatory thereof, was error. The law upon this subject has been declared in many cases, and is well stated in the case of *Ware* v. *State,* 91 Ark. 555, 121 S. W. 927, where it was said:

"It is uniformly held that the prosecution cannot resort to the accused's bad character as a circumstance from which to infer his guilt. This doctrine is founded upon the wise policy of avoiding the unfair prejudice and unjust condemnation which such evidence might induce in the minds of the jury. If such testimony should be admitted, the defendant might be overwhelmed by prejudice, instead of being tried upon the evidence affirmatively showing his guilt of the specific offense with which he is charged. 1 Greenleaf on Evidence (8th ed.), § 14 b, § 14 q; Wigmore on Evidence, § 57.

"And so, too, it is held that one offense cannot be proved by the evidence of the commission of another offense, unless the two are so connected as to form a part of one transaction. But, as wholly independent acts, the commission of one offense cannot be shown by evidence of the commission of another. And the introduction of such testimony is also inadmissible because it raises another and different issue which would call for the introduction of other testimony upon such issue, and thus would involve the true and specific issue presented to the jury for its determination, whether the defendant was guilty of the specific crime charged in the indictment. *Dove* v. *State,* 37 Ark. 261; *Endaily* v. *State,* 39

Ark. 278; *Ackers* v. *State,* 73 Ark. 262, [83 S. W. 909]; *Allen* v. *State,* 68 Ark. 577, [60 S. W. 956.]''

But, inasmuch as the undisputed evidence shows that appellant was guilty of the crime of murder in the first degree, was the error prejudicial? We are constrained to hold that it was.

Under the law a jury which has convicted an accused person of the crime of murder in the first degree may, in its discretion, impose the death penalty or a sentence of imprisonment for life. Both are punishments authorized by law for the commission of the crime of murder in the first degree, and the trial jury has the discretion to impose the one or the other. But, while either life imprisonment or the death sentence may be imposed, the law recognizes that there is a difference in these degrees of punishment and that the first named is less than the latter.

Prior to the enactment of § 3206, C. & M. Digest (act 187, Acts 1915, page 774), authorizing the alternate punishment, bail was not allowed upon an appeal to this court from a judgment convicting an accused of the crime of murder in the first degree. But in the case of *Walker* v. *State,* 137 Ark. 402, 209 S. W. 86, 3 A. L. R. 968, which arose after the passage of the act of 1915, the appellant was given a life sentence upon a conviction for murder in the first degree, and it was held in that case that he was entitled to bail upon his appeal, for the reason, there stated, that the severest punishment of the law was not imposed and that bail would be granted where the punishment imposed was a life, and not a death, sentence.

The court again recognized that there was a difference in severity between a life and a death sentence in the case of *Davis* v. *State,* 155 Ark. 245, 244 S. W. 750, where it was said: ''In construing this latter statute'' (§ 3206, Crawford & Moses' Digest) ''in *Walker* v. *State,* 137 Ark. 402, 209 S. W. 86, the court referred to the jury fixing the punishment in a capital case at life imprisonment as imposing the lesser penalty provided by the stat-

ute." This Davis case expressly declares the law to be that, while the technical guilt of murder in the first degree is always the same, the law now imposes a greater or lesser punishment for the commission of that crime.

So, therefore, while the undisputed testimony shows appellant guilty of the crime of murder in the first degree, and the jury could not, under the law, have returned any other verdict, there has been imposed the greater, rather than the lesser, punishment for that crime. Were it the law that one, a certain and no other, punishment might be imposed, we would be justified in holding that no prejudice resulted in the imposition of the death sentence, because we could say that the jury could not, under the law, have returned any verdict except that of guilty and could not have authorized the imposition of any sentence except that of death. But we cannot say this for the reason that the jury might, under the law, have imposed another and the lesser punishment, although they must necessarily have found appellant guilty of murder in the first degree as charged in the indictment. We are therefore unable to say that the admission of the incompetent testimony was not prejudicial, for the reason that a greater sentence was imposed than might otherwise have been imposed, had the incompetent testimony not been admitted.

It does not follow, however, that, because the judgment imposed cannot be permitted to stand, the cause must be reversed for a new trial. The error affected only the degree of punishment which might be imposed, and the practice in such cases was declared by Mr. Justice Riddick in the case of *Vance* v. *State,* 70 Ark. 272, 68 S. W. 37, where the defendant had been convicted of murder in the first degree and given a death sentence. In that case certain testimony was erroneously excluded which, if admitted, might have had the effect of reducing the degree of the crime and, consequently, the extent of the punishment, and upon these facts it was there said: "Having reached the conclusion that the error of the

circuit court above referred to was only prejudicial in so far as it may have affected the finding of murder in the first degree, we have now to consider what should be the judgment of this court. In the case of *Simpson* v. *State,* where a conviction of murder in the first degree was reversed because the evidence was not sufficient to support it, Chief Justice COCKRILL, who delivered the opinion of the court, said: 'In this case the jury have found the prisoner guilty of murder; but, having found a degree of murder which the proof does not warrant, the verdict stands for the offense of murder, and fails as to the degree. It is then as though the jury had found him guilty of murder, but failed to assess the punishment.' The court thereupon ordered the prisoner be sentenced for murder in the second degree. Now in that case the evidence was not sufficient to sustain the finding of murder in the first degree, while here the evidence is sufficient, but the conviction as to murder in the first degree must be set aside because of the exclusion of material evidence bearing on that point. It is then within our discretion to reverse the judgment and remand the case for a new trial on the whole case, or, as the exclusion of the evidence referred to could have affected the degree of murder only, we can set aside the judgment for murder in the first degree, and allow the verdict to stand for murder in the second degree. The verdict would then fail as to the degree, but stand as to the offense of murder, and the situation of the case would be the same as if the jury had found the defendant guilty of murder in the second degree, but failed to assess the punishment, and we would remand the case with an order to sentence the defendant for murder in the second degree. *Simpson* v. *State,* 56 Ark. 19, [19 S. W. 99]; *Routt* v. *State,* 61 Ark. 594, [34 S. W. 262]; *Ballew* v. *U. S.,* 160 U. S. 187, [16 S. Ct. 263].''

In that case the judgment was reversed and the cause was remanded, with directions to the circuit court to sentence the defendant for murder in the second degree.

But in the case of *Simpson* v. *State,* 56 Ark. 5, 19 S. W. 99, the court recognized the right of the State to elect whether the judgment shall be reversed or modified, and that practice was approved in the case of *Warren* v. *State,* 88 Ark. 322, 114 S. W. 705, where it was ordered that the judgment should be modified unless the Attorney General should, within fifteen days, ask that it be remanded. See also, *Noble* v. *State,* 75 Ark. 250, 87 S. W. 120; *Harris* v. *State,* 119 Ark. 94, 177 S. W. 421.

But, unless the request is made by the Attorney General for the reversal of the judgment, rather than have it modified, we may cure the error by the modification of the judgment. In the case of *Crowe* v. *State,* 178 Ark. 1121, 13 S. W. (2d) 606, the appellant had been convicted of murder in the first degree, but the trial court had committed the error of not advising the jury that they had the discretion to impose a life sentence, and we cured this error by modifying the judgment ourselves without remanding the cause for that purpose. We there said: "The court did not instruct the jury as to its right to render a verdict of life imprisonment in the State Penitentiary, at hard labor, in accordance with the provisions of § 3206 of Crawford & Moses' Digest. Under this section of the statute the jury had the right to fix the punishment of the defendant at life imprisonment at hard labor in the penitentiary. This was the lesser penalty provided by the statute, and the court erred in not so instructing the jury. There is no other error, however, in the record; and the error in this respect can be cured by modifying the judgment of the lower court by reducing the punishment from the death penalty to life imprisonment in the State Penitentiary at hard labor. This is accordingly done."

Unless, therefore, the Attorney General shall, within fifteen days, elect to request that the cause be remanded for a new trial, the judgment of this court will be that the sentence of death be reduced to that of imprisonment for life, and it is so ordered.

HUMPHREYS, MEHAFFY and MCHANEY, JJ., dissent.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BEARD.

Opinion delivered May 18, 1931.

R. E. Wiley and *Richard M. Ryan,* for appellant.

D. D. Glover and *W. H. Glover,* for appellee.

HUMPHREYS, J. Appellee brought this suit in the circuit court of Hot Spring County against appellant to recover damages in the sum of $3,000 for the loss of a leg alleged to have been sustained, when attempting to board a work train, through the negligence of appellant in providing a defective freight car with which to work and an unsafe place in which to do so. The particular negligence alleged was that appellant furnished the men with whom appellee was working a work train to ride on and carry their supplies, which contained a freight car with a defective stirrup or foothold on which to stand when getting on and off the train while engaged in the performance of their duties and also placed loose gravel on its right-of-way over the Main Street crossing in the city of Malvern, Arkansas, over planks that stuck up in a way to trip men when getting on and off the train.

Appellant filed an answer denying the material allegations of the complaint, and, in addition, pleaded as a

complete defense and bar to appellee's alleged cause of action that he assumed the risk of whatever danger there may have been in attempting to board the train.

At the conclusion of the evidence, appellee was permitted to amend his complaint, over appellant's objection and exception, to the effect that, after appellant discovered the peril of appellee in attempting to board the train, it negligently failed to stop its train and thereby prevent the injury.

The cause was submitted to the jury upon the pleadings, testimony, and instructions of the court, resulting in a verdict and consequent judgment for $3,000 against appellant, from which is this appeal.

Appellant first contends for a reversal of the judgment upon the alleged grounds that no liability was shown on account of negligence, and, if so, that the risk incident to boarding the moving train was assumed by appellee. These grounds are not sustained by the undisputed evidence in the case. The evidence, viewed in its most favorable light to appellee, reflects the following facts: Appellee was one of a crew of about twenty men employed by appellant to load and distribute rails and ties along its tracks between Malvern and Donaldson onto and from a train of cars furnished for that purpose. In loading and unloading ties, the work was usually done while the train was moving. The men would jump off, pick up, and load the ties and jump back on the train while it was in motion. Owing to the length of the rails, the train would stop for the men to do that work. The men were instructed by the foreman to keep up with the train, meaning to get on and off the train, even when moving if necessary. It was the custom of the crew, including the foreman, to get on and off the train when running in order to keep up with it and be ready at any place it might be to perform their duties. On the 18th day of April, 1930, the train was on the side track in Malvern where the crew was working. Some of the men, including appellee, were directed by the foreman, U. G. Heath, to transfer some angle bars from one car to

another. When they had completed that particular work and were climbing down out of the car, the engine, with one car attached, moved north to do some switching, and then it backed into the main line and south toward the depot at a speed not to exceed ten miles an hour, pushing three cars. As it passed along, two of the men, who were standing with appellee, boarded the first and second cars, and appellee attempted to board the third car or the one next to the engine. He caught the handhold and started to put his foot in the stirrup, but it was bent five or six inches under the car, and, on that account, he missed it and ran along with the car until he reached the Main Street crossing, where he stumbled on a board sticking up out of loose gravel on the right-of-way and fell under the train, the wheel of which ran over and crushed his leg, necessitating the amputation thereof just below the knee. During the time appellee was holding to the handhold and running along with the car, the fireman observed him but said nothing to the engineer about stopping the engine until appellee stumbled on the plank and fell, at which time he called to the engineer, who immediately stopped the engine but too late to prevent the injury. The fireman testified that it was not unusual for an employee to catch the handhold and run along with the moving train in order to board same, and that he did not regard appellee's position as perilous until he stumbled. In the course of the introduction of testimony, the court, over the objection and exception of appellant, admitted evidence to the effect that on other days the crew loaded and unloaded ties while the train was moving, and that the men got off and on the moving train while doing the work; also that the engineer would blow the high-ball blast for the men to board the train whenever he started to leave a place, and that some of them would get on before the train started and others after it started if it was not going too fast.

The testimony detailed above is of a substantial nature and sufficient, when accepted as true by the jury, to sustain the verdict and judgment. It cannot be said,

as a matter of law, under the facts that appellant was not guilty of negligence or that appellee assumed the risk of boarding the moving train. It was the duty of appellant to furnish cars without substantial defects such as bent stirrups and to remove planks calculated to trip men when boarding slowly moving trains in the performance of their duties. The train was not moving so rapidly that it can be said, as a matter of law, appellee assumed the risk in attempting to board same in the discharge of his duties.

We have carefully read the instructions given and those refused and have concluded that the court fully and correctly declared the law of negligence and assumption of risks applicable in the case.

Appellant also contends for a reversal of the judgment because the court admitted testimony relative to loading and unloading ties while the train was moving, blowing of high-balls, etc., at other days and places, but, as the testimony related to the movement of the same train for the convenience of employees engaged in the same kind of work, the evidence was admissible.

Appellant also contends for a reversal of the judgment because the court submitted the issue of discovered peril to the jury for determination. The instruction submitting this issue to the jury was based upon the testimony of the fireman to the effect that he saw appellant holding by the handhold and running along with the moving train without notifying the engineer to stop same. According to appellee's own theory of the case, this is what the crew was directed and expected to do in boarding cars in the performance of their duties.

The fireman testified that he did not regard appellee in danger until he tripped and stumbled on the plank sticking out of the loose gravel on appellant's right-of-way at the Main Street crossing; whereupon he called to the engineer, who immediately applied the emergency brakes and stopped the train. Appellant was not required, under the doctrine of discovered peril, to stop the train until appellee was actually discovered to be in a

perilous position. The testimony was not sufficient to show this at the time the fireman first discovered appellee, and so there was no evidence to justify or warrant the submission of that issue to the jury.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

TEXARKANA SPECIAL SCHOOL DISTRICT *v.* RITCHIE GROCER COMPANY.

Opinion delivered May 18, 1931.

Willis B. Smith and *Pratt P. Bacon,* for appellant.

Jones & Jones, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the order erroneously refunding the taxes to appellee was void as having been made by the county judge and not the court, and that the demurrer admits the allegations of the complaint showing such fact, and that the court therefore erred in sustaining the demurrer.

It is true the complaint alleges that the order was made on a certain day, "which was neither an adjourned nor regular term of the county court of Miller County, Arkansas, the county judge, pretending to be sitting as a court, made a void order and judgment, etc." to refund to appellee the sum claimed, taxes paid on the alleged erroneous assessment. It is also true that the allegation is that the order was made on a day, which was neither an adjourned or regular term of the court and that the county judge, "pretending to be sitting as a court, made a void order, etc.", but no fact is stated showing the order to have been void, and the allegation is that "the county judge, pretending to be sitting as a court," made such void order. This is but a legal conclusion not admitted to be true by the demurrer, which does not admit that the county judge made the order on a day or at a time when the court was not in session. A demurrer admits only those facts, which are well pleaded; and in determining whether a demurrer to a complaint should be sustained, every allegation made therein together with every inference, which is reasonably deducible therefrom, must be considered. *Hudson* v. *Simonson,* 170 Ark. 243, 279 S. W. 780; *House* v. *Road Imp. Dist.,* 158 Ark. 330, 251 S. W. 12; *Pierce Oil Corp.* v. *Hope,* 127 Ark. 38, 191 S. W. 405, S. C. 248 U. S. 498, 39 S. Ct. 172; *Brown* v. *Arkansas Central Power Co.,* 174 Ark. 177, 294 S. W.

709; *Moore* v. *North College Avenue Imp. Dist.*, 161 Ark. 323, 256 S. W. 70.

The court did not err in sustaining the demurrer, and the judgment must be affirmed. It is so ordered.

BARNETT *v.* STATE.

Opinion delivered May 18, 1931.

Oscar Barnett, for appellant.

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

MEHAFFY, J. The grand jury of Hot Spring County on April 8, 1930, returned an indictment against the appellant charging him with transporting liquor in said county. The appellant filed a demurrer to the indictment, stating that the facts alleged did not charge or constitute a public offense or any violation of the law of the State of Arkansas.

The court overruled the demurrer, and the appellant saved his exceptions.

The evidence showed that about the 1st day of February, Howard Stewart, Edwin Stewart, Ray Ross, and three girls were in an automobile riding on the streets of Malvern and drove out to Rockport, about two and a half miles from Malvern, for the purpose of getting some liquor. They failed to get the whiskey and drove back to Malvern and stopped in front of the Sanitary Cafe.

Ray Ross, one of the parties in the car, went into the cafe and returned in about twenty minutes. It was then about 10:30 o'clock. The appellant was there, and, according to one of the witnesses, said that he had made arrangements with the Yates boys to get some liquor, and would give them some if they would take them home, which was about fourteen miles from Malvern.

The Yates boys and appellant got in the car and were driven out to the Yates boys' home where they obtained a half gallon fruit jar of whiskey, put it in the car and drove back to Malvern. On the way back the boys drank some of the whiskey, but the girls did not

drink any. They stopped in front of the Sanitary Cafe, and it was then about 12:15 A. M.

Before going to the Sanitary Cafe after returning with the whiskey, they drove to the ice plant, and one of the boys got out and hid the whiskey. They left the Sanitary Cafe about 12:15 and started to Hot Springs, and they went by the ice plant, and one of the boys got out and got the whiskey and got back into the car.

After they had left for Hot Springs, the brother of one of the girls went to the night marshal, and he and the marshal learned that the appellant and others had left in the car for Hot Springs, and followed and overtook them and took the girls back home, but did not arrest any of them.

Before the car stopped the officer heard one of the occupants of the car say, "Pour it out," and some one poured the contents of the fruit jar out on the ground, and some of it fell on the running board of the car. The officer said it smelled like whiskey, and he asked what it was, and appellant said it smelled like corn liquor.

The appellant was not in the party at first when they started after whiskey, but was with them when they took the Yates boys home and was with them until the officer took the girls home.

The evidence tends to show that, when they went out to the home of the Yates boys, they intended to get whiskey and drink it while there, but they could not get the driver to stop, and while they drank some of it there, they kept the jar in the car, had it in the car when they got back to Malvern, and it was in the car when the officer overtook them, and somebody poured the whiskey out.

When the officer overtook them, somebody in the car said, "Step on it," and appellant reached over and turned the switch key and stopped the car, and appellant asked the officer if they were under arrest, and the officer said, "No, we just want to get the girls."

The appellant's testimony is to the effect that when he went with them they were to get some whiskey to drink, but it was not his understanding that they would transport it or take it away with them, and that he tried to keep the party from going on to town, and it was the agreement that they would drink the whiskey where they got it and would not bring it back. He said if he had known they were going to bring liquor back he would not have gone with them; that he had no control over the car.

The jury returned a verdict of guilty and fixed appellant's punishment at a fine of $100, and judgment was entered accordingly. A motion for a new trial was filed, overruled, and exceptions saved. The case is here on appeal.

Appellant first contends that the judgment should be reversed because the indictment showed on its face that the crime, if committed at all, was committed on the first day of February, 1931, and appellant was tried in January, 1931, and that the indictment does not charge that the liquor was transported from one place to another in Hot Spring County. It is therefore insisted that the court should have sustained the demurrer to the indictment.

The indictment charges specifically that the grand jury of Hot Spring County, in the name of and by the authority of the State of Arkansas, accused Oscar Barnett, Jr., of the crime of transporting intoxicating liquors, and that he, in the county and State aforesaid, etc. The indictment therefore charges that he transported the liquor in Hot Spring County. The indictment was returned by the grand jury in April, 1930, and charged that the offense was committed on the first day of February, 1931, and it is urged that on this account the demurrer should have been sustained.

It is apparent that the date, 1931, was a clerical error, because the indictment charged the commission of a crime and the date mentioned in the indictment was a

future date and it is perfectly clear that this was a clerical error.

The circuit clerk was called by the prosecuting attorney, and testified that the indictment was returned on April 8, 1930. This court has many times held that a late or impossible date after the indictment is an obvious error and does not affect the validity of the indictment. *Conrand* v. *State,* 65 Ark. 559, 47 S. W. 628; *Duncan* v. *State,* 181 Ark. 603, 27 S. W. (2d) 99; *Cooper* v. *State,* 145 Ark. 403, 224 S. W. 726; *Carothers* v. *State,* 75 Ark. 574, 88 S. W. 585; *Hunter* v. *State,* 93 Ark. 275, 124 S. W. 1028; *Grayson* v. *State,* 92 Ark. 413, 123 S. W. 388, 19 Ann. Cas. 929.

It is next contended by appellant that the parties had no intention of transporting whiskey, but were all looking for whiskey to drink, and that the driver of the car, over the protest of all of them, brought the whiskey back to town. But it is admitted that the whiskey was hidden at the ice plant, and the party drove by the ice plant, and appellant says Howard Stewart got out and got the whiskey from where he had hid it, and they went on their merry way to Hot Springs.

There was no protest by appellant or any one else, and no objection made to stopping at the ice plant, getting the whiskey, and carrying it on in the car. It is true appellant says he had no control over the car, and that the liquor belonged to the Stewart brothers, and that, if anybody was guilty of transporting liquor, Howard Stewart was, and the evidence shows that he was not indicted.

Appellant contends that the judgment ought to be reversed because some of the others were not prosecuted, and he says the prosecuting attorney made a statement to the jury that he did not intend to prosecute the girls.

If appellant violated the law, it was the duty of the prosecuting attorney to prosecute him. The fact that the others in the party were as guilty as appellant is no

defense. The failure of the prosecuting attorney or other authorities to properly enforce the law or to enforce the law against some and not against others is no defense in a prosecution. *Riggs* v. *Hot Springs,* 181 Ark. 377, 26 S. W. (2d) 70.

The validity of a law does not depend on a completely successful enforcement, nor does it depend on the good faith of the officers whose duty it is to prosecute. One who violates a law cannot be discharged merely because it is shown that there are other violators who have not been convicted, or that those whose duty it is to perform the duties required by it have fallen short or refused to perform their duties for any reason. *People* v. *Gardner,* 143 Mich. 104, 106 N. W. 541; *City of Centralia* v. *Smith,* 103 Mo. App. 438, 77 S. W. 488.

"Appellants prosecute this appeal upon the theory, among others, that if other people in Houston had violated the ordinance as to the erection of fireproof buildings, this would license them to violate it by erecting buildings contiguous to those of others and to preclude the latter from any remedy to protect their property. We know of no principle upon which to found such a proposition." *Chimene* v. *Baker,* 75 S. W. 330.

A person charged with a criminal offense cannot escape punishment by showing that others were also guilty.

The appellant contends that the remarks of the prosecuting attorney were prejudicial. The prosecuting attorney said he was not going to prosecute the girls; that he believed in starting at the top and coming down. There was no error in this statement that was in any way prejudicial to appellant. *Clarkson* v. *State,* 168 Ark. 1122, 273 S. W. 353; *Hall* v. *State,* 161 Ark. 465, 257 S. W. 61.

Appellant contends that the judgment should be reversed because it did not find him guilty as charged in the indictment. The verdict of the jury was: "We, the jury, find the defendant guilty, and assess his fine at $100."

A verdict of guilty implies a finding of every element essential to constitute the crime as charged, and the verdict is sufficient if from its language no doubt can arise as to the offense of which he is convicted. *Wallace* v. *State,* 180 Ark. 627, 22 S. W. (2d) 395.

It is contended that the court erred in its refusal to give instructions 1 and 2 requested by the appellant. Each of these instructions was erroneous, because each in substance told the jury they could not find the defendant guilty unless he knew when starting out that they were going on a trip for the purpose of transporting liquor. It would make no difference what their understanding or intention was when they started out if they afterwards transported liquor in violation of law. If they transported whiskey in violation of law, they would be guilty even if they started out with the intention to not transport it.

It is contended that there is no evidence tending to show that the appellant transported the liquor. We think the evidence was sufficient to submit the question to the jury, and the jury's verdict, where there is any substantial evidence to support it, is conclusive here for the reason that it is the province of the jury, and not this court, to pass on the credibility of the witnesses and the weight to be given to their testimony.

It is finally contended by appellant that the facts in this case are similar to the facts in the case of *Locke* v. *Ft. Smith,* 155 Ark. 158, 214 S. W. 11. In that case it was held that the evidence was not legally sufficient to warrant a verdict of guilty. The appellant in that case, at the earnest solicitation of a friend, got into the latter's car for the purpose of riding about the streets of Ft. Smith. Locke ascertained that his friend had been drinking and formed the intention of getting him home as soon as he could. They were not going after whiskey, but Locke was trying to get his friend home. He put one of the bottles of whiskey he found on the seat in his pocket. He did not get into the automobile for the purpose of carrying or assisting his friend to convey liquor,

but his purpose was to get his friend home and not the purpose of carrying whiskey.

We think there was sufficient evidence to submit the question to the jury, and the judgment is affirmed.

CYPRESS TANK COMPANY, INC., *v.* WEEKS.

Opinion delivered May 18, 1931.

Walter L. Goodwin, for appellant.

J. B. Milham, for appellee.

BUTLER, J. This suit was brought in the justice court by the appellee to recover wages alleged to be due and a penalty for the nonpayment thereof under § 7125, Crawford & Moses' Digest. This statute is applicable under the last clause to all companies and corporations doing business in this State and to all servants and employees thereof who shall be discharged or refused further employment and who shall request or demand the payment of any wages due. The statute provides that, if payment be not made within seven days from such discharge or refusal to longer employ, the employee may recover the unpaid wages and, as a penalty, an amount equal to the wage per day for each day during the continuance of the refusal to further employ or pay.

Weeks was a carpenter and had been in the employ from time to time of the appellant company engaged in the erection and repair of its tanks. On the morning of the 14th of February, 1930, appellant, through its man-

ager at El Dorado, employed the appellee at $6 per day to work on a tank at a point in Louisiana about seven or eight hours distant from El Dorado by regular motor travel. It was necessary to secure others to help in the work, and a delay was thereby occasioned, so that appellee was not able to leave El Dorado until about six o'clock on the evening of the day he was employed. He left in a car procured by Roach, the manager of appellant at El Dorado, and in company with two others who were also to engage in the work for which appellee was employed. On reaching the point of destination on the following day, they were informed by the appellant's agent at that place that they would not be needed, and thereupon returned by way of Shreveport to El Dorado, reaching there some time on the evening of the 16th. The appellee was put to work the next day on one of appellant's tanks in what was called the Urbana field. He was given no other employment, and a disagreement then arose as to the amount due for his previous employment beginning on February 14, and from this difference this suit resulted.

There were only two witnesses who testified in the trial of the case in the justice court and on appeal to the circuit court, the appellee testifying for himself and Roach on the part of the appellant. In the justice court there was a judgment for the appellee for $10 without a penalty, and on appeal to the circuit court there was a judgment for $10 balance wages due, and $114 penalty. By appeal to this court that verdict and judgment is sought to be reversed.

Weeks claimed that because of his employment on the 14th, and his trip to Louisiana in accordance with such employment, the time consumed in returning to El Dorado, and for the one day's work he actually performed on the 17th, he was entitled to pay at $6 per day, contract price, for the 14th, 15th, 16th and 17th of February, and made demand on or about the 19th of February for his wages as claimed. He had been paid $14. The appellant at first allowed him only one day's

pay for his trip and return from Louisiana and one day's work on the 17th and claimed a balance of $2 due it on account of the $14 that had been advanced to appellee. After other demands had been made by Weeks and some correspondence had been between him and the appellant, it finally agreed to allow him one day more and on the 8th of March tendered him a check for $4 as settlement in full for his claim. This was rejected by Weeks, and he brought this suit.

The sole question presented for our determination is as to the amount due Weeks on the 19th day of February at the time he demanded settlement. At that time the company was contending that Weeks was only entitled to one day's pay for his trip to Louisiana, and that, with the work on the 17th, he had still been overpaid the sum of $2. Appellant failed and refused for more than seven days after demand to pay appellee for his time, but on the 8th of March tendered the check for $4. Weeks testified that the car furnished by the appellant was not working properly, and that on account of the condition of the roads they were from six o'clock on the evening of the 14th until seven o'clock on the morning of the 15th in reaching their destination, and that upon their arrival they went to the place appointed to report for work, but were unable to find the agent of appellant there and did not find him until 1:30 in the afternoon; that they were then informed that there was no work for them; that, because of their being up all night, they were not able to get further on their return trip than Shreveport where they stayed all night, and that it required until the evening of the 16th to complete the return trip to El Dorado. Because of this Weeks claimed that he was entitled to three days' full pay and with the day made on the 17th that he was entitled to $24. Roach testified that he refused to continue the appellee in the work he was engaged in on the 17th because he had only employed him from day to day, and that his services were no longer needed after the 17th. The jury by its verdict found that the appellee was entitled to four days'

full time, and in the circumstances above narrated as disclosed by the evidence is found substantial testimony to support the verdict.

From the 17th of February to the 8th of March inclusive, the day on which the tender was made, totals nineteen days, which, at $6 per day, would be $114, that being the amount awarded by the jury as a penalty. March 8 was the day the first offer to pay the balance of the wages and therefore, under any view of the case, if the statute applies, the amount found by the jury is correct. This statute was interpreted in the case of *St. L. I. M. & S. Ry. Co.* v. *Bryant*, 92 Ark. 429, 122 S. W. 996, and the construction there placed upon it makes it applicable to the instant case, for we there said: "The plain object and purpose of this statute is to secure for the employee the prompt payment of wages due." It is the contention of the appellant that, because of the dispute as to the amount of wages actually due, the penalty statute has no application. Doubtless cases may arise in which there might be a difference of opinion between the employer and employee as to the amount due when a recovery of a penalty would not be justified where an employee fails to call special attention to the items demanded or to make demand therefor. But in this case the information was equally available to both parties, and specific demand was made for the days claimed. Therefore, this case does not come within the rule announced in *Hall* v. *C., R. I. & P. Ry. Co.*, 96 Ark. 634, 132 S. W. 911.

It is insisted by the appellee that the undisputed evidence shows that at no time was there a tender of the amount found to be due until the date of the trial in the justice court on April 4, 1930, and to that time the amount of penalty due would have been $264. Appellee further insists that the recitals in the docket entries made by the justice of the peace refute the claim made that $10 was tendered in the justice court; that in fact no tender was made until the trial in the circuit court when the accrued penalty amounted to the sum of $1,308,

and that he should have judgment here for said sum plus the amount of wages due. This contention cannot be considered here because the appellee has not appealed from the judgment of the court below.

It is insisted by the appellant that the court erred in its declaration of law. Only a general objection and exception was made, and in that part of the instruction submitted to us we find no inherent error. The case must therefore be affirmed. It is so ordered.

ASHTON GLASSELL COMPANY, INC., *v.* MANSFIELD LUMBER COMPANY.

Opinion delivered May 25, 1931.

James B. McDonough, for appellant.

A. M. Dobbs, for appellee.

MEHAFFY, J. This action was begun in the Sebastian Circuit Court by appellee to recover from the appellant on a breach of contract. There were two counts in the complaint, in one of which it was alleged that the appellant entered into a contract with appellee to purchase from appellee all form lumber used in the construction

of the Ward Hotel at Fort Smith. In the other count it was alleged that the appellant agreed to purchase from appellee all the cement required by the said appellant in the construction and building of the said hotel at a price of $2.75 per barrel, less 10 cents per barrel discount, and a deduction of 10 cents per sack on the return of the sacks used.

Appellee alleged that this was a verbal contract, and that appellant afterwards forwarded to appellee a written statement accepting the proposals and agreeing to purchase from appellee said materials, and that this writing consummated the verbal contract.

The following is the written statement referred to:

"March the 30th, 1929.

"Mansfield Lumber Company,
"Ft. Smith, Arkansas.
"Att. Mr. Caldwell

"Gentlemen: This will serve as an acceptance of your proposal to furnish us with the necessary form lumber for the Ward Hotel, Ft. Smith, at the price of $27.50 per M f.o.b. job, delivered as ordered by our job force. It is further understood that the cement is to be handled through you as dealer on a basis of your quotation of $2.75 less 10 and 40 delivered to us if there when needed.

"Please sign and return one copy for our files.

"Yours very truly,
"The Ashton Glassell Co., Inc.
"By Ashton Glassell,
"President."

"AG:WEM

"Accepted: Mansfield Lumber Co.,
"By A. B. Caldwell."

Appellee alleged that there was a breach of contract, and that it was damaged thereby 20 cents per barrel on 5,000 barrels.

Appellant demurred to appellee's complaint. The demurrer was overruled, and appellant then filed answer denying the material allegations in the complaint.

There was a trial by jury and a finding in favor of appellant as to the lumber, but the jury returned a verdict in favor of appellee for $250 for a breach of the cement contract.

Motion for new trial was filed, overruled, and exceptions saved, and the case is here on appeal.

The evidence showed that A. B. Caldwell, yard manager for appellee, had a conference with Ashton Glassell, president of the Ashton Glassell Company, Inc., and that the price of lumber and cement was discussed, and the witnesses, on the part of the appellee, testified that there was a verbal agreement entered into under which appellant was to purchase through appellee the cement to be used in the Ward Hotel; that Caldwell told Glassell that they handled Dewey cement, and that Dewey cement would be furnished; that Glassell said he had one car of Marquette cement *en route,* but would not buy any more. These witnesses testified that the parties agreed on Dewey cement.

The appellant's testimony tended to show that appellant agreed to take Dewey cement if Hutto and Caldwell would sell $5,000 worth of stock in the hotel. This is denied by appellee's witnesses.

The evidence of Glassell was to the effect that he did not at any time authorize appellee to buy Dewey cement. On April 23, 1929, appellant wrote a letter to appellee stating that it seemed impossible to get appellee to handle Marquette cement, but that it was its custom to use the material that it purchased rather than use some particular brand that it was customary for appellee to handle, and that, as explained to the writer, the only cement that appellee would handle was the Dewey cement. The letter closed with the statement: "Since the above conditions exist, we feel that this action is the only one to take. It will save both of us embarrassment and is a happy solution, and we are taking this step." The letter was signed by the president of the company.

It is first contended by appellant that the instrument sued on is not a contract between appellant and appel-

lee for the purchase and sale of cement. A contract may be defined as an agreement between two or more persons upon sufficient consideration to do or not to do a particular thing. The letter introduced in evidence states that it will serve as an acceptance of appellee's proposal to furnish necessary lumber, etc., and the letter then states: "It is further understood that the cement is to be handled through you as dealer on a basis of your quotation."

This letter is signed by the appellant and accepted by the appellee. It clearly shows that appellee made a quotation of prices, and that the appellant stated that it was the understanding that the cement was to be handled through appellee and delivered to the appellant. That necessarily means that the appellee was to deliver the cement to the appellant at the price or quotation named in the letter.

The appellant states in its brief that it contended in the lower court and contends now that the writing became a contract, but that it did not bind it to buy any cement from appellee. It is contended that it contained no obligation on the part of the appellant to purchase the cement. We do not agree with appellant in this contention. The writing introduced shows an agreement on the part of the appellant to purchase the cement at the price named, and on the part of the appellee to deliver it to appellant when needed. We therefore think that the writing constituted a contract of purchase and sale.

Appellant cites to support its contention *Slayden* v. *Augusta Cooperage Co.*, 163 Ark. 638, 260 S. W. 741, and the court said: "The contract, as alleged, left it entirely optional with the appellant as to whether he would put out any logs for the appellee. There was nothing to bind him to put out any amount of timber etc."

In the instant case, under the contract in evidence, the appellant was bound to purchase, and the appellee was bound to deliver, the cement. The appellant argues that the agreement was to handle through the appellee

as dealer, and that that leaves the appellant the right to select the cement, and that it was not a contract to buy from the appellee. The contract merely provided for cement and did not specify the kind of cement to be used. But, under the contract, appellant agreed to take and appellee agreed to deliver the cement.

We do not agree with the appellant that the evidence of Caldwell, Hutto and McConnell was inadmissible. We think this testimony was competent. It is a well-settled rule that parol evidence is not admissible to contradict or vary the terms of a written contract, but it is equally well settled that parol evidence is admissible to identify the subject-matter of a contract where it does not contradict the terms of the writing. *Little Rock Cooperage Co.* v. *Gunnels,* 82 Ark. 286, 101 S. W. 729, 12 Ann. Cas. 293; *Kelley* v. *Carter,* 55 Ark. 112, 17 S. W. 706; *Dollar* v. *Knight,* 145 Ark. 522, 224 S. W. 983; *Moore* v. *Exelby,* 170 Ark. 908, 281 S. W. 671; *Bigelow* v. *Casper,* 145 Mass. 270, 13 N. E. 896.

The parol evidence in this case does not vary or contradict the terms of the written agreement; it is entirely consistent with the written agreement. The written agreement is for cement, but it does not identify or name the kind of cement. The evidence tending to show the kind of cement is not repugnant to the terms of the writing, but is consistent with and explanatory of them. 10 R. C. L. 1019.

"The terms of an instrument may in some cases be clear except that there may exist an uncertainty as to the subject-matter to which the writing relates and which it is necessary to, in some way, identify in order to give effect to the document with a proper degree of certainty. In such cases parol evidence will be received to enable the court to apply the writing to its subject-matter, and its admission is in no way a violation of the parol evidence rule." 5 Chamberlayne on Evidence, 4973.

The evidence clearly shows that the parties discussed the kind of cement to be used, and appellee's testi-

mony clearly shows that the cement agreed on was Dewey cement, and that appellee had already ordered the cement when it was notified by appellant that it intended to use Marquette cement. As to whether the kind agreed on by the parties was Dewey cement was a question of fact for the jury.

What we have already said answers the contention of the appellant that the contract was oral and void because of the statute of frauds.

We have carefully examined the instructions given as well as those requested by appellant, and have reached the conclusion that there was no error in giving or refusing instructions, and that the questions of fact were properly submitted to the jury, and that the jury's verdict is sustained by substantial evidence.

The judgment is affirmed.

BATES *v.* BATES.

Opinion delivered June 1, 1931.

Evans & Evans and *Tom W. Campbell,* for appellant.

Cravens & Cravens, for appellee.

SMITH, J. The parties to this litigation are brothers, and on May 13, 1921, they entered into a partnership agreement for the purpose of manufacturing and selling vinegar at Fort Smith under the firm name of Ozark Fruit Company. In March, 1929, B. C. Bates, the elder

brother, who resided in Little Rock and had conducted in that city an independent business as a manufacturer and dealer in vinegar, brought this suit to dissolve and settle the partnership business with his brother, John D. Bates. The complaint recites numerous advances made to the firm by plaintiff, and judgment therefor was prayed.

An answer was filed, in which the existence of the partnership was admitted, but it was alleged that the partnership was dissolved on April 30, 1923, at which time plaintiff had withdrawn all advances made to the firm and had become largely indebted to it.

Each party presented a complicated account against the other, the one by the plaintiff being to the effect that he had made advances to the firm which had not been repaid him. According to the accounts kept by the defendant, the plaintiff had withdrawn his advances to the partnership, and had, in addition, borrowed a large sum of money from the partnership.

The court below did not undertake to state this account, but did find as a fact that the partnership had been dissolved, and that the defendant "has paid the plaintiff for his former share in it long ago, * * *," and the complaint was dismissed as being without equity.

We are unable to say that this finding of fact is against the preponderance of the evidence. But, without regard to the state of the accounts between the partners, the testimony appears to fully sustain the finding made by the court that the partnership was dissolved in 1923. According to the testimony of the defendant, John D. Bates, the partnership was then insolvent, and had been made so by the withdrawals of his brother and partner, but defendant took control of the business as owner in his individual capacity and assumed and paid the partnership debts. If this is true—and that finding does not appear to be contrary to a preponderance of the evidence—it is unimportant whether B. C. Bates had withdrawn all his advances or not. The agreement to take

charge and become the owner and assume the debts was sufficient consideration to support the dissolution agreement which the court found was made between the parties in 1923.

The testimony is in irreconcilable conflict as to whether there was such an agreement, and, while we have carefully considered the testimony, we think no useful purpose would be served in setting it out and discussing it. There are numerous contradictions in the testimony, but it must be remembered that a period of nearly six years intervened between the date of the alleged dissolution of the partnership and the institution of the suit for its dissolution and an accounting, and, after considering all the testimony, we have concluded that the chancellor's finding, that there was a final dissolution in 1923, is not against the preponderance of the evidence.

As we have said, the court found that, upon a final statement of the account between the parties, the balance would be against the plaintiff, but the court did not attempt to state the account and ascertain this balance. It does not appear, however, that appellee, the defendant below, complains of that action.

In the decree from which this appeal comes it was recited that "the action on the part of the plaintiff was for the dissolution of a partnership between the plaintiff and the defendant, and for judgment for a considerable sum of money, and also for a restraining order enjoining the defendant from the use of certain trade names, * * *," which were stated, which had been used by the plaintiff in his individual business at Little Rock before the formation of the partnership and since that time by him.

The court found that "plaintiff is entitled to a remedy, however, injunctive and prohibitive, against the defendant against the use of various trade names hereinbefore mentioned, or any of said trade names." Because of this finding it is insisted by the plaintiff below, the appellant here, that the entire costs of the cause should

not have been assessed against him, as was done, for the reason that he obtained partial relief.

The court also found that the defendant had not used these trade names since the dissolution of the partnership, and that the defendant asserted no right to use them. The court did find that "* * * plaintiff has no assurance that he (defendant) may not yet use them, and while the plaintiff makes no claim to any federal copyright to said names, yet the proof shows that he had given to those names value to him in branding and labeling his products long before the partnership, which were used by agreement during the partnership, and are still used by the plaintiff in his business. * * *"

We think the court was correct, notwithstanding this finding, in imposing all the costs upon the plaintiff. The right to the use of these trade names was only incidentally involved in the litigation, and was not contested by the defendant, and we think no abuse of the discretion was shown which chancery courts have in apportioning costs. *Spencer* v. *Johns*, 180 Ark. 441, 21 S. W. (2d) 961.

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

TAYLOR *v.* JONESBORO TRUST COMPANY.

Opinion delivered June 1, 1931.

Sam Rorex and *Lamb & Adams,* for appellant.

Horace Sloan, for appellee.

MEHAFFY, J. On July 17, 1927, the American Trust Company and the Jonesboro Trust Company, banking institutions, in Jonesboro, Arkansas entered into a contract which provided, among other things, that the Jonesboro Trust Company sold, part absolutely and part in trust, all its assets to the American Trust Company.

The American Trust Company assumed the payment of all bills payable, depository liability, unpaid operating expenses for July, 1927, of the Jonesboro Trust Company, the payment of all taxes, and local assessments on the Jonesboro Trust Company property that the committee of that company might direct and to advance money for insurance premiums on said property; to advance moneys not in excess of $5,000 to pay any contingent liabilities of the Jonesboro Trust Company not then shown on the books of that company, if approved and ordered paid by the committee of the Jonesboro Trust Company, and to loan annually during the years 1927-1931, both inclusive, sums not exceeding in the aggregate $10,000 for the purpose of furnishing mortgagors in financing the operation of lands mortgaged to the Jonesboro Trust Company for the purpose of protecting the security of the said company.

The Jonesboro Trust Company sold absolutely to the American Trust Company its banking house and fixtures, its insurance department, $335,000 in bills receivable at par, and to be selected by the buyer, and in addition the American Trust Company took at par all cash on hand and bank deposits in correspondent banks due the Jonesboro Trust Company. The residue of the property of the Jonesboro Trust Company consisted principally of

bills receivable, stocks and bonds, and real estate. The contract provided that these assets should be held in trust by the American Trust Company and disposed of as rapidly as possible with the approval of the committee of the Jonesboro Trust Company and the proceeds applied as collected to reduce the remainder of the obligations assumed by the Jonesboro Trust Company.

The contract entered into was quite lengthy, containing 32 separate paragraphs. We deem it unnecessary to set out the entire contract. The contract was properly signed by the Jonesboro Trust Company and the American Trust Company, and was approved by the Bank Commissioner in the following words: "The foregoing contract has been examined by the Arkansas State Banking Department, and same is hereby approved." The statement was signed by Walter E. Taylor, State Bank Commissioner.

It was stipulated that the cause might be finally tried in vacation upon the stipulations and the pleadings; that the plaintiffs named in the complaint as stockholders of the Jonesboro Trust Company are in fact stockholders of said company; that the following copies of documents with their exhibits shall be treated as evidence:

Exhibit A. Copy of minutes of special stockholders' meeting of Jonesboro Trust Company on July 25, 1927.

Exhibit B. Copy of minutes of meeting of directors of American Trust Company on July 9, 1927.

Exhibit C. Copy of minutes of meeting of directors of American Trust Company of July 12, 1927.

Exhibit D. Copy of minutes of meeting of directors of American Trust Company, July 15, 1927.

Exhibit E. Copy of minutes of meeting of stockholders of American Trust Company, August 2, 1927.

Exhibit F. Copy of document executed as an amendment to articles of agreement and incorporation of American Trust Company recorded in Corporation Record 3, page 319, in the office of the county clerk, Jonesboro District, Craighead County, Arkansas.

Exhibit G. Copy of document executed as an amendment to articles of agreement and incorporation of Merchants' & Planters' Bank & Trust Company, recorded in Corporation Record 3, page 319, in the office of the county clerk, Jonesboro, Arkansas.

Exhibit H. Copy of document executed as an amendment to articles of agreement and incorporation of Jonesboro Trust Company, recorded in Corporation Record 3, page 320, in the office of the county clerk, Jonesboro District of Craighead County, Arkansas.

Another stipulation is that the contract actually executed bears the date July 17, 1928.

After the contract was entered into, the American Trust Company assumed possession of the banking house, fixtures, and furniture, insurance agency, cash, deposits in other banks and notes receivable of the Jonesboro Trust Company taking outright the items called for in the contract, and holding in trust the remainder of the assets of the Jonesboro Trust Company. The American Trust Company either paid or substituted its own notes for the outstanding bills payable of the Jonesboro Trust Company, and all the depository liabilities of the Jonesboro Trust Company were changed so that thereafter each depositor was either paid his deposit or had a similar deposit account with the American Trust Company. Sundry outstanding small bills of the Jonesboro Trust Company were paid by the American Trust Company with the result that under the said contract the American Trust Company became the sole creditor of the Jonesboro Trust Company. To pay off the balance due the American Trust Company (*i. e.*, the difference in liability assumed by the American Trust Company and the agreed value of the assets purchased outright from the Jonesboro Trust Company by the American Trust Company), effort was made, as outlined in the contract between the two companies, to reduce assets held in pledge to cash and apply same on the said balance, this being done in co-operation between the American Trust

Company and the Jonesboro Trust Company, as provided in the said contract, and the liquidation of the Jonesboro Trust Company has proceeded since then up till November 1, 1930, in the manner provided by the said contract, with the knowledge of the State Bank Commissioner.

Prior to November 1, 1930, the date of the closing of the American Trust Company and its taking over by the State Bank Commissioner, the validity of the contract in providing for such method of liquidation was not questioned by the State Bank Commissioner or any party to the contract. However, on January 27, 1931, Walter E. Taylor, State Bank Commissioner, without notice of any kind to any one connected with the Jonesboro Trust Company, declared that he was taking exclusive charge of the affairs of the Jonesboro Trust Company, and appointed the defendant, George A. Knox, as his special deputy, for such purpose, a true copy of order appointing said George A. Knox is hereto attached as Exhibit I. No stockholder, officer or any other person connected with the Jonesboro Trust Company, knew, or had any information, as to any intention of the State Bank Commissioner to make or to file the order for his taking over the affairs of the Jonesboro Trust Company until January 27, 1930, the date of the filing of the order appointing Geo. A. Knox.

After the making of the contract between the Jonesboro Trust Company and the American Trust Company, the Jonesboro Trust Company maintained no office or place of business of its own, but the business of liquidation was transacted either at the office of the American Trust Company, or at the headquarters of the liquidation committee of the Jonesboro Trust Company, at the office of Horace Sloan, attorney at law, Jonesboro, Arkansas; that after said date the said Jonesboro Trust Company did not hold itself out as transacting a banking business, it received no deposits of any kind whatever, but was engaged solely and exclusively to reduce its

assets to cash, as contemplated in the agreement between it and the American Trust Company.

On July 25, 1927, a meeting of the stockholders of the Jonesboro Trust Company ratified the contract made on July 17, and above referred to. On the 9th day of July, 1927, a meeting of the directors of the American Trust Company was held and a committee was appointed and given full authority to close the deal with the Jonesboro Trust Company. Before the contract was executed the signatures of holders of more than two-thirds of the capital stock of the American Trust Company had been secured. Amendments to articles of agreement, showing the approval and filing with the committee on March 29, 1928, were introduced in evidence. Other documents were introduced showing a compliance with the law in the execution of the contract.

The appellees brought this suit in the chancery court to enjoin and restrain the Bank Commissioner and special deputy from taking over or keeping in their possession any of the assets of the Jonesboro Trust Company, except so far as the American Trust Company would be entitled to do under its contract with the Jonesboro Trust Company, and to cancel the appointment of Geo. A. Knox as special deputy, and to enjoin and restrain the Bank Commissioner from appointing any person to take charge or attempt to take charge of the assets of the Jonesboro Trust Company, and to enjoin Walter E. Taylor, Bank Commissioner, from personally taking charge or interfering in any way with the contract.

Appellants filed answer denying all the material allegations of the complaint. The chancellor entered a decree in favor of the appellees, enjoining and restraining the Bank Commissioner and deputies from taking over any of the assets of the Jonesboro Trust Company except in so far as the American Trust Company would have been entitled to do under the contract of July 17, but permitting the Bank Commissioner to exercise and enforce such control over the disposition of the assets and

the liquidation of the Jonesboro Trust Company as was given to the American Trust Company under the terms of the contract to the end that the terms of the contract shall be carried out in their entirety. The case is here on appeal.

Appellants first contend that all contracts, such as the one involved here, are to be limited and construed by the legal status of banking institutions as fixed by statutory regulation and judicial construction when the contract was executed. It is contended that our statute is a borrowed statute; that is, that it is practically a copy of the national banking law, and that when we adopted this statute we adopted its construction by the federal court. This is true, but this does not mean that when we adopt a statute we will follow decisions thereafter rendered by other courts; but we know of no decision by the federal court handed down, either before or since the adoption of this statute, that prohibits the making or holds invalid a contract like the one here involved.

Appellant has called attention to numerous decisions of the federal court, and none of these hold that a contract like the one here involved is invalid, and we know of no decision to that effect. Some of the decisions to which appellant calls attention are to the effect that a contract made in contemplation of insolvency, or made for the purpose of giving a preference, is invalid, but these questions are not involved in this case. The contract was not made for the purpose of giving a preference.

The original statute in Arkansas provided only for reorganization or consolidation, and did not provide for purchase or acquisition by one bank of the assets of another. The act of 1923, however, provided that any bank may effect such reorganization, purchase, or acquisition or consolidation, etc. This act expressly provides that banks may do the things provided for in this contract. It provided that one bank may purchase all or any part of the assets of another. Acts 1923, p. 515, § 4.

This section of the statute was complied with, and there is no contention that there was failure to do any of the things provided for in this statute. The contract therefore was expressly authorized by statute.

This court, in approving a contract similar in some respects to the one involved, said: "They agreed with the appellant that they would take over the assets of the Valley Bank and pay into such bank the money necessary to discharge its obligations and assume the risk of whatever loss might be involved in the transaction." The court also said: "The doctrine applicable to the facts of this record is announced in the case of *Schofield* v. *National Bank,* 97 Fed. 282, and expressed in syl. No. 3 as follows: 'A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and lease and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and securities, is not *ultra vires,* but is within its powers conferred by statute to conduct a general banking business.' " *Nakdimen* v. *First National Bank,* 177 Ark. 303, 6 S. W. (2d) 505; *Barham* v. *Crittenden County Bank,* 170 Ark. 77, 278 S. W. 636.

This court upheld the validity of a contract of the purchase of the assets of one bank by another in the case of *State use Crawfordsville Special School Dist.* v. *Huxtable,* 178 Ark. 361, 12 S. W. (2d) 1.

The appellant says that no established rule of law, whether statutory or common law, can be abrogated or to any extent modified by contract. It is also true that no valid contract can be abrogated or to any extent modified without the consent of both parties. It is argued that the statute under which the contract was made does not contemplate the assumption by a solvent banking institution of the debts of an insolvent bank. No one knew at the time of the making of this contract that either of the banking institutions was insolvent. Both banks had been examined by the State Banking Department and were not

only thought to be solvent, but the Bank Commissioner actually approved the contract. This was not a reorganization or a consolidation, and, under the original act and the Acts of 1917 (p. 748) no authority existed to make a contract of purchase, but, under the Acts of 1923, a purchase by one bank of the assets of another was expressly authorized.

It is contended that the rights, remedies, and procedure under the banking act are exclusive. The remedy or procedure in this case was under the provision of the banking act, a provision which expressly authorized the kind of contract here involved. But it is contended that, when both banks became insolvent, the Bank Commissioner automatically became the liquidating agent, armed with all the power and authority under the banking statute. He had no more authority and could have had no more than the American Trust Company itself had. As we have already said, it was a valid contract, and cannot be abrogated without the consent of both parties.

The statute authorizes the Bank Commissioner to take charge of a bank, and, if found to be insolvent, he shall have full power and authority to hold and retain possession of all the money, rights, credits, assets, and property of every description. Section 711, Crawford & Moses' Digest.

Section 719 of Crawford & Moses' Digest provides for taking possession of the property of any bank and § 720 authorized the sale of any property, but the Jonesboro Trust Company has no property; it had no assets; it sold all of its assets, with the approval of the Bank Commissioner, to the American Trust Company, part of the property being sold outright, and part of it in trust, but all of its property was sold, and it has no property that the Bank Commissioner could take charge of.

We deem it unnecessary to review the authorities cited by counsel, because the contract involved here is authorized by statute, the requirements of the statute were complied with, the Jonesboro Trust Company sold

all of its property as it had a right to do, and the contract was approved by the Bank Commissioner.

One of the authorities cited and quoted from by appellant in its reply brief was *Derscheid* v. *Andrew,* 34 Fed. (2) 884. In that case the court said: "However, a contract as here made is valid, and the state bank a creditor to whom the stockholders are liable if made while the national bank was still in active operation and not thought to be insolvent."

The contract in this case was made when it was not thought that either bank was insolvent. Moreover, in the case above quoted from the suit was to collect from stockholders, and that question is not involved here.

The decree of the chancellor is affirmed.

Mr. Justice KIRBY dissents.

CASTEEL *v.* YANTIS-HARPER TIRE COMPANY.

Opinion delivered June 1, 1931.

Simmons & Lister, for appellant.

Daily & Woods, for appellee.

BUTLER, J. At about seven P. M. on Tuesday, November 12, 1929, the appellant was standing in the safety zone at 11th Street and Garrison Avenue in the city of Fort Smith waiting for a street car. Several other persons were there also, among these being Walter Hager, who became a witness in plaintiff's behalf. While standing in this safety zone, through which automobiles were not supposed to drive, a car ran around another car, and, traveling at a speed of from 25 to 30 miles an hour, negligently drove through the safety zone, striking the appellant, seriously injuring her as well as a number of other persons.

Appellant brought suit against S. B. Harper and Marshall Yantis, partners in business, operating under the firm name of Yantis-Harper Tire Company, and Robert Tolliver, a colored employee of the firm, on the theory that the car inflicting the injuries belonged to the partnership and was driven by the defendant, Tolliver, while engaged in his employment as the servant of the partnership. Tolliver denied striking the appellant, and, in addition to this defense, Yantis-Harper Tire Company defended upon the ground that Tolliver was not in their service at the time of the injury, if in fact he caused such injury.

On the trial of the cause in the court below a verdict was returned under the direction of the court against the appellant, the plaintiff, in favor of defendants, Yantis and Harper. After the direction of the court, and before the submission, plaintiff took a nonsuit as to Tolliver and prosecutes her appeal from the verdict and judgment in the court below, assigning as error the action of the court in directing a verdict against her.

The action of the court was doubtless predicated on the theory that the evidence failed to show either that the car causing the injury was operated by Tolliver, or, if so, that, Tolliver at the time was in the employ of the defendant partners. In testing the correctness of the court's conclusion under our settled rule, the testimony must be viewed in the light most favorable to the plaintiff, together with all the inferences properly deducible therefrom, and the allegations of the complaint should have been submitted to the jury, if there was in the entire testimony any substantial evidence, either direct or circumstantial, tending to support the same.

The testimony on the part of the defendant was to the effect that Tolliver was regularly employed by Yantis-Harper Tire Company and had been so employed for several years; that he worked by the day and was paid by the day, and only paid when he worked. Tolliver testified that he was not employed on the day of the injury to the appellant, and his testimony was corroborated by that of the cashier and timekeeper of the partnership, who gave testimony to the same effect as did other employees of the company. Their testimony was also to the effect that, shortly before the occurrence in question, Tolliver was loaned the use of one of Yantis-Harper's cars for the sole purpose of permitting Tolliver to go to his home to get a raincoat which he wanted for his own use, and that the use of the car had no relation whatever to any service performed for Yantis-Harper Tire Company, or any connection with their business, and had no relation to any duty of Tolliver as an employee of the part-

nership. In addition to the testimony relative to Tolliver's employment and his use of the car, Tolliver testified that the car in which he was driving was not the one which caused the injury, and that he was traveling in a careful manner and had injured no one.

It was upon the testimony above narrated that the action of the court was based in directing a verdict for the defendants, Yantis and Harper. In testing the weight and sufficiency of this evidence to support the action of the trial court, as stated in the case of *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52: "It may be said to be the general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established, and a verdict directed based as on such evidence. But this rule is subject to many exceptions, and where the witness is interested in the result of the suit, or facts are shown that might bias his testimony, or from which an inference may be drawn unfavorable to his testimony, or against the fact testified to by him, then the case should go to the jury."

Now, the evidence stated above was not all the evidence in the case. There was evidence to the effect that Tolliver was a regular employee of the partnership, and had been such for a number of years; that a part of his duties was to deliver gasoline, tires and other commodities and to answer service calls over the city; that for the performance of these duties he was furnished a service truck, the property of the partnership, and that his negligent operation of this vehicle caused the injury to the plaintiff. The law applicable to this state of facts has been so frequently considered by us that it may be treated as settled. In the recent cases of *Hunter* v. *First State Bank of Morrilton,* 181 Ark. 907, 28 S. W. (2d) 712; *Andrews* v. *Boone,* 181 Ark. 1061, 29 S. W. (2d) 284, and *Mullins* v. *Ritchie Grocer Company, ante* p. 218, the au-

thorities from our own and other jurisdictions are reviewed. No useful purpose would be served by again reviewing them. In *Mullins* v. *Ritchie Grocer Company, supra,* it was said: "The doctrine is settled in this State that, if the automobile causing the accident belongs to the defendant and is being operated at the time of the accident by one of the regular employees of the defendant, there is a reasonable inference that at such time he was acting within the scope of his employment and in the furtherance of his master's business. The inference or presumption of fact, however, may be rebutted or overcome by evidence adduced by the defendant during the trial. Where the evidence on this point is contradictory, the question is one for the jury. Where the facts are undisputed and uncontradicted, it becomes a question for the court."

It is argued, however, that the inference or presumption which may have arisen from the fact that the car causing the injury was the property of appellee and driven by one of its regular employees was overcome by the testimony on behalf of the defendants, that the testimony of their witnesses was uncontradicted, and that the verdict based on this evidence was properly directed. But, as we have often said, the presumption arising which we are now considering is not one of law but of fact to be deduced from all the testimony, and the question as to whether it has, or has not, been overcome is equally a question for the jury. The vehicle which caused the injury was identified a few minutes after the accident in the place of business of the partnership by a witness, one Hagar, who followed the car immediately as it left the scene of the accident to the place of business of the appellees, and there met Tolliver, the driver, who came out on the walk as witness arrived, and asked, "What's the matter—did I hit some one down there?" Witness stated that Tolliver made the further statement that he had been away to get or deliver a package. The testimony concerning the remarks of Tolliver was objected to as

being incompetent as against Yantis and Harper. It is admitted, however, that the testimony concerning the statement made by Tolliver was admissible against him, but it is insisted that it was not admissible and should not be considered in connection with the liability of Yantis and Harper for the reason that it was not a part of the *res gestae*, and that it was improper to prove any act or declaration of Tolliver as tending to show his agency or employment.

The rule is settled that the declarations of an employee as to who was responsible for an injury, made after its occurrence, is incompetent as against his employer for the reason that his employment does not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duties of employment. *River R. & H. Const. Co.* v. *Goodwin,* 105 Ark. 247, 151 S. W. 267; *Stetcher Cooperage Works* v. *Steadman*, 78 Ark. 381, 94 S. W. 41; *Caldwell* v. *Nichol,* 97 Ark. 420, 134 S. W. 622; *Pfeifer Stone Co.* v. *Shirley,* 125 Ark. 186, 187 S. W. 930; *Williams* v. *Elrod*, 128 Ark. 207, 193 S. W. 514; *Webb* v. *K. C. So. Ry. Co.,* 137 Ark. 107, 208 S. W. 301; *Frolich* v. *Hicks,* 143 Ark. 565, 222 S. W. 373; *St. L.-S. F. Ry. Co.* v. *Vernon,* 162 Ark. 226, 258 S. W. 126. But that rule does not render this testimony incompetent. It is to be remembered that one of the issues in the case was the question of fact as to whether or not Tolliver was the driver of the car causing the injury. He denied that he was. The testimony therefore was competent to identify him, and no error was committed in admitting such testimony, even when it is assumed that it was so remote in time after the happening of the event as not to be a part of the *res gestae.*

It is also to be observed that the witnesses testifying as to the facts upon which the appellees relied were all employees of the partnership, and in their examination, while all testified on a certain date which they named Tolliver was not employed by his co-defendants, that date, as fixed by some of the witnesses, did not correspond

with the date of the injury to the appellant. From these facts the jury might have found that the testimony of these witnesses was biased by the relationship they sustained to the partnership, and from the discrepancies in their testimony and the attendant circumstances of the injury, the jury might have drawn an inference unfavorable to their testimony and against the facts testified to by them. We therefore think that, under the rule announced in *Skillern* v. *Baker, supra,* and *Mullins* v. *Ritchie Grocer Company, supra,* there was a case made which should have gone to the jury. It follows that the judgment of the trial court must be reversed, and the cause remanded for a new trial. It is so ordered.

ROCKFORD TRUST COMPANY *v.* PURTELL.

Opinion delivered June 1, 1931.

Lake, Lake & Carlton, for appellant.

Jas. S. McConnell, for appellee.

SMITH, J. The facts out of which this litigation arose, while somewhat complicated, are practically undisputed, and are to the following effect.

The Rockford Trust Company, as administrator of the estate of Mrs. Martha Smith, brought suit to foreclose a mortgage executed on March 13, 1924, by O. P. Purtell and wife to the Guthrie Mortgage Company. The mortgage was given to secure a loan of $1,200, evidenced by a principal note for that amount, due December 1, 1933, with 10 per cent. interest coupons attached thereto. The mortgage was upon the usual conditions, and contained an accelerating clause, giving the holder of the note the right to declare it due upon the failure to pay any installment of interest. The mortgage was duly filed and recorded March 25, 1924.

The mortgage company made an assignment of the note by an indorsement in blank on the back thereof. There was also executed a separate assignment of the mortgage to an assignee named as..... The date of the assignment of the mortgage was June 16, 1924. This assignment was not acknowledged, and was never recorded.

The indorsed note, together with an abstract of the title to the lands embraced in the mortgage brought down to June 20, 1924, and the original application of Purtell to the mortgage company for the loan, came to the hands of Fred J. Sovereign in the city of Rockford, Illinois, and he, on February 4, 1925, sold and assigned the note to Mrs. Martha Smith and delivered it to her with the other instruments referred to. She paid the face of the note and the accrued interest thereon for the note, and had it in her possession at the time of her death February 20, 1929. Interest payments were made up to December 1, 1927, when default was made, and as subsequent payments had not been made, the administrator of the owner has exercised the option of declaring the entire debt due. There was a prayer for a judgment for the amount of the note, with interest, and for a decree of foreclosure. Certain persons were made parties defendant whose interests were acquired in the following manner.

On February 27, 1924, Purtell, the grantor in the mortgage which the trust company sought to foreclose, executed and delivered to J. F. Cannon a mortgage whereby he conveyed to Cannon the lands described in plaintiff's mortgage, to secure a note payable to Cannon for $832.42. Thereafter, to-wit, on June 20, 1924, the Guthrie Mortgage Company executed and delivered to Cannon its promissory note for $1,200, due forty-five days after date, and also executed and delivered to Cannon at the same time an assignment of the Purtell mortgage, which is the same mortgage that plaintiff trust company sought to foreclose by this suit. In consideration of the execution and delivery to Cannon of the mortgage company's note and the assignment of the Purtell mortgage, Cannon released the mortgage which Purtell had executed to him in February, 1924, by a release deed dated June 20, 1924, which was filed for record on the same date. This release deed was shown in the abstract of title which was delivered by the mortgage company to Sovereign, and by Sovereign to Mrs. Smith.

The assignment to Cannon of the Purtell mortgage by the Guthrie Mortgage Company, which was dated June 20, 1924, and recited the consideration to be $1,200 cash in hand paid, was duly acknowledged, and was filed for record July 1, 1924. Cannon received only the assignment of the mortgage and did not receive the note which it secured.

No indorsement of any kind was ever made upon the margin of the record where the mortgage here sought to be foreclosed was recorded.

Cannon brought a suit, in which he alleged that the execution of the release deed, whereby he canceled the mortgage executed to him by Purtell, had been procured by fraud, and that the consideration therefor had failed, and he prayed that his release deed be canceled, and that the original mortgage from Purtell to him be foreclosed. An intervention was filed in this cause by C. E. Coleman, who had become the owner of a second mortgage which

Purtell had executed. There were no parties to this suit except Cannon, plaintiff, Purtell, defendant, and Coleman as intervener. In that cause it was decreed on June 2, 1927, that the release deed had been obtained without consideration, and it was canceled, and the foreclosure of the original mortgage from Purtell to Cannon was ordered. Pursuant to this decree of foreclosure, a commissioner of the court sold the land to one L. B. Hill, who, upon the approval of the sale by the court, received a commissioner's deed, and Hill and his vendees were made parties defendant to the foreclosure suit brought by the trust company, it being prayed that the conveyances to them be canceled as clouds upon the title.

Upon the final submission of the cause a decree was entered, from which is this appeal, to the effect that the plaintiff trust company, as administrator of Mrs. Smith's estate, should have judgment against Purtell for the amount of the note, but that the cause should otherwise be dismissed as being without equity, and that the lien of the mortgage sought to be foreclosed should be canceled, thus leaving in full force and effect the decree and the proceedings thereunder whereby Cannon canceled his release of the mortgage to himself from Purtell and obtained a decree of foreclosure of that instrument.

The action of the court in refusing to decree the foreclosure of the mortgage bought by the plaintiff's intestate, and in canceling it is defended upon the authority of § 4 of act 374 of the Acts of 1917 (page 1805), which appears as § 7394, Crawford & Moses' Digest.

Act 374 of the Acts of 1917 is entitled, "An act to regulate the manner of renewing or extending time of payment of debts secured by mortgages, deeds of trust, or vendor's liens the operation of the statute of limitations thereon, and prescribing the manner in which transfers of mortgages and liens and satisfaction thereof shall be noted of record."

The history of act 374, and the purpose of its enactment, is recited in the opinion in the case of *Kinney* v.

North Memphis Savings Bank, 178 Ark. 716, 11 S. W. (2d) 486.

By § 1 of the act of 1917, which became § 7382, Crawford & Moses' Digest, it is provided that no agreement for the extension of the date of maturity of a note secured by a mortgage or other liens there named, whether in writing or not, shall, so far as it affects the rights of third parties, operate to extend the statute of limitations unless a memorandum showing such extension be indorsed on the margin of the record where such instrument is recorded.

Section 2 of the act, which became § 7399, Crawford & Moses' Digest, gives to any person who, according to the face of the record, is the owner of any of the liens mentioned the right to satisfy the liens of record by indorsement on the margin of the record where the instrument is recorded, and provides that when this is done a subsequent purchaser, mortgagee or judgment creditor is protected against such liens "unless there shall appear on the margin of the record where such instrument is recorded a memorandum showing that the said mortgage, deed of trust, vendor's lien, lien retained in deed or note, or other evidence of indebtedness secured thereby has been transferred or assigned, which said memorandum shall be signed by the transferrer or assignor, giving the name of the transferee or assignee, together with the date of such transfer or assignment, said signature to be attested and dated by the clerk." There follows in this section the proviso that when this memorandum is indorsed upon the margin of the record, satisfaction of the record can only be made by the transferee.

Section 3 of the act of 1917, which became § 7400, Crawford & Moses' Digest, provides the manner in which the liens there named may be discharged and satisfied of record.

Section 4 of the act, which appears as § 7394, Crawford & Moses' Digest, is in the nature of a proviso to the preceding three sections, which imposed certain duties

and provided certain hazards for noncompliance therewith. Section 4 recites that nothing in the preceding sections shall prevent the sale, transfer, or assignment of the liens mentioned by a separate instrument, duly acknowledged and recorded, and imposes upon the clerk and recorder, at the time of recording such separate instrument the duty of noting, on the margin of the record of the original instrument, a memorandum showing that the lien contained in such instrument and the notes or other instruments evidenced thereby have been transferred, and to whom transferred, with the date of the transfer and the book and page where such instrument was recorded, but to this is added the proviso that the failure of the clerk to make such marginal entry or notation shall not invalidate the sale, transfer or assignment recorded as therein provided.

In other words, as applied to the facts of this case, § 7394, Crawford & Moses' Digest, does mean that a lien holder, by a separate instrument, duly acknowledged and recorded, may transfer the lien, and that, while it is the duty of the recorder to indorse, upon the margin of the assigned instrument, the date of the transfer and the name of the party to whom transferred and the book and page where such assignment has been recorded, the failure of the clerk to discharge this ministerial duty shall not invalidate the transfer. But the act does not undertake to change the law on the subject of the assignment of negotiable instruments.

Here Cannon took, by a separate instrument, an assignment of the mortgage, which did recite that the debt secured by the mortgage was also assigned, but it is to be remembered that this debt was a negotiable note, which was not indorsed or delivered to Cannon. The note was not therefore transferred, the recital of the assignment to the contrary notwithstanding. There is nothing in § 7394, Crawford & Moses' Digest, to change the law in regard to the transfer of title to a negotiable note. The law on that subject appears in the Negotiable Instrument Act. Sections 7796 and 7797, Crawford & Moses' Digest.

Section 7796 reads as follows: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery."

Section 7797 of the same chapter provides how an indorsement shall be made, and it reads as follows: "The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is sufficient indorsement."

Cannon did not take the note which the assigned mortgage secured by indorsement or by delivery. On the contrary, the note was indorsed in blank by the payee and in due course was delivered to plaintiff's intestate. She, and not Cannon, took title to the note. Of course as she did not require the performance of the provisions of the act of 1917, she held the note subject to the peril of having her lien defeated by a satisfaction thereof entered on the margin of the record by the mortgage company, the owner of record of the lien, but this was not done.

The question for decision is therefore just this, who is entitled to the benefit of the mortgage lien? Does it inure to the benefit of the legal holder and owner of the note which the mortgage secures but who did not have the fact of her purchase noted upon the margin of the record? Or does it inure to the benefit of one who took an assignment reciting that the mortgage and the debt it secures was transferred, yet who did not take the instrument evidencing that debt, to-wit, a promissory note?

In the case of *Troyer* v. *Cameron,* 160 Ark. 421, 254 S. W. 688, the payee in certain negotiable notes had transferred them as collateral security for a loan, and, while they were so held, he undertook, by a separate written assignment, to transfer his interest in the notes to another, so as to constitute his assignee an innocent pur-

chaser under the Negotiable Instrument Act. It was there said: "The notes were payable to order, and to have negotiated them it was necessary for Fensler" (the payee) "to indorse them by writing his name on the instrument itself, or upon a paper attached thereto, and to deliver them. Section 7796-7798, Crawford & Moses' Digest. This was not done. At the time of the attempted assignment the notes were in possession of Henry Moore, who held them as collateral security. Fensler was not in possession of them, and could not negotiate them within the meaning of the negotiable instrument law."

Here the debt secured was a twelve hundred dollar note, with interest coupons attached, payable to the mortgage company; and, while the mortgage company's assignment to Cannon recited that it had transferred this debt to him, it did not do so in fact, because that debt was a negotiable note, which the mortgage company did not indorse or deliver to Cannon.

The writing which evidenced the debt, a negotiable note, was acquired by plaintiff's intestate before its maturity and for full value by indorsement and by delivery, and, as an incident to the ownership thus acquired, there was also acquired the benefit of the mortgage which secured the note, subject, however, to the hazard of having that right destroyed by a satisfaction of the lien by the record owner thereof, no indorsement having been made upon the margin of the record of the transfer of the note.

In the case of *Carpenter* v. *Longan,* 83 U. S. 313, 21 L. Ed. 271, Mr. Justice SWAYNE, speaking for the Supreme Court of the United States, said: "The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. *Jackson* v. *Blodget,* 5 Cow. 205; *Jackson* v. *Willard,* 4 Johns. 43." It was there further said: "The transfer of the notes carries with it the

security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

"All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action, standing alone, is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid, the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.*"

Our own cases are to the same effect. In *Pullen* v. *Ward,* 60 Ark. 90, 23 S. W. 1034, after quoting in part with approval the language above quoted from the Carpenter case, Mr. Justice Battle said: "In this case the note and lien stand in the same relation. They are as inseparable as the note and mortgage. As in the latter case, the note is the principal and essential thing, and the lien the accessory and incident. The lien passes with the transfer of the note, and expires when it is paid. The lien (a vendor's) is, in effect, a mortgage, and, like it, passes to the assignee of the note, it being negotiable, freed from any defense the maker (Pullen) had against it

in the hands of the vendor." See also *Smith* v. *Butler,* 72 Ark. 350, 80 S. W. 580; *Hebert* v. *Fellheimer,* 115 Ark. 366, 171 S. W. 144; *Graves* v. *First National Bank of Bentonville,* 126 Ark. 177, 189 S. W. 664; *Beard* v. *Bank of Osceola,* 126 Ark. 420, 190 S. W. 849; *Hankins* v. *Merchants' & Planters' Bank,* 161 Ark. 221, 255 S. W. 916.

We conclude therefore that plaintiff's intestate acquired the benefit of the mortgage lien by her purchase of the debt which it secured, and that, as Cannon did not acquire the note which the mortgage secured, neither he nor those claiming through him are entitled to enforce the lien of the mortgage. Therefore the right of the plaintiff's intestate to enforce the lien of this mortgage is not affected by the decree wherein it was adjudged that Cannon's release deed be canceled and the mortgage to him from Purtell be foreclosed, as plaintiff's intestate was not a party to that litigation.

The decree of the court below will therefore be reversed, and the cause remanded, with directions to enter a decree conforming to this opinion.

STATE EX REL. LATTA *v.* MARIANNA.

Opinion delivered June 1, 1931.

Smith & Fitzsimmons, for appellant.

John L. Daggett and *Mann & McCulloch,* for appellee.

BUTLER, J. The State of Arkansas on the relation of B. F. Latta, the appellant, filed its petition for mandamus in the Lee County Circuit Court, which petition, after alleging that Marianna was a city of the first class, that certain named persons were the mayor and aldermen of said city, that the petitioner, Latta, was a taxpayer of the city and an owner of valuable property fronting on Main Street, which was one of the principal thoroughfares and business districts of Marianna running east and west, and bisected by Poplar Street, which streets, with their sidewalks, had been public streets for more than twenty years, no private ownership or interest in any portion of said streets having existed for that length of time, further alleged: That W. S. McClintock was the owner of a lot located on the southwest corner of Main and Poplar streets, near the business property aforesaid, belonging to the petitioner; that at some time prior to October, 1929, McClintock asked and obtained permission of the city council to tear down the buildings then located on said property and to erect a two-story brick building on the site of the old one; that, in order to remove the debris, it would be necessary to use a part of the street and all of the sidewalk, and asked and obtained permission to make this obstruction. The council voted "to grant all of Mr. McClintock's requests, and he was informed that he was at liberty to proceed according to his

own plans," that, pursuant to the request and permission aforesaid, McClintock proceeded with the demolition of the old building and caused to be erected on its site a modern two-story brick building with a basement; that, as a means for gaining entrance to the basement, he appropriated one-half of the eight-foot sidewalk abutting on said building and caused to be cut through the same an aperture of sufficient width to permit private passage; that in this aperture he caused to be constructed a series of concrete steps as a means of ingress and egress, and on the north side of the opening was placed a heavy iron railing about 34 feet long spiked on top; that the contact of said aperture with the sidewalk is at all times open at the east end and unprotected; that the said McClintock caused to be cut through the sidewalk a second opening to the west of that before mentioned, similar in width and approximately 30 feet long, and unprotected on the west; that said appropriation of the sidewalk was unauthorized and deprived the public of the use of one-half of the same, leaving an insufficient space for pedestrian traffic; that the petitioner, a taxpayer and citizen, was inconvenienced, harassed, and his business conducted on the property aforesaid damaged because of the maintenance of the purprestures and apertures, and that the public, as a class, is inconvenienced and, without the authority of law, is deprived of the free and uninterrupted utility of the sidewalk for a distance of sixty feet where traffic is heaviest, and that such obstructions constitute a public nuisance and are a nuisance *per se*.

The petitioner further alleged that, on the first of October, 1929, on notice to McClintock, he petitioned the city council for an abatement of the nuisance, and that upon presentation of the petition it was denied. The prayer of the petition was for an issuance of a writ of mandamus directing the mayor and aldermen to abate the nuisance. To this petition a demurrer was interposed on the grounds, (1), that there was a defect of

parties defendant; (2), that the petition does not state facts sufficient to constitute a cause of action, and, (3), that the court was without jurisdiction over the subject-matter. The court sustained the demurrer and dismissed the petition, from which judgment is this appeal.

It is the contention of the appellant that the language of § 7606 of Crawford & Moses' Digest places an imperative duty on the part of the city council to keep open and in repair the streets and sidewalks, and, since the admitted allegation of the petition shows that there was an obstruction of the sidewalk, the city council was without authority to authorize or acquiesce in the obstruction, was without discretion in the matter, and therefore mandamus was the proper remedy. Section 7607, *supra,* is as follows: "The city council shall have the care, supervision and control of all the public highways, bridges, streets, alleys, public squares, and commons within the city; and shall cause the same to be kept open and in repair, and free from nuisance.

The city council indubitably has the power to supervise and control the streets and sidewalks of the city, with authority to cause to be removed any structure which encroaches upon the same, nor is this power lost because of inaction of the city governing body for a long period of time. Section 7748, Crawford & Moses' Digest; *Helena* v. *Wooten,* 98 Ark. 158, 135 S. W. 828. Neither can the municipal authorities alienate or authorize a use inconsistent with the right of the public to the reasonable use and enjoyment of these public ways. *Beebe* v. *Little Rock,* 68 Ark. 39, 56 S. W. 791; *Lester* v. *Walker,* 177 Ark. 1101, 9 S. W. (2d) 323. It follows that the city council might, if it saw fit, cause the obstruction complained of to be abated. *Sander* v. *Blytheville,* 164 Ark. 434, 262 S. W. 23.

By § 7748, Crawford & Moses' Digest, power is given municipalities, such as the city of Marianna, to regulate the construction and use of street and sidewalks within its limits. That portion of the section pertinent to the issue here presented is as follows:

"In order to better provide for the public welfare, safety, comfort and convenience of the inhabitants of cities of the first class, the following enlarged and additional powers are conferred upon cities of the first class, viz., to regulate the use of sidewalks and all structures and excavations thereunder, and to require the owner or occupant of any premises to keep the sidewalks in front or alongside of the same, free from obstruction, and to build and maintain suitable pavement or sidewalk improvements therealong, whenever the same may become necessary to the safety or convenience of travel, and to designate the kind of sidewalk improvement to be made and the kind of material to be used by such owner or occupant at the time within which such improvement is required to be completed. Provided, the kind and character of sidewalk improvement for the same street and block shall be uniform. * * *

"Third, to alter or change the width or extent of streets, sidewalks, alleys, avenues, parks, wharves, and other public grounds and to vacate or leave out such portion thereof as may not for the time being be required for corporate purposes, and where lands have been or may be required or donated to such city for any object or purpose which has become impossible or impracticable, the same may be used or devoted for other proper public or corporate purposes, or sold by order of the city council and the proceeds applied therefor.

"Fourth, to punish, prevent or remove encroachments or obstructions upon any of the streets, sidewalks, wharves or other public grounds of said city, by buildings, fences, or structures of any kind, posts, trees, or any other matter or thing whatsoever, and no statute of limitation or lapse of time that any such obstruction or encroachment may have existed or been continued shall be permitted as a bar or defense against any proceeding or action to remove or abate the same, or to punish for its continuance, after an order has been made by the city council or the police court for its removal or abatement."

Such are the varied uses and conflicting interests of city life that, as is said in Ex parte *Foote,* 70 Ark. 12, 65 S. W. 706: "Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights or clearly transcend the powers granted them." In the case of *Sander* v. *Blytheville, supra,* the court said: "The city council, likewise, has a similar discretion in determining what character of structure may be erected and maintained up, over, or under, the streets, alleys and sidewalks of the city so long as such structure does not constitute *per se* a common nuisance." In the case of *Ruffner* v. *Phelps,* 65 Ark. 412, 46 S. W. 728, it is said: "A purpresture is an encroachment upon the street which the municipality may or may not tolerate at its option, if the same be not also a public nuisance."

On a consideration of the statutes and decisions above cited, we conclude that the correct rule is that the governing body of municipalities may, within its discretion, permit an encroachment upon the streets or sidewalks where such encroachment is not of such nature as to necessarily prevent the reasonable and proper use by the public, and which does not of itself constitute a common nuisance. The facts, as presented by the petition in this case, do not show a complete obstruction of the sidewalk, but only a partial obstruction, nor does it show any special damages suffered, and the allegation that it is a nuisance *per se* states but a conclusion of law which is not supported by the facts alleged. We are of the opinion that the allegations sufficiently show that the obstruction was made with the assent of the city council, and its refusal to abate such obstruction is a proper exercise of its discretion.

If the council erred in the exercise of its power, mandamus is not the remedy to correct the same. It is not a writ of right and can never be issued to control the

discretion of an officer whose action or duty depends upon the exercise of official discretion. *Jones* v. *Adkins,* 170 Ark. 298, 280 S. W. 389; *Huie* v. *Barkman,* 179 Ark. 772, 18 S. W. (2d) 334.

While the petitioner alleges that he has been damaged, no facts are stated as a basis for this statement; but if he has suffered special damages, mandamus is clearly not his remedy, but he may proceed in the manner pointed out in the case of *Lincoln* v. *McGehee Hotel Co.,* 181 Ark. 1117, 29 S. W. (2d) 668.

Other questions are raised by counsel which, in view of the conclusion reached, it is unnecessary for us to discuss or determine. It follows from the views expressed that the judgment of the trial court is correct, and it is therefore affirmed.

LEONARD *v.* TAYLOR.

Opinion delivered June 1, 1931.

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

Sam Rorex and *Nat R. Hughes,* for appellee.

BUTLER, J. On November 17, 1930, the American Exchange Trust Company, being insolvent, closed its doors.

At that time, and for a considerable period previous thereto, it held a note for $10,000 executed in its favor by J. E. Shroll and Ben C. McFerrin, evidencing a loan of $10,000 in money, which had been made to Shroll to aid in the construction of bridges in Newton County, Arkansas, in road improvement No. 6. This improvement was begun prior to the passage of the Harrelson Road Law, act No. 5 of the acts of the General Assembly of 1923. In aid of the construction, Newton County undertook to pay for the construction of certain bridges, the builder of which was J. E. Shroll, and issued its warrants in the sum of $25,545.55, delivering the same to the said Shroll on completion of the bridges. These warrants, at the time of the execution of the note, were delivered to the American Exchange Trust Company as collateral security for the payment of the note aforesaid, and before November 17, 1930. Under authority of the Harrelson Road Law, the State Highway Commission took over and undertook to complete improvement No. 6, incorporating the same in its highway No....., and said improvement No. 6 delivered to the commission the cash on hand, amounting to the sum of $38,600, which was paid into the State Treasury to the credit of the said commission.

It was claimed that, under the terms of act No. 153 of the Acts of 1929, as construed in the case of *Grabiel* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41, the State was obligated to pay the outstanding indebtedness of improvement No. 6, including the amount represented by the scrip aforesaid, and Shroll made application to the State Highway Commission for the payment of the amount represented by said warrants. Action by the commission was not taken on said claim until February 18, 1931, at which time the claim was approved and ordered paid by voucher, directing the Auditor of State to issue his warrant to the American Exchange Trust Company and J. E. Shroll for the sum of $25,545.55, the amount of said Newton County warrants, on condition that the said

warrants be surrendered to the Highway Commission. As has been noted, between the time of the application to the commission for the payment of the warrants and the favorable approval thereof by the commission in February, 1931, the American Exchange Trust Company closed its doors, and at that time and now is indebted to the State of Arkansas for sums the latter had on deposit in said bank amounting to more than $600,000. This was secured by a bond executed by the Home Accident Insurance Company, an insolvent corporation, the assets of which are insufficient to pay a large portion of the deposit, and there will be left an amount greatly in excess of $10,000 unsecured. Upon presentation by McFerrin, the representative of the American Exchange Trust Company, of the warrant of the Auditor of State, the State Treasurer refused to pay to the bank the amount represented by the note with accrued interest, but offered to credit the same on the State's claim for the amount owing to it by said bank.

These are the facts out of which this lawsuit arose, and the question presented for our determination is whether or not the State has a right to offset the demand of the American Exchange Trust Company out of its deposits in said bank. Counsel for the American Exchange Trust Company argue that there was no valid claim against the State until the highway commission ascertained whether the claim was valid, and the amount thereof, and, as the commission did not do so until February 18, 1931, after the Exchange Trust Company became insolvent, such claim could not be used as an offset under the rule announced in *Sloss* v. *Taylor,* 182 Ark. 1031, 34 S. W. (2d) 231. In this contention we are of the opinion that the appellee is mistaken. If the indebtedness evidenced by the Newton County warrants was such as to come within the purview of act No. 153 of the Acts of 1929, the obligation of the State attached on the passage of said act and not on the date when the commission became satisfied of its authenticity and validity. There-

fore, the only question was whether or not the American Exchange Trust Company was the owner of this obligation before it closed its doors. If it was such owner, the State was indebted to it for the same, and it was indebted to the State for the amount of the State's deposit, and there would be mutual claims entitling the State to set-off its deposit against the same.

The effect of our decisions is that the holder of the pledge has a special ownership therein to the extent of the debt secured thereby and may proceed to enforce it if it be a chose in action, a negotiable instrument, or any of a like nature. *Turner* v. *Stroud,* 37 Ark. 556; *Barnes* v. *Bradley,* 56 Ark. 98, 19 S. W. 235; *Plunkett* v. *State National Bank,* 90 Ark. 86, 117 S. W. 1079, which decisions are in line with the general rule cited by appellant from 21 R. C. L. 660-666. Therefore, when Shroll delivered the Newton County warrants to the American Exchange Trust Company, he transferred all the right he had therein to the pledgee, the effect of which act was to transfer the State's obligation directly to the pledgee, and from that time the State became indebted to the American Exchange Trust Company, regardless of when, or by whom, demand was made for the payment thereof. The fact that Shroll filed the claim with the commission in October, 1930, would be immaterial, for it is apparent that the American Exchange Trust Company's rights were recognized as the voucher was ordered drawn so that those rights would be protected and the condition made that the scrip in its hands be delivered to the commission. As is pointed out in *Burton* v. *Blytheville Realty Co.,* 108 Ark. 411, 158 S. W. 131, the statute on setoff does not define it nor undertake to limit the right to pleading except in the particular named in the statute, § 1197, Crawford & Moses' Dig., and the courts in applying this statute have liberally construed it so as to arrive at a true balance where mutual demands exist. *Funk & Son* v. *Young,* 138 Ark. 38, 210 S. W. 143.

It follows that the judgment of the trial court will be reversed, and the cause remanded with directions to allow the offset as pleaded by the State.

TAYLOR *v.* DIERKS LUMBER & COAL COMPANY.

Opinion delivered June 8, 1931.

Steel & Edwards, for appellant.

Abe Collins and *Lake, Lake & Carlton,* for appellee.

HART, C. J., (after stating the facts). It has been uniformly held by this court that a general deposit of

money in a bank passes the title immediately to the bank and establishes the relation of debtor and creditor between the bank and the depositor. The bank is bound by an implied contract to honor the checks of the depositor to the extent of his deposit and becomes liable on its refusal to do so. *Himstedt* v. *German Bank,* 46 Ark. 537; *Carroll County Bank* v. *Rhodes,* 69 Ark. 43, 63 S. W. 68; *Bank of Hatfield* v. *Chatham,* 160 Ark. 530, 255 S. W. 31; and *Arkansas Valley Bank* v. *Kelley,* 176 Ark. 387, 3 S. W. (2d) 53. This rule of law was also recognized and stated in *Darragh Company* v. *Goodman,* 124 Ark. 532, and other Arkansas cases were cited in support of the general rule.

The court also said that it was well settled that a bank receiving a draft for collection merely is the agent of the drawer or forwarding bank and takes no title to the paper or the proceeds when collected but holds same in trust for remitting it. The difference is that, when a bank receives a general deposit, it takes the title in itself and is in no sense the agent of the depositor for collecting the amount of the check or draft deposited. From the time of the delivery of the draft or check from the customer to the bank, the latter became the owner of the check. It might make any disposition of it that it saw fit. The bank becomes absolutely the owner of it, subject only to the condition that, in case the check or draft is dishonored and not paid, the depositor would become liable to the bank on his indorsement made on the check or draft when deposited. In such cases, the bank is collecting the check or draft for itself as owner and not as agent of the owner as in cases where the check or draft is deposited for collection. This difference is clearly pointed out in *Darragh Company* v. *Goodman,* 124 Ark. 532, 187 S. W. 673. See also, as establishing the same rule, *Burton* v. *United States,* 196 U. S. 283.

As said by Mr. Justice Davis in *Bank of the Republic* v. *Millard,* 10 Wall. (U. S.) 152:

"It is an important part of the business of banking to receive deposits, but when they are received, unless

there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lundhurst and Campbell, in the House of Lords, in the case of *Foley* v. *Hill,* and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect."

In the present case, when appellee, through its agent, carried the cash and checks to the bank and the bank received it as a deposit and placed the amount to the credit of appellee in the pass book, the relation of creditor and debtor subsisted between them and not that of principal and agent. The relation was in legal effect a transfer of the money and checks by the customer to the bank upon an implied contract on the part of the cashier to repay the amount of the deposit upon the checks of the depositor.

The bank acquired title to the money and checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business. The transaction was completed when the customer tendered the cash and checks to the bank for deposit, and the president of the bank received them without any restriction. When the president credited the customer's pass book with the amount of the deposit, the title passed to the bank; and the items constituting the deposit were not again subject to the control of the customer.

Thus, it will be seen that the relation of debtor and creditor is a voluntary one, and a general deposit made with a bank is a contractual relation. Like other contracts, it is necessary that there should be a meeting of the minds of the parties, and the assent of both parties is essential to a deposit to create a privity of contract between the bank and the depositor. The relationship cannot end without the consent and knowledge of both parties. In our opinion it follows from an application of this well-known rule that no secret intention on the part of the officers of the bank could change the transaction from a general deposit to a deposit in trust. It is manifest that the transaction, considered in the light of what was done by the parties themselves, without considering the secret mental reservation on the part of the officers of the bank constituted the transaction a general deposit. Such being the nature and character of the deposit, it cannot be changed by any secret mental reservation on the part of one of the parties.

But it is contended that the relation is changed by the notice on the pass books which was copied in our statement of facts. We do not think so. Reference to the language used in the notice will show that it does not in any way change the character of the contract between the parties. If the checks, as we have held, were passed to the credit of the bank unconditionally and without any special understanding, then the title to the checks was in the bank, and the only liability of the customer was on his indorsement, if the bank on which the check was drawn did not honor it. The liability of the customer as indorser was the same as the liability imposed upon him by the terms of the notice. It will be remembered that the agent of appellee testified that appellee indorsed all of the checks which were deposited by him for it. *Burton* v. *United States,* 196 U. S. 283.

The same principle is set forth in *Taft* v. *Quinsigamond National Bank,* 172 Mass. 363. In that case the court said:

"So, when, without more, a bank receives upon deposit, a check indorsed without restriction, and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker."

As we have already seen, the checks were placed to the credit of the customer on the pass book without any special understanding between the parties. The custom of the bank was to forward such checks for collection as for itself, and the customer was only liable on its indorsement if payment was not made.

Counsel for appellee also seek to uphold the decree by invoking the general rule in a case note to 20 A. L. R. 1206, to the effect that acceptance of general deposits by a bank hopelessly insolvent constitutes a fraud such as will entitle the debtor to rescind the contract and recover back the deposit or give him a preferential claim or create a trust *ex maleficio*.

We do not think the principle there announced has any application because this question is settled by our statute. Acts of 1927, p. 297. The Legislature of 1913 created the State Bank Commission and provided rules and regulations for the organization of banks, the conduct of their business, and their liquidation when they became insolvent. The object of the statute was to protect the public in its dealing with banks and to provide a fair, just and expeditious manner of winding up their affairs when they became insolvent. The plain purpose of the act of the Legislature of 1927 above referred to was to define the relation between creditors of banks, in charge of the State Bank Commissioner and to set out how they should be settled with. We have held that the State Bank Commissioner is the statutory assignee of an insolvent bank and, like a receiver, takes the funds in the same condition they were held in by the bank immediately prior to his taking possession. *Sloss* v. *Taylor*, 182 Ark. 1031, 34 S. W. (2d) 231.

We have already placed a liberal interpretation upon the provision of the act of 1927, above referred to, to promote its plain purpose of defining the relation of the creditors of the bank with the State Bank Commissioner when he takes charge of it as an insolvent bank. The evident purpose of the statute was to define the relation of the creditors of the bank as of the formal date of its insolvency, which was the date when it was taken charge of by the State Bank Commissioner under the statute. In the case of *Taylor* v. *Whaley, ante* p. 598, it was held that the rule as to preference to the effect that in case public funds are acquired by a bank unlawfully and wrongfully, the beneficial depositor would be entitled to recover same in preference to general creditors of the bank, was abrogated by the enactment of act 107 of the Acts of 1927, which provides that the beneficiary of an express trust in writing, signed by the bank, as distinguished from a constructive trust, a resulting trust or a trust *ex maleficio,* shall have preference over general creditors; and also provides that all creditors not classed as secured or prior creditors, including the State of Arkansas, and any of its subdivisions, shall be general creditors thereof.

This same rule would apply to private creditors because there is nothing in the statute to indicate otherwise. While § 1 of act 107 of the Acts of 1927, purporting to amend our State Bank Act, is somewhat long and involved, as construed by the court, there can be no preference or trust relations between the creditors and the insolvent bank except as allowed by the statute. We have carefully considered the language of the statute, and find that there is nothing in it which would warrant us in allowing the claim of appellee herein as a preferred claim or to show that there was any trust relation, within the meaning of the statute when the deposit was made.

It follows, therefore, that the decree must be reversed, and the cause will be remanded with directions to dismiss the complaint of appellee, plaintiff in the court below, for want of equity. It is so ordered.

SPEARS *v.* MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered June 8, 1931.

W. H. Glover and *D. D. Glover,* for appellant.

R. E. Wiley and *Richard M. Ryan,* for appellee.

SMITH, J. This is a suit to recover the value of a skating rink shipped by L. Newton, in the name of J. O. Spears, as consignor, to J. O. Spears, as consignee, from Fulton to Amity (both of which places are in this State) which was destroyed by fire at 1:15 A. M. on February 28, 1930, while the rink was still in the car in which it had been shipped over the road of the defendant railroad company.

Newton and Spears, who joined as plaintiffs in the suit, alleged and offered testimony to the effect that Newton sold the rink to Spears for $3,500, its value, and that a cash payment was made upon the sale and delivery of the property. That the rink was so constructed that it could be taken down in sections eight feet long and four feet wide, and that it was loaded in its knocked down

condition in one of defendant's cars at Fulton for shipment to Amity on February 21, 1930, upon which date a bill of lading was issued by the defendant railroad company. The bill of lading, as issued, contained no directions as to the manner or place at which notice should be given to the consignee of the arrival of the car. Testimony was offered, however, to the effect that the shipping agent was directed to insert in the bill of lading a direction to notify Spears at Gurdon, which was his place of residence, but this fact was denied by the agent.

The car was delivered at Amity and placed upon a sidetrack near the depot used for unloading cars at 9:45 A. M., February 24. The agent at Amity testified that he did not know Spears, the consignee, or his place of residence, but that he mailed, at the postoffice in Amity on February 24, a letter containing notice of the arrival of the car addressed to Spears at Amity, which letter contained the car initials and number, the point of shipment, and its contents, in a stamped envelope bearing the return address of the railroad company. This letter was never delivered and in due course was returned to the agent at Amity, who exhibited it at the trial from which this appeal comes.

Plaintiffs sought to excuse their delay in unloading the car upon the grounds (1) that the consignee had no notice of its arrival, and (2) that during the three days preceding the fire, the weather was such that the rink could not be unloaded without damaging it. Upon this last issue plaintiff's testimony was to the effect that so much rain fell during this time that the rink would have been ruined had it been unloaded, as it was constructed of high grade maple, and when its sections were put together it was forty by ninety feet, the sections being put together in grooves, which were fastened to make the entire floor smooth and level, and, had it become wet, it would have warped, which would have destroyed its value, as it had to be perfectly level to be adapted to the use for which it was constructed. When the floor had

been put together, it was covered by a heavy canvas tent which protected it from the rains.

Numerous instructions were asked and given, while others were refused, but we do not set them out, as the instructions which will be discussed present the questions of fact and of law involved in the case.

The suit was defended by the railroad company upon the theory that the car was not unloaded within the 48 hours allowed by law for that purpose after notice of its arrival had been given, and that its liability thereafter was not that of a carrier, but that of a warehouseman, and as there was no evidence of negligence on its part causing the fire it was not liable for the destruction of the rink.

The question of the negligence of the railroad company was submitted to the jury in a number of instructions, which told the jury to find for the plaintiffs if the fire resulted from the negligence of the defendant railroad company. The evidence on this issue was to the effect that the car in which the rink was shipped was in good condition and properly sealed, and that the seals were inspected both morning and evening while the car was at Amity before the fire and was found upon each inspection to be intact. The car was destroyed by fire as well as the rink, and when the fire was discovered it was observed that a door of the car had been forced open for about six to ten inches and that the fire had originated near the door in the middle of the car. It was shown also that the last train to pass preceding the fire went by at 3:30 P. M. on the 27th, and that the engine of this train was an oil burner. This testimony supports the finding that the fire was not caused by the negligence of the defendant railroad company.

All the instructions given by the court declared the law to be that the consignee was under no duty to unload the rink in the rain, and that the "free time," during which the obligation of the railroad company was that of a carrier and not that of a warehouseman, was not to

be reduced in so far as the delay in unloading was caused by the condition of the weather. It is insisted, however, that the undisputed testimony shows that the rink could not have been unloaded on account of the rain, and that this issue should not therefore have been submitted to the jury, and that the court should have declared, as a matter of law, that the consignee's "free time" had not expired, and that the railroad company's liability as a common carrier had not terminated. We are unable, however, to say that the testimony did not present the issue whether the condition of the weather was responsible for the delay in unloading.

The questions of fact in the case were resolved by the jury in favor of the defendant railroad company, as is reflected by the verdict which was returned in its favor.

The most serious question in the case is presented by an instruction numbered 6-A requested by the defendant, which was modified by the court and given as modified. The modification consists in the addition of the phrase which is inclosed within the parenthesis. It reads as follows: "No. 6-A. You are instructed that if you find and believe from the evidence that the plaintiffs did not unload the shipment or skating rink from said railroad car after the 48 hours' free time allowed them (or were not hindered from unloading same by the rains during the 48 hours' free time) after the notice had been placed in said mail or postoffice at Amity, if you find that such notice was proper notice, then you are told that the plaintiff cannot recover, and you should so find, unless they have proved by a preponderance or a greater weight of the testimony that the fire in question and damage therefrom was caused by the negligence of the defendant."

The plaintiffs made specific objection to this instruction, pursuant to which they now insist that the instruction is contrary to § 903, Crawford & Moses' Digest. This section appears as § 8 of act 193 of the Acts of 1907 (Acts 1907, p. 453), entitled "An Act to

regulate freight transportation by railroad companies doing business in the State of Arkansas." This section deals with the notice which a carrier is required to give a consignee of the arrival of a shipment and reads as follows: "§ 903. Legal notice, as referred to in this act, may be either actual or constructive. Where the consignee or his agent is personally served with the notice of the arrival of freight at or before 6 P. M. of any day, free time begins at 7 o'clock A. M., on the day after such notice has been given. Constructive notice referred to consists of posting notice by mail to consignee. Where this mode of giving notice is adopted, there shall be 48 hours additional free time; provided, however, that when any case where notice of arrival is given by mail that said notice shall be by registered letter, that notice shall date from the receipt of said registered letter."

Now it was admitted at the trial that the letter addressed to Spears was not registered, and it is insisted that, upon this admission being made, the court should have charged the jury, as a matter of law, that the consignee had no constructive notice of the arrival of the car, and that therefore the liability of the railroad company at the time of the fire was that of a carrier, and not that of a warehouseman. It is undisputed that the first actual notice of the arrival of the car which the consignee had was obtained by him on Thursday morning, February 27, which was the day before the fire, and that this notice was obtained in a conversation over the telephone between the consignee and the railroad company's agent at Amity. So therefore, if the unregistered letter was not constructive notice of the arrival of the car, the consignee did not have notice, because the "free time" had not expired when the fire occurred.

The case of *Arkadelphia Milling Co.* v. *Smoker Merchandise Co.*, 100 Ark. 37, 129 S. W. 680, discusses the question of the time when liability of a carrier as such ceases. It was there said: "The liability of the common carrier ceases with delivery of the goods at the

point of destination according to the directions of the shipper, or according to the usage and custom of the trade at such place of destination. This delivery may be actual, or it may be constructive; and in either case the liability of the carrier terminates with such delivery. An actual delivery of goods is made when the possession is turned over to the consignee or his duly authorized agent, and a reasonable time has been given in which to remove the goods. When such delivery is thus made, the carrier is fully discharged from further liability. *Southern Exp. Co.* v. *Everett,* 37 Ga. 688; *Brunswick & W. Ry. Co.* v. *Rothchild,* 119 Ga. 604. To constitute constructive delivery, the carrier must give notice to the consignee or his duly authorized agent, if that is at all practicable, of the arrival of the goods, and must also give a reasonable opportunity and time thereafter for the consignee or his agent to remove same. When that is done, the liability of the carrier is terminated, whatever its liability may otherwise be."

Was there sufficient notice of the arrival of the car? It must be conceded that there was not, under the provisions of § 903, Crawford & Moses' Digest, set out above.

We are of the opinion, however, that the requirement of this section that constructive notice be given by registered letter has been abrogated by subsequent legislation on the subject and by regulations approved pursuant to such subsequent legislation by the Arkansas Railroad Commission.

An act was passed at the 1921 session of the General Assembly enlarging and defining the powers of the Commission (Act 124, General Acts 1921, p. 177).

By § 5 of this act it is provided that "the jurisdiction of the Commission shall extend to and include all matters pertaining to the regulation and operation of all common carriers."

By § 7 (p. 187) of the act it is provided that no common carrier shall modify, change, cancel or annul any rate except after thirty days' notice to the public and to

the Arkansas Railroad Commission, "which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges shall go into effect; provided, the particular regulatory body having jurisdiction of such matter under this act may enter an order prohibiting such person, firm or corporation from putting such proposed new rates into effect pending hearing and final decision of the matter by the said regulatory body, and whenever there shall be filed with the said regulatory body any schedule proposing a change in any rates, charges or regulations, the regulatory body shall have, and it is hereby given, authority, either upon complaint or upon its own initiative, upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge or regulation; and pending such hearing, and the decision thereon, (the) such regulatory body upon filing of such schedule, or after such schedule should be filed, and delivering to the carrier or carriers or public service corporations affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate or charge; and after full hearing, whether completed before or after the rate, charge or regulation goes into effect, the said regulatory body may make such order in reference to such rate, fare, charge or regulation as shall be deemed proper and just."

The act of 1921 repeals all laws in conflict with it.

Pursuant to the provisions of this act the Tariff Bureau of the American Railway Association filed with the Arkansas Railroad Commission "Freight Tariff No. 4-J Naming Car Demurrage Rules and Charges Applying at all points on Railroads parties hereto."

It does not appear whether these regulations were investigated or otherwise suspended by the Arkansas Railroad Commission, but the following certificate was offered in evidence at the trial from which this appeal comes:

"CERTIFICATE.

"This is to certify that American Railway Association Freight Tariff 4-J, I. C. C. No. 2192, Arkansas Railroad Commission No. 17, issued June 26, 1929, effective August 1, 1929, also Supplement No. 1 to said tariff issued July 24, 1929, effective September 1, 1929, and issued by B. T. Jones, agent, are on file with the Arkansas Railroad Commission." This certificate was attested by the secretary under the seal of the Commission.

The effect of this certificate is that, whether investigated or otherwise suspended, as the Railroad Commission had authority to do under the statute quoted, the regulations became effective on September 1, 1929, and were in force at the time of the shipment out of which this litigation arose. Certain later regulations were also filed with the Arkansas Railroad Commission and approved by that body, but they do not conflict with or change the regulation in Freight Tariff 4-J, which reads as follows:

"Rule No. 4, Subject Notification. Section A.—Except as otherwise provided in sections B, C, or D of this rule, notice of arrival shall be sent or given consignee or party entitled to receive same by this railroad's agent, in writing, or, in lieu thereof, as otherwise agreed to in writing by this railroad and consignee, within twenty-four hours after arrival of car and billing at destination, such notice to contain car initials and number, point of shipment, contents and, if transferred in transit, the initial and number of original car. When address of consignee does not appear on billing, and is not known, the notice of arrival must be deposited in United States mail, inclosed in a stamped envelope bearing return address, same to be preserved on file, if returned. An impression copy shall be retained, and when notice is sent or given on a postal card the impression shall be of both sides. (See Rule 3, Sections B and C). In case a car subject to rule 3, section C, paragraph 1, is not placed on public delivery track within twenty-four hours after

notice of arrival has been sent or given, notice of placement shall be sent or given to consignee."

This rule recognizes the right to contract for other or additional notice than that of a notice deposited in the United States mail, inclosed in a stamped envelope, bearing the return address of the carrier, but it also recognizes such notice is sufficient in the absence of a contract for other or additional notice.

The issue whether such additional notice was requested was submitted to the jury and is concluded by the verdict of the jury.

We conclude therefore that the jury was warranted in finding that notice was given which conformed to the requirements of the law, and that the consignee did not within 48 hours thereafter claim his freight and obtain its delivery, and, this being true, the liability of the railroad company was thereafter that of a warehouseman, and the railroad company was then liable only for loss or damage which resulted from its negligence.

An objection was made to an instruction which told the jury that the plaintiffs could not recover for the loss of the rink by fire unless it was shown by the testimony that they were the owners of the rink. The objection was made to this instruction that it submitted an issue not raised by the testimony. There appears, however, to have been testimony which cast such doubt upon the plaintiff's ownership as to present this issue.

Certain other errors were assigned, which we think are not of sufficient importance to require discussion.

Upon a consideration of the whole case we find no error in the record, and the judgment must therefore be affirmed, and it is so ordered.

Opinion delivered June 8, 1931.

[redacted]

M. A. Matlock and *J. R. Wilson,* for appellant.

Mahony & Yocum, J. N. Saye and *W. T. Saye,* for appellee.

HUMPHREYS, J. This is the second appeal in this consolidated case. On the first appeal, this court ruled that the complaints sufficiently alleged causes of action by the appellants against appellees for deceit, reversed the judgments, and remanded the causes for further proceedings according to law and not inconsistent with the opinion. The opinion on the former appeal may be found in the case styled *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. (2d) 826; and reference is made thereto for the allegations of fraud and deceit relied upon by appellants for a recovery. Upon the remand of the cause, appellee filed answers denying the material allegations of the complaints, and the consolidated causes proceeded to a trial upon the pleadings and testimony, at the conclusion of which the trial court, at the request of appellee over the objections of appellants, instructed a verdict for appellee and rendered a judgment thereon dismissing the complaints, from which is this appeal.

During the trial of the cause, the court excluded Exhibit B to the testimony of J. Byrd Wright, one of the appellants being certain correspondence between himself and the Revenue Department of the United States as to the amount due it for income taxes due from the partner-

ship, the earnings of which are involved in this litigation; and also excluded Exhibit A to the testimony of Paul Hanry, the other appellant, reflecting the statement of the income tax return of the partnership involved in this cause. The record discloses that appellants made every effort possible to obtain the books of the partnership referred to, which had been under the control of appellee, and for some reason were unable to secure them. The record also discloses that the only means appellants had in ascertaining the amount of earnings due from the partnership was from the books in the possession of appellee unless permitted to introduce the audit of the officers of the United States revenue department and the correspondence relating thereto tending to show the earnings of said partnership. The court erred in excluding this testimony, since the primary evidence by which the earnings of the partnership could have been established was withheld by appellee. It comes clearly within the rule of admissibility of secondary evidence.

The trial court should have admitted this evidence and submitted the issues joined to the jury for determination.

On account of the errors indicated, the judgments are reversed, and the consolidated cause is remanded for a new trial.

MISSOURI PACIFIC RAILROAD COMPANY *v.* MEDLOCK.

Opinion delivered June 8, 1931.

Thos. B. Pryor and *Thos. B. Pryor, Jr.*, for appellant.

Partain & Agee, for appellee.

HUMPHREYS, J. This is an appeal from a judgment in the sum of $150 obtained by appellee against appellant in the circuit court of Crawford County for an injury received through the alleged negligence of a fellow-servant while turning a motor car around which was being used by a section gang to carry their tools and ride upon when engaged in the performance of their duties. It was alleged in the complaint that Sleepy Reeves, a co-employee of appellee, negligently slipped or stumbled without warning or notice to appellee released his hold and allowed the weight of the end of the car they were lifting to fall or rest upon him and strain his back.

Appellant contends for a reversal of the judgment on the sole ground that the testimony failed to show any fact from which it might reasonably be inferred that appellee's co-employee negligently slipped or stumbled.

Appellee, on the other hand, argues that it may reasonably be inferred from his own testimony that his co-employee negligently slipped or stumbled, thereby causing him to release his hold on the car and throw its entire weight on appellee. The testimony he relies upon is as follows:

"We worked until about 2 o'clock, and we started to turn our car to come back to town; it was at the crossing, and we started to turn the car around, and it got hung and one of the boys went around to prize it loose, and that left two at my end of the car, and some way Sleepy Reeves stumbled and left the weight on me."

From aught that appears from this testimony, the slipping or stumbling which caused Sleepy Reeves to release his hold on the car may have been due to an accidental misstep. Had the testimony tended to show even inferentially that the slipping or stumbling was due to a failure on the part of Sleepy Reeves to watch where he was walking or to walk as slowly as he should or to inattention or disobedience or other misconduct in the performance of his duties, then such testimony would

have created a question of fact upon the issue of negligence for determination by the jury; but, since the cause of the slipping was conjectural only, it was improper to submit the issue of negligence to the jury. Upon the record as it stands, the court should have instructed a verdict for appellant.

Only a few of the parties present when the alleged injury occurred testified in the case. Sleepy Reeves was not introduced as a witness by either party. It may be that the case was not fully developed.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

TALLEY *v.* TUGGLE.

Opinion delivered June 8, 1931.

S. W. Garratt, for appellant.

Walter J. Hebert, for appellee.

KIRBY, J., (after stating the facts). It can make no difference, as to the liability of appellant upon his contract for a division of the commissions with appellee, broker, that he was not at the time of such agreement a licensed salesman of appellee, in whose employ he had been when the property was listed with appellee for sale and negotiations begun therefor. The jury found, on conflicting testimony, that he had agreed to divide the commissions on an equal basis at the time of quitting the employ of appellee, in case he should make the sale of certain property, which it is admitted that he afterwards effected; and it is unimportant whether he had a license as a salesman for appellee at the time of such agreement, or a license on his own account or any license at all, since he was duly licensed at the time he perfected the sales and earned the commissions.

Appellee was a regularly licensed real estate broker, and could, of course, make a sale of any of his property

listed through any individual dealer or salesman, so far as he was concerned, and becomes entitled to whatever commissions were agreed to be paid by such salesman.

There is nothing inherently unlawful in the carrying on a brokerage business, and there is no intimation in the testimony of contemplated violation of any law or affecting the sales through an unlicensed salesman when the agreement for division of the commissions was made. *Engles* v. *Blocker,* 127 Ark. 385, 192 S. W. 193.

This is all that was done in this case, and the testimony is amply sufficient to support the verdict. Neither do we find any error in the giving or refusal to give instructions, and the judgment will be affirmed. It is so ordered.

OLIVER *v.* GANN.

Opinion delivered June 8, 1931.

N. F. Lamb, for appellant.

Arthur L. Adams, John W. Gann, Jr. and *A. P. Patton,* for appellee.

KIRBY, J. The questions raised for determination by this appeal are, whether drainage districts may sell lands forfeited to or acquired by them upon the sale thereof for the collection of taxes for an amount less than would have been required paid by the owner to redeem the lands from such forfeiture and sale; and also the effect of the failure of the clerk to file a certified list of lands included in a commissioner's report of sale as provided in act 445 of 1923, p. 395.

These ejectments were consolidated for trial, plaintiff claiming title to the Wicker lands, under deed from Drainage District No. 7 of Poinsett County, under date of November 29, 1929, and under a deed from Road Improvement District No. 5 of Poinsett County, dated December 22, 1929.

The answer in the Wicker case alleged there had been no compliance with act 445 of 1923, page 395, by District No. 7, and that the consideration expressed in its deed is less than the tax, penalty, cost and interest due on the several tracts of lands forfeited and conveyed.

The same denial and allegations were pleaded in bar of the deed from the Road Improvement District No. 5 conveying the lands.

It was stipulated that, except for the foreclosure sales for delinquent assessments and conveyances by the improvement districts, Gann was the owner of the southeast quarter, section 23, township 11 north, range 4 east; and that an insurance company had a mortgage on the land which became delinquent for drainage taxes for 1926 and foreclosure proceedings were instituted, decree rendered and the lands sold by the commissioners to the district on April 30, 1927, sale was reported on May 3, 1927, and on that date a deed executed by the commissioner of District No. 7. Similar proceedings were had by the district for assessments owing for 1927 and that the district's deed of November 2, 1929, to plaintiff, recited a consideration of $10 per acre and other consideration paid, but for an actual consideration of $5 per acre,

and the assumption by the grantee of all future drainage taxes in said district against said lands. The amount of delinquent taxes due Drainage District No. 7, at the time the deed was executed by the district to appellant, was $1,334.38. That on December 2, 1929, Gann redeemed said lands for the 1927-28-29 levee district taxes by paying the sum of $307.71, the total amount due.

The stipulation also shows that Oliver purchased from the drainage district the land included in the Gann case for an actual consideration of $5 per acre and the assumption by him of the future maturing installments of drainage taxes in said district against said lands, and further that, when the deed to Oliver was executed the amount of delinquent taxes in said district against said lands amounted to $1,334.38, a sum considerably in excess of the actual consideration paid by him. It shows also that the consideration paid by Oliver for the Wicker lands was $5 per acre and the assumption of all future installments, the amount of delinquent taxes on these lands at the time of the execution of the deed to Oliver was $359, a sum $159 in excess of the sale price to Oliver. The market value of the lands at the time of the conveyances by the improvement districts to Oliver was not less than $25 per acre.

Appellant relies upon the case of *Arkansas-Louisiana Highway Improvement Dist.* v. *Pickens,* 169 Ark. 603, 276 S. W. 355. In this case in which lands were purchased by a road improvement district at the sale for assessments due, the court said: "When the lands are bought in by the commissioners at the foreclosure sales, they become the property of the district, to be used for the purpose of raising revenues to pay the bonds. The lands do not belong to the bondholders, and the district is not entitled to take credit, as contended by counsel for appellees, to any extent until revenues are raised by the sale thereof. The lands thus purchased become the absolute property of the district, and express authority is conferred by the statute to sell the lands at prices fixed

by the commissioners. The theory is, and the practice should be, in order to comply with the spirit of the scheme, for the commissioners in selling the land to secure a sufficient price at least to cover the expenses and all of the delinquent assessments up to the time of the resale, so that the lands will bear their full share of the expense of the improvement.'' See also *Meyer* v. *Rolfe,* 71 Ark. 215, 72 S. W. 52; *Vietz* v. *Road Imp. Dist.,* 139 Ark. 567, 214 S. W. 50; *Crowe* v. *Security Mortgage Co.,* 176 Ark. 1130, 5 S. W. (2d) 346. In the last case, where it was held the district had the right to assign the certificate of purchase, the court said:

''So therefore it must follow that the improvement district had the right to assign certificates of purchase for lands sold it for a sum not less than the taxes, penalty, interest and costs for which the lands were sold.''

Oliver agreed to pay all future assessments upon the lands at the time of the purchase thereof, and the payment of the consideration therefor, which was in fact a less amount than would have been required to redeem the lands from the sale under the law allowing the owner the right of redemption, but the lands had been acquired by the district under a sale properly made, and it had the right to dispose thereof for a less amount than would have been required for redemption by the owner in order to get them back into private ownership where they were still subject to the payment of all the other assessments of benefits of the improvement district.

It may be said that, even though all future assessments were promptly paid, the district would necessarily lose by such sale the difference between the amount paid in cash by the purchaser and the amount it would have required to be paid for redemption by the owner, and, even though this be a fact, it is also true that the lands were shown to have been worth at least $25 per acre, and the district could have conveyed the entire title, subject to the payment of the remaining assessments, and might have received more than the whole amount necessary to

redeem and to pay all future assessments, and there is no indication or intimation in the testimony that the loss, the negligible amount of the difference between the sale price or the consideration received and the amount that would have been required for the redemption of the lands by the owner, could or would appreciably affect the security of the lands of the district for payment of the bonds issued.

It was not necessary to resort to a sale under the provisions of the statute (§ 3646, Crawford & Moses' Digest) before the lands were sold to the district in payment of the taxes due thereon, since they were necessarily sold subject to the lien of all improvement district assessments existing against them at the time of the sale and could not have been sold under said statute free of any such liens, except for the amount of taxes already due. *Board of Comrs. of McKinney Bayou Dist.* v. *Directors Garland Levee Dist.*, 181 Ark. 899, 28 S. W. (2d) 721.

It has also been held that, if the lands are acquired at foreclosure sales for delinquent taxes by the improvement district, they cannot be sold again by the district for other taxes accruing (*Crowe* v. *Security Mortgage Co., supra*); and would thus be left in the district unavailable for realization of other assessments thereafter becoming due to the district, unless and until they could first be sold and disposed of for at least the amount required paid by the owner to redeem the lands from the sale thereof.

Neither did the failure of the clerk to file the certified list of lands included in the commissioner's report of sale of lands in the improvement district as required in act 445 of 1923, p. 395, render the tax sale, otherwise regular and properly made, invalid. It would be singular indeed if a sale regularly made by the agencies provided therefor under a decree of the chancery court, duly reported and confirmed, with the commissioner's deed thereafter approved, could be held invalid because the

clerk failed to certify it among the list of lands sold by the commissioner in accordance with the said act, which provides a penalty for his failure to do so. Certainly a ministerial officer's failure to comply with this provision of the statute, for violation of which a penalty is prescribed against the officer, could not have the effect to invalidate a judicial sale and conveyance of lands by the commissioner of the chancery court regularly approved by the court. The construction of the act in *Crowe* v. *Security Mortgage Co.*, 176 Ark. 130, 5 S. W. (2d) 346, and *Wyatt* v. *Beard*, 179 Ark. 305, 15 S. W. (2d) 990, is not in conflict with this holding.

Reversed.

KEEBEY'S, INC., *v.* WILLIAMS.

Opinion delivered June 8, 1931.

Martin & Martin, for appellant.

Carmichael & Hendricks, for appellee.

MEHAFFY, J. The appellant brought suit in replevin in the Little Rock Municipal Court against Edwin W. Shirey to recover certain personal property.

The appellant made, executed, and filed the statutory affidavit as required by § 8640 of Crawford & Moses' Digest.

The court issued an order for the delivery of the property and inserted a clause commanding the officer that, if the property mentioned in the order could not be found, to take the body of the defendant, that is, to arrest the defendant, as provided in § 8642 of Crawford & Moses' Digest.

Appellant also executed a bond as provided for in § 8643 in Crawford & Moses' Digest. This bond is to the effect that the plaintiff shall prosecute the action, and that he shall perform the judgment of the court therein by returning the property if a return thereof shall be adjudged, etc.

The sheriff refused to serve the writ, that is, refused to arrest the defendant, until plaintiff executed a bond to the effect that the plaintiff shall pay to the defendant all the damage which he may sustain by reason of the arrest, if the order is wrongfully obtained.

Upon the refusal of the sheriff to arrest the defendant, the appellant here filed in the Pulaski Circuit Court a petition for mandamus. The sheriff, the appellee herein, filed a general and special demurrer to the petition. The court sustained the demurrer; the appellant properly excepted, and refused to plead further, and the court dismissed the petition. The case is here on appeal.

The only question for our consideration is whether the sheriff had the right to refuse to serve the writ until a bond was given to the effect that the plaintiff should pay the defendant all damages which he might sustain by reason of the arrest if the order was wrongfullly obtained.

The appellant insists that, having given the bond provided for in § 8643, he was not required to give any

other bond, and that it was the duty of the sheriff to serve the writ, but the bond provided for in this section is in fact a delivery bond and is for not exceeding double the value of the property and the cost of the action.

Section 8642 of Crawford & Moses' Digest provides that if the plaintiff shall file an additional affidavit that he believes the property has been concealed, removed, or disposed of in any way with intent to defeat the plaintiff's action, the clerk or magistrate shall insert a clause commanding the sheriff or other officer, if the property mentioned in the order cannot be had, to take the body of the defendant so that he appear at the return day of the order to answer the premises. The additional affidavit was not made.

It was necessary that this additional affidavit be filed before the court could make the order for the arrest of the defendant, and, since this affidavit was not filed, the sheriff was justified in refusing to serve the writ until plaintiff executed a bond; but, even if the additional affidavit had been filed, still the sheriff would not be required to serve the writ until the bond was given.

Section 438 of Crawford & Moses' Digest is as follows: "A defendant in a civil action can be arrested and held to bail only upon the conditions and in the manner prescribed in this chapter." Section 439 provides for the procedure. Section 440 is as follows: "The order of arrest shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, a bond to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the arrest if the order is wrongfully obtained."

It will be seen therefore that the statute expressly provides that the arrest shall not be made until the bond provided for in § 440 had been executed.

The appellee calls attention to numerous questions which we do not deem it necessary to discuss because the statute plainly requires the bond before the sheriff can

be required to serve the writ. The statute providing for the capias clause has been construed a number of times by this court, and it is sufficient to say that it is a valid statute and not violative of the constitutional provisions discussed by appellee. It does not violate § 2 of art. 16 of the Constitution with reference to imprisonment for debt. In the first place, the statute does not provide for imprisonment for debt, but it provides for the arrest upon the filing of an affidavit charging that the property has been concealed, removed, or disposed of in any way with intent to defeat the plaintiff's action. The arrest is not for debt, but it is for the fraud in concealing or disposing of the property for the purpose of defeating plaintiff's action.

An action in replevin may be brought where plaintiff's property is wrongfully detained by the defendant, whether there is any debt or not. The property might have been stolen or defendant might have gotten possession of it in many ways without being indebted in any way to the plaintiff, but we deem it unnecessary to discuss these questions further, because § 440 of Crawford & Moses' Digest requires that the bond shall be given before the order of arrest shall be issued.

The judgment of the circuit court is affirmed.

FIRST STATE BANK *v.* TAYLOR.

Opinion delivered June 8, 1931.

[redacted]

Walter L. Pope, for appellant.

Sam Rorex and *Nat R. Hughes,* for appellee.

MEHAFFY, J. On November 13, 1930, the First State Bank, which was at that time operating under the name of the Bank of Knobel, was the owner of a sight draft with bills of lading attached drawn by the Knobel Gin Company on R. A. Downs & Company of Pine Bluff, Arkansas, in amount of $2,398.04, which was on that date sent for collection and credit to the American Exchange Trust Company of Little Rock.

The American Exchange Trust Company received the draft on the 14th of November, 1930, and sent it for collection to the Merchants' & Planters' Bank & Trust Company at Pine Bluff, Arkansas. The draft was paid to the Merchants' & Planters' Bank & Trust Company by the drawee November 15th. November 15th was Saturday, and was the last day that the American Exchange Trust Company was open for business, and the collection made by the Pine Bluff bank was not sent to the American Exchange Trust Company until after the American Exchange Trust Company became insolvent and closed its doors.

The draft was collected on the last day that the American Exchange Trust Company was doing business and before it closed its doors. On the 20th of November the amount of the draft was paid to the Bank Commissioner into assets of the American Exchange Trust Company, and the Bank of Knobel was on that day notified of the payment. The Bank of Knobel was notified on the 22nd day of November that the draft had not been accounted for.

Both the American Exchange Trust Company and the Merchants' & Planters' Bank & Trust Company closed at 1:00 o'clock, November 15th, and did not thereafter operate as banking institutions. The Bank Commis-

sioner took charge of both these banks as insolvents on November 22.

The appellant filed a petition in the chancery court asking that it have a preferred claim against the American Exchange Trust Company for the amount of the draft. The chancery court dismissed the petition for preference, and the case is here on appeal.

The facts are undisputed, and the question here presented is whether, at the time of the failure of the American Exchange Trust Company, the relation between it and the First State Bank was that of debtor and creditor, or principal and agent, because, if the relation of principal and agent existed, the appellee was the owner of the proceeds of the draft, and entitled to recover it; on the other hand, if the relation of debtor and creditor existed, the proceeds of the draft would go into the general fund and the appellee would be entitled to no preference over other depositors.

We recently said: "Although there is some conflict in the authorities, the general rule is that the title to commercial paper received for collection by a bank and forwarded to its correspondent in the usual course of business does not vest in the bank, to which the paper is sent, but remains in the sending bank until the collection has been made. After the collection is made, then the relation of debtor and creditor exists. Before collection however, if loss occurred, it would be borne by the sending bank, and not by the bank to which the papers were sent. Prior to collection, the relation of principal and agent exists. *Taylor* v. *Corning Bank & Trust Co., ante* p. 757.

It therefore appears from our former decision that the relation of principal and agent existed until collection was made, that is, until the transaction was completed, and the money received by the American Exchange Trust Company. The question is, who was the owner of the proceeds of the draft after the debtor had paid, but before it reached the American Exchange Trust Company? This question can be answered by ascertaining who would

bear the loss, if loss occurred, before it reached the American Exchange Trust Company.

The Pine Bluff bank failed after the collection was made and on the same day that the American Exchange Trust Company failed, but if the money had been stolen or embezzled, or loss had occurred in any other way before the Pine Bluff bank remitted to the American Exchange Trust Company, such loss would have been borne by the First State Bank, the bank which sent it to the American Exchange Trust Company for collection.

If a bank receives drafts for collection and sends them to a correspondent bank and loss occurs, it falls on the owner of the drafts and not on the bank which sent them for collection to its correspondent, unless the sending bank was guilty of negligence in some way that caused or contributed to the loss, and it would then be liable for its negligence, and not because the relation of debtor and creditor existed.

This being true, it follows necessarily that the relation of debtor and creditor did not exist between the Knobel bank and the Little Rock bank until the Little Rock bank actually received the money. "It is likewise well established that a bank receiving a draft for collection merely is the agent of the remitter, drawer, or forwarding bank, and takes no title to the paper or the proceeds when collected, but holds the same in trust for remitting." *Darragh & Co.* v. *Goodman,* 124 Ark. 632, 187 S. W. 673.

The Kentucky court, where the facts were somewhat similar to the facts in this case, said: "That the actual relation between the parties was that of principal and agent is not only shown by the letter of instruction accompanying the draft and the entry mentioned, but the theory of appellant's right to the money is based upon the fact conceded in his pleadings that the draft was sent by one and received by the other for collection and credit. There is however, as contended by counsel, a distinction between an instruction by the owner to a collect-

ing bank to collect and remit, and the one given in this case to collect and credit. But whatever difference in meaning of the two phrases there may be, both convey the idea that the party giving is the owner and the one receiving the instruction is agent. Such then being the relation when the draft was received, the main inquiry is whether anything thereafter occurred which had the legal effect to change the attitude of the Fidelity Bank from that of agent to owner." *Armstrong* v. *Boyertown Nat'l Bank,* 90 Ky. 431, 14 S. W. 411, 9 L. R. A. 553.

The court in the above case also said, after discussing the contract and rules applicable: "But it is well settled that where a bank receives a draft or note for 'collection on account', or, what is the same, 'collection and credit', it does not owe the amount until collected; and, though credit be given therefor prior to collection, the bank is not precluded from canceling such credits, which is regarded as merely provisional, if the paper is dishonored. It would therefore seem just and reasonable, even if there was no authority to support the position, that, if the bank does not, in such case, owe the amount before it is actually collected, it should not be held to have any other right to it than as agent, and that, if not bound by an entry of credit, it should not have power to bind the real owner thereby. It has, however, been distinctly, and we think correctly, held that a holder of paper, who delivers it to a bank for collection and credit, is at liberty to treat the bank as an agent until the proceeds are collected by the bank in money, and that authority of the bank to credit the customer does not arise until he has actually received the money."

The letter of the Bank of Knobel in the instant case, sent, to the American Exchange Trust Company November 13, 1930, was as follows: "We enclose for collection and credit," and the letter of the American Exchange Trust Company sending the draft to the bank at Pine Bluff also stated: "Enclosed find for collection and credit;" and, as stated by the Kentucky court in discus-

sing the phrase "collection and credit" and "collect and remit," whatever other differences in meaning in the two phrases there may be, both convey the idea that the party giving is the owner and the one receiving is the agent.

That the Bank of Knobel was the owner of the drafts cannot be doubted, and under the general rule followed by this court, it was the owner of the proceeds until actually received by the American Exchange Trust Company. This is true, because, if the loss had occurred before the American Exchange Trust Company received the money, it would have fallen on the Bank of Knobel and not on the American Exchange Trust Company.

The only question in this case is whether the title to the draft and proceeds was in the Bank of Knobel until the money was received by the American Exchange Trust Company, and, having reached the conclusion that the appellant was the owner of the proceeds, the decree of the chancellor is reversed, and the cause remanded with directions to enter a decree in accordance with the prayer of the complaint.

SCHUTT *v.* ARKANSAS RICE GROWERS' AGRICULTURAL CREDIT CORPORATION.

Opinion delivered June 8, 1931.

George C. Lewis, for appellant.

BUTLER, J. This case was tried before the court sitting as a jury upon an agreed statement of facts and

an agreement that A. H. Hemme would testify to certain things. The court found for the defendant and entered judgment in accordance with the verdict, from which the plaintiff has prosecuted this appeal.

It may be said that the statements which it is admitted that Hemme would make were not disputed by any witness, so that there was no dispute as to any of the facts in the case, which, as reflected by the record, are as follows: Schutt, the appellant, borrowed $200 from the appellee corporation on the 12th day of November, 1927, for which he executed his promissory note bearing interest from date until paid at the rate of seven per cent. per annum, and as security for its payment pledged with the corporation two notes executed by A. H. Hemme, dated February 1, 1927, each for the sum of $250 with interest at the rate of eight per cent. per annum from date until paid. The note executed by Schutt remaining unpaid, on October 3, 1928, the corporation filed suit against Hemme on his aforesaid notes in the justice court and recovered judgment thereon for the amount thereof with interest. A payment of $100 had been made upon one of the notes on February 1, 1927, and the judgment was for the amount of the notes with interest less this payment. Hemme and the agent of the corporation were present at the time the judgment in the justice court was rendered, and thereafter the agent of the corporation satisfied the judgment, reciting that it had been paid in full, and surrendered to Hemme the note given it by Schutt and the two notes executed by Hemme which had been pledged by Schutt as aforesaid, and this action by the corporation was without the knowledge or consent of Schutt.

It was admitted that Hemme would testify that at this time and upon the delivery of the notes to him he was told by the agent of the corporation that satisfaction of the judgment was in full of all claims against him. This statement was not denied. On the 16th of February, 1931, Schutt brought suit against the corporation, al-

leging the above facts and praying for judgment against the corporation for the difference between $400 with accrued interest and the $200 note with interest representing the amount he owed the corporation.

The court erred in its finding and judgment, but should have rendered judgment for the plaintiff in accordance with the prayer of his complaint. While the corporation had a qualified title in the notes pledged and could recover on them from Hemme, it could not, under the facts in this case, accept anything less than the face value of the notes less the $100 payment, and, having received the amount of the note with interest which Schutt had executed, it was its duty to pay the remainder to him. In this case it is plain that the pledgee converted the notes pledged and by the satisfaction of the judgment and surrender of the notes to Hemme placed it beyond its power to return them after the debt for which they were pledged had been collected as it was its duty to do. As is held in the case of *First National Bank* v. *First National Bank,* 159 Ark. 517, 252 S. W. 594: "*Prima facie,* the value of the note is its face, but the defendant is at liberty to show any fact or circumstance tending to invalidate it or reduce its value." Therefore, in an action for conversion the measure of damage is *prima facie* the face value of the note, and, where no evidence is interposed as in this case tending to invalidate the note or reduce its value, the *prima facie* case becomes conclusive.

In the case of *Hamburg Bank* v. *George,* 92 Ark. 472, 123 S. W. 654, the rule is stated in the second syllabus, as follows: "While a pledgor is not entitled to recover the pledge until the debt for which it is pledged is paid, yet when the pledgee converts the pledge and thereby puts it beyond his power to return it, the pledgor is entitled to sue for the value of the pledge at the time of the conversion, less the amount of the debt."

It follows that the trial court erred in its holding and judgment. The judgment is therefore reversed, and the cause remanded with directions to enter judgment in ac-

cordance with the prayer of the complaint. It is so ordered.

BOOTH & FLYNN *v.* PRICE.

Opinion delivered June 15, 1931.

[redacted]

John G. Rye and *W. P. Strait,* for appellant.

Robert Bailey and *Hays & Smallwood,* for appellee.

HART, C. J., (after stating the facts). The principal assignment of error is that the court erred in not instruct-

ing a verdict in favor of appellants. In determining the rights of the parties to this lawsuit, the court must consider the relation in which they stood. On the part of appellants, it is insisted that the court should have told the jury, as a matter of law, that the relations of master and servant did not exist between appellant and appellee, and that appellee was a mere volunteer in helping the watchman of appellant put out the fire. Consequently, it is said that appellants owed him no duty in the premises except to refrain from injuring him after his perilous condition was discovered. They invoke the general rule that a person who is not authorized to perform as a servant the work, in doing which he was injured, cannot recover damages of the master, because the master, not having authorized him to act, owes him no duty. There is an exception to this rule, where the injured person is an "emergency servant," acting at the request of an employee who has, under such circumstances, authority to request his services, although ordinarily he is not invested with such power. *Central Kentucky Traction Co.* v. *Miller,* 147 Ky. 110, 143 S. W. 750, 40 L. R. A. (N. S.) 1184; *Hollenback* v. *Stone & Webster Engineering Corporation,* (Mont.) 129 Pac. 1058; Labatt on Master and Servant, vol. 4, § 1563; and 39 C. J. 554. The latter authority says that it has been held in the case of an "emergency servant" that the liability of the master for an injury to him is governed by the ordinary rules as to the liability of the master for an injury to a servant.

As stated in *Marks* v. *Rochester Railroad Co.* (Court of Appeals of New York) 40 N. E. 782, "In every business and employment there are exigencies which are not anticipated, and which require a servant to act, in the absence of the principal, for the immediate protection of his interest; and he may do things in his interest, when the emergency arises, which transcends his usual authority, and they will be deemed to have been authorized."

This court has recognized that where an emergency exists, requiring immediate action to protect the master's

interest, the servant has an implied authority to employ help, and the person so employed becomes the servant of the master and entitled to protection as such. See case note to Ann. Cas. 1913C, at 793. In *St. Louis, Iron Mountain & Southern Railway Company* v. *Jones,* 96 Ark. 558, 132 S. W. 636, recovery was refused a brakeman employed by the conductor of a freight train, the brakeman having been injured while assisting in loading and unloading freight. In *Yazoo & Mississippi Valley Rd. Co.* v. *Kern,* 99 Ark. 584, 138 S. W. 988, which was an action for damages for the death of a switchman employed by a yardmaster, the trainmaster alone having authority to employ a train crew, a recovery was likewise denied. Again, in *Henry Quellmalz Lumber & Manufacturing Co.* v. *Hays,* 173 Ark. 43, 291 S. W. 982, it was held that, if an unforeseen emergency arises rendering it necessary in the employer's interest that his employee have temporary assistance, the law implies authority to procure such necessary help, and an assistant so procured is entitled to the same protection as any other employee. In that case recovery was denied because the undisputed evidence showed that there was no sudden or unexpected emergency which would give the ginner the implied authority to employ a temporary assistant to unstop the gin stand. The court expressly approved the view, however, that whether circumstances constitute an emergency authorizing an employee to procure temporary assistance, so as to entitle the assistant to the same measure of protection as other employees, is generally a jury question.

According to the allegations of the complaint and the proof introduced by appellee, the jury was warranted in finding that the fire was caused by gasoline which had been allowed negligently to escape from the feed pipe extending from the main tank to the carburetor and falling on the platform of the ditch digging machine where the vapors arising therefrom were ignited by coming in contact with the lighted lantern which the watch-

man had been instructed to keep lighted and sitting on the platform of the machine. The fire thus started gave rise to an unexpected and sudden emergency which warranted the jury in finding that the watchman had implied authority to summon to his assistance in putting out the fire appellee and his companion. In other words, the jury might have found that appellants failed to properly inspect their machine or they would have discovered the defect in the feed pipe which allowed gasoline to drip from it, and their negligence in so doing was the cause of the original fire because the gas formed by the dripping gasoline coming in contact with the lighted lantern caused the original conflagration.

It is claimed, however, by counsel for appellants that this was not the proximate cause of the injury of appellee. They insist that his own conduct in going into the flames to turn off the stopcock near the main tank was an intervening cause, and that therefore appellants are not liable. The general rule is that what is the proximate cause of an injury is a question for the jury. It is to be determined as a fact in view of the circumstances attending it. It is ofttimes difficult of application, but the question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? So, it is generally held that, in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable sequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469; *Pittsburg Reduction Co.* v. *Horton*, 87 Ark. 576, 113 S. W. 647; *Bona* v. *Thomas Auto Co.*, 137 Ark. 217, 208 S. W. 306; *Meeks* v. *Graysonia, N. & A. Rd. Co.*, 168 Ark. 966, 272 S. W. 360; *Standard Pipe Line Co.* v. *Dillon*, 174 Ark. 708, 296 S. W. 52; and *Mays* v. *Ritchie Grocer Co.*, 177 Ark. 708, 7 S. W. (2d) 980.

In view of the attending circumstances in the present case, we think the court was warranted in submitting to the jury the question whether or not the original negligence of appellant in allowing the gas to escape from the feed pipe in the vicinity of a lighted lantern was not the proximate cause of the injury received by appellee. It was the duty of the watchman to protect the property, and the emergency was so great that the jury might have found that appellee was an "emergency servant" within the meaning of the rule above announced.

Suppose the watchman had been the one who was in the place of appellee. His injury would be directly traceable to the original negligence of the appellant. Appellants should have anticipated that all the events which did happen in the present case would likely happen if a fire was caused by its negligence in allowing gasoline to escape from the feed pipe, vaporize, and then be ignited from a lighted lantern nearby.

The court also submitted to the jury the question of the assumption of risk and contributory negligence of appellee. It is earnestly insisted by counsel for appellants that the court should have told the jury, as a matter of law, that appellee assumed the risk, and that he was guilty of contributory negligence. This we consider the most serious question in the case, but we do not think that it was *per se* negligence for a servant to be in a place of danger when his master's property was on fire and in the discharge of his duty he was trying to put it out. Of course, there is always more or less danger in working around property that is on fire. The greatness of the hazard depends upon the attending circumstances. For instance, the course of the wind might be a contributing circumstance which would greatly increase the hazard, the height and extent of the flames, and various other matters might furnish contributing causes. Under the circumstances attending the present case, we do not think that it can be said that the conduct of appellee was so reckless or so unusually hazardous as to prevent

the jury from allowing him a recovery. He and a companion were driving along the road, when the watchman suddenly and unexpectedly called them to help to put out the fire. He immediately jumped out of his automobile and came to the fire. He knew something about the value of the property and its necessity to appellant in conducting its work. He probably knew that, if the machine was destroyed, appellants would not only lose the value which was considerable, but that they would have to stop the work until it could procure a new machine. He endeavored to protect himself by wrapping his arm in a quilt to prevent it being burned when he went to turn off the stopcock so as to stop the gasoline from flowing out of the main tank. Doubtless for the moment he overlooked the fact that the gasoline had been spraying out on his clothes from the waist downwards and that this might ignite from the flames. It is natural that he could not view the circumstances with the same coolness that any one taking a retrospect of the occurrence could do. He was actuated by a laudable desire to prevent, not only the destruction of the property, but to keep the employees from having to be idle until a new machine could be procured. In any event, it would seem that the jury might find that he acted with as much prudence as any reasonable man would have done under the circumstances, and that it should not be said, as a matter of law, that he acted in such a reckless manner with full realization of the unusual hazard attending the occurrence that he should not be allowed to recover for the damages resulting from his injury.

In *Reynolds* v. *Great Northern Railway* (Minn.) 199 N. W. 108, a freight train was distributing supplies to stations along the line of the road. While gasoline was flowing from a tank car through a hose into the intake pipe of the pumping plant, a brakeman set his lighted lantern near the mouth of the intake pipe. For some unknown reason, the conductor pulled the nozzle of the hose out of the pipe, and an explosion followed setting

hose and car on fire. In an attempt to cut the hose with a knife, the conductor suffered burns which caused his death. The court held that whether pulling the nozzle out of the pipe was the sole or only concurring cause of the accident was a question for the jury. It was further held that whether the attempt to cut off the hose was so reckless that the conductor should have been deemed to assume the risk, was also a question for the jury.

Appellee knew that, if the fire reached the gasoline in the main tank, there would be an explosion which would utterly destroy the property. He was confronted with an emergency and adopted the only means which could have been adopted to save the property, and that was to turn the stopcock and thus prevent the gasoline from flowing from the tank. As we have already seen, he was somewhat excited, and he should not be prevented recovering because he failed to realize the danger from the gasoline which had escaped on the lower parts of his clothing evaporating and coming into contact with the flames. In view of all the circumstances, we do not think it can be said as a matter of law that his conduct was so unreasonable and reckless that he should be deemed to have assumed the risk as a matter of law or that he was guilty of contributory negligence as a matter of law.

Numerous instructions were given at the request of both parties. We have carefully examined the instructions given, and we think that the case was fully and fairly submitted to the jury under the principles of law above announced. No complaint is made as to the amount of damages recovered; and, in view of the severity of the burns suffered by appellee, there could be no just complaint in this respect.

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

DRAINAGE DISTRICT NO. 18, CRAIGHEAD COUNTY, *v.* MCMEEN.

Opinion delivered June 15, 1931.

Baker & Gautney, Denver L. Dudley and *Joe C. Barrett,* for appellant.

E. L. Westbrooke, Eugene Sloan, John W. Gann and *Arthur L. Adams,* for appellee.

SMITH, J. Drainage District No. 18 of Craighead County was organized by the county court of that county under the provisions of the statute known as the Alternative System of Drainage Districts, § 3607 *et seq.,* Crawford & Moses' Digest, and the benefits assessed by the commissioners under the authority of that act were approved and confirmed by the county court in 1919.

After the construction of the improvement, it was found that the lands in the lower or southern end of the district had not received the anticipated benefits, by reason of an insufficient outlet for the drainage, and the commissioners undertook to reassess the benefits of all the lands in the district to conform to this condition.

No change in the sum total of the betterments was made, but the commissioners claim that they have equalized the betterments by the reassessment thereof to conform to the actual betterments received, rather than to the benefits anticipated at the time of the original assessment, which, according to subsequent developments, appear to be inaccurate and unequal.

The upper proprietors resisted the reassessment in both the county court and the circuit court, where the cause was heard upon a stipulation, which recites the essential facts and from which we copy the following statements:

"It is stipulated and agreed by and between the said exceptors and objectors * * * and the commissioners * * * that because of circumstances, developments and events not known to or in contemplation of the parties involved when the original assessment of benefits was made in said Drainage District No. 18, the plan of drainage as then contemplated could not be and was not carried out, nor were the actual benefits realized to certain of the lands which were contemplated as a result of the improvement when original assessment of benefits was made and filed. That among the particular incidents or developments not known, contemplated or anticipated at the time of such original assessment of benefits was the construction of what is generally known and termed as the lock and dam in Poinsett County, Arkansas, as a part of the improvement constructed by Drainage District No. 7 of Poinsett County, Arkansas, adjacent to said Drainage District No. 18. That the construction of said lock and dam and other developments and conditions have made it impossible to supply the drainage to certain lands in the lower or south end of this District No. 18 which was in contemplation of parties when the original assessment was filed and confirmed. That certain of the lands so situated in said district have, for reasons above indicated, been frequently overflowed and at all times subject to overflow or damage by water to an extent which has

hindered their clearing and development, or their cultivation, and in many instances has entirely prevented it. The reassessment of benefits as proposed to be made under act No. 47 of the Acts of 1929, undertakes to redistribute the burden of assessments in accordance with these conditions, and results in a shifting of assessment which substantially adds to the assessment of benefits upon some lands in the upper or north end of the district, raising it substantially above that fixed by the original assessment, and lowering it substantially on other lands in the lower or south end of the district.''

The circuit court found that the district was without authority to make the reassessment, and sustained a demurrer to the petition therefor and dismissed the reassessment proceeding, and this appeal is from that order and judgment.

It is conceded by the district that the reassessments cannot be made unless authority therefor is found elsewhere than in the Alternative Drainage District Act under which District 18 was organized, as no such authority was conferred by that act. The protesting landowners insist that no such authority has been conferred, and they also contend that legislation conferring that authority would be unconstitutional if such legislation had been enacted.

We have before us only the question of the power of the district to reassess betterments and the constitutionality of legislation authorizing the reassessment if it exists.

In the chapter on Reassessments and Revisions in the excellent work on improvement districts in Arkansas by Sloan, it is said at § 967, under the title, ''Alternative System Drainage Districts,'' page 854, that ''in 1927 the following power was conferred on alternative system drainage districts: 'The commissioners of the districts aforesaid shall have the power to make a reassessment of the benefits not oftener than once a year, and such reassessment shall be made, advertised, and equalized as

is provided for the original assessment of benefits; and all appeals of landowners objecting thereto must be taken and perfected within thirty days from the time of the action of the county court thereon.' "

The act referred to is act 203 of the Acts of 1927, page 680, entitled "An act in aid of drainage districts."

We need not consider whether that act confers the power of reassessment here sought to be exercised, as the particular statute upon which the drainage district here especially relies, and under which it proceeded in making the reassessments, is act 47 of the Acts of 1929 (Vol. 1 Acts 1929, page 94). This act has the following title: "An act authorizing the funding of bond indebtedness of any levee or drainage district and authorizing reassessment of benefits in such districts."

It is insisted that this act should be construed with reference to its title, and that, when so construed, it should be interpreted as meaning that the reassessment which § 4 thereof contemplates is authorized and can only be made in connection with the funding or refunding of the bonded indebtedness of a levee or drainage district, and that authority to reassess is conferred only in such cases, and that, inasmuch as it is not claimed that district 18 is attempting to refund its indebtedness, the act does not apply.

Section 4 of act 47 reads as follows: "A reassessment of benefits may be made in any levee or drainage district in the State, whether created under general law or by special act of the Legislature, not oftener than once a year, and such reassessment shall be made by the commissioners or directors or assessors, respectively, of such district as was authorized for the original assessment therein, and such reassessment shall be made in the same form, after the same notice, hearing and rights of appeal as were provided for the original assessment of benefits in such district, and with the same time limitation on rights of appeal and suits attacking the assessment of benefits in such district as provided for the origi-

nal assessment of benefits, and installments thereof levied, extended and collected at the same time, in the same manner, by the same officers, and with the same lien and penalties for delinquencies as were provided for the original assessment. If in any such levee or drainage district the original assessment of benefits was made by assessors, the board of directors or commissioners of such district shall have the power to fill any vacancies in the board of assessors; or, if in any such district the power of the board of assessors was exhausted on making the original assessment, the board of commissioners or directors of such district shall have the power to appoint a new board of assessors composed of the same number and with the same qualifications as the original board, such new board to have all powers to make the reassessments herein provided for as were conferred on the original board of assessors."

It appears that § 4 of the act, if read by itself, confers the authority to reassess in unmistakable terms, but that section, of course, must be read in connection with the act of which it is a part, and its title is not to be ignored in its interpretation.

In the case of *State* v. *White,* 170 Ark. 880, 281 S. W. 678, it was said that "the language of the caption of a statute is not controlling, but it has some force in interpreting the meaning of the lawmakers when otherwise in doubt, * * *." *Conway* v. *Summers,* 176 Ark. 796, 4 S. W. (2d) 19; *Huff* v. *Udey,* 173 Ark. 464, 292 S. W. 693; *Logan* v. *State,* 150 Ark. 486, 234 S. W. 493; *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45; *Oliver* v. *Southern Trust Co.,* 138 Ark. 381, 212 S. W. 77.

We have concluded that § 4 is not so limited by the title of the act, of which it is a part, as to be applicable only to those districts which are proposing to refund their indebtedness. The section is, of course, applicable to such districts, but we do not think it is limited to them. Section 4 provides that a reassessment of benefits may be made in *any* levee or drainage district,

whether created under general law or by special act, not oftener than once a year. Now, it is usually true that such districts issue bonds to expedite the construction of the proposed improvement, but they are not required to do so, and there may be cases in which they have not done so. If there were such district, § 4 would apply to them.

The alternative drainage act, under which District 18 was organized, does not require such districts to issue bonds. It merely authorizes them to do so. Section 15 of this act (act 279 of the Acts of 1909, page 829), which appears as § 3623, Crawford & Moses' Digest, provides that, "in order to hasten the work, the board may borrow money at a rate of interest not exceeding six per cent. per annum, may issue negotiable bonds therefor, signed by the members of the board, and may pledge all assessments for the repayment thereof."

Another recital not to be ignored, but which, on the contrary, is of the greatest importance, is that the reassessments which § 4 authorizes may be made not oftener than once a year. The taxes are payable annually. It is highly improbable that an annual refunding of the district's indebtedness was contemplated, yet the reassessment may be made "not oftener than once a year."

Did the General Assembly have the power to pass the act? In answer to this question, it may first be said that it is not claimed that the district proposes to impair the security of the holders of the obligations of the district to pay money. On the contrary, it is proposed to increase that security by equalizing the burden of discharging those obligations in proportion to the betterments, or enhanced value, of the lands in the district.

Further answering this question, it was said in the case of *Lee* v. *Osceloa & Little River Road Imp. Dist. No. 1,* 162 Ark. 4, 257 S. W. 370, that, "this court has held that the Legislature may provide for a new assessment of benefits in a drainage district and for a reassess-

ment of benefits of a road district. *Burr* v. *Beaver Dam Drainage District,* 145 Ark. 51, 223 S. W. 362, and *Earle Rd. Imp. Dist. No. 6* v. *Johnson,* 145 Ark. 438, 224 S. W. 965."

This question was thoroughly considered in the last-cited case, where it was said: "The question has never been expressly decided by this court, but we hold now that it is within the power of the Legislature to confer authority on an improvement district to reassess the benefits to property in a district. There is no necessary finality in an assessment of benefits to accrue from a local improvement."

In reaching the conclusion announced in the case of *Earle Improvement Dist.* v. *Johnson, supra,* it was there said: "Nor can it be said that there are any contractual rights involved in the assessment of benefits which would be impaired by a new determination of benefits; nor does an increase in the amount of assessments under a reassessment constitute a taking of property without due process of law. An appraisal of benefits in advance of the actual realization is a mere anticipation, and we see no reason why there cannot be a subsequent reassessment for the purpose of determining whether or not those anticipated benefits have in fact been realized, or whether in the light of subsequent changes and developments the original assessment was a correct estimate of benefits. Of course, there must be an assessment of benefits before the construction of the improvement is begun in order to determine whether or not the cost of the improvement will exceed those benefits. But the only constitutional or inherent restraint in this regard is that the improvement shall not be constructed until it is found that the cost will not exceed the benefits to accrue to the property from the improvement.

"This is done at the time when the cost of the improvement is a mere estimate as well as the estimate of benefits. If, however, it is subsequently found that the cost of the improvement will be more, there is no restric-

tion upon the right to proceed with the increased cost, provided, it does not exceed the benefits; and there is no legal restriction upon the right to reassess the property for the purpose of determining whether those benefits will be sufficient to meet the increased cost. Hamilton on Special Assessments, § 827. We find, in other words, no legal restrictions upon the power of the Legislature, and we have nothing to do with the policy of the lawmakers in granting authority to improvement districts to reassess benefits from time to time."

It is finally insisted that, even though authority to make a reassessment was conferred by act 47 of the Acts of 1929, that act has been repealed by act No. 240 of the Acts of 1931, approved March 27, 1931. In support of this argument, it is insisted that act No. 240 of the Acts of 1931 is a recodification of acts 47 and 285 of the Acts of 1929, and therefore repeals both of them.

Act 285 of the Acts of 1929 is entitled "An act to provide for the funding of the indebtedness of any levee or drainage district, other than bonded indebtedness," and reference is made in § 2 of this act to act 47 of the Acts of 1929 as to the procedure whereby its provisions may be made available.

Act 240 of 1931 does contain provisions which appear in both the Acts of 1929, but the act of 1931 does not expressly repeal either of the Acts of 1929, nor does it do so by necessary implication.

We had occasion in the recent case of *Louisiana Oil Refining Co.* v. *Rainwater, ante* p. 482, to thoroughly consider the question of the repeal of a statute by implication, and it will not be necessary to again review the authorities on that subject. It was there held, in conformity with numerous prior decisions, that repeals of statutes by implication are not favored, but that a statute may be repealed by implication when the provisions of the earlier statute are repugnant to each other and irreconcilable, or when the subsequent statute covers the whole subject-matter of the former and is manifestly intended as a substitute for it.

Act 240 of the Acts of 1931, being the last enactment, does, of course, repeal any former act in conflict with it, although it contains no recital of any intention to repeal any act, or any part of an act, but in § 4 of the act of 1929 there is nothing in conflict with the act of 1931, and we therefore conclude that act 47 has not been repealed.

We are reinforced in this conclusion by the legislative history of act 240 of the Acts of 1931, which was approved by the Governor March 27, 1931.

Contemporaneously with the progress of act 240 through the General Assembly was another bill, which was also passed by both Houses of the General Assembly at the same session. This latter was House Bill No. 196, which was expressly intended to repeal act 47 of the Acts of 1929, and had no other object.

The recent case of *Cordell* v. *Kent,* 174 Ark. 503, 295 S. W. 404, was one in which an improvement district sought to refund its bonded indebtedness under the provisions of act 114 of the Acts of 1927, an act entitled, "An act to authorize road improvement districts in the State of Arkansas to refund present indebtedness, and for other purposes." Property owners in the improvement district sought to enjoin the proceedings, upon the ground that act 114 had been repealed by act 126, passed at the same session. The latter act was entitled, "An act to provide for the refunding of the indebtedness of local improvement districts."

The chancellor held that the latter act repealed the prior one, and in reversing his decision we quoted with approval from *Smith* v. *People,* 47 N. Y. 330, as follows: "Statutes enacted at the same session of the Legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes *in pari materia.* Each is supposed to speak the mind of the same Legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect,

so as to give validity and effect to every other act passed at the same session."

We must, of course, assume that the General Assembly knew what action it had taken and what the effect of that action was. The futility of passing an act to repeal act 47 is therefore apparent, if that result was accomplished by a contemporaneous act. However, House Bill 196, which expressly repealed act 47 of the Acts of 1929, was vetoed by the Governor on April 1, and it therefore never became a law. This was done by the Governor after he had approved act 240 on March 27, and the proclamation of the Governor vetoing House Bill 196, and stating the reason for so doing, did not recite that act 47 of the Acts of 1929 had already been repealed.

Act 47 was not therefore expressly repealed, because the bill having that purpose, and that purpose only, was vetoed by the Governor, and, as we have attempted to show, it has not been repealed by implication.

We conclude therefore that § 4 of act 47 subsists and is in full force and effect as a valid law, and the drainage district is therefore entitled to invoke its provisions in making a reassessment.

The judgment of the court below will therefore be reversed, and the cause remanded, with directions to overrule the demurrer to the petition of the commissioners of the district, and for further proceedings not inconsistent with this opinion.

HART, C. J., and MEHAFFY, J., dissent.

HUFFSTUTTLER *v.* STATE USE WHITE COUNTY.

Opinion delivered June 15, 1931.

W. D. Davenport, W. H. Gregory, Tom W. Campbell, Brundidge & Neelly and *Miller & Yingling,* for appellants.

Culbert L. Pearce, for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of White County for $31,789.05, primarily against appellants, W. D. Davenport, J. H. McElwee, and J. Y. Woodson, as depository bondsmen and, secondarily, against H. A. Huffstuttler, treasurer, and his official bondsmen, after the reformation of the bond for county funds lost in the Union Bank & Trust Company; and a cross-appeal by appellee from a decree disallowing its claim against H. A. Huffstuttler and his bondsmen to

the amount of $2,005.34, lost in the Bank of Pangburn, and its claim for interest on the amount lost in both banks.

The record reflects that, under act 113 of the Acts of 1905, the Union Bank & Trust Company was regularly designated by proper order of the county court a county depository of White County for two years from the 12th day of July, 1921; that, pursuant to the order, it executed a depository bond in accordance with said act on the 8th day of August, 1921, signed by a number of sureties, including appellants, W. D. Davenport, J. H. McElwee and J. Y. Woodson; that, at the November term, 1923, of the White County court, the court made and entered another order designating said Union Bank & Trust Company depository for a term of two years from the date thereof, on condition it should file the depository bond required by said act, which it failed to do; that, on October 1, 1927, after the passage of the general depository act for the State of Arkansas repealing act 113 of the Acts of 1905, the county court made and entered an order designating said bank a county depository under requirement that it should file a bond satisfactory to the judge of White County before any of the county funds should be deposited in said bank; that no bond was filed by said bank under said order, and that the said bank continued to receive deposits from various treasurers of White County from and after the 8th day of August, 1921, down to the date of its failure on the 4th day of November, 1930, at which time there was on deposit in the name of H. A. Huffstuttler, treasurer, the sum of $31,789.05; that none of the money deposited by the treasurer of said county within two years after the depository bond was filed and approved on August 8, 1921, was in the bank at the time it failed, but that said moneys had been paid out on proper checks and warrants prior to the failure; that the Bank of Pangburn was never designated as a county depository by order of the county court, and never filed a depository bond in compliance with act 113 of the Acts

of 1905, or the general depository act of 1927; that the treasurer, H. A. Huffstuttler, deposited county moneys in the Bank of Pangburn under oral instructions of the county judge, and that at the time of its failure on the 15th day of November, 1930, the treasurer had on deposit in said bank the sum of $2,005.34 belonging to said county; that, on the 6th day of November, 1929, H. A. Huffstuttler was elected treasurer of White County and filed an official bond on a blank form in the sum of $80,000 on December 31, 1929, after same was examined and confirmed by the county judge, firmly binding him and his bondsmen to account for all funds coming into his hands, which bond failed to set out the names of his bondsmen in the body of the instrument, the title of his office, the term thereof, and which he failed to sign, but which was regular in all other respects.

Other facts appear in the record, which we deem it unnecessary to set out in order to determine the questions involved on this appeal.

The first question involved on this appeal is whether the depository bond executed on August 8, 1921, by the Union Bank & Trust Company, and signed by appellants, W. D. Davenport, J. H. McElwee, and J. Y. Woodson, as sureties, was a continuing bond or whether the liability thereon was limited to a two-year period. The bond is silent as to the length of the term thereof, but the statute providing for its execution clearly evinces an intention by the Legislature that its duration should be for a period of two years. Provision was made therein for interest bids by banks for the use of county funds for two years after April 1, 1905, and for a bond in the sum of not less than the total revenue of the county for the years for which the bond should be given, and that, after the approval an order should be made designating the successful bidder as a depository of the funds of said county for a period ending thirty days after the time fixed for another selection of a county depository. These provisions appear in §§ 1, 2, 3, and 6 of the act, and could not

appropriately be read into a continuing bond while they can be interpolated into a bond of limited duration. Authority for reading the statute into the bond is found in the cases of *Crawford* v. *Ozark Ins. Co.*, 97 Ark. 549, 134 S. W. 951; *McMillan* v. *Farmers' Bonded Warehouse*, 169 Ark. 7, 272 S. W. 867; *School Districts Nos. 28 and 29* v. *Massie*, 170 Ark. 222, 279 S. W. 993; and *Bolen* v. *Farmers' Bonded Warehouse*, 172 Ark. 975, 291 S. W. 84. The obligation of appellants on the depository bond to account for the county funds received did not extend beyond the period of two years fixed in the order designating said bank as a county depository.

The next question involved on the appeal is whether the trial court erred in reforming the official bond filed by H. A. Huffstuttler, treasurer, so as to express the intention of the parties. It is manifest that the intention was to execute and file a treasurer's bond in conformity with § 1906 of Crawford & Moses' Digest. This court is committed to the doctrine that courts of equity may reform written instruments to express the intention of the parties clearly shown when, by mutual mistake, the written contract fails to do so. *Welch* v. *Welch*, 132 Ark. 234, 200 S. W. 139. The reformation of the bond followed the clear intention of the parties and was within the jurisdiction of the trial court.

The next question involved on the appeal is whether H. A. Huffstuttler, treasurer, and his official bondsmen are liable for deposits made by him in the Union Bank & Trust Company and the Pangburn bank and lost on account of the failure of the banks.

They claim immunity from liability for the amount deposited and lost in the Union Bank & Trust Company under the order made and entered of record by the county court on the 1st day of October, 1927, designating the Union Bank & Trust Company a county depository. This order was made pursuant to the provisions of the general depository act of 1927 and recites that, before any of the county funds should be deposited in said bank, it should

file a bond satisfactory to the county judge. The bond was never given; hence the order afforded no protection whatever to the treasurer and his bondsmen. They cannot claim immunity under a conditional and ineffective order.

They claim immunity from liability for the amount deposited and lost in the Bank of Pangburn because the treasurer took a bond from it to repay his deposits, which was approved by the county judge. There is nothing in the general depository act of 1927 authorizing the treasurer to take such a bond and extending immunity to him and his bondsmen for losses in case he does. The treasurer therefore deposited the county funds in the Bank of Pangburn contrary to the provisions of the general depository act of 1927, and he and his official bondsmen are liable for the amount of $2,005.34 lost on account of the failure of said bank.

The next question involved on this appeal is whether the trial court erred in disallowing the sum of $238.14 for accrued interest on daily balances on deposit in the Union Bank & Trust Company and interest after November 4, 1930, on the amount lost in the Union Bank & Trust Company and interest from November 17, 1930, on the amount lost in the Bank of Pangburn. There can be no question that the court erred in disallowing the accrued interest on deposits until the time of the failure of the Union Bank & Trust Company; and, under the rule announced by this court in the case of *Talley* v. *State,* 121 Ark. 4, 180 S. W. 330, interest should have been allowed from the time of the failure of the banks up to the time of the decree at the rate of 6 per cent. per annum.

That part of the decree reforming the county treasurer's bond and the judgment against him and his official bondsmen for the amount deposited and lost in the Union Bank & Trust Company is affirmed.

The decree is otherwise reversed, and the cause is remanded with directions to the court below to render a decree in accordance with this opinion.

PRIEST *v.* MOORE.

Opinion delivered June 15, 1931.

Steel & Edwards, for appellant.

Lake, Lake & Carlton, for appellee.

MEHAFFY, J. Appellees filed their petition with the county board of education of Sevier County on the 29th day of March, 1930, praying for a consolidation of Rural Special School Districts Nos. 13 and 61 of Sevier County.

After appellees had filed their petition, and before it was disposed of, appellant filed a petition for the consolidation of school districts Nos. 7, 11, 13 and 61 of Sevier County.

While appellees' petition was filed first, the appellants were the first to give notice. The notice was given by appellants on the 14th day of April, 1930, and the appellees' notice was dated the 15th day of April.

The appellants filed before the county board of education a motion to continue, and the hearing was continued until the 14th day of June, 1930. On the 14th day of June, 1930, the petition of appellees was presented, asking for the consolidation of school districts Nos. 13 and 61, the demurrer to said petition having been filed and overruled.

The county board of education then considered the petition of appellees and found that it was for the best interest of the school children not to grant said petition, and the petition was therefore denied. Appellees filed an affidavit and bond for appeal, and an appeal to the circuit court was granted. On the same day, the county board of education considered the petition of the appellants and granted said petition. District No. 13 thereupon filed an affidavit and bond for appeal; the bond was approved and an appeal to the circuit court was granted.

An order was entered by the county board of education after considering the petition and hearing the evidence, granting said petition, dissolving districts Nos. 7, 11, 13 and 61, and changing the boundary line so as to include the territory in the four districts into one district, and formed and created one district out of the territory of the four districts, to be known as Consolidated School District No. 7 of Sevier County.

District No. 13 appealed to the circuit court. The cases were consolidated in the circuit court. A demurrer to appellees' petition was filed in the circuit court, overruled, and exceptions saved. The circuit court then entered the following judgment:

"Now, on this day, the 21st day of August, 1930, comes the respondents, John Moore *et al.*, by their attorneys, Lake, Lake & Carlton, and move to dismiss the petitions in these proceedings for want of jurisdiction, and the court proceeded to hear and determine said motion upon the record made in these proceedings.

"And the court, after examining the petition of F. C. Priest *et al.*, the filing marks thereon, the notices of the petitions and the affidavits, proving that said notices had been posted in the several school districts for the time prescribed by law, as well as the order of the county board of education, denying the petition of John Moore *et al.*, and the order of said board granting the petition of F. C. Priest *et al.*, finds that the petition of John Moore *et al.* prayed for the consolidation of Rural Spe-

cial School District No. 13 and Common School District No. 61 of Sevier County, and that the petition of F. C. Priest *et al.* prayed for the consolidation of the same two school districts, together with Rural Special School District No. 7 and Rural School District No. 11, all in Sevier County; and this court finds as a matter of law that the county board of education cannot at the same time consider two petitions affecting the same territory, or a part of the same territory, but must dispose of the petition first filed before accepting or considering a second petition affecting the same or a part of the same territory, and therefore that the county board of education was without jurisdiction or authority to grant the petition of F. C. Priest *et al.*, and that this cause should be dismissed.

"It is therefore considered, ordered and adjudged by the court that this cause be, and the same is hereby, dismissed for want of jurisdiction. To the judgment and order of the court in dismissing this cause, the petitioners, F. C. Priest *et al.*, except and ask that their exceptions be noted of record."

We find it unnecessary to pass on the demurrer filed by appellants to the petition of appellees.

The record shows that the board of education heard the petition of appellees first and denied same, and then heard the petition of appellants and granted same, and that both parties appealed to the circuit court, where the cases were consolidated.

Appellees contend that the case should be affirmed because there is no bill of exceptions and no motion for new trial.

We recently said: "It is next insisted that the judgment must be affirmed because there is no bill of exceptions. This was not necessary. We have copied the judgment in our statement of facts, and, by reference to it, it will be seen that it recites all the facts upon which the court based its opinion. This court has uniformly held that no bill of exceptions is necessary where the judg-

ment of the lower court reciting the facts upon which it is based shows error on its face." *Yockey* v. *St. L.-S. F. R. Co., ante* p. 601; *Hisey* v. *Sloan,* 180 Ark. 797, 22 S. W. (2d) 1007; *Burns* v. *Harrington,* 162 Ark. 162, 257 S. W. 729; *Buchanan* v. *Halpin,* 172 Ark. 822, 290 S. W. 602; *Williamson* v. *Mitchell Auto Co.,* 181 Ark. 693, 27 S. W. (2d) 96; *Davis* v. *McCandless,* 130 Ark. 538, 198 S. W. 132; *Davies & Davies* v. *Patterson,* 132 Ark. 484, 201 S. W. 504.

A motion for a new trial and bill of exceptions is necessary where the error does not appear on the face of the record, but the judgment in this case recited: "And this court finds as a matter of law, that the county board of education cannot at the same time consider petitions affecting the same territory or a part of the same territory, but must dispose of the petition first filed before accepting or considering a second petition affecting the same or a part of the same territory."

All parties residing in the district are interested and are entitled to be heard on a petition to consolidate, and, if they think that a petition to consolidate districts should not be granted, they have a right to appear and resist the petition, and they may do this by presenting another petition. It is the wishes and convenience of the majority of the persons in the territory affected that is to be considered, and there is no objection to filing more than one petition, and, if the county board of education thinks it proper to hear them together, it may do so.

We know of no reason why the inhabitants of the district might not present an additional petition for the purpose of showing that the petition under consideration should not be granted.

In the case of *Rural Special School District No. 21* v. *Common School District No. 87, ante* p. 329, after the original petition was filed, there were three others filed affecting one of the districts. The board ignored the last three petitions filed and made an order consolidating districts 21 and 87, but there was no reason why the board

of education might not hear evidence on the petitions if necessary. The law provides: "The county board of education shall have the power to dissolve any school district now established or which may hereafter be established in its county, and attach the territory thereof in whole or in part to an adjoining district or districts, whenever a majority of the electors residing in such district shall petition the court so to do." Section 8869, Crawford & Moses' Digest.

There might be three such districts, A, B, and C. It might be the desire of the majority of the territory affected to annex one-half of B to A, and a petition might be filed with the board of education asking this to be done. Another petition might be filed by C asking that the other half of B be annexed to it. There would be no reason why both petitions could not be heard by the board at the same time.

Again, the county board of education considered two petitions in the case of *Franklin County Board of Education* v. *Riley, ante* p. 148.

The duty of the board of education is to hear any petition or petitions that may be presented; hear the evidence and make its findings as required by law. If more than one petition is filed affecting part of the same territory, the board of education itself may determine whether it be advisable to hear them together or hear them separately.

In the instant case, however, the petitions were not considered together. The board of education first considered the petition of appellees and denied the prayer of the petition. It then considered the petition of appellants and granted the prayer of petitioners.

The county boards of education are vested by law with a sound discretion in the determination of matters necessary to the formation or consolidation of school districts, which is subject to review only when it appears that such orders are arbitrary or unreasonable. It was therefore the duty of the circuit court to hear the petition

in order to determine whether the action of the board of education was arbitrary or unreasonable.

The judgment of the circuit court is reversed, and the cause remanded with directions to proceed with the trial according to law and not inconsistent with this opinion.

HOUSTON OIL COMPANY OF TEXAS *v.* PHILLIPS.

Opinion delivered June 15, 1931.

Gaughan, Sifford, Godwin & Gaughan, for appellant.

Compere & Compere, for appellee.

McHANEY, J. Appellant correctly states the case as follows: "Appellee had been in the employ of appellant, working in a connection gang for about a year prior to July 16, 1929, the date when he received the injury complained of in his complaint. During the course of his employment, he assisted in laying two short pipe lines near appellant's Camden refinery. Prior to his employment by appellant, he had worked as a blacksmith in Arkadelphia for more than twenty years.

"Appellee and twelve or fifteen other employees of appellant were engaged in laying a pipe line from the Camden refinery to the McDonald Oil Field some twelve or fifteen miles away. The right-of-way for the pipe line had been cut and appellee and the others were engaged

in digging the ditch in which said line was to be laid. In laying the pipe line they started at the Camden refinery and were laying it towards the McDonald Field. On account of the railroad spur track near the refinery, it was necessary to lay the line under said track and to make the ditch at that particular place some deeper than at other places.

"At the time appellee was injured the ditch near the spur track had been dug, and was, according to appellee, about eighteen or twenty inches wide, and about twenty-four inches deep. A stump about six inches in diameter at the top and four inches at the bottom had been left standing near the middle of the ditch.

"Appellee was instructed by his foreman to take an axe and cut the stump out of the ditch. He got an axe, got down in the ditch and had struck from three to six licks with the axe when he struck the bank of the ditch and in doing so the axe glanced, striking his left foot and almost severing the toe next to the large one. He was immediately given first aid treatment to stop the flow of blood, then taken to the hospital where he was given further treatment. No other part of his foot was injured."

In addition, it may be said the undisputed proof is that it is customary to dig down the banks of the ditch around a stump so as to make what is called a bell hole, to enable the axe to cut the stump off at the bottom of the ditch without striking the bank. Also that appellee had never before been directed to chop down a stump in the ditch and was not advised that a bell hole was necessary.

A trial resulted in a verdict and a judgment against appellant for $500. The only assignment of error urged here for a reversal of the judgment is the refusal of the court to direct a verdict in its favor, on the ground that it was not negligent and that appellee assumed the risk as a matter of law.

We think the court correctly submitted these questions to the jury. The foreman directed appellee to get

 [redacted]

an axe and chop the stump out of the ditch. He did not tell him to get a shovel, make a bell hole around the stump, then get an axe and chop it out. Appellee attempted to do exactly what he was told to do in the manner directed by the foreman, and acted under his direct supervision. The foreman knew it was customary first to dig a bell hole and says he neglected to notice whether it had been done or not when he told appellee to get the axe and chop the stump out. This was sufficient to take the question of appellant's negligence to the jury.

Nor can we say appellee assumed the risk as a matter of law. This question was submitted to the jury in several instructions which are not complained of, and its finding is binding here.

Affirmed.

[redacted]

CITIZENS' PIPE LINE COMPANY *v.* TWIN CITY PIPE LINE COMPANY.

Opinion delivered June 8, 1931.

[redacted]

James B. McDonough, for appellant.

Vincent M. Miles and *Warner & Warner,* for appellees.

BUTLER, J. The present litigation began in this manner. The Harding Glass Company, a corporation engaged in the manufacture of glass, required and used a large quantity of gas as fuel which it had contracted to purchase from the Twin City Pipe Line Company, a corporation engaged in the business of distributing natural gas in and within the vicinity of Fort Smith, Arkansas. The glass company had for a time used the gas delivered by the pipe line company until, through the means of a subsidiary company, it acquired the control of certain gas wells in the State of Oklahoma. The stockholders of the glass company and others organized the Citizens' Pipe Line Company for the purpose of conveying gas from the aforesaid wells to the plant of the glass company for its own use, and procured the passage of an ordinance from the city of Fort Smith by which it was permitted the use of the streets and alleys of the city under which were laid its mains.

On the 15th day of August, 1928, the Twin City Pipe Line Company filed its complaint in the chancery court making the Citizens' Pipe Line Company and the city of Fort Smith defendants, in the prayer of which complaint it asked that the ordinance be declared void, and that the Citizens' Pipe Line Company be enjoined from constructing its pipe lines in the streets of Fort Smith. Soon after the filing of the complaint the Citizens' Pipe Line Company made preparations to begin the work of laying its lines in Fort Smith, whereupon the complainant served notice on August 24th that it would ask for a temporary injunction restraining the defendant pipe line company from proceeding with its work until the cause could be heard on its merits in court. This petition was heard and granted on August 28th, conditioned upon the execution by the complainant of the bond required by statute. This bond was executed and the temporary injunction issued on the last date aforesaid which resulted in the Citizens'

Pipe Line Company ceasing its work in Fort Smith and transferring it to Oklahoma where work was begun on the pipe line and continued until it was completed from the wells to the limits of the city of Fort Smith on October 20, 1928.

On September 14th the cause came on for hearing on its merits, and on September 25 following a decree was rendered as of September 18th by the terms of which the defendants were enjoined from proceeding with the work as prayed for in the complaint. From that decree an appeal was prosecuted to this court, where the decree of the chancery court was reversed and remanded with directions to dismiss the complaint of the Twin City Pipe Line Company for want of equity, the opinion being delivered on November 12, 1928. Upon a remand of the cause the defendant, Citizens' Pipe Line Company, filed a complaint in which it sought to recover damages occasioned to it by reason of its work having been stopped for seventy-three days because of the injunctions granted and issued. In this complaint it was alleged that the suit was brought without probable cause, and items of damage were set up amounting to a large sum. The chancellor in his judgment found "that there is no specific evidence fixing any damages resulting from the temporary restraining order from the date of its issuance to the date of the decree of the chancery court" and dismissed the claim for damages, from which order and judgment is the present appeal.

It is contended by the appellant, Citizens' Pipe Line Company, that its damage was not limited to that accruing from the date of the issuance of the temporary injunction until the decree rendered September 18th following, but also for such damage as it suffered between the entry of the permanent injunction and the decision of this court on appeal reversing the decree of the chancellor and remanding the cause with directions to dismiss the complaint of the Twin City Pipe Line Company for want of equity. If it was established that the suit out of

which these injunctions grew was brought without probable cause or the injunctions maliciously obtained, it is not to be doubted that the contention of the appellant here is correct. In such case the party injured might have maintained his action at law for malicious prosecution, which relief may now by force of statute be granted by the court out of which the injunction was sued. The appellant introduced evidence of another suit having been brought in the United States Court by the appellee against the Harding Glass Company for the purpose of showing that this suit was wantonly brought. It argued that the sole purpose of the suit in the United States court was to prevent the appellant here from supplying gas to the Harding Glass Company, with which company it had a contract to take its entire output, and, as its privilege to lay pipes under the streets of Fort Smith was granted for the sole purpose of enabling it to carry out its contract with the glass company, the practical effect of the suit in the United States court would have been to make the franchises involved in this suit worthless.

It is our opinion that a consideration of the issues involved in the suit brought by the appellee company in the United States court against the appellant company does not warrant the inference of any malicious purpose or that it was brought without probable cause. From an examination of the questions determined in the cases of *Citizens' Pipe Line Co.* v. *Twin City Pipe Line Co.*, 178 Ark. 309, 10 S. W. (2d) 493, and *Harding Glass Co.* v. *Twin City Pipe Line Co.* decided by the Supreme Court of the United States May 4, 1931, it will be seen that these questions were important, on which learned lawyers and courts of high repute may and do differ, and therefore it cannot be said that the suit here involved was wantonly brought or without probable cause.

As there was no common-law liability of the party securing the injunction, although erroneously granted, unless it was maliciously obtained, or except as modified

by statute, there would be no general liability for the injunction here issued, unless the common-law rule has been changed by statute or unless the obligation entered into in specific terms or by necessary intendment fixes such liability. The rule is thus stated in chapter on Injunctions, 32 C. J., § 744: "Complainant's liability for the wrongful issuance of an injunction at his instance may, of course, be fixed by the bond that he was required to give as a condition to the granting of the injunction. But, although there is contrary authority, the general rule, unless changed by statute, is that, without a bond for the payment of damages or other obligations of like effect, a party against whom an injunction has been wrongfully issued can recover no damages unless he can make out a case of malicious prosecution by showing malice and want of probable cause on the part of the party who obtained the injunction." The reason for this rule is stated in the case of *Yonkers* v. *Federal Sugar Refining Co.*, 221 N. Y. 206, as follows: "Public policy was thought to demand that the free pursuit of remedies in the courts should not be obstructed by the menace of liability for innocent mistakes"; and thus, in the case of *Russell* v. *Farley*, 105 U. S. 433: "If the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or in a proper case, an action for malicious prosecution."

Since we have seen that the suit out of which the alleged damages grew was not the result of malice and was not without probable cause, the extent of the liability of the appellee company must be ascertained from an examination of the bond given and a consideration of our statute regulating the issuance of injunctions. Section 5792 of Crawford & Moses' Digest provides: "Where it appears by the complaint that the plaintiff is entitled to

the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act which could produce great or irreparable injury to the plaintiff, or where, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act, in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute."

Section 5801 provides: "In every case the court or judge granting an injunction shall specify in the order therefor an amount for which the party obtaining it shall give security in a bond to the party enjoined, before the injunction shall become effectual; which amount shall be sufficient to cover all the probable damages and costs that may be occasioned by the injunction."

Section 5802 provides: "The court or judge may prescribe the effect of the bond, so as to secure to the party enjoined the damages to which he may become entitled, if it is finally decided that the injunction ought not to have been granted."

These are the provisions of law under which the order for a temporary injunction was made and under which the bond sued on was executed. That part of the order relating to the giving of the bond is as follows: "It is further ordered and decreed that this order shall become and be effective upon the filing and approval by this court, or by the clerk of this court, of a bond in the sum of $20,000, conditioned that the plaintiff will pay damages accruing to the defendant, Citizens' Pipe Line Company, if it should eventually be adjudged that this order is improperly issued." And the condition of the bond executed pursuant to that order is as follows: "That if the plaintiff, Twin City Pipe Line Company, shall pay such damages as may be adjudged by the court to be due the defendant, Citizens' Pipe Line Company, in the event

such temporary injunction should be found to be improperly issued, this bond to be void; otherwise, to be in full force and effect."

By § 5791 of Crawford & Moses' Digest, it is provided that: "Injunction may be the final judgment in an action, or may be allowed as a provisional remedy, and where so allowed it shall be by order."

It will be seen from an examination of these statutes and the bond that the injunction authorized was a provisional remedy, its purpose being to maintain the *status quo* until the cause could be heard upon the merits and to provide for the security and payment of damages accruing during the life of the temporary injunction, if any should be occasioned thereby, and this was the extent and limit of the liability. It is earnestly insisted, however, that the right to damages by the party enjoined and the liability of the one procuring the injunction was extended by the provisions of act No. 102 of the Acts of 1915, so as to cover all damages which might accrue at any time before the final determination of the cause, irrespective of the time in which the temporary injunction, as such, ceased to function. It is argued that this view of the effect of act No. 102, *supra,* is warranted by the decision in the case of *Sullivan* v. *Wilson Mercantile Co.,* 168 Ark. 262, 271 S. W. 30, where that act was considered. In speaking of the effect of that statute, counsel for appellee say that the statute is sweeping in its terms providing a new remedy where none before existed, and that by § 5801 it is made mandatory that a bond shall be given in every case, and in every case where an injunction is granted a bond is required and the right to the bond is not limited to a temporary injunction. We do not think that a consideration of act No. 102, *supra,* in connection with the entire chapter on injunctions, warrants the position taken by learned counsel. Act No. 102 was an act amendatory of §§ 3998 and 4001 of Kirby's Digest of the statutes. These sections were a part of the Civil Code dealing with the subject of injunctions and were digested in Kirby's

Digest in the chapter on Injunctions, and, as amended by act 102, *supra,* are now §§ 5822 and 5825 of Crawford & Moses' Digest, a part of the chapter on Injunctions in that digest.

Section 3998 of Kirby's Digest was as follows: "Upon the dissolution in whole or in part of an injunction to stay proceedings upon a judgment or final order, the damages shall be assessed by the court which may hear the evidence and decide in a summary way, or may at its discretion cause a jury to be impaneled to find the damages."

Section 4001 of Kirby's Digest was as follows: "Judgment shall be rendered against the party who obtained the injunction for the damages assessed and the assessment shall be conclusive against the surety of such party."

Section 1 of act 102, *supra,* provides that § 3998 of Kirby's Digest should be amended to read as follows: "Upon the dissolution in whole or in part of any injunction or restraining order of any kind and of every kind and nature whatsoever, the chancery court wherein the same was pending may assess and render against principal and sureties on the injunction bond a valid judgment for any and all damages occasioned by the issuance of such injunction or restraining order; and the court may either appoint a master and report as to such damages or may render summary judgment therefor; or at its discretion may cause a jury to be empaneled to find such damages." Crawford & Moses' Digest, § 5822.

By § 2 of said act § 4001 of Kirby's Digest was amended so as to read as follows: "Such judgment for damages shall be rendered against the party who obtained the restraining order or injunction and against his sureties on the bond, and the same shall be conclusive against them, and in proceedings hereunder the sureties shall be considered parties in the cause, provided, the court may in its discretion require reasonable notice to such sureties before such finding and judgment." Crawford & Moses' Digest, § 5825.

Prior to the passage of act No. 102, *supra,* §§ 5803 and 5804 of Crawford & Moses' Digest (at the passage of the act §§ 3977 and 3978 of Kirby's Digest) contained the only specific reference to the character of damages which might be recovered on the dissolution of a temporary injunction, and it might have been, as argued by the appellant, that, under the statute as it existed prior to the passage of act No. 102, the injured defendant "in an injunction suit had no remedy unless the suit was brought to enjoin proceedings upon a judgment." If that be true, that act only enlarged the scope of the law so as to give the right to damages, not only in cases where a judgment was enjoined, but in all other cases in which an injunction as a provisional remedy had been procured, and further enlarged the remedies in injunction suit so as to authorize the court in which the suit was instituted and in that suit to assess the damages against the sureties on the injunction bond without remitting the party aggrieved to an independent action on the bond.

The case of *Sullivan* v. *Wilson Mercantile Co., supra,* relied on by the appellant, goes no further than the above statement. That was a case where the appellee had purchased lands and instituted an action against the appellant in the chancery court, alleging that the appellant was interfering with the possession of the appellee by trespassing on the lands and thus preventing the peaceable possession of the appellee. The prayer of appellee's complaint was that the appellant be perpetually enjoined from interfering with the possession and from trespassing on the land. A temporary restraining order was obtained at the commencement of the action. An answer was filed by the appellant who set up his rights of possession under a lease from the appellee's grantor, and he also filed a cross-complaint in which he alleged certain damages which had been occasioned by his having been deprived of the possession under the injunction issued in the case. On the final hearing of the cause, the court dismissed both the complaint of the appellee and the

cross-complaint of the appellant. The decree contained no formal dissolution of the injunction, and there was no assessment of damages claimed by the appellant. This court on appeal held that the dismissal of appellee's complaint was tantamount to a dissolution of the injunction, and that the trial court erred in not awarding damages to the appellant for being put out of the possession and kept out during the pendency of the action, and said: "If appellant's cross-complaint had been an independent action for damages, his remedy was complete at law, and he could not have invoked the jurisdiction of a court of equity; but, in the present action instituted by the appellee in which an injunction was obtained and which deprived appellant of substantial rights, the latter was entitled under the statute to a restitution of the possession of which he had been deprived by the injunction and an assessment of damages sustained by reason thereof. Crawford & Moses' Digest, §§ 5822-5825. The effect of the dismissal of appellant's complaint was to dissolve the injunction, and appellant was entitled to the relief afforded under the statute." It will be noted that in that case the damages suffered were under a temporary restraining order issued at the commencement of the suit and continuing down until the final decree dissolving the injunction was entered.

An examination of the statutes on the right to injunction and the liabilities of the parties thereunder discloses that there are two classes of injunctions authorized: one, on the final judgment, the other, as a provisional remedy. The latter is referred to in other parts of the statute as a temporary injunction, and it is this class only in which a bond is required. So that, wherever the word "injunction" is used in the statute in connection with the giving of bond or the liability of the parties arising because of such bond, it necessarily means a temporary injunction. For, as we have seen, it is that character of injunction only in which a bond is required. Therefore, as § 5822, *supra,* deals with the remedies against the principal and his sureties on an injunction bond, the words "any in-

junction or restraining order of any and every kind and nature whatsoever'' must necessarily refer to and mean the provisional remedy by temporary injunction. Thus it will be seen that the common-law liability of the party securing an injunction has not been changed by the statute except as to the provisional remedy, liability for which is fixed by the bond. This, by necessary implication, limits the damage to such as was occasioned by, and incurred within the life of, the temporary injunction. The purpose of the temporary injunction, as we have seen, was to preserve the *status quo* until a hearing on the merits in the suit could be had, and, when this hearing was had and a decree rendered thereon, the temporary injunction had completely served its purpose and ceased to be. In its stead there arose the injunction based on the solemn adjudication of the court on the merits of the case, and the injuries, if any, which from then on were suffered were such as were *damnum absque injuria.*

Counsel have cited a number of decisions that adopt a contrary view, but we think these decisions are not in consonance with our statute and are out of harmony with the general rule, which as stated in 32 C. J. § 695 (Injunctions) is as follows: ''Where a decree for a perpetual injunction is rendered, the order for a preliminary injunction is merged and ceases to have any further effect.'' It follows that, so much of the decree of the trial court as denied the items of damage accruing subsequent to September 25, 1928, the date of the final injunction, will be sustained. However, as it seems that the testimony was not directed to that point, we are unable to say whether any damage was sustained within the life of the temporary injunction, and the cause will therefore be remanded with directions, if the appellant so wills, to take additional testimony relating to the damage, if any, which under our view is recoverable.

We deem it well to say that we are of the opinion that the rule relative to the recovery of attorneys' fees as damages is in no wise changed. We adhere to the doc-

trine announced in the case of *Oliphint* v. *Mansfield & Co.*, 36 Ark. 191, for the reason stated in *Oelrichs* v. *Spain*, 15 Wall. 211. The cause is therefore remanded for such other and further proceedings as the parties may elect in conformity with the law and not inconsistent with this opinion.

KEITH *v.* KEITH.

Opinion delivered June 15, 1931.

A. I. Roland and *D. M. Halbert*, for appellant.

Joe W. McCoy, for appellee.

McHANEY, J. January 10, 1919, the widow and heirs at law of John W. Keith, deceased, including appellants and appellees, leased certain lands belonging to said decedent's estate to one J. J. Ball for the removal of gravel. The particular piece of land now in controversy was described in the lease to Ball as follows: "And all gravel in section 17, township four, south of range seventeen west, lying east and west of Ouachita River." In the next paragraph of said lease it was stipulated that "the second party (Ball) is not to excavate closer than fifty feet to high bank on the south side of the gravel bar east of the river in the southeast quarter of the southeast quarter of section seventeen, and not to excavate closer than two hundred feet of the south line of the southwest quarter of the southeast quarter of section seventeen." Shortly after the execution of this lease,

dower was assigned to the widow in other lands, she agreeing to take a child's part, one-tenth, in the proceeds of the gravel lease, and the nine heirs taking a one-tenth share each. In May, 1919, appellant, M. N. Keith, purchased from appellees, Mrs. Batchelor and Mrs. McCoy, his sisters, their interest in the dower lands assigned to the widow for a consideration of $2,700 each, taking a warranty deed from each prepared by his attorney, in which the gravel bars were reserved by each in this language: "It being understood and agreed that this deed does not include our interest in any of the gravel bars leased to J. J. Ball by said Jennie S. Keith and others, and that all our rights in said gravel bars and said lease, and the proceeds to be paid under said lease according to the terms thereof, being hereby reserved. Said lease now being of record in mortgage record 'O,' page 415, in the recorder's office of Hot Spring County, Arkansas."

In April, 1929, a new lease agreement was made with H. F. Riley and others, the Ball lease of 1919 having been canceled, in which the land was described as follows: "All lands owned by the lessors, containing gravel in sections 16, 17 and 21, township 4 south, range 17 west." This controversy arises over a distribution of the proceeds from the sale of gravel under this latter lease.

Appellant, M. N. Keith, contends that Mrs. Batchelor and Mrs. McCoy are entitled to share only in the proceeds from the sale of gravel from that part of the gravel bed from which Mr. Ball was permitted to remove gravel in the original lease in section 17. In other words, it is his contention that his sisters reserved in their deeds to him only such gravel in section 17 as Ball was permitted to excavate, and that, when gravel is removed under the new lease in section 17, outside the limitation in the Ball lease of 1919, he is entitled to recover their share of the proceeds thereof by virtue of their deed to him. The chancery court denied his contention and dismissed his complaint for want of equity.

We think the court was correct in so holding. The original lease to Ball covered "all gravel in section seventeen." True, he was not permitted to excavate closer than 50 feet to the high bank in a certain quarter section, nor closer than 200 feet to the south line of another quarter section of 17, but the granting clause in said lease conveyed all gravel in section 17. It is simply a case of having a lease on more land than he was permitted to mine or excavate. The lease therefore covered all gravel in section 17, and the reservations in the deeds of Mrs. Batchelor and Mrs. McCoy clearly excepted from the conveyance their interest in "any gravel bars leased to J. J. Ball."

The decree is correct, and must be affirmed. It is so ordered.

FAULKINBURY *v.* SHAW.

Opinion delivered June 15, 1931.

Pratt P. Bacon and *Will Steel,* for appellant.

King, Mahaffey, Wheeler & Bryson and *James D. Head,* for appellee.

BUTLER, J. This is an appeal from a verdict instructed for the defendant by the trial court at the close of plaintiff's evidence in a personal injury suit instituted by Mrs. Effie Faulkinbury against Percy A. Shaw, doing business as Shaw Gas & Plumbing Company, in the city of Texarkana, Arkansas. Mrs. Faulkinbury was injured in the store of appellee by the falling of a kitchen sink upon her ankle on the morning of February 15, 1930, while she was in the appellee's place of business as a prospective purchaser of merchandise for sale by appellee. The appellee therefore owed the appellant the duty of exercising ordinary care to maintain and conduct his business so as to avoid injuring her. *Alfrey Heading Co.* v. *Nichols,* 139 Ark. 466, 215 S. W. 712. Appellant alleged that the appellee failed in his duty to her in this particular by insecurely attaching a kitchen sink on the inside of his store to an old brick wall with wooden pegs driven therein upon which the sink was suspended, and that, because of the negligent fastening of said sink to said wall, the sink fell while appellee was in the exercise of due care, injuring her foot, ankle and leg.

The testimony on the part of the appellant tended to show that the building occupied by the appellee as a tenant, and in which he carried on the business of retailing articles of merchandise, was erected about 45 years before the occurrence resulting in the injury to the appellant; that the walls of the building were made of common or sand brick joined together with mortar made of lime, water and sand without the admixture of cement; that, by reason of the materials used in the construction of the walls, and on account of their age, the walls had

become and were soft and "pretty rotten"; that this was the general condition of the walls of this building which had been occupied by the appellee for approximately two years, and that he had had the building repaired while he was a tenant therein; that within the store and along the east wall the appellee had caused holes to be chiseled or drilled in the wall at certain intervals into which were driven wooden pegs, so that the outer ends thereof were flush with the surface of the wall. Into these pegs, hooks were screwed, and upon these hooks, about three feet above the floor, were suspended kitchen sinks in a row extending from the rear of the store to near the front of the building. Along the side of the building by this wall and these sinks was a narrow passageway for the use of the employees and customers. While appellant was in this passageway, in company with one of appellee's clerks, one of the sinks, weighing from 125 to 150 pounds, fell from the side of the wall, striking the appellant and injuring her.

In addition to the above facts, about which there is no dispute, a witness for the appellant, who testified that he was in the building business and had been for a number of years, and who had overhauled the building in question several times for the owner, and had also done some work therein for the appellee, testified that it was usual for sinks to be hung on the walls of the show rooms, and that two dealers in the city of Texarkana beside the appellee had their sinks suspended from the walls of their buildings, but that there was a difference in the brick in the walls of the building in which appellee did business and in modern brick, and also in the construction of the wall; that the brick used then was softer, and the mortar made without cement, while in the more modern buildings the bricks are harder, and cement used in the mortar, making the entire structure denser and more durable. Witness gave his opinion as to the cause of the sink falling, in this way: "I would say that if it fell it was on account of the wall being rotten, and when the pegs were

drove in there—just the weight hanging on those pegs—it would naturally pull out, and the brick would shell and the thing would fall down." Witness also stated that not all sinks were supported by the hooks alone; that some dealers, in exhibiting their sinks, put legs under them and some had brackets, and if supports were put under the sinks it was better than supports behind them.

Counsel for the appellee erroneously imply by their argument that the appellee was not liable unless he knew of the unsafe condition of the wall, and that the pegs driven therein could not be expected to hold. This view seems to have been the one adopted by the trial court, for in its direction to the jury it is said: "The court is of the opinion, gentlemen, that there isn't any evidence bringing home to the defendant the knowledge that this particular sink was dangerous to the plaintiff, or that she would probably be injured by the falling of the sink, or that the sink would fall. Taking that view of the evidence, gentlemen, it becomes the court's duty to instruct you to return a verdict for the defendant in the case."

For support of this view appellee apparently relies on the language used in the case of *Hobart-Lee Tire Co.* v. *Keck*, 89 Ark. 122, 116 S. W. 183, and *Alfrey Heading Co.* v. *Nichols, supra,* where the principle is laid down that the owner of premises who knows of their unsafe condition is responsible for injuries occasioned thereby to an invitee, who is ignorant of them and who is injured while using due care for his own safety. In those cases the evidence showed that the premises were unsafe, and were known to be so by the owners, and the statement declares the correct principle. However, it does not follow that the owner's liability is limited to only those cases in which he had actual knowledge of the unsafe condition of the premises, nor does the text in 45 C. J., at page 837, cited by appellee, sustain that view.

In the case of *St. L. I. M. & S. R. Co.* v. *Dooley*, 77 Ark. 561, 92 S. W. 789, the court held correct the following instruction: "If you find from a preponderance of

the evidence that the pile of ties in question was in an unsafe condition, and the agent of defendant company *was in position to observe and know that fact,* and said agent of said defendant company directed said plaintiff to unload his ties upon the pile of ties in question, and the plaintiff was using ordinary care and prudence while unloading or attempting to unload said ties, and by reason of the negligence or wrongful acts of such company, or its agents, plaintiff sustained an injury, then you will find for the plaintiff." In so holding, the court said: "The bare permission of the owner of private grounds to persons to enter upon his premises does not render him liable for injuries received by them on account of the condition of the premises. But if he expressly or impliedly invites, induces or leads them to come upon his premises, he is liable in damages to them—they using due care—for injuries occasioned by the unsafe condition of the premises, *if such condition was the result of his failure to use ordinary care to prevent it,* and he failed to give timely notice thereof to them or the public."

In *St. Louis, I. M. & Sou. Ry. Co.* v. *Gaines,* 46 Ark. 555, it was held that the presumption was that the master had furnished suitable appliances for the performance of the work, and also that he was presumed to have had no notice of the defect, *and was not negligently ignorant of it.*

From a fair consideration of all the cases, it appears that the owner of the premises is liable to the invitee for injuries resulting from a dangerous condition existing on the premises of which he knows, and the invitee does not know; and the owner is also liable for injuries resulting from defective conditions of the premises, unknown both to the invitee and himself, where the circumstances surrounding the situation are such that he could and would have known of the dangerous condition had he exercised reasonable care and foresight for the safety of those who might come upon his premises by his invita-

tion, express or implied. Applying this principle to the facts stated, we think there was sufficient evidence to warrant the submission of the case to the jury for them to say whether or not from all the circumstances in the case the appellee knew, or ought to have known, of the defective condition of the walls, and whether or not he was negligent in suspending the sinks therefrom in the manner described. Negligence, like any other issue of fact, may be established by either direct or circumstantial evidence, or by both, and in this case, from the circumstances proved, including that of the falling of the sink, the jury might have inferred negligence on the part of the appellee in hanging the sink to the wall. 20 R. C. L. 180; *St. L. I. M. & So. Ry. Co.* v. *Fuqua,* 114 Ark. 112, 169 S. W. 786; *Mo. Pac. Ry. Co.* v. *Hull,* 182 Ark. 873, 33 S. W. (2d) 406.

During the examination of witness, Walter Harris, who had qualified as an expert builder and who had testified as to intimate knowledge of the building occupied by the appellee, the following question was asked: "In putting that sink up there, could it be told by the one putting the sink up there that this wall was old and that it would shell, and that it was soft brick?" The expected answer was that one putting up this particular sink at that place in the building, of this weight could have told by the slightest testing of these wooden pegs that they were not securely driven into the wall and could not be so driven. The question was objected to, and the objection was sustained. We think it was a proper question, and that the court should have permitted it to be asked and answered. The testimony shows that the witness had qualified as an expert, that he had an intimate knowledge of the building in question, and was qualified to give the opinion asked. *Collinson* v. *Kirtner,* 141 Ark. 132, 216 S. W. 1059, 8 A. L. R. 760; *K. C. So. Ry. Co.* v. *Henry,* 87 Ark. 452, 112 S. W. 967.

Much of the briefs of counsel are devoted to a discussion of the applicability of the doctrine of *res ipsa*

loquitur to the instant case. Any discussion by us of that doctrine would be merely in anticipation of what the court might or might not rule. Therefore it is unnecessary for us now to comment on the argument or decisions cited by counsel in their discussion of that doctrine.

The trial court erred in directing a verdict for the defendant. The case should have been submitted under proper instructions for the determination of the issues raised by the pleadings and testimony. For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

IN RE SMITH.

Opinion delivered June 15, 1931.

Oscar Barnett, for appellant.

PER CURIAM. Mrs. Stella Smith, by her attorney, asks this court to compel her husband, Filus Smith, to deposit in the registry of the court a sufficient sum of suit money, including costs and attorney's fees, to enable her to perfect an appeal from the Hot Spring Chancery Court, in which her complaint for divorce was dismissed for want of equity.

We have uniformly held that this court has the power, pending an appeal in a divorce proceeding, to make an order allowing the wife costs and suit money as an incident to the appellate jurisdiction in this court. We have also uniformly held that this court has no appellate jurisdiction until there is filed with the clerk of the court a certified copy of the judgment or decree and the pleadings on file in the court below.

The motion of the petitioner herein is tantamount to asking a rule on the clerk to file a certified copy of the decree of the chancery court without paying the fee of eleven dollars and fifty cents required by § 2141 of Crawford & Moses' Digest. The section is a part of the Acts of 1895 fixing the salary of the clerk of the Supreme Court and for other purposes. Acts of 1895, p. 213.

Section 7 provides that the clerk of the Supreme Court, in lieu of other fees, shall be allowed and paid by the appellant, or plaintiff in error, in advance, in all civil actions and misdemeanors, a fee of $11.50, which shall include all the costs in the case, etc. The action makes no exception as to the payment of the fee in divorce cases, and neither does § 3506 of the Digest, which provides for suit money during the pendency of an action for divorce, and, in the absence of a statute allowing it, the court has no power to make any exception.

For the reason that the court has no jurisdiction until the appeal is pending here, and the appeal is not pending until the docket fee is paid and the transcript lodged with the clerk, as above indicated, the petition must be denied. In this connection it may be stated that there is no attempt to prosecute the suit as a poor person under the provisions of §§ 1850-1855 of the Digest.

Justices HUMPHREYS and MEHAFFY, JJ., dissent.

BARNETT *v.* BANK OF MALVERN.

Opinion delivered February 4, 1929.

Oscar Barnett, for appellant.

Glover, Glover & Glover, for appellee.

SMITH, J. This is the second appeal in this cause; the suit being one brought under §§ 7395 and 7396, Crawford & Moses' Digest, to recover damages for the alleged refusal and failure of a mortgagee to cancel the mortgage lien upon request so to do after the payment of the debt secured by the mortgage. *Barnett* v. *Bank of Malvern,* 176 Ark. 766, 4 S. W. (2d) 17.

The mortgagee, the defendant bank, had brought suit to foreclose a mortgage upon a lot which appellant bought subject to the mortgage. There was a decree of foreclosure, but before the sale appellant paid the mortgage debt, and the attorney for the bank caused a notation of that fact to be made upon the margin of the record of the chancery court in which the decree of foreclosure had been entered. When sued for the failure to

satisfy the mortgage lien under the provisions of the above-numbered sections of Crawford & Moses' Digest, the bank defended upon the ground that the cancellation of the decree of foreclosure by entering satisfaction on the margin of the record thereof was a substantial compliance with the requirements of the statute, and the court so instructed the jury, and, under the directions of the court, the jury returned a verdict in the bank's favor.

Upon the appeal from the judgment of the court rendered upon the verdict of the jury returned as aforesaid, we held that the statute had not been substantially complied with, and that the mortgagor, or his successor in interest, had the right to demand the indorsement of satisfaction of the mortgage upon the margin of the record where the mortgage was recorded, although satisfaction of the decree of foreclosure had been previously entered.

Upon the remand of the cause, the bank defended upon the ground that it entered satisfaction of the mortgage upon the margin of the mortgage record within 60 days after being requested so to do, and that no request to satisfy had been made prior to the institution of the suit for damages for the failure to satisfy. The case appears to have been submitted at the trial from which this appeal comes under proper instructions. The testimony on the part of the plaintiff was to the effect that the request to satisfy was made and not complied with; while that on the part of the bank was to the effect that the request was not made until after the suit for damages had been commenced. The instructions made the determination of this issue of fact decisive of the question of liability.

(1). Appellant insisted in the court below, and insists here, that he was entitled to a judgment upon the pleadings, for the reason that the opinion on the former appeal is decisive of the issues joined at the trial from which this appeal comes. Appellant is mistaken in this contention. We do not undertake to decide any issues

of fact raised in the case on the former appeal, but, inasmuch as a verdict had been directed at the first trial against plaintiff, we said on the appeal that, in determining whether he had a cause of action, we gave to the testimony in his behalf its highest probative value, and we merely decided that this testimony was legally sufficient to support a verdict in his favor.

(2). We would therefore be constrained to affirm the judgment from which the present appeal comes but for the fact that counsel for the defendant bank, in the course of his argument before the jury, said: "The satisfaction of the judgment record of the chancery court where the mortgage was foreclosed by the defendant, and as Mr. Robert Smith (the cashier of the bank) told you, was a full and complete satisfaction of any and every claim that the Bank of Malvern had against that property by reason of that mortgage; and plaintiff should not ask for any further satisfaction here." An objection to this argument was overruled by the court, and exceptions duly saved.

The argument of counsel was an improper one, as it was directly contrary to the law as declared in the opinion on the former appeal and to the instructions given at the request of the plaintiff. It was expressly decided on the former appeal that, notwithstanding the satisfaction of the decree of foreclosure, plaintiff had the right to demand that the mortgage record be satisfied also; yet counsel asserted plaintiff had no such right.

In the case of *Briggs* v. *Jones,* 132 Ark. 455, 201 S. W. 118, it was held (to quote a syllabus) that "The refusal of the trial court to correct counsel, where he has made an improper statement of the law in his argument, is tantamount to the giving of an erroneous instruction on the subject." The cases of *Bird* v. *State,* 154 Ark. 297, 242 S. W. 71, and *Davie* v. *Padgett,* 117 Ark. 551, 176 S. W. 333, are to the same effect.

For this error the judgment must be reversed, and it is so ordered.

BARNETT *v.* BANK OF MALVERN.

Opinion delivered June 15, 1931.

Oscar Barnett, for appellant.

D. D. Glover, for appellee.

MEHAFFY, J. This is the third appeal in this case. The facts are stated in the case of *Barnett* v. *Bank of Malvern,* 176 Ark. 766, 4 S. W. (2d) 17. We will not restate the facts stated in the opinion on first appeal.

The second appeal is reported *ante* p. 1030, 13 S. W. (2d) 616. The suit was brought by appellant to recover damages for alleged refusal and failure of the mortgagee to satisfy the mortgage record, upon request to do so after payment of the debt secured by the mortgage.

The attorney for the appellee, the bank, had indorsed upon the margin of the decree of the chancery court, the payment in full of the indebtedness secured by the mortgage, but this court held that this was not a compliance with the statute, §§ 7395, 7396.

In that case a verdict had been directed in favor of the bank, and the court reversed the judgment and remanded the cause for a new trial.

It was again tried, and a verdict returned for the bank, and Barnett prosecuted a second appeal. On the second appeal the judgment was again reversed, and the cause remanded for a new trial. The appellant insisted when the case was here on second appeal, that he was entitled to a judgment upon the pleadings for the reason that the opinion on the former appeal is decisive of the issues joined at the second trial, but this court held that we did not undertake to decide any issues of fact, but, inasmuch as there had been a directed verdict, we said that, in determining whether he had cause of action, we gave to the testimony in his behalf its highest probative value, and merely decided that that testimony was legally sufficient to support a verdict in his favor, and this court further said that we would be constrained to affirm the judgment but for the fact that the attorney for the bank had made an improper argument to the jury, and this was the only ground for reversing the judgment on the second appeal.

Appellant contends that on second appeal the judgment was reversed because of the improper argument and improper evidence. However, the court said that we would therefore be constrained to affirm the judgment from which the present appeal comes, but for the fact that counsel for the bank, in the course of his argument before the jury said: "The satisfaction of the judgment record of the chancery court, where the mortgage was foreclosed by the defendant, and as Mr. Robert Smith (the cashier of the bank) told you, was a full and complete satisfaction of any and every claim the Bank of Malvern had against the property by reason of the mortgage, and plaintiff should not ask for any further satisfaction here."

This court held this was an improper argument because it had been expressly decided on the first appeal

that, notwithstanding the satisfaction of the decree of foreclosure, plaintiff had the right to demand that the mortgage record be satisfied also, and the attorney in his argument had asserted that the plaintiff had no such right.

Appellant insists that the judgment in this case should be reversed because the court below permitted the introduction of the same records that were complained of in the former appeal, and permitted the same attorney to again argue, over the objections of appellant, that the satisfaction of this chancery judgment was a satisfaction of the mortgage record.

The appellant himself testified about the mortgage and the payment of it, and called the clerk and had him produce the record, not only of the deed, but of the mortgage. He also showed that the mortgage had been satisfied on the 16th day of May, by the attorney for the bank and the cashier.

It was admitted that the bank held the mortgage; that it brought a foreclosure suit, and that the appellant paid the entire mortgage debt, and the only question to be determined by the jury was whether a request had ever been made to satisfy the mortgage. The undisputed proof shows that the mortgage record was not satisfied within 60 days after the appellant testified that request was made. There is no controversy or dispute about the date when the mortgage was satisfied; there is no dispute about the payment of the money by Barnett, and the bank defended solely on the ground that no request was ever made by the appellant.

Appellant objects to the introduction of the chancery record, but the attorney stated that he only wanted to show satisfaction on the margin of the record. The appellant had introduced his checks showing payment of the amount of the judgment and the introduction of the satisfaction on the record showing that the amount of the judgment had been paid, and this evidence was not prejudicial. The trial judge repeatedly told the attorneys

and the jury that the issue to be tried was whether the appellant had requested the appellees to satisfy the mortgage record.

It is next contended by the appellant that the court permitted attorneys for the appellee to again argue to the jury that the satisfaction of the chancery judgment was a proper satisfaction of the mortgage record. This is the argument that was made at the second trial, but in the trial of the case from which this appeal comes the attorney for the appellee did not make this argument. The only argument objected to in the last trial of the case, as set out by the appellant himself, is that Mr. Glover, the attorney for the appellee, said: "And he comes in here and says that he gave notice," whereupon Mr. Barnett said: "I object to the notice," Mr. Glover said: "All right, request, then."

This is the only argument objected to and the only argument of appellee's attorney mentioned in appellant's abstract or brief. Of course this was not prejudicial; the attorney merely used the word "notice" instead of "request."

The appellant next contends that the judgment should be reversed because the court granted a continuance over the objections of appellant. The record shows that on August 5, 1929, the appellant filed a motion alleging that an order was entered on the 31st day of July, 1929, as follows: "Cause by consent continued till January term, 1930, not to be tried then unless D. D. Glover can be here at that time."

The motion was for the court to set aside this order and set the case for trial. The reasons given in the motion are: "1. That the order is contrary to the laws of Arkansas as expressed in the statute thereof. 2. Because the said order is inconsistent with the opinion of the Supreme Court of the State of Arkansas in its first opinion written in the first appeal of this cause. 3. Because the said order is inconsistent with the second opinion handed down by said court and filed herein on the second appeal in this case.

The motion does not state in what manner the order continuing the case by consent violated the laws of Arkansas or was inconsistent with the opinions of this court. The appellant did not contend in said motion that the order of continuance was not agreed to by him.

It is also undisputed that one continuance at least was had because of the sickness of the appellant. No evidence was introduced, so far as the record shows, on any of the motions, and there is no evidence in the case tending to show that the court abused its discretion in granting the continuance or that appellant was prejudiced thereby, and, in the absence of any showing or any evidence as to the circumstances, we cannot say that the court abused its discretion.

Appellant offers no explanation or evidence tending to show that the order continuing the case till October 7, the date on which it was tried, was improperly made, or that he did not agree to it.

Appellant insists that the judgment should be reversed because the court refused to give instruction No. 3 requested by him. Instruction No. 3, reads as follows: "You are told that such matters of proof introduced by the plaintiff, as revealed by the deed records, mortgage records and court records, cannot be controverted, disputed or denied by the defendant, and you must accept such matters of record as conclusive evidence of the facts as revealed by them.

"You are further instructed that the purpose of the law (§ 7396 of C. & M. Digest) is not only to award compensatory, but also exemplary, damages as a punishment against the mortgagee for refusing to comply with the request or demand of the mortgagor to satisfy the mortgage on the record. A substantial recovery was intended in such cases. However, in this case your verdict must be not more than $500 in favor of the plaintiff."

This instruction was erroneous in telling the jury that they must accept matters of record as conclusive evidence of the facts as revealed by them, and it was also

erroneous in telling the jury that a substantial recovery was intended in such cases.

The statute provides that if any person receiving satisfaction does not, within 60 days after being requested, acknowledge satisfaction, etc., he shall forfeit to the party aggrieved a sum not exceeding the amount of the mortgage money. The amount to be recovered is to be fixed by the jury, and it was not proper for the court to tell the jury there must be a substantial amount.

The evidence of appellant's damages was sufficient to support a verdict for a substantial amount if the jury had found in his favor, but it was the province of the jury, if they found for him, to determine the amount, and it would have been error for the court to have instructed them that their verdict must be for a substantial amount.

The court fully and fairly instructed the jury in instructions not objected to by the appellant. The only issue in the case was whether a request had been made as contended by the appellant for the satisfaction on the mortgage record. The appellant testified very positively that he made the request at a time when the president of the bank was passing his office. The appellant is corroborated by Mr. W. W. Dyer, who testified that he heard appellant ask Mr. Smith, the president of the bank, if he had received his money. He said this was on the 12th of March. The evidence introduced by appellee tended to show that no request had ever been made. Mr. Smith testified very positively that the appellant never made any such request at any time. Other witnesses connected with the bank testified that no request was ever made, but that is unimportant because the appellant does not claim to have made a request of anybody except the president.

No recovery is provided for until a request to acknowledge satisfaction has been made, and then the person receiving satisfaction has 60 days within which to acknowledge satisfaction. Section 7396, Crawford & Moses' Digest.

The evidence as to whether the request was made is in conflict.

"Wherever there is conflict in the testimony, it is the province of the jury to pass upon the weight of the evidence and the credibility of the witnesses; and, even if it appear that the verdict is contrary to the preponderance of the testimony, this furnishes no ground for reversal." *Armour Co.* v. *Rose, ante* p. 413; *Ark. P. & L. Co.* v. *Cates,* 180 Ark. 1003, 24 S. W. (2d) 846; *Hyatt* v. *Wiggins,* 178 Ark. 1085, 13 S. W. (2d) 301; *S. W. Bell Tel. Co.* v. *McAdoo,* 178 Ark. 111, 10 S. W. (2d) 503; *Ark. P. & L. Co.* v. *Orr,* 178 Ark. 329, 11 S. W. (2d) 761; *Mo. Pac. Rd. Co.* v. *Edwards,* 178 Ark. 732, 14 S. W. (2d) 230; *Western Union Tel. Co.* v. *Downs,* 178 Ark. 933, 12 S. W. (2d) 887; *Wright* v. *State,* 177 Ark. 1039, 9 S. W. (2d) 233; *Turner* v. *State,* 109 Ark. 138, 158 S. W. 1087; *People's Bank* v. *Brown,* 136 Ark. 517, 203 S. W. 579; *Harris* v. *Wray,* 107 Ark. 281, 154 S. W. 499; *Gazola* v. *Savage,* 80 Ark. 249, 96 S. W. 981.

The question whether or not a request had been made having been properly submitted to the jury, and there being substantial evidence to support the verdict, this court will not reverse.

The judgment is affirmed.

GERIG *v.* FURR.

Opinion delivered June 15, 1931.

Buzbee, Pugh & Harrison, for appellant.

W. D. Swaim and *McMillan & McMillan,* for appellee.

BUTLER, J. This action was brought in the Clark Circuit Court by the appellee to recover damages for injuries sustained by him while in the employ of the appellant. The alleged cause of negligence was the failure of the appellant to provide a reasonably safe place in which appellee might do his work.

The appellee recovered judgment in the court below and on appeal here it is, among other things, insisted that the evidence was insufficient to establish negligence on the part of the appellant.

Appellant is a partnership, which at the time of the injury was engaged in building a bridge across the Caddo River bottom. In this construction work it employed a large number of men among whom was the appellee, who, while in the performance of his duties on the 29th of July, 1930, fell and was severely injured.

The evidence is conflicting, but that most favorable to the appellee may be thus stated. Appellee was engaged with four or five others in tying long steel rods with small wire into bundles. These bundles were to be used in reinforcing concrete pillars upon which the bridge when completed was to rest. How long appellee had been in the employ of the appellant is not certain; he stated "for several days" before the date of the injury. Appellee was a man about fifty years of age whose chief occupation was that of tenant farmer, but at intervals he did other work. His son was his regular foreman, but on this day one Dave Yates had been left to act as foreman in his place. The right-of-way which led to the construction work and at the point of the injury was 130 feet

wide. A small concrete mixer was used in mixing concrete for pouring into forms for pillars, and this for convenience would be located near the point where a pillar was to be erected, and when one pillar was cast the mixer would be moved a short distance where another pillar was to be set and so on, being moved at frequent intervals ranging from one or two days to as short as a few hours apart. When the mixer would be set in place, three 2x4s about 12 feet long would be laid by its side and across these scantling planks 2x12 inches in width and of varying lengths from 8 to 12 feet, would be laid, thus forming a low platform about two inches in height from the surface of the ground. The purpose of this platform was to form a fairly level and firm surface on which carts or "buggies" carrying material from the mixer to the form into which it was to be poured might be easily rolled. When the mixer would be moved, the planks and 2x4s would be taken up and placed by the mixer in its new position. The proper way to make this platform was to place the 2x4s on the ground and the planks across them without nailing. When the platform was laid upon which appellant afterwards stumbled and fell, the employees who were laying it began to nail the planks to the 2x4s. The general foreman noticing this, directed them not to nail the planks saying, "Don't nail them—we will have to use them over and over, and it is not necessary any way." At the time of the injury to appellee the concrete mixer was sitting about the center of the right-of-way with the above-described platform resting immediately by and west of it. Appellee was at work tying the steel rods in "a little yard" on the side of the right-of-way 200 feet northeast of the mixer. He had previously been doing the same work at a point on the side of the right-of-way southwest of the concrete mixer and had left some small wire at this point. While tying the rods northeast of the mixer, he and his coworkers had used all the small wire there, and Yates told him to go and get more wire. "You know where it is."

In obedience to this direction, Furr left the point of his work and started diagonally across the right-of-way to the point at which he had been at work before and at which he had left the wire. The direction he took led him immediately to the above-described platform, and, as he was in the act of stepping upon it, another employee, who, with three others, was carrying an empty form, stepped upon the end of one of the planks which projected from the 2x4s, causing it to rise above the level of the floor. Appellee struck his foot at the instep against this and fell heavily upon the platform, severely injuring him. On the east side of the platform was a sand pile and gravel and some long pine poles used in the "false work" of construction, and on the west side of the platform were some forms. These forms were about 24 inches square and required from two to four men to carry them. In making his way down and across the right-of-way the most convenient route for appellee to take was to and across the platform; otherwise he would have to cross over the pile of sand and gravel on the east or the empty forms on the west or detour on the right-of-way so as to avoid them. It was the usual thing for employees to walk across the platform, and appellee himself had walked across it several times, twice on the morning before his injury. He had not helped build the platform, nor had he seen any of them built, and he did not know how they were constructed.

It is our opinion that the above facts do not constitute actionable negligence on the part of the appellant. While it was the duty of appellant to exercise ordinary care to see that the premises were reasonably safe for the purposes contemplated, they were not insurers of appellee against the natural and ordinary risks incident to the performance of his duties, and in the exercise of ordinary care the appellant was only obligated to provide against those contingencies which might be expected by an ordinarily careful and prudent person. It is true, the accident might not have happened had the

planks been nailed to the 2x4s, but can it be said, when the situation of appellee with reference to the nature of his work and the uses for which the platform was constructed are considered, that such an accident might have been reasonably anticipated by one of ordinary experience and sagacity, and could such a one have reasonably foreseen that the result which did happen might occur? We think not.

The case of *Oak Leaf Mill Co.* v. *Littleton,* 105 Ark. 392, 151 S. W. 262, relied on by the appellee, presents an entirely different situation to that of the instant case. In that case the platform on which the injury occurred was the place for the performance of the duties of the injured servant on which heavy logs were placed to be rolled down by the servant as need required. Two of the planks were unfastened, and the injury was caused by a log on which there was a knot rolling over the unfastened plank, the knot striking the plank, causing it to fly upward. In that case the court held that it was a question for the jury whether such an accident might reasonably have been anticipated and foreseen in the light of the attendant circumstances. But in the case at bar the platform had no connection with any of the duties appellee was called upon to perform. Its sole purpose was for the use of the concrete "buggies," it was but two inches above the surface of the ground, and was constructed in the customary manner which construction was necessary as the use of such platform at any one place was temporary. It had to be moved frequently and used, as stated by the foreman, "over and over again." The evidence is undisputed that the platform was properly constructed for the use for which it was intended, and there was no fact or circumstance in the history of the use of such platform, or any such attending its location at any time, which could have caused a man of ordinary intelligence and experience to have reasonably foreseen the occurrence of the accident from which appellee suffered or any similar accident.

As said in *LaGrand* v. *Arkansas Oak Flooring Co.*, 155 Ark. 585, 592, 245 S. W. 38, "If the master, in the exercise of ordinary care to furnish a safe place and tools, could not have reasonably anticipated or foreseen that the injury could have occurred as it did, then he is not negligent if he fails to provide means to prevent it." *Ultima Thule Arkadelphia, etc. Ry. Co.* v. *Benton,* 86 Ark. 289, 110 S. W. 1037; *Pittsburg Reduction Co.* v. *Horton,* 87 Ark. 576, 113 S. W. 647; *Saxon* v. *Barksdale,* 168 Ark. 976, 272 S. W. 647; *Covington* v. *Little Fay Oil Co.,* 178 Ark. 1046, 13 S. W. (2d) 306; *Ault* v. *McGaughey,* 173 Ark. 322, 292 S. W. 359.

It follows that the trial court erred in refusing to direct a verdict for the defendant as requested, and, as the case appears to have been fully developed, the judgment is reversed, and the cause dismissed.

AMERICAN EXCHANGE TRUST COMPANY *v.* TRUMANN SPECIAL SCHOOL DISTRICT.

Opinion delivered May 4, 1931.

Wallace Townsend, for appellant.

J. Brinkerhoff, for appellee.

KIRBY, J., (after stating the facts). The law is well settled that school districts are not only authorized to exercise the powers that are expressly granted by statute, but also such powers as may be fairly implied therefrom, and from the duties which are expressly imposed upon them, and such powers are implied when the exercise thereof is clearly necessary to enable them to carry out and perform the duties legally imposed upon them. *Andrews Company* v. *Delight Special School District,* 95 Ark. 26, 128 S. W. 361.

It is also true that all special school districts in the State are authorized and impowered, for the purpose of raising funds for the erection and equipment of necessary school buildings, to borrow money and mortgage the real property of the district for the security thereof as provided by statute. Sections 8977 and 8978, Crawford & Moses' Digest. The later section provides the form for the evidences of indebtedness, either warrants or notes, the effect thereof, and that, if warrants are issued, "they may be drawn payable in the future and need not be registered with the county treasurer until the time for payment, but shall be drawn upon the building fund and paid out of it in the order of their date after the building fund is provided and collected by the successive levy and collection, and said special school district shall be allowed in law or equity no defense merely by reason of the fact that it is a school district." This statute also provides that, should any school district desire to borrow money or issue bonds or other evidences of indebtedness, etc., it shall be done after advertising for bids for sale of the bonds, etc. Under this statute the districts are given power to issue warrants on the treasurer payable in future as evidences of indebtedness for money borrowed and secured by mortgages upon the real property of the

district, but only such warrants as "shall be drawn upon the building fund and paid out of it in the order of their date, as the building fund is provided and collected by the successive levy and collection, etc."

There is no doubt but that the board of directors could provide a building fund for the payment of bond issues for money borrowed by the district, but the statute does not require that it shall be done, except when warrants payable in future are issued as evidences of indebtedness for the money borrowed. This court held, in construing a special act authorizing the borrowing of money by a special school district which provided that the evidences of indebtedness issued by the district shall be "paid out of the building fund in the order of their date after the building fund is provided and collected by successive levies," that it pledged in effect "the building fund" of the district, the bonds containing such recitals, to the payment thereof; but held also that the bonds were valid obligations of the district, and it was evidently the intention of the Legislature that they should be paid out of the revenues of the district "and are therefore a charge against such revenues." *Schmutz* v. *Special School District of Little Rock,* 78 Ark. 119, 95 S. W. 438. The board of directors could not have limited the liability of the district to the payment of the bonds out of the revenues set aside for "the building fund," if one had been provided, since they were and are a charge against the whole revenues of the district.

No error was committed, however, by the court in refusing a mandamus to compel the special district to set aside revenues into a building fund for the payment of the *unmatured* bonds, maturing, and as they matured. The trustee had no duties to perform, except in foreclosure of the mortgage, if it became necessary, and no error was committed in refusing to allow the trustee expenses including a reasonable attorney's fee. Attorney's fees cannot be allowed as costs in suits, except as provided by statute, the same being regarded as a provi-

sion for a penalty and not to be enforced in the State courts. *Boozer* v. *Anderson,* 42 Ark. 157; *Federal Land Bank of St. Louis* v. *Craig,* 176 Ark. 381, 3 S. W. (2d) 34; p. 345, Hughes on Arkansas Mortgages, § 114. The case is easily distinguished from *Williams* v. *Prioleau,* 123 Ark. 156, 184 S. W. 847, relied upon by appellant.

It follows that the chancellor's decree was correct, and it is in all things affirmed.

SMITH and BUTLER, JJ., dissent.

KRUMPEN *v.* TAYLOR.

Opinion delivered June 8, 1931.

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George C. Lewis, for appellant.

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

HART, C. J., (after stating the facts). At the outset it may be stated that, under our statute regulating the liquidation of insolvent banks, orders for sales of the assets of an insolvent bank may be made and confirmed by the chancery court in vacation without notice. Section 720 of Crawford & Moses' Digest; and Supplement to Crawford & Moses' Digest by Castle, § 719; Acts of 1921, p. 514; *Barham* v. *Crittenden County Bank,* 170 Ark. 77, 278 S. W. 696. This holding was recognized and approved by the court in *State use of Crawfordsville Special School District* v. *Huxtable,* 178 Ark. 361, 12 S. W. (2d) 1.

Without regard to whether the sale of the assets of the insolvent bank to the new bank was improvident or not, the sale should not have been confirmed because the new bank was organized in violation of the provisions of our Constitution regulating the organization of private corporations. Article 12, § 8, of our Constitution provides that no private corporation shall issue stocks or bonds except for money or property actually received or labor done. The interveners offered to prove that practically all of the stock issued by the new bank was paid for in checks by the subscribing stockholders against funds held by them in the insolvent bank. The court

erred in refusing to admit the excluded evidence; for its admission would have shown that subscriptions for stock in the new bank were to be paid by the subscribing stockholders in checks given by them upon the funds owed them by the insolvent bank. This was a palpable evasion of the provision of the Constitution above referred to. This court has uniformly held that under the Constitution of 1874, article 12, § 8, prohibiting the issuance of stocks by private corporations except for money or property actually received, a note given to such a corporation for the purchase of stock in it is void. *Bank of Commerce* v. *Goolsby,* 129 Ark. 416, 196 S. W. 803; *Bank of Dermott* v. *Measel,* 172 Ark. 193, 287 S. W. 1017; and *Bank of Manila* v. *Wallace,* 177 Ark. 190, 5 S. W. (2d) 937.

The depositors of the insolvent bank were creditors of it, and the payment by them of subscribed stock in the new bank by checks on the funds owned by them in the insolvent bank could in no sense be called a compliance with the Constitution. It was a plain violation of the constitutional provision referred to to pay their stock subscriptions in the new bank by checks given on the insolvent bank for money due them by it. The sale of the assets of an insolvent bank to a new bank which was not legally organized could not be a valid sale and binding upon the depositors and creditors of the insolvent bank. The excluded evidence would have shown that the new bank was not organized according to law; and the chancery court therefore erred in approving and confirming a sale of the assets of the insolvent bank to it.

Therefore, the decree will be reversed, and the cause will be remanded for further proceedings in accordance with this opinion, and in accordance with the principles of equity. It is so ordered.

HART, C. J., (on rehearing). This is a plain case confused by much argument on the motion for a rehearing. As will be seen from the sections of the statute cited in our orginal opinion and our decisions construing

them, an order of the chancery court is necessary for a sale of the assets of an insolvent bank by the State Bank Commissioner. The order of approval of the chancery court is a prerequisite before any sale of the assets of a bank in the hands of the State Bank Commissioner for liquidation can be made. The Commissioner may negotiate the terms of sale, but it is the decree of the chancery court which gives effectiveness to the contract. In so far as the assets and property of the insolvent bank were concerned, the State Bank Commissioner must act under the order of the chancery court, and is, in this respect, the arm of the court as though acting as receiver under the appointment of the court.

Recognizing this to be the law, the attorneys for the State Bank Commissioner filed a petition in the chancery court asking that the court ratify and confirm a sale of the assets of the insolvent bank pursuant to certain negotiations which were exhibited with the petition. In the petition it is alleged that a new bank has been organized for the purpose of purchasing the assets of the insolvent bank, said new bank having a capital stock of $75,000, which has been fully paid in cash. The interveners replied that they had no knowledge of a bank having been organized with a capital stock of $75,000, but they denied that said capital stock had been paid in cash or that any part of the same has been paid in cash. It was stipulated between the parties that a list of depositors who became stockholders in the new bank need not be copied in full in the transcript, but that same shows an aggregate subscription to the stock of the new bank in the sum of $78,452.32, divided among 465 stockholders.

We also copy from the record the following:

"The petitioners, L. Krumpen, Sr., and others, hereby offer to prove that practically no cash has been paid into the so-called new bank, but that its capital has been made up of checks given against funds held by depositors in the failed bank.

"John Moncrief: We object to that testimony.

"The court declined to permit the introduction of testimony to that effect.

"To which ruling the petitioners excepted at the time."

We held in our original opinion that the chancery court erred in not allowing appellants to introduce the offered proof in evidence, and said that the offered proof tended to show that the bank was not legally organized. We did not mean to say that the Bank Commissioner could not contradict the offered evidence.

In addition to what we said about the Constitution requiring the capital stock of corporations to be paid in cash or in property received or in labor done, we call attention to the provisions of our bank law on the subject. Section 677 of Crawford & Moses' Digest and § 677 to Castle's Supplement. It can be seen from reading these sections that it is not contemplated that a new bank shall be authorized by the Commissioner until the capital stock subscribed is paid in. It may be true, as contended by counsel for appellee, that none but the State can call in question the organization of the new bank. The fact that the State may do so is a good and sufficient reason why the chancery court should not have confirmed the sale of the assets of the insolvent bank to the new bank unless the new bank was organized according to law. The creditors of the insolvent bank would be without remedy if they did not attack the sale of the assets of the insolvent bank to the new bank; for, if the order of the chancery court confirming the sale should become final, then any attack after that would be a collateral one unless the order of the chancery court confirming the sale was void on its face.

That is not the case here. The issue before the chancery court was whether or not the sale was a provident one; and, as bearing on that question, appellants offered to prove that practically no cash had been paid into the new bank, and that its capital had been made up by checks given against funds held as depositors in the insolvent

bank. The Bank Commissioner stood in the shoes of the insolvent bank, and questions of offset might come up, and it was a material and pertinent question for the chancery court to decide whether capital stock in the new bank had been actually paid in. It was proper for the chancellor to consider the evidence bearing on this question. On the one hand, the interveners might substantiate their contention that the capital stock was not paid in, and, on the other, the Bank Commissioner might contradict it by showing that the capital stock had been paid. It was the duty of the chancellor to consider all the facts and circumstances attending the sale in order to determine whether it was a provident or improvident sale. Otherwise, the whole matter might just as well have been placed exclusively in the hands of the State Bank Commissioner. If the approval of the chancery court was absolutely required for a valid sale of the assets and property of the insolvent bank, it necessarily follows that the chancery court is vested with some discretion in the matter. The Bank Commissioner may negotiate the terms of the sale, but it is the order of the chancery court which gives effectiveness to the contract.

An appeal was taken to this court from an order of the chancery court approving the sale. Chancery cases are tried *de novo* on appeal, and this is a direct and not a collateral attack on the decree of the chancery court. Upon a remand of the case, the whole matter will be before the chancery court anew, and it will become its duty to hear all evidence bearing on the question whether the sale was a provident or an improvident one, and in determining this question, evidence as to whether or not the subscribed capital stock of the new bank was actually paid in is material and relevant to the issue.

Therefore, the petition for rehearing will be denied.

DELONEY *v.* DILLARD.

Opinion delivered June 15, 1931.

James S. McConnell, for appellant.

Feazel & Steel, for appellee.

HART, C. J., (after stating the facts). It is a well settled principle of equity jurisprudence in this State that wherever at the time of sale a vendor of land is indebted to the purchaser and continues to be indebted to him after the sale with the right to call for a reconveyance upon payment of the debt, a deed absolute on its face will be construed by a court of equity as a mortgage. Evidence, written or oral, is admissible to show the real character of the transaction. The law presumes that a deed absolute on its face is what it appears to be, and the burden is on the one claiming it to be a mortgage to overcome this presumption by clear, unequivocal and convincing evidence. *Harman* v. *May,* 40 Ark. 146; *Hays* v. *Emerson,* 75 Ark. 551, 87 S. W.

1027; *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023; *Naill* v. *Kirby,* 16 Ark. 141; *Matthews* v. *Stevens,* 163 Ark. 157, 259 S. W. 736; *Bolden* v. *Grayson,* 167 Ark. 180, 266 S. W. 975; *Bailey* v. *Frank,* 170 Ark. 610, 280 S. W. 663; and *Tribble* v. *Tribble,* 173 Ark. 561, 293 S. W. 705.

In the present case, the deed and agreement in question bore the same date; they relate to the same subject-matter; they were executed by the same parties, and the agreement by positive and direct expression refers to the deed as a part of it. Therefore, they can both be considered as one instrument in construing the contract between the parties and, when so construed, constitute a mortgage. *Vaugine* v. *Taylor,* 18 Ark. 65; *Belding* v. *Vaughan,* 108 Ark. 69, 157 S. W. 400, and cases cited; and *Mechanics' Lumber Co.* v. *Yates American Machine Co.,* 181 Ark. 415, 26 S. W. (2d) 80.

When thus considered, it is plain that, when the two instruments are considered together as the parties covenanted and intended that they should be, they are a mortgage and should so be considered by a court of equity. This view is strengthened when we consider the testimony of I. L. DeLoney copied in our statement of facts. He was asked the direct question, whether he had ever paid Hillie Davis the $750 he had borrowed from him on the land. He replied that he did not because he had not had it to pay. There is nothing whatever in the record to contradict this evidence, and we think the chancery court correctly held that it was established by clear, convincing, and satisfactory evidence that the deed and agreement constituted an instrument which was a mortgage.

It is next insisted that the judgment creditors could not levy on the land because it constituted the homestead of I. L. DeLoney. Even if it could be said that I. L. DeLoney attempted to impress the land with the character of homestead, we do not think that could affect the lien of the judgment creditors because he did not attempt to occupy the land as a homestead until after

the recovery of the judgments against him by the plaintiffs in this action. The lien attached when they recovered their judgments against him because the land was situated in the same county where they recovered their judgments, and their liens could not be displaced by DeLoney moving on the land and impressing it as a homestead after the liens attached. *Simpson* v. *Biffle*, 63 Ark. 289, 38 S. W. 345; *Burgauer* v. *Parker*, 69 Ark. 109, 61 S. W. 381; and *Cazort & McGehee Co.* v. *Byars*, 104 Ark. 637, 150 S. W. 109.

J. L. Deloney executed the mortgage on the land before Cecil Deloney was married to him. Her husband's estate in the land was subject to be converted into personalty by a foreclosure sale under the mortgage. She could not, after a foreclosure and a conversion of the estate into money, share in the surplus, if any, of the proceeds of sale.

On the question of jurisdiction of the chancery court, but little need be said. The principle which underlies the doctrine herein applied is peculiarly one of equitable cognizance. The reason is that it would be a virtual fraud for the grantee to insist upon the deed as an absolute conveyance of the title when the parties intended it to be security for a debt and therefore in reality a mortgage; and this is the view of the court in the cases above cited.

It follows that the decree of the chancery court must be affirmed.

COLLIER *v.* STATE.

Opinion delivered June 22, 1931.

Cotton & Murray, for appellant.

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

HART, C. J. M. W. Collier prosecutes this appeal to reverse a judgment of conviction under § 743 of Crawford & Moses' Digest prohibiting overdrafts. The statute reads as follows:

"It shall hereafter be unlawful for any individual, corporation or association of individuals, resident or doing business in this State, to make or give check or draft on any account in any bank or trust company or on any person, firm or corporation, on which the said individual, corporation or association of individuals, shall not have full authority to check or draw such draft or check, or, having such authority, to make any check or draft upon an account in any bank, savings bank or trust company, when there shall not be sufficient funds therein to cover the same, unless they shall have made prior arrangements with said bank, savings bank, or trust company for said check or overdraft; provided, however, that if any individual, corporation or association of individuals, shall, when notified of such draft or check, immediately make a deposit to cover the same, they shall not be subject to the provisions of this act; provided further, that checks or drafts given where said individual, corporation or association of individuals, have had no checking account in said bank shall not come under the provisions of this act."

The first assignment of error is that the judgment must be reversed because the court erred in not sustaining a demurrer to the indictment on the ground that the indictment was fatally defective because it did not contain an averment that the defendant was notified that the check had not been paid. The rule in this State is 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. The reason is that it is a general rule of evidence that where the negative of an issue does not permit direct proof, or where the facts come more immediately within the knowledge of the defendant, the burden of proof rests upon him. *Cleary* v. *State,* 56 Ark. 124, 19 S. W. 668; *Richardson* v. *State,* 77 Ark. 321, 91 S. W. 758; *Starr* v. *State,* 165 Ark. 511, 265 S. W. 54; *Thomas* v. *State,* 181 Ark. 316, 25 S. W. (2d) 424. See also Acts of 1929, vol. 2, page 1309, for the present law. The exception in the present case being contained in a proviso, and not in the enacting clause of the statute, it was unnecessary to negative the exception in the indictment. Facts bringing the defendant within the exception of the statute are matters of defense which he must prove. Therefore we are of the opinion that the court properly held the indictment to be a valid one.

The next assignment of error is that the evidence was not legally sufficient to sustain the verdict. According to the testimony of Sid Martin, about the 9th day of January, 1925, he sold some cattle to M. W. Collier, and the latter gave him a check on the Bank of Hollister at Hollister, Missouri, for $310. The check was given and the transaction occurred in Baxter County, Arkansas. Martin indorsed the check and deposited it with his local bank in Arkansas for collection. In due course, the check was received by the Bank of Hollister and was duly protested by it because M. W. Collier had no funds with

which to pay it. As soon as Martin received notice of protest, he went in person to the bank and presented the check to it for payment. He was informed by the bank officers that Collier did not have any money there. Martin then went to the home of Collier and was told by his wife that he was not there. Upon making further inquiry, he was informed that Collier had left the country. Martin did not see Collier any more for more than two years. Collier told him that he knew the check had not been paid, and promised to pay it. Collier claimed that the bank had violated its agreement with him. Collier gave other checks for cattle which he purchased in Baxter County, Arkansas, and they were also turned down.

It is earnestly insisted that this evidence did not warrant a conviction because it does not affirmatively show that Collier was notified that the draft was not paid by the bank upon presentation so that he might make a deposit to cover same. As we have already seen, it was unnecessary for the State to negative the exception in the indictment and proof. When the State made a *prima facie* case by proving that the check was given by the defendant and was not paid by the bank upon which it was drawn, the burden was then on the defendant to show that no notice was given him, so that he might have immediately made a deposit to cover it.

Besides this, the testimony of Martin, inferentially at least, shows that Collier knew that the check had not been paid and would not be paid. After Martin received notice of the protest of the check, in due course of mail, he went to the home of the defendant to inquire about the matter and found that the defendant had left the country immediately after giving the check. He did not return until two or three years thereafter. Considering all the facts and circumstances proved in the case, we cannot say that the jury was not warranted in returning a verdict of guilty against the defendant. Therefore the judgment will be affirmed.

RIVERSIDE LAND COMPANY *v.* BIG ROCK STONE & MATERIAL COMPANY.

Opinion delivered June 22, 1931.

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Frauenthal, Sherrill & Johnson and *Donham & Fulk,* for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

HART, C. J., (after stating the facts). Counsel for appellant seek a reversal of the decree under the common-law rule adhered to by this court that a tenant under a lease for a term of years by holding over at the end of the term without any new agreement, and paying rent according to the terms of the lease, which has been accepted by the lessor, becomes a tenant from year to year. *Belding* v. *Texas Produce Co.,* 61 Ark. 377, 33 S. W. 421; *Lamew* v. *Townsend,* 147 Ark. 282, 227 S. W. 593; and *Jonesboro Trust Co.* v. *Harbough,* 155 Ark. 416, 244 S. W. 455.

We do not think the principle of law announced in these cases has any application under the terms of the lease under consideration. In these cases the leases were for a fixed term, and contained no provision looking to their renewal or the extension of their term. Here the parties provided for the continuance of the lease upon the compliance with certain conditions prescribed therein. This distinction is expressly recognized in *Lamew* v. *Townsend, supra.*

This court has also recognized that there is a difference between a stipulation for the renewal of a lease and one for its extension. The reason is that where a renewal is provided for, a new lease should be executed or at least the lessee should do everything required of him to procure the execution of a new one so that the failure of

the lessor to execute a new lease would work an estoppel against him. In the case of an extension clause, the execution of a new lease is not necessary, and the parties continue under the provisions of the original lease by complying with the extension agreement. *Neal* v. *Harris,* 140 Ark. 619, 216 S. W. 6; and *Keith* v. *McGregor,* 163 Ark. 203, 259 S. W. 725. Other cases recognizing and upholding this principle by this court might be cited, but the question is so well-settled in this State that we deem it unnecessary to do so.

Counsel for both parties in this case have called our attention to numerous decisions of courts of last resort of other States upon the question, but for the same reason we do not deem it necessary to cite or review them. Most of them may be found under the case notes to 29 L. R. A. (N. S.) 174, and 64 A. L. R. 316.

Where no notice of extension to be given by the lessee is provided for in the lease itself, the lessee, by retaining possession of the premises after the expiration of the terms of the lease, will be deemed to have elected to renew or extend it according to the terms of the lease. *Hays* v. *Goldman,* 71 Ark. 251, 72 S. W. 563.

Where a lease provides that the lessee shall have the privilege of renewing the lease or extending its provisions upon giving notice for a certain length of time before the termination of the lease, the giving of such notice constitutes a condition precedent, upon the nonperformance of which the right of renewal or extension of the lease may be forfeited. *Bluthenthal* v. *Atkinson,* 93 Ark. 252, 124 S. W. 510. That case also holds that, where the form of the notice is not prescribed in the lease, it may be given verbally. The court also expressly recognized in that case, although the giving of the notice was a condition precedent, it might be waived by the parties. The court held that under the facts of that particular case, however, there was no waiver.

In an extensive case note to 64 A. L. R. 316, it is said that the general rule is that where a lessee, having

a privilege of extending the lease, holds over, even without any notice to the lessor of his election to extend the lease for a further term, his holding over constitutes an election so to extend, and he is entitled as against the lessor to hold for a further term. Among the cases cited in support of the rule is *Lamew* v. *Townsend,* 147 Ark. 282, 227 S. W. 593. To the same effect see 16 R. C. L. 894.

In the case at bar, the lease prescribed as a condition precedent to the exercise of the right by the lessee to extend the lease the giving of notice in writing within a specified time before the expiration of the first term of the lease, and such condition must be complied with or it must be waived by the lessor. There is no contention in the present case that this condition was complied with; but it is strongly insisted that the compliance with such condition was waived by the lessor. Other cases holding that provisions of this sort with regard to the giving notice for the extension of the lease may be waived by the parties are the following: *Kramer* v. *Cook,* 7 Gray (Mass.) 550; *Long* v. *Stafford,* 103 N. Y. 274, 8 N. E. 522; and *Probst* v. *Rochester Steam Laundry Co.,* (New York) 64 N. E. 504.

It is plain from reading the case of *Bluthenthal* v. *Atkinson,* 93 Ark. 252, 124 S. W. 510, that where the lease provides that the tenant must give notice of his intention to renew or extend the lease, a failure to give such notice within the required time will justify the landlord in treating the lease as not extended or renewed. It is equally plain from the opinion in that case that the lessor may waive such notice, and that he will be treated as having done so where the facts warrant it.

Bearing in mind these settled principles of law, we now come to the question whether the chancery court was justified in finding under the facts that the written notice for an extension of the lease was waived by the parties. Under the provisions of the lease, the parties contemplated that the term of ten years provided in the lease might be extended by repeated exercise of the power

given by the lease until the whole term amounted to ninety years. It is true that no notice in writing was given by the lessee under the terms of the lease before the expiration of the first term. It is equally certain that the parties contemplated an extension of the lease.

The business to be carried on upon the leased premises was that of excavating sand from the bed of the Arkansas River, storing it in bins, and shipping it over the tracks of an adjacent railroad. The leased premises only contained 4½ acres of land. This was sufficient for the purpose. The sand is taken from the bed of the Arkansas River by extensive machinery erected for that purpose, stored in the bins on the leased premises, and then carried by switch tracks on the leased ground to the right-of-way of an adjacent railroad.

The original lessee was Mord Roberts, who, pursuant to a provision of the lease, assigned it to a corporation of which A. C. Butterworth was president. The latter gave as an excuse for not complying with the provisions of the lease as to notice that he thought from what Roberts had told him that the lease was for ninety years, and that the provision only related to the appraisal which fixed the rental value of the property. In any event his company continued the operation of the plant after the expiration of the first ten-year period and continued to pay the rent under the terms of the original lease. This showed that the lessee expected to extend the lease under its terms; for he will be presumed to have known what the provisions of the lease were. On the other hand, the fact that the lessor accepted the rent knowing that the lease had a clause looking to an extension of its provisions under certain terms tended to show that it did not intend to assert its right of forfeiture but waived its right to declare the lease at an end.

This view is made manifest by the conduct of the parties. It seems that Butterworth had charge of the matter for appellee and Wright for appellant. Butterworth approached Wright about the matter at a club

house of which they both were members. They continued to negotiate about the extension of the lease generally with regard to the new rental for more than a year after they first took up the matter. Wright told Butterworth that his company had been offered a rental of $75 a month. During the latter part of 1921, Butterworth accepted this proposal for the new rent for the balance of the second ten-year period. Thereafter, he continued to pay rent in that amount, and appellant continued to accept it for the balance of the second ten-year period. The question of the lease being terminated at the end of the first ten-year period did not come up again until appellee gave the notice for a second extension near the end of the second ten-year period. This of itself showed that the parties considered that the lease had been extended by fixing a new monthly rental contract to begin in January, 1922. It will be remembered that the lease expressly provided for an extension of the term for successive ten-year periods until the full term of ninety years was reached by giving the written notice and appointing appraisers to fix the rental value for the new extension period.

Butterworth testified that Wright agreed to an extension of the lease at a monthly rental of $75 per month in advance beginning from the first day of January, 1922. Wright also testified that he thought this new rental was for an extended time of the lease. He was asked the specific question if it was for the remaining period or the next ten-year term, and replied, "Yes." It is true that the two remaining directors of appellant company testified that they considered that the lease had expired at the end of the first ten-year period when the lessee failed to give the written notice, but it does not appear that they ever acted upon this conclusion or notified the lessee that such construction would be put into effect. They admitted that Wright had authority to act for the lessor and that he did do so. It was plain from the testimony of Wright that appellant did not intend to declare

the lease forfeited because of the failure of the lessee to give the required notice, but that it intended to waive the giving of such notice and actually did so by agreeing to the advancement and accepting it for the balance of the second ten-year period.

Butterworth testified that, relying upon this, appellee after the beginning of the year 1922 made improvements upon the leased premises of the estimated value of $40,000, which it would not have done had it understood that it was continuing under a month to month or year to year rental. It is true that the main value of the improvements was machinery which appellee had a right to remove when its lease expired, but a considerable amount of it was expended in erecting bins and other buildings which would necessarily have to be left on the leased premise. Then too, according to the testimony of Butterworth, which is not attempted to be disputed, the machinery would not be of much value as second-hand machinery. It could only be used in the operation of plants of this sort, and the situation of the ground at that point with relation to the Arkansas River and to an adjacent railroad made it valuable for the purpose for which it was used. Another site equally favorable for the purpose would have to be secured before the machinery could be used by appellee. In any event, according to the testimony of Butterworth, which was not attempted to be disputed, improvements of the estimated value of $40,000, would be practically lost to appellee if the lease should be construed to be terminated at the end of the first ten-year period. Appellant under the circumstances must have known that these improvements were contemplated, and that they were actually made by appellee after the advanced rental was fixed upon, and appellee commenced to pay it in advance upon the first day of each month.

When we consider that the lease itself contemplated successive extensions of the ten-year period upon the fixing of a new rental at the end of each period, and,

that the amount of that new rental was fixed in pursuance of the terms of the lease, we are of the opinion that these facts, considered in connection with the surrounding circumstances, warranted the chancellor in finding that the notice in writing required to be given was waived by the lessor. Therefore, the decree will be affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* JENKINS.

Opinion delivered June 22, 1931.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.
Hays & Smallwood, for appellee.

SMITH, J. Omer Jenkins drove an automobile, in which his wife was also riding, up the incline of a crossing over defendant railway company's track, and just as he drove across the track and started down the opposite side of the crossing he met a truck owned by L. A. Lemons but driven by an employee, and, to avoid the impending collision, he turned his automobile to the right and drove over to the extreme edge of the crossing. As he did this some of the earth of the crossing gave way, and the automobile turned over and fell some eight or ten feet into a borrow pit. Both Jenkins and his wife were pinned under the car for a few minutes before it was lifted off of them, and Jenkins breathed or gasped a few times after being taken out from under the car, and then died.

Mrs. Jenkins qualified as administratrix, and brought this suit "in behalf of the estate of said deceased and also for herself as the widow and the next of kin of said deceased," and for her cause of action she alleged the facts stated above.

The suit was brought against both the owner of the truck and the railway company, it being alleged that the concurring negligence of the truck driver and that of the railway company had caused her intestate's death. The alleged negligence on the part of the railway company was the defective condition of the crossing, and there was testimony legally sufficient to support the finding that the railway company was negligent in this respect, and that this negligence was a contributing, if not the sole, cause of the injury.

The cause was submitted under instructions which authorized a verdict against either the owner of the truck or the railway company, or both, accordingly as the jury found whether one or the other, or both, were negligent. There was a verdict in favor of the owner of the truck, but against the railway company, which assessed the damages at $8,000, and from the judgment pronounced thereon is this appeal.

The case made was largely dependent on the testimony of Mrs. Jenkins, the widow of the intestate and his administratrix, and objection was made to her testimony upon the ground that she was disqualified under § 4144, Crawford & Moses' Digest (schedule, § 2, Constitution 1874), which provides that: "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."

It may be first said that objection was made by the defendant railway company to the submission of the question whether the deceased had endured conscious pain and suffering before his death, upon the ground that the undisputed testimony showed that the deceased had been rendered unconscious, and that he did not regain consciousness during the few minutes intervening between his injury and his death.

Upon this question the jury was told to make a separate finding, if any compensation was allowed on that account, but to make no finding on that account unless compensation was allowed for pain and suffering. The following verdict was returned: "We, the jury, find for the defendant, Lemons," (the owner of the truck), "and we find for the plaintiff, Mrs. Jenkins and heirs against C. R. I. & P. Railroad in the sum of ($8,000) eight thousand dollars." Under this verdict returned under the instructions referred to above, it conclusively appears that no compensation was allowed for pain and suffering, and that the verdict returned was for the exclusive benefit of the widow and heirs.

Upon this state of the record, it becomes unnecessary to determine whether the evidence of Mrs. Jenkins as to the cause of her husband's death related to transactions with or statements of her husband within the meaning of § 4144, Crawford & Moses' Digest, above quoted; or,

whether, if they were such statements or transactions, she was an administratrix within the meaning of the statute, or a mere trustee for the widow and next of kin, suing in the nominal capacity of administratrix. *St. Louis & San Francisco R. Co.* v. *Fithian,* 106 Ark. 491, 504, 153 S. W. 600; *St. Louis & San Francisco R. Co.* v. *Conarty,* 106 Ark. 421-430, 155 S. W. 93; *Adams* v. *Shell,* 182 Ark. 959, 33 S. W. (2d) 1107.

The administratrix was the widow, and, as such, she had a cause of action, in support of which she had the right to testify, and she had the right also to testify in support of the cause of action of the next of kin, who, in this case, were the children of herself and her husband, her intestate. Had the suit been brought only for the benefit of herself as widow and for her children as next of kin under § 1075, Crawford & Moses' Digest, as it might have been, no question would have arisen as to her right to testify. She sued, however, for the benefit of the estate also, and sought to recover in that behalf to compensate the pain and suffering, and an indefinite number of cases have held that the separate causes of action may be joined in a single suit. Indeed, the practice is to so join them, but, as we have said, there was no recovery for pain and suffering, and it therefore becomes unimportant to determine whether her testimony was competent or not, for, if incompetent, it was not prejudicial, for the reason that a recovery was had only upon the cause of action in support of which her testimony was competent.

Objection was made to instruction numbered 7 given at the request of plaintiff, which reads as follows:

"7. The court further instructs you that when two concurring causes produce an injury which would not have resulted in the absence of either, the party responsible for either cause is liable for the consequent injury. So, in this case, if you find from the evidence that the defendants, L. A. Lemons and the Chicago, Rock Island & Pacific Railway Company, were guilty of some

act of negligence which concurred in producing the injury and death of plaintiff's intestate, which injury and death would not have occurred in the absence of either concurring act of negligence, then the party responsible for either act of negligence is liable for the consequent injury and death of plaintiff's intestate, and plaintiff would be entitled to recover against either or both of them."

The objection to this instruction is that the jury was left to roam at will without reference to the allegations of negligence contained in the complaint, and the instruction authorized the jury to find for the plaintiff without finding the defendants guilty of the negligence alleged in the complaint.

The instruction does appear to be subject to this objection, but it may be first said that only a general objection was made to the instruction in the court below. It may be further said that the instruction was not in conflict with any other instruction given, and it must therefore be read and interpreted in connection with the other instructions in the case. The first of these specifically recites the negligence alleged against the railway company, and in the sixth instruction, which immediately preceded the instruction set out above, the jury were told that they must find that the railway company was guilty of some act of negligence alleged in plaintiff's complaint, which was the proximate cause of the injury, before returning a verdict against the railway company. So that, when the instructions are read together, as they must be, it affirmatively appears that the jury were confined, in its deliberations and findings, to the matters alleged in the complaint.

An objection was made to instruction numbered 9, given at the request of the plaintiff, which reads as follows:

"If you find from the evidence that plaintiff is entitled to recover as the widow and next of kin for the loss of her intestate, you will take into consideration the earn-

ing power of the deceased, his expectancy of life, and the amount which he might have contributed to his family, and, taking all these facts into consideration, you will award to said widow and next of kin such sums as you may believe from the evidence will fairly compensate them for the pecuniary loss of their husband and father."

This instruction is alleged to be erroneous, in assuming that the widow was suing "as the widow and next of kin." But this objection is not well taken, as we have quoted the allegation of the complaint that she had brought the suit in that behalf.

It is also insisted that the instruction is erroneous in not limiting the recovery to the loss of contributions from deceased's earnings, as the estate still has the returns from his property. We doubt if the instruction is fairly open to that objection, as the jury was told "to take into consideration the earning power of the deceased," and no request was made to make it more specific in the respect to which objection is now made, and the jury was told to return a verdict for such sum "as you may believe from the evidence will fairly compensate them for the pecuniary loss of their husband and father." In the absence of a specific objection we hold this instruction to be a correct declaration of the law.

It is finally insisted that the verdict is excessive. Upon this question it may be said that the testimony shows that the deceased was survived by his widow and eight children, the eldest being a son, who was twenty-one years old but a helpless cripple, unable to earn a livelihood and dependent upon his father, who supported him, and the youngest child was only six years old. All these children lived with and were supported by the deceased, who had a life expectancy of 18.07 years. Deceased owned a small farm, which he cultivated with the aid of various members of his family. He supplied his family "plenty to eat, and plenty to wear," as the widow expressed it, and she also testified that the deceased's earning capacity was from a thousand to twelve hundred

dollars per year. This testimony is sufficient to support the verdict returned.

Upon a consideration of the whole case, we find no reversible error, and the judgment must therefore be affirmed, and it is so ordered.

Cox *v.* State.

Opinion delivered June 22, 1931.

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

Mehaffy, J. The appellant was indicted, tried, and convicted of the crimes of burglary and grand larceny in Searcy County, Arkansas. The indictment charged that the offense was committed January 1, 1931. He was indicted on the 10th day of February, 1931, and the case was called for trial on the 12th day of February, 1931. When the case was called for trial, the appellant filed a motion for a continuance until the next regular term of court, or that the case be postponed until 30 days after March 12th. He alleged as a cause for continuance "that W. U. McCabe, a member of the Arkansas Legislature now in session, which will be adjourned March 12, 1931, as representative from Baxter County, Arkansas, is his attorney and now in attendance in said Legislature, and is employed by defendant to represent him, and he has no

other attorney, and under the law cannot be required to attend this court."

The court overruled appellant's motion for a continuance, to which ruling of the court the appellant objected and excepted. The court then asked the appellant if he desired any attorney be appointed by the court to defend him, and he answered that he did not and refused to make any further plea, and the court entered a plea of not guilty for him, and a jury was impaneled and the trial was had, resulting in the conviction of the appellant.

A motion for a new trial was filed in which it was alleged, first, that the verdict of the jury and the judgment of the court was contrary to law; second, that the court erred in overruling the motion for continuance; third, that, after the court overruled his motion for continuance, he refused to enter any plea to the said charge, and refused to ask for counsel as he was standing upon his rights under the motion for continuance. It was also alleged that the prosecuting attorney committed prejudicial error in his argument. The case is here on appeal.

The Legislature in 1931 passed an act amending § 430 of Crawford & Moses' Digest to read as follows: " 'Section 430. That any and all proceedings in suits pending in any of the courts of this State in which any attorney for either party to any suit is a member of the Senate or of the House of Representatives, or is a clerk or sergeant-at-arms or a doorkeeper of either branch of the General Assembly, and any and all proceedings in suits pending in any of the courts of this State in which any member of the Legislature or clerk or sergeant-at-arms or doorkeeper of either branch of the General Assembly is a party, shall be stayed for fifteen days preceding the convening of the General Assembly and for thirty days after adjournment thereof.'

"Section 2. Whereas, many courts of the State will convene during the present session of the General Assembly, and whereas it is more important that members

of the Legislature shall attend to their public duties rather than to their private affairs, and this act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared, and this act shall take effect and be in force from and after its passage."

This act became a law on the second day of February, 1931. The Legislature convened on the 12th day of January, 1931.

The indictment charges that the offense was committed on the 1st day of January, 1931, but the proof shows that the burglary and larceny were committed on the night of the 19th of January, or possibly the morning of the 20th of January. It therefore clearly appears that the crime charged was committed some days after the meeting of the Legislature.

The indictment against appellant was returned on the 10th day of February, practically a month after the Legislature had convened, and the trial was set for the 12th of February, at which time the appellant filed his motion for continuance, alleging that he had employed W. U. McCabe, who, as representative of Baxter County, was attending the session of the Legislature in Little Rock. The indictment and trial was in Searcy County, Arkansas, at Marshall, quite a distance from Mountain Home, in Baxter County, the home of Mr. McCabe.

There is no indication in the record as to when he employed Mr. McCabe, but it was probably not earlier than the 10th of February, when the indictment was returned, and certainly could not have been earlier than the 20th day of January, at least eight days after the meeting of the Legislature, because the crime was not committed until the 20th. No communication was had from Mr. McCabe, and no claim was made that Mr. McCabe was his regular attorney, or had ever been his attorney until this time.

At common law applications for continuance were addressed to the sound discretion of the court, but, under

the statute above quoted it is mandatory upon the court to grant a continuance when it is made to appear to the court by proper showing that the defendant had employed his attorney prior to the convening of the Legislature and at the time set for trial his attorney was in attendance upon a session of the Legislature; but in this case the crime was not committed until several days after the meeting of the Legislature, and, while the law provides that all proceedings pending in the courts of this State in which an attorney for either party to any suit is a member of the Senate or the House of Representatives shall be stayed for 15 days preceding the convening of the General Assembly and for 30 days after the adjournment thereof, this means attorneys employed before the meeting of the Legislature.

The very language of the act that the proceeding shall be stayed for 15 days preceding the convening of the General Assembly shows that the Legislature meant attorneys for parties who had been employed prior to the meeting of the Legislature. The Legislature evidently did not intend that a person charged with crime in any of the courts of the State could secure a continuance of his case by employing somebody who was a member and already in attendance upon a session of the Legislature. *Johnson* v. *State*, 283 Pac. 590; *People* v. *Goldenson*, 19 Pac. 161; *Holloway* v. *State*, 255 Pac. 1022; *Otey* v. *State*, 263 Pac. 155; *Burkhart* v. *State*, Tex. Cr. App., 26 S. W. (2d) 238.

There is some conflict in the authorities on the question here involved, and the statutes are not in all respects alike; some courts say that these statutes are passed to induce attorneys to become members of the Legislature, but the reason for the enactment of the law here involved is stated in the law itself, and it applies not only to attorneys who are members of the Legislature, but to clerks, sergeants-at-arms, or doorkeepers of either branch of the General Assembly, and the reason given by the Legislature in § 2 of the act is that it is more im-

portant that the members of the Legislature shall attend to their public duties rather than to their private affairs. It is a privilege granted to the attorneys who are members of the Legislature.

In this case, Mr. McCabe, who was a member of the Legislature, made no request for a continuance, and did not communicate with the court in any way. While it is a privilege of an attorney who is a member of the Legislature, a party to a suit had the right to a continuance, either where he has employed an attorney prior to the meeting of the Legislature, and who is at the time attending a session of the Legislature; or, if one's regular attorney is a member of the Legislature, and a suit should arise, the party would have a right to a continuance on account of his attorney being in attendance upon the Legislature; but where a person is indicted after the meeting of the Legislature, charged with the commission of a crime at a time after the meeting of the Legislature, he cannot, by merely employing an attorney who is a member of the Legislature, have his case continued, without any showing as to when the employment was made or that the member of the Legislature is his regular retained attorney. If this was the meaning of the statute, all any person charged with crime in any of the courts would have to do to get a continuance would be to file a motion alleging that he had employed a member of the Legislature to try his suit. One cannot secure a continuance in a case that arises after the meeting of the Legislature by employing a member of the Legislature as his attorney. It has been the practice of the courts throughout the State to accommodate attorneys who are members of the Legislature by postponing the trial of their cases or setting their cases at a time when it will be convenient to try them.

We have not set out the evidence, but have given it careful consideration and find that it is ample to sustain the verdict.

One of the grounds for motion for new trial was that the prosecuting attorney had made an argument that was prejudicial, but no objection was made to this argument at the time it was made, and the appellant cannot raise the question for the first time in his motion for new trial.

The judgment of the circuit court is affirmed.

BOARD OF COMMISSIONERS OF RED RIVER BRIDGE DISTRICT *v.* WOOD.

Shaver, Shaver & Williams and *Jones & Jones,* for appellant.

Henry Moore, Jr., for appellee.

MEHAFFY, J. The Legislature, at its session in 1917, passed an act to create the Red River Bridge District. The act fixed the boundary of said district, and it was organized for the purpose of constructing and maintaining a free public bridge across the Red River at some point within the limits of the district. The act provided that the commissioners might grant a right-of-way over said bridge to any public utility provided that the concession granted to public utilities should not interfere essentially with the use of such bridge as a public highway.

The act provided for the appointment of assessors, and that said assessors should proceed to assess the value of the benefits accruing to each piece of real property within the district, etc., and provided that they must adjust the burden of assessment to the benefits that would accrue to the property. The act also provided that the commissioners might issue bonds for an amount not to exceed the estimated cost of the work, which bonds should

bear a rate of interest not exceeding 6 per cent. and should not be sold for less than par, unless by unanimous vote of the board. To secure the payment of said bonds, the board was authorized to pledge and mortgage its assessment of benefits. It was also provided in the act that the assessment should be a charge and a lien against all real estate in the said district from the date of the resolution adopted by the board of commissioners, and should be entitled to preference over all judgments, executions, incumbrances, or other liens whatsoever, and shall continue until such assessments with any penalties and costs shall be paid.

It was further provided that all bonds issued by the commissioners under the terms of the act shall be secured by lien on all property subject to taxation, and that the making of said assessments, levy and collection, might be enforced by mandamus.

In 1920 the Legislature amended act 16 of the Acts of 1917, stating that the district was organized for the purpose of constructing and maintaining a toll bridge across Red River at some point within the limits of the district. Said act authorized the commissioners to charge tolls and to grant a right-of-way over said bridge to public utilities. The commissioners were authorized to establish and fix rates of toll not exceeding the rates named in the act, and it was expressly provided that all tolls collected shall be for the benefit of the district. The commissioners were required to keep or cause to be kept accurate records of all tolls collected and account therefor in the same manner they are now required by law to account for other funds received by said district from any other source.

The bridge was built across Red River at, or near, Index, in the counties of Miller and Little River, and taxes or assessments, as provided for in the original act, were collected during the years 1917-1924, inclusive, and the assessments so collected were used in paying on bonds issued to build said bridge, and interest.

Since the year 1925, no assessments have been collected under the assessment of benefits levied, but funds have been received from tolls collected, and said funds have been used in paying the expenses of the bridge in retiring the bonds and paying interest. There has been accumulated from said tolls, and is now on hand with the treasurer of the bridge district, approximately $170,000.

During the years 1917-1924, inclusive, approximately $112,000 of assessments were collected on lands in Miller County, and $37,000 on lands in Little River County.

The Legislature in 1931 passed an act authorizing and directing the board of commissioners of the Red River Bridge District to repay all persons the taxes or assessments paid by them on lands situated within the improvement district. The payments were to be made to persons who paid the assessments. The preamble of the act passed in 1931, among other things, stated that assessments were levied and collected for several years, and that since the year 1921 tolls have been collected for traffic across the bridge, and that for the last few years it had not been necessary to collect taxes against lands within the district for the reason that the tolls collected paid all maturing bonds, interest and expenses, and in addition thereto has accumulated a large sum of money in the hands of the commissioners of the district, and that it was found advisable to use such toll funds as may be necessary to repay those who paid taxes or assessments.

Section 4 of the act of 1931 provided: "By reason of the depression that exists in said counties and the great need of funds on the part of property owners to pay taxes, and for other purposes, and in order to preserve the public peace, health and safety, an emergency is hereby declared to exist, and this act shall take effect and be in full force from and after its passage."

This action was begun by appellees in the Miller Chancery Court for an injunction restraining appellants from issuing vouchers or paying any funds belonging to the bridge district to any taxpayers as a refund for taxes

paid on assessments of benefits levied against the lands and real estate in said district.

The complaint alleged the formation of the district under the act of 1917, and that said act was amended as above set forth, in 1920, and that there had been accumulated from tolls approximately $170,000. It was alleged that the plaintiffs were citizens and taxpayers of Little River County and Miller County, and as such citizens and taxpayers, paid taxes during the years from 1917-1924, inclusive, on the assessment of benefits against their lands within said district to build the bridge, and they further alleged that they bring this suit on behalf of themselves and in a representative capacity on behalf of all other citizens and taxpayers in the Red River district, and that the number of such citizens and taxpayers represented by the plaintiffs were several thousand persons.

It was alleged that the act of 1931 is a local or special act, and is contrary to the amendment to the Constitution, that the act is unconstitutional, illegal and void; that the defendants were preparing to receive and pay claims under the act of 1931; that the plaintiffs are interested in having said bridge become a free bridge at the earliest possible time, and they are entitled to have the funds of said bridge district used for the purpose for which they have been collected.

It was also alleged that they had no adequate remedy at law.

The appellants filed a demurrer and answer, the demurrer alleging: (1), that the court had no jurisdiction of the subject of the action; (2), that the plaintiffs have not legal capacity to sue, and have not legal capacity to bring and maintain this action; (3), that the complaint does not state facts sufficient to constitute a cause of action; (4), that the complaint does not state facts sufficient to entitle plaintiffs to the relief asked, and, (5), that the act of the Legislature mentioned is not a local or special act and is not in violation of the Constitution.

The answer filed expressly reserved all the rights under the demurrer and alleged that the building of the bridge at an approximate cost of $375,000, the assessment of benefits, the issuing of bonds, the amendment to the act of 1917 authorizing the collection of tolls and fixing the rates, that taxes were collected during 1917 to 1924, inclusive, amounting to approximately $170,000; that the commissioners had paid all obligations of the district, including maturing bonds and accrued interest, as the same became due; had purchased $35,000 worth of unmatured bonds; that the bonds now outstanding and unpaid amount to $169,500, which mature in different amounts annually up to and including 1931; that the district now has on hand cash, deposited in banks, amounting to $175,-631.84; that the annual tolls collected have been $60,-739.60 in 1928, to $80,108.95 in 1930; and that it is the belief that they will average in the future as much as they have in the past years.

They alleged that all the bonds could be paid within the next three years, and, in addition to these things, alleged as a further reason for the passage of the act of 1931, successive crop failures; that the people were impoverished, unable to maintain themselves and plant their crops; and there was great depression in the counties of Miller and Little River, and great need of funds. The answer denied the allegations in the complaint as to there being citizens and as to there being several thousand people in the district.

It was further alleged that 85 per cent. of the taxpayers in Miller County, within said district, are in favor of the refund of taxes as provided for in the act; that 90 per cent. of the tolls charged and collected come from automobiles and light trucks crossing the bridge, and that 75 per cent. of the tolls are paid by people who do not live in the district and contribute nothing to the building or payment of said bridge. It was admitted that they were preparing to receive and pay claims.

A demurrer was interposed to the answer setting up several grounds, but, as attention will be called to these

grounds in the opinion, it is not necessary to set them out in full here. The court granted a restraining order as prayed, and the case is here on appeal.

This case, as stated by the appellants, involved the constitutionality of an act of the General Assembly passed at its 1931 session. That act provided for the repayment to persons who had paid assessments in the Red River Bridge District in Miller and Little River counties and for nothing else. If this is a special or local law, it violates Amendment No. 12 of the Constitution, which reads as follows: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

This court has uniformly held that the Constitution of the State is not a grant but a limitation of power; and, unless the power of the Legislature is limited, either expressly or by necessary implication, its power is supreme.

A statute passed by the Legislature will always be upheld unless it is clearly prohibited by the Constitution. If it is doubtful whether the act comes within the limitation of the Constitution, the doubt will be resolved in favor of the constitutionality of the act. *Cobb* v. *Parnell, ante* p. 429; *State* v. *Crowe,* 130 Ark. 272, 197 S. W. 4; *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.

Whether a statute is constitutional or not is a question of power, a question whether the Legislature, in this particular case, was within the constitutional limits and observed the constitutional conditions; in other words, the question in this case is whether the act of 1931 is prohibited by amendment No. 12 to the Constitution. We have nothing to do with the policy of the law, nor whether the power, if it existed, was exercised properly.

Courts must assume that legislative discretion has been properly exercised. *State* v. *Crowe,* 130 Ark. 272, 197 S. W. 4; *McAdams* v. *Henley,* 169 Ark. 97, 273 S. W. 355.

The act of the Legislature here involved is in no sense a general law. It involves only the tolls collected by the Red River Bridge District and provided for the

repayment of assessments to persons who had paid the assessments on lands within the improvement district.

The act of 1917 creating the Red River Bridge District is a special act, and no one contends otherwise. It provides merely for the creation of the bridge district, the assessment of benefits to pay for the bridge, and for the building of the bridge. The act of 1920, amending the act of 1917, is purely a local act, and it is not contended that either of these acts were general acts. Both of them were passed by the Legislature, however, before the adoption of the amendment No. 12, and at a time when the Constitution did not prohibit the passage of local or special acts.

A general law must relate to persons and things as a class, and must operate throughout the State upon the whole subject or class, and must not be restricted to any particular locality within the State, and, of course, if this is not a general law, it necessarily follows that it is a local or special law. *Ark-Ash Lbr. Co.* v. *Pride & Fairley,* 162 Ark. 241, 258 S. W. 235; *McLaughlin* v. *Ford,* 168 Ark. 1112, 273 S. W. 707; *Farrelly Lake Levee Dist.* v. *Hudson,* 169 Ark. 37, 273 S. W. 711; *Webb* v. *Adams,* 180 Ark. 716, 23 S. W. (2d) 617; *Simpson* v. *Teftler,* 176 Ark. 1106, 24 S. W. (2d) 330; *Skelly Oil Co.* v. *Murphy,* 180 Ark. 1023, 24 S. W. (2d) 314; *Smalley* v. *Bushmaier,* 181 Ark. 847, 28 S. W. (2d) 61.

The rule requiring courts to uphold the statute, if there is any doubt as to whether the power of the Legislature exists under the Constitution, does not authorize the court to read words into the statute even to save its constitutionality. If the statute does not violate the Constitution, or if there is any doubt about whether it does or not, it is the duty of the court to uphold the statute, but if there is no doubt about the statute being in conflict with the Constitution, then it is the duty of the court to uphold the Constitution and declare the act void, and it is only in cases where the language of the act will bear two constructions that the court is justified in adopting

a construction that will sustain rather than one which will defeat it. 25 R. C. L. 1002.

The act involved here is plain and unambiguous. There is no way in which it can be construed by the court so as not to be in violation of the Constitution.

"If the words embody a definite meaning which involve no ambiguity, and there is no contradiction between different parts of the same writing, then the meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument; and neither courts nor Legislatures have a right to add to or take away from that meaning." *Lybrand* v. *Wofford,* 174 Ark. 303, 296 S. W. 729.

It is contended by appellants that the amendment to the Constitution does not prohibit the passage of all and every kind of special or local laws, and they call attention to the case of *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617. This court in the above case held that the act there involved was a local or special act.

The Constitution does prohibit the passage of all and every kind of special or local laws that are special or local in a constitutional sense. The act involved here is clearly in violation of the amendment to the Constitution. The act under consideration does not apply to all toll bridges nor to all of a class, but is specifically limited in its application to the Red River Bridge District. To hold that an act of this kind might be passed by the Legislature would not be a construction of the constitutional provision, but it would be abrogating it or ignoring it. There is no escape from the conclusion that the act is in violation of Amendment No. 12 of the Constitution.

It is next contended that the repayment of these assessments is the discharge of a moral obligation, and does not come within the inhibition of the amendment. A complete answer to this contention is that the law creating the improvement district and authorizing the

building of the bridge and assessment of benefits does not authorize the collection of any assessment of benefits from any person, except where the benefit to the land is equal to or greater than the amount of the assessment. In other words, it must appear that the property is benefited, and the assessment pays for that benefit, so that whoever pays an assessment must receive a benefit at least equal to the amount he pays. If he has received benefits for all that he paid, how can it be said that there is any moral obligation to repay?

But if there were a moral obligation on the bridge district to pay, this would not authorize or justify the passage of a local or special law in violation of the Constitution? The Constitution does not prohibit local legislation, but amendment No. 5 expressly authorizes local legislation. What the Constitution does do, however, by express provision, is to prohibit the Legislature from passing any local or special act.

Therefore, if there was a moral obligation on the district to repay the assessments to the taxpayers, it could be done by a general law.

The act of 1931 does not deal with the sovereign administrative power of the State, but it is a local law dealing with the local affairs of the district.

It is contended that the power to tax is an attribute of sovereignty. This is true, but it does not follow, because the power to tax is an attribute of sovereignty, that the Legislature can pass a special act distributing taxes or assessments, or repay them to the taxpayers.

It is next contended by the appellants that the commissioners of the bridge district have authority to repay the taxes independently of the authority conferred upon them by the act of 1931. Whether this is true or not, it is not necessary to decide because it could not do so until it had paid all of its legal obligations. The act creating the district provides for the assessment and collection of taxes and provides that the district may issue bonds and pledge and mortgage the assessments of benefits. These

assessments, when collected, were for the purpose of paying the obligations of the district contracted under the authority of the act of 1917. The act of 1920, providing for the collection of tolls for the use of said bridge, expressly provides that all tolls collected should be for the benefit of the district, and it also required the commissioners to account for the tolls collected in the same manner that they were required to account for the assessments or other funds received by the district. If the tolls collected were insufficient for any reason, to discharge the obligations of the district created under authority of the act of 1917, assessment and collection of benefits would be required for the purpose of discharging such obligations.

It is also contended by the appellants that, if the act of 1931 is a special act, the Legislature had a right to pass it because it amends act 178 of the Acts of 1920. It is not and does not purport to be an amendment of that act. It is an independent act for the purpose of repaying assessments, and for no other purpose. The court has never held that the Legislature had authority to amend a special act. It has held that, since authority is given in the constitutional amendment to repeal a special act, it may repeal a part of a special act, but it did not hold that it had authority to amend a special act.

The appellants contend that the appellees are not toll payers, have suffered no special injury, and have no vested interest, and therefore have no right to maintain this suit. They are citizens and taxpayers in the district, and, if the money received from tolls was used for any purpose other than the payment of the indebtedness of the district, such indebtedness would have to be paid by assessments on their lands. They are therefore interested in having the money used for the purpose of paying the debts of the district and a right to maintain suit for that purpose.

The decree of the chancery court is affirmed.

STANLEY *v.* STATE.

Opinion delivered June 22, 1931.

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Paul G. Matlock, for appellant.

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

KIRBY, J., (after stating the facts). It is first urged that the evidence is not legally sufficient to warrant the verdict of murder in the first degree, and in any event that the court erred in not instructing the jury of the lesser punishment they could have inflicted if they found defendant guilty of murder in the first degree.

The testimony is set out at some length, and we are constrained to agree with the contention that it is not sufficient to warrant the verdict of murder in the first degree. There is no testimony indicating any deliberate or premeditated intention to kill or to take the life of the deceased, or that, prior to the difficulty, appellant harbored any malice or ill will towards him. No threats of any kind are shown to have been made. No killing can be murder in the first degree in the absence of premeditation and deliberation. Section 2338, Crawford & Moses' Digest; *Harris* v. *State,* 119 Ark. 85, 177 S. W. 421. In the case cited, the court, quoting from an earlier case, *Bivens* v. *State,* 11 Ark. 455, said: "* * * The distinctive feature of this particular class of cases of murder in the first degree being a wilful, deliberate, malicious and premeditated specific intention to take life. The inquiry then in cases of this class of murder in the first degree must always be, was the killing wilful, deliberate, malicious and determined on before the act of killing? If it was, then that degree of malice has superinduced the act that is necessary to make it rank in the highest grade of murder. * * * And it is only necessary that the premeditated intention to kill should have actually existed as a cause determinately fixed on before the act of killing was done, and was not brought about by provocation received at the time of the act, or so recently before as not to afford time for reflection."

The killing appears to have been the result of a sudden quarrel, difficulty or row provoked and brought on by the deceased in the serving of appellant with the

bowl of chili that he had ordered, as he had the right to do, in the place where he was employed. There was no conversation testified to by any witness that should have provoked deceased into attempting to eject appellant from the premises, and, from the statements testified to, it appeared defendant was willing to go, if permitted to do so. Regardless of the merits of the controversy, the testimony shows that the deceased provoked the difficulty and followed it up, throwing stove wood at appellant in trying to eject him from the premises, continued to be the aggressor until appellant had gotten out of the kitchen; that appellant claimed that he only threw the stick of wood, that he had snatched up from the box in the street, at his assailant, when he was pursuing him out of the back door, in order to protect himself. It is true the marshal testified that appellant told him he stood by the door on the outside, called the deceased to come out and then threw the stick of wood, striking him as he came out. The appellant denied this story and was corroborated by another witness, who said he saw him throw the stick of wood from where he had gotten it out of the wood box in the street, and saw it strike the deceased. Even if he stood by the side of the door and threw the missile at deceased, who provoked the difficulty and pursued him beyond the door, where the marshal said he had confessed he was standing, when he threw the wood at deceased, it was but in continuation of the difficulty and altercation, provoked by the deceased, so recent as to have afforded appellant no time for reflection, or cooling time, that would have constituted the result of killing his pursuer, under circumstances, murder in the first degree. The majority have concluded that, under the circumstances and according to the undisputed testimony, the killing could not have been murder in the first degree, and that the evidence is insufficient to support a conviction for a greater offense than murder in the second degree, for which the punishment shall be

imprisonment in the penitentiary for a period of five years.

The court erred, of course, in not informing the jury that it was authorized to assess the lesser penalty of life imprisonment, if they found the appellant guilty of murder in the first degree, in accordance with the statute and our decisions, and the confession of error of the attorney general on this point is sustained. *Crowe* v. *State,* 178 Ark. 1121, 13 S. W. (2d) 606; *Cook* v. *State,* 179 Ark. 244, 15 S. W. (2d) 323; *Williams* v. *State, ante* p. 873.

In accordance with the practice, for the said error of the court in the failure to instruct the jury as to the punishment they could have assessed, life imprisonment, on a conviction of murder in the first degree, and because the evidence is insufficient to support the verdict for a greater offense than that of murder in the second degree, the judgment will be modified here, reducing the offense to murder in the second degree, with a sentence of 5 years in the penitentiary. *Simpson* v. *State,* 56 Ark. 19, 19 S. W. 99; *Routt* v. *State,* 61 Ark. 594, 34 S. W. 262; *Crowe* v. *State,* 178 Ark. 1121, 13 S. W. (2d) 606.

It is so ordered.

(1) NATIONAL UNION FIRE INSURANCE COMPANY *v.* BYNUM.

(2) WALKER *v.* BOYKIN.

Opinion delivered June 22, 1931.

(1) *Verne McMillen,* for appellant.

John Baxter, for appellee.

(2) *Robinson, House & Moses,* for appellant.

Roberts & Stubblefield, for appellee.

SMITH, J. W. B. Bynum owned a large sawmill plant, upon which he carried insurance amounting to $169,500. This insurance was written by a large number of insurance companies, and three of the policies, aggregating $10,000, were written by the Home Fire Insurance Company, of this State. A fire occurred, and the loss as adjusted amounted to $137,770.10.

Each of the insurance policies covering this property contained what is commonly called the *pro rata* clause, which provides that each insurance company shall only be liable to the insured for its *pro rata* amount of the insurance carried on the property, "whether valid or not or whether by solvent or insolvent insurers."

Certain of the insurance companies insisted that the insurance written by the Home Fire Insurance Company should be taken into account in determining the extent of their liability, and offered to pay on that basis, but, when they refused to pay except on that basis, suit was brought to enforce *pro rata* liability without taking into account the policies written by the Home Fire Insurance Company.

The fire occurred December 1, 1930, but prior thereto a suit had been filed by the Attorney General to dissolve

the Home Fire Insurance Company and to wind up its affairs.

It was alleged in the complaint filed by the Attorney General that the Home Fire Insurance Company was a domestic insurance corporation, being incorporated under the laws of this State, and that the State Insurance Department had "certified the defendant company to the Attorney General as an insolvent insurance company, to have its affairs wound up and administered as provided by law." It was alleged that the company was insolvent, and that to preserve its assets for the benefit of its creditors it was necessary that some person be appointed "to take charge of all the assets, of every kind and character, of said company, to make an inventory of its property, and to handle and manage it under the proper orders of this court." It was alleged that an opportunity had been given the company for a hearing as to the status and condition of its affairs as provided by law, but that the company had waived this right and admits its insolvency. Wherefore it was prayed that the court, "by proper judgment and order, appoint some suitable person to take charge of said insolvent company and to administer its affairs under the order of this court."

On November 24, 1930, which was, of course, prior to the date of the fire, an order and judgment was entered by the court granting the relief prayed by the attorney general. This judgment recites the appearance of the insurance company, and its confession of the allegations of the complaint, and its consent that the "court may appoint a receiver as provided by law," and that the court, "being well and sufficiently advised in the premises, doth find from the evidence that the said insurance company is insolvent, that its reserves are clearly impaired, and that a receiver should be appointed by this court as provided by law." It was thereupon ordered that Elmo E. Walker be appointed receiver, to take charge of all the assets, books, papers, etc., of the com-

pany, and that "he proceed to the administration of the affairs of said company until the further orders of the court," to which end he was authorized to employ such attorneys and assistants as was necessary in the administration of the affairs of the company, and "that he be and he is hereby empowered to collect premiums and bills receivable, to pay such operating expenses of said company as is necessary, and to do any and all other things necessary to consummate and carry out said receivership; that all officers, directors, officials, agents, or employees of said defendant insurance company be and they are hereby directed to turn over to said receiver all books, records, fixtures, equipment, moneys, bills receivable, real estate, and all other assets of every kind, nature or character at once."

All persons were enjoined from interfering with the administration of the receiver and the order was to be effective upon the execution of the bond there provided for and the taking of the oath required by law. The receiver had qualified and had entered upon the discharge of his duties as such at the time of the fire. Certain other facts were stipulated which we need not recite.

A number of suits which were brought in Chicot County against the insurance companies which resisted payment were consolidated for trial, and the court was asked on their behalf to make the following declaration of law:

"That the appointment of a receiver for the Home Fire Insurance Company did not dissolve the corporation and did not cancel the policies issued by the Home Fire Insurance Company to the plaintiff, and that said policies were a part of the whole insurance covering the property described in the policies sued on herein, within the meaning of that provision in each of the policies issued by the defendant which provides: 'This company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby insured shall bear to the whole insur-

ance, whether valid or not, or by solvent or insolvent insurers.'

"That the plaintiff is entitled to recover only that proportion of the loss from each defendant which the amount of its policy bears to the whole insurance, and, each defendant having tendered that amount to the plaintiff in its answer, plaintiff should have judgment against the defendants only for the amounts tendered, with the costs which accrued up to the time the answers were filed."

The court declined to so declare the law, but, upon the contrary, declared the law to be that the appointment of a receiver canceled the policies of insurance issued by the Home Fire Insurance Company, and that those policies could not be considered as a part of the whole insurance covering the loss or damage to the property described in the policies sued on, and a judgment was rendered accordingly, including a penalty of twelve per cent. and an attorney's fee. No complaint is made of the fee allowed the attorney, but it is insisted that in any event the penalty was improperly imposed, for the reason that it is in excess of the amount in controversy, as the insurance companies had offered to pay the sum demanded, less the *pro rata* part of the Home Fire Insurance Company policies.

It is urged for the reversal of the judgment of the circuit court that there was no adjudication of insolvency of the Home Fire Insurance Company, and that there was no order dissolving the corporation, and no order canceling its outstanding contracts of insurance; that, on the contrary, the receiver was ordered to proceed with the administration of the affairs of the company, to collect premiums and other bills receivable, and was not authorized or directed to wind up the affairs of the company. The cases of *Federal Union Surety Co.* v. *Flemister*, 95 Ark. 389, 130 S. W. 574, and *Johnson & Cotnam* v. *Baxter*, 108 Ark. 350, 157 S. W. 387, are cited in support of this contention.

We do not review those cases, as they are not applicable to this case. The instant case is governed by the statute under which the Attorney General proceeded, and the order and judgment of the court must be interpreted with reference to the statute upon which it was based.

The Attorney General did not recite the statute pursuant to which he had proceeded, but he was not required to do so. The authority was conferred and the duty imposed upon the Attorney General to institute the proceeding herein recited by paragraph eight of § 5951, Crawford & Moses' Digest, which reads as follows:

"Whenever the Insurance Commissioner shall have reason to believe that any insurance company of this State is insolvent or fraudulently conducted, or that its assets are not sufficient for carrying on the business of the same, or during any noncompliance with the provisions of this chapter, he shall communicate the fact to the Attorney General, whose duty it shall then become to apply to the Supreme Court or the circuit court, or, in vacation, to any of the judges thereof, for an order requiring said company to show cause why their business should not be closed; and the court or judge, as the case may be, shall thereupon hear the allegations and proofs of the respective parties, or appoint some suitable person as examiner to perform such duty and report upon the facts to said court or judge. If it appears to the satisfaction of said court or judge that such company is insolvent, or that the interests of the company so require, the said court or judge shall decree a dissolution of such corporation, and a distribution of its effects; but in case it shall appear to said court or judge that said corporation is able to comply with the provisions of this act, and that it is not insolvent, a decree shall be entered annulling the act of the Insurance Commissioner in the premises and authorizing such company to resume business."

Pursuant to this proceeding the insurance company was adjudged to be insolvent. It is recited that the court "doth find from the evidence that the said defendant

insurance company is insolvent." And that adjudication stands unchallenged and unmodified. Indeed, it appears to have been confessed by the insurance company, and upon this adjudication the receiver was ordered to proceed to the administration of the affairs of said company until the further orders of the court. If there is any ambiguity about this order—and there does not appear to be—it is removed when read in connection with the statute above quoted, pursuant to which said order was made. The statute directs the action to be taken when the order is made which it authorizes, and that direction is that "The said court or judge shall decree a dissolution of said corporation and a distribution of its assets."

The recital in the judgment of the court that the receiver "is hereby empowered to collect premiums and bills receivable" is not to be construed as conferring authority upon the receiver to continue in business as an insurer. The provisions of the statute are to the contrary, and this direction must be construed as an authorization only to the receiver to collect all the assets of the company, including the premiums then due it.

A number of annotated cases which collect and review the authorities on this subject are cited in the notes to § 102 of the chapter on Insurance in 32 C. J., p. 1039, and in the notes to § 20 of the chapter on Insurance in 14 R. C. L., p. 853. In the section last mentioned the law is stated as follows: "While there are some contrary decisions, the weight of authority supports the proposition that, on the judicial adjudication of the insolvency of a stock insurance company and the appointment of a receiver, the outstanding policies of the company are *ipso facto* canceled, and that a claim for a loss thereafter occurring is not a provable claim against the company. The policyholders are creditors for the value of their policies at the time of the breach thus occurring, which, in most cases, is the *pro rata* return premium, though net value in life insurance cannot, of course, be computed in

this manner, and a provision of a statute for a return of the *pro rata* premium on a dissolution of an insurance company does not apply to life policies."

The reason for this rule is well stated by the Supreme Court of Iowa in the case of *Shloss* v. *Metropolitan Surety Co.,* 128 N. W. 384, to be that "This conclusion is based on the proposition that, by the decree of dissolution, the company is rendered incapable of carrying out its contracts, its business is brought to an end, and the policyholders become creditors to the amount equal to the equitable value of their respective policies and entitled to participate *pro rata* in its assets; and a settlement of the company's affairs cannot be postponed to await a determination of the contingencies on which its policy engagements are dependent." (Citing authorities.)

The judgment in the case of *National Union Fire Insurance Co. et al.* v. *Bynum,* No. 2217, appealed from the Chicot Circuit Court, conformed to this view.

As to the penalties in those consolidated cases, it suffices to say that the plaintiff was entitled to recover, and did recover, the full amount sued for, and the case is therefore within the letter and spirit of § 6155, Crawford & Moses' Digest, which allows the penalty. It is true the difference between the sum demanded and the sum tendered is less than the penalty, but it is true also that it was the refusal to pay this difference which made the institution of the suits necessary. The plaintiffs were not required to accept any sum less than the full amount due under their policies, and they have been put to the expense and have incurred the delay and trouble of a lawsuit to recover that amount. It is this which the penalty compensates, and it was therefore properly assessed. *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123, 235 S. W. 412; *Illinois Bankers' Life Assn.* v. *Mann,* 158 Ark. 425, 250 S. W. 887; *Fidelity Phenix Fire Ins. Co.* v. *Roth,* 164 Ark. 608, 262 S. W. 643; *Bankers' Reserve Life Co.* v. *Crowley,* 171 Ark. 135, 284 S. W. 4; *Fulmer* v. *East Ark. Abstract & Loan Co.,* 173 Ark. 668, 293 S. W. 1018.

Without reciting the facts under which case No. 2208, submitted here under the style of *Elmo Walker* v. *Boykin,* arose, it may be said that the same question of law is presented, and the views here expressed are controlling in that case, and, as it was held by the trial court in that case that the Home Fire Insurance Company was liable, although the loss by fire occurred after the rendition of the judgment appointing the receiver for the Home Fire Insurance Company, that judgment must be reversed.

It follows therefore that the judgment in case No. 2217 (*Insurance Co.* v. *Bynum*) will be affirmed; while the judgment in case No. 2208 (*Walker* v. *Boykin*) must be reversed, and that cause remanded, and it is so ordered.

STATE USE HEMPSTEAD COUNTY *v.* ARKANSAS BANK & TRUST COMPANY.

Opinion delivered June 22, 1931.

Carrigan & Monroe, for appellant.

W. S. Atkins and *Lemley & Lemley*, for appellee.

BUTLER, J., (after stating the facts). The theory on which this suit was brought was that the Arkansas Bank & Trust Company became the depository by reason of an unlawful agreement entered into between it and the two banks above named to stifle competitive bidding for the county funds and to thus obtain its funds at a less rate of interest than the county could otherwise have obtained, and less than was reasonable and fair; and that, by this combination and agreement, the said banks became trustees to the extent of the funds received by them, the legal effect of which would be to make the claim of the county a preferred one and superior to that of the general depositors.

The facts are not in dispute. The banks involved in this suit, and others, perhaps, for several years had had an understanding by which only one of the banks should procure a certain account, and that the account when so procured should be divided in certain proportion among the other banks. It appears that several years ago competition for the deposit of public funds was keen, the rate of interest offered being sometimes as high as 5½ and 6½ per cent. but approximately ten years before the date of this suit it was realized that such competition and the rate of interest bid for public funds were unprofitable

and unwise. Hence the agreement, and in the early part of 1929, and before April 12th of that year, carrying out the general understanding which had obtained for a number of years, the three banks agreed that the Arkansas Bank & Trust Company should become the bidder for the county depository at the letting of the contract for such to be made on April 12th, and that the Arkansas Bank & Trust Company would carry with the other two banks in an equal amount approximately sixty per cent. of the funds it received and kept on deposit as county depository, it to be paid by the two other banks the same rate of interest which it paid the county, which in this case was three per cent. Pursuant to that agreement, the Arkansas Bank & Trust Company bid three per cent. interest on daily balances for the county and school funds, and on said date it was designated as county depository and executed the bond required by law in the sum of $145,000 with the Home Accident Insurance Company as surety thereon, guaranteeing to the county the faithful accounting and paying over on legal demand the moneys deposited in that bank by said county. To carry out its agreement with the other two banks, the Arkansas Bank & Trust Company, on April 20th, made deposits with the two other banks, each at the time executing to the Arkansas Bank & Trust Company a written guaranty, guaranteeing to the Arkansas Bank & Trust Company the prompt payment of all checks and orders that it might draw upon any deposit then made or any deposits thereafter made with interest at three per cent. per annum, figured on daily balances. The guaranty was a continuing one so long as the Arkansas Bank & Trust Company might deposit or have on deposit any amount to its credit in the other two banks. Provision was made for the cancellation of the guaranty upon notice and upon the payment in full of the amount of any deposits then on hand in said banks.

On January 6, 1930, the three banks entered into a written agreement for the handling in the future of certain named accounts; one, the collector's account; an-

other, the water and light account; and an account designated as the county treasurer's account, this being an account under which the county and school funds were held and handled. At that time, as shown by a notation at the head of the agreement, the Arkansas Bank & Trust Company had the county treasurer's account, which, under the terms of its contract with the county, would continue until April, 1931. That agreement, signed by each of the banks, is as follows:

"Hope, Arkansas, January 6, 1931.

"It is hereby mutually agreed among the three banks in Hope that the following bank accounts will change every two years:

"1. County collector's account each two years, about January. (The collector's account starting in January, 1931, at First National Bank and first savings will change about January, 1932.)

"2. County treasurer's account each two years, about April. (The county treasurer's account is let by bid by county court. The account is now in Arkansas Bank & Trust Company since April, 1929; will change about April, 1931.)

"3. Hope water and light account each two years, about July. (This account is now in the Arkansas Bank & Trust Company since July, 1928; will change about July, 1930.)

"It is understood and agreed that each bank make and pay for its own depository bond."

In all essential particulars the facts in the case at bar as outlined above are the same as in the case of *Taylor* v. *Whaley, ante* p. 598. This case is ruled by that. In the Whaley case the contention of the appellee, treasurer of Independence County, was that the money in the Citizens' Bank & Trust Company belonged to Independence County because there had been an unlawful agreement between that bank and the North Arkansas Bank of Batesville, which had been designated as the county depository, by which agreement said North Arkansas Bank became such depository, the alleged unlawful agreement

being in all respects the same as that in the instant case, *i.e.*, that they conspired together to submit only one bid and obtain the use of the public funds at a reduced rate of interest on daily balances in the name of the North Arkansas Bank and then divided the funds. The evidence in that case tended to establish the agreement, and the trial court so found and held that because of it the county funds which had been deposited by the North Arkansas Bank with the Citizens' Bank pursuant to that agreement never became the assets of the North Arkansas Bank, and that the Citizens' Bank was directly responsible to the appellee, as treasurer of Independence County, for said funds. In that decision the rule was recognized that a deposit of public funds in an incorporated bank constitutes a general deposit, and the relation of debtor and creditor obtains between the bank and the depositor; but that in cases where funds are acquired by the bank unlawfully and wrongfully, the depositor would be entitled to recover same in preference to the general creditors of the bank. We held, however, that this rule of preference was abrogated by act No. 107 of the acts of the General Assembly of 1927 providing for the distribution of the entire assets of an insolvent State bank.

The appellant, in the case at bar, contends that, while the facts here are similar to those of the Whaley case, yet there are vital points of difference which distinguish the two. The alleged points of difference are: (1) that, in the instant case, the testimony established an express agreement, while in the Whaley case there was only a tacit understanding between the banks to stifle bidding followed by a later division of the funds between them; (2) that there was a solemn written and signed agreement executed between the three banks in the case at bar, under the terms of which the funds were divided among themselves and the defendants, Citizens' National Bank and First National Bank, received and held their portions of said funds; (3) that there were separate written bonds executed by the Citizens' National Bank

and First National Bank to the Arkansas Bank & Trust Company for the faithful handling of these funds.

The first point of difference urged is wholly immaterial, for it matters not in what way the fact of the agreement complained of was established, so long as the evidence adduced established its existence and that it was acted upon. In both cases the evidence established the agreement beyond question and the similar action of the banks in the instant case and those involved in the Whaley case.

The second point of difference urged does not exist. The written agreement signed by the banks in the instant case was entered into after the alleged unlawful agreement complained of and after the banks had proceeded thereunder, and the agreement referred only to the relation of the banks to each other and their dealings with the public funds in the future. It recognized that the Arkansas Bank & Trust Company had the county funds and would retain them until April, 1931, and the agreement related to the disposition of those funds after said date.

On the third alleged point of difference there is none. It was not deemed necessary to recite in the statement of facts in the Whaley case the giving by the Citizens' Bank & Trust Company of a bond to the North Arkansas Bank guaranteeing payment to the latter bank of the funds deposited by it in the former, but there was such a bond, the effect of which we considered in deciding the Whaley case.

The position is taken by the appellant that the bonds made by the Citizens' National Bank and the First National Bank to the Arkansas Bank & Trust Company, the written agreement of January 6, 1930, together with the manner in which the Arkansas Bank & Trust Company's account was carried on the books of the other two banks established an express written trust within the meaning of act No. 107, *supra*. We do not agree with this contention: first, because the only written agreement signed by the Arkansas Bank & Trust Company, as we have

seen, is referable only to the future handling of the county funds and does not relate to the agreement under which the Arkansas Bank & Trust Company was designated as the county depository; and, second, because the agreement was not with the county, and to be an express trust within the meaning of the act the agreement must be between the trustee and the *cestui que trust,* signed by the trustee at the time the contract for the deposit of the funds was made. "Express trusts are thus created by the direct and positive act of the parties manifested by some instrument in writing, whether by deed, will or otherwise." *U. S. Fidelity & Guar. Co.* v. *Smith,* 103 Ark. 145, 147 S. W. 54.

Act No. 107 of the Acts of 1927, which controlled our decision in the case of *Taylor* v. *Whaley, supra,* and which must control in the instant case, by § 1 provides: "All creditors of a bank of which the commissioner has taken charge are classifiable either as secured creditors, prior creditors, or general creditors." Continuing, that section defines "prior creditors," one definition of which, and the one relied on by the appellant, is as follows: "(5) The beneficiary of an express trust, as distinguished from a constructive trust, a resulting trust, or a trust *ex maleficio,* of which said bank was the trustee, and which was evidenced by writing signed by said bank at the time thereof." After defining certain other prior creditors, the section further provides that "all creditors not in this section hereinabove classed as secured or prior creditors of said bank, including the State of Arkansas, and any of its subdivisions, shall be general creditors thereof."

It is suggested that, in our construction of subdivision (5) of § 1 of act 107, *supra,* in the case of *Taylor* v. *Whaley,* we overlooked or ignored the words in said section "of which the said bank was trustee." We neither overlooked nor ignored these words, but considered them in connection with the entire subdivision, giving to the same what we conceived to be its ordinary and common sense meaning. In fact, we were unable to see any ob-

security or ambiguity in that subdivision, and are of the opinion that the intention is so clearly expressed as to require no construction. The subdivision might have omitted the words, "as distinguished from a constructive trust, a resulting trust, or a trust *ex maleficio* of which said bank was the trustee," in which event the statute would have read: "The beneficiary of an express trust which was evidenced by a writing signed by said bank at the time thereof." But the inclusion of the words which we say might have been omitted was merely to, and did, emphasize that no trust should be the basis of a preferred claim except an express trust. We think the legislative intent clear, and the reasons for the limitation named in the act sound. Experience has shown that the rights of general depositors are often impaired in failing or insolvent banking institutions by reason of preferences given to favored depositors which the act in question sought to cure and which could not reasonably have been anticipated to work harm to the State, or its agencies, in respect to their funds on deposit in such institutions, as the policy of the law was to protect said funds by bonds executed by depository banks securing the payment of public funds on demand. The unfortunate situation in this case, as in many others that have recently arisen, is that the bonds taken to secure the public funds on deposit have proved insufficient.

As in the Whaley case, we have failed to state a number of facts surrounding the agreement entered into between the three banks because it is unnecessary for us to decide whether the agreement and the action of the banks thereunder was lawful or unlawful; if unlawful, no trust in the moneys received by the banks could arise except a trust *ex maleficio,* which is not such a trust as under the statute would create a preference. We reaffirm the doctrine announced in *Taylor* v. *Whaley, supra;* and, as that doctrine is controlling in the instant case, the decree of the learned special chancellor is correct, and it is therefore affirmed.

Mr. Justice MEHAFFY dissents.

MONTGOMERY *v.* NOWELL.

Opinion delivered June 22, 1931.

[redacted]

R. W. Robins and *George F. Hartje,* for petitioner.

PER CURIAM. H. W. Montgomery seeks to have quashed by this court an order of the circuit court of Faulkner County by which he was suspended from office as circuit clerk and recorder of Faulkner County, and R. A. Nowell temporarily appointed to fill the vacancy.

The record shows that H. W. Montgomery was duly elected circuit clerk of Faulkner County at the general election in November, 1930, and duly qualified and entered upon the discharge of his duties. On June 1, 1931, the grand jury of Faulkner County returned three indictments against him, charging him with the offense of embezzlement, alleged to have been committed while he was treasurer of Faulkner County prior to the beginning of his term as circuit clerk. On the return of the indictments, the circuit court suspended him from office under the provisions of § 10,335 of Crawford & Moses' Digest. Immediately after making the order, the court adjourned until the next term, which will commence on the first Monday in November, 1931. R. A. Nowell was temporarily appointed in his place under the provision of § 10,338 of the Digest. The parties have agreed that the above statement is a correct copy of the record in the matter.

The order of the circuit court was wrong. In *Jacobs v. Parham,* 175 Ark. 86, 298 S. W. 483, it was held that each term of office is a separate entity and that § 10,335 of the Digest does not provide for the suspension of an indicted officer except for offenses committed during the term, and that suspension may not be had for official mis-

conduct during the prior term of office for which he may be indicted. That case rules the present proceedings, and it may be said that in 46 C. J., at page 986, the author says that offenses committed during a previous term of office are generally held not to furnish cause for removal. It follows that the order of the circuit court suspending H. W. Montgomery from the office of circuit clerk must be quashed, and it is so ordered.

TAYLOR *v.* COX.

Opinion delivered June 29, 1931.

Sam Rorex and *Nat R. Hughes*, for appellant.

Owens & Ehrman, for appellee.

SMITH, J. The facts out of which this litigation arose are simple and without substantial dispute. However, it may be said that the following facts are established by the great weight of the testimony.

Paul D. Cox, who is the son of Mrs. Junie M. Cox, borrowed about $32,000 from the Exchange Trust Company, of Little Rock, Arkansas, with which he purchased stock in a radio corporation, and he deposited the stock as collateral for the loan. The Exchange Trust Company was absorbed by the American Trust Company, and the consolidated bank continued in business under the corporate name of the American Exchange Trust Company. The consolidated bank acquired title to the Cox note, and, when it matured, the bank declined to renew the note or to carry the indebtedness further except upon the condition that Mrs. Cox should join with her son in the execution of a new note for the sum then due. A new note was executed and signed by both Cox and his mother as joint

makers, and we find this note to be both in form and in fact the joint obligation of the makers. This note was due ninety-one days after date, and recited that "we, or either of us," promise to pay the amount thereof to the bank. Presentment for payment and notice of dishonor or protest were waived by all parties makers of the note.

The note recited that to secure its payment the makers thereof had deposited as collateral the original stock then in the hands of the bank and a large amount of additional corporate stock, which was the sole property of Mrs. Cox, and which was particularly described, and the makers severally agreed that, upon failure to pay the note, the holder thereof might sell the collateral, or any substitute therefor or addition thereto, without notice to either maker, at public or private sale, and without advertisement or demand, with the right to apply the proceeds of any or all the collateral to the payment of the costs and expenses of collection, sale and delivery of the stock, and the holder of the note was given the right to purchase at such public or private sale. The net proceeds of the sale were to be applied upon the note.

The holder of the note was given the right to demand additional security from the makers, which they were obligated to furnish after twenty-four hours' notice given either personally or by United States mail, in default of which the right of sale was given, and the makers of the note obligated themselves to pay any deficit remaining to the bank, or to the holder of the note.

It was further provided in the note that: "As part of the consideration and collateral for the payment of this note, and any other liability or liabilities which the American Exchange Trust Company may hold against a maker of this note, said bank shall have the right to apply, and, in the event of garnishment, receivership, bankruptcy or suit of any kind begun as to any of the makers hereof, the total amount of any deposit or collection which such makers may at the time have in, or in transit to, said bank, without notice, towards the pay-

ment of any indebtedness which the said maker may then owe said bank, whether said indebtedness be due according to its terms or not."

The bank was insolvent on November 15, 1930, and its affairs were taken over by the State Bank Commissioner and are now being administered under the direction of that department. Mrs. Cox filed an intervention in the court where the proceedings were pending, in which she prayed the right to have an individual deposit in the bank credited upon this note, with the privilege of paying the balance due and withdrawing the collateral deposited with the bank when the note was executed. The court accorded Mrs. Cox this right, and the Bank Commissioner has appealed from that order.

The right of Mrs. Cox to this set-off is denied for three reasons: (1) the note is fully secured, and no set-off can be allowed; (2) Mrs. Cox is an accommodation maker and the principal is solvent; (3) if sued by the bank on the note, Mrs. Cox could require the bank to look to the collateral of Paul D. Cox before taking her deposit.

In support of these contentions, an interesting and able argument is presented, and many authorities cited; but we find it unnecessary to review these cases in view of the facts as we find them to be.

It may be said, however, that the testimony does not show whether the present value of the collateral fully secures the note, and the statement is made by counsel for appellee that this is not true, owing to the decline in the market value of the stocks held as collateral; but we do not regard that question as of controlling importance, even though it had been shown that the debt was fully secured. This contention, as well as the second and third, are disposed of when we say that we find from the testimony that Mrs. Cox was not a mere accommodation maker of the note but was a joint maker thereof.

Certainly, under the recitals of the note, Mrs. Cox is a joint maker thereof and primarily liable as such, and the entire testimony in the case confirms that view.

The undisputed testimony shows that the bank was unwilling to renew the original note of Paul D. Cox, and that note was taken up and paid from the proceeds of the second note, and this first note thus passes out of the case.

The bank not only required Mrs. Cox to execute the note here involved as a joint maker, but it imposed additional requirements which clearly manifest the intention to impose the obligations arising out of that relation. She was required to deposit as additional collateral other corporate stock having a large face value which she owned individually, and she was also required to carry a personal account which was at no time to be less than $13,000. At the time she made this agreement, she had a savings account of $15,000, on which interest was paid at 4 per cent., and she had a checking account of over $1,500. She was allowed to withdraw $2,000 of the savings account, but she at all times thereafter maintained a savings account of as much as $13,000, and it is this deposit, as well as the amount of her checking account, which she seeks to have applied to the note. The ledger page of the bank showing the savings account contained a notation that no check should be charged against it except with the approval of the cashier of the bank.

This officer testified that the deposit was held, not as collateral to the loan, but that it was held as a compensating balance, and, while he testified that a check against this account would have been paid, he admitted that, had such check been drawn, the loan would have been called or declared due or additional collateral would have been required.

Mrs. Cox and her son both testified, and there is no reason to question the truth of their testimony, that, before she agreed to execute the new note, she exacted of her son an agreement that she should share equally with him in the profits or losses from that time on in his stock which the bank then held as collateral. But this is not all. Mrs. Cox went to California on a visit, but before

going she left the key to her safety deposit box with the direction and authority to her son to extract from the box additional stock which she owned individually and to deposit the same as collateral if this requirement was imposed.

In addition to all this, members of the discount board of the bank testified that when the new loan was presented to and approved by them, they relied upon Mrs. Cox's collateral and her ability to pay, reenforced by her agreement with reference to her stock in her safety deposit box.

In view of these facts, we are clearly of the opinion that Mrs. Cox was a joint maker of the note, and had the right to offset the full amount of her deposits against her liability on the note.

It has frequently been held by this court that, when a bank becomes insolvent, a depositor, who is indebted to the bank, may set-off the amount of his deposit in an action by the receiver or assignee to recover on the indebtedness due to the bank, and in the case of *Hughes* v. *Garrett,* 150 Ark. 404, 234 S. W. 265, one of the cases so holding, it was also held that, when a depositor was indebted to an insolvent bank on more than one account, he might direct the application of the deposit to a particular account, in the absence of a prior application of the deposit by the bank on another account.

In the case of *Stroud* v. *American National Bank of Rogers,* 158 Ark. 505, 250 S. W. 525, it was held that the maker and an indorser of a note are initially liable for its payment, regardless of the fact that the note is secured by collateral, and that in a suit upon a note against an accommodation indorser it was no defense that the holder of the note had colluded with the maker to require the indorser to pay where the holder holds collateral out of which it might make its money.

However, while we have said the testimony does not show whether Paul Cox is solvent or insolvent, and is silent as to the value of the collateral, these questions

are unimportant here, for the reason that Mrs. Cox is not an indorser, nor an accommodation maker, but is a joint maker, and is liable as such, and she therefore has the right—frequently recognized and enforced by this court—of offsetting the amount of her deposits in the bank against the demands due by her to the bank. *Steelman* v. *Atchley,* 98 Ark. 294, 135 S. W. 902; *Funk* v. *Young,* 138 Ark. 38, 210 S. W. 143; *Hughes* v. *Garrett,* 150 Ark. 404, 234 S. W. 265; *Desha Bank & Trust Co.* v. *Quilling,* 118 Ark. 118, 176 S. W. 132; *United States F. & G. Co.* v. *Maxwell,* 152 Ark. 73, 237 S. W. 708; *Prudential Realty Co.* v. *Allen,* 25 A. L. R. 938, note II.

The order of the court below conformed to the view here expressed, and it is therefore affirmed.

TOLLIVER *v.* STATE.

Opinion delivered June 29, 1931.

Seth C. Reynolds and *J. O. Livesay,* for appellant.

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

SMITH, J. Appellant was convicted of murder in the first degree, and given a life sentence in the penitentiary, under an indictment charging him with having shot and killed one Almer Crossly. He admitted firing the shot which caused Crossly's death, but interposed the defense

that the killing was accidental. The testimony may be briefly summarized as follows: The killing occurred in a room which appellant occupied. A number of other colored men were in his room shooting dice. Appellant was not engaged in the game, but was fixing an inner tube near the stove in the room, which was several feet from the bed where the dice game was in progress. Crossly and some other colored men entered the room and walked over to the bed. At about that time appellant quit work on the inner tube, walked over to the bed and took a pistol from under the pillow. A clicking sound was heard as if a pistol had been cocked, and a shot was fired immediately thereafter. The pistol was one which could not be fired until it had first been cocked. It could not be fired by merely pulling the trigger, as could a double-action or self-cocking pistol. This shot killed Crossly almost instantly after grazing the arm of another man as he reached across the bed for his winnings. No quarrel of any kind had occurred in the room, and appellant made no remark indicating any intention to shoot.

Three witnesses were permitted to testify, over the objection of appellant, concerning threats made by the latter on the night before the killing. These witnesses testified that appellant said some one had insulted him at his house the night before, and that he said, "I would have killed a man that night if I had had my gun; and that ain't all." Appellant did not say who the man was, and the witnesses did not know to whom he referred, but one of the parties present asked where the man lived, and appellant "motioned towards the compress." Deceased was present at appellant's house the night before the killing and worked with appellant at the compress.

Testimony was offered by appellant to the effect that he and deceased were friends of long-standing; that they had never had a quarrel, and that there was no bad feeling between them. Appellant also denied having made any threats against deceased, or any other person, and

denied having had the conversation attributed to him by the witnesses who testified concerning the threats. Appellant testified that he happened to remember that he had a half dollar under the pillow lying on the bed where the men were shooting dice, and he thought his money would be safer in his own pocket, and he went to the bed to get the money. In regard to the pistol he testified as follows: "They was playing on the bed. I got up to get my money and got my pistol out and was standing with it in my hand and Son Smith knocked my hand and the gun went off. Son was standing at the head of the bed, and I had to walk around to the wall between him and the wall." After describing the position of various participants in the game he proceeded to say: "When I pulled the gun up, and reached and got the gun, I said I believe that boy will bar the five. Smith said Gulley ain't got nothing, and he knocked my gun, and the gun went off." Smith testified that he hit appellant's arm, and the gun went off, and other persons in the room corroborated the testimony of both appellant and Smith.

Upon the issues thus joined, the court gave the usual instructions in homicide cases, but exceptions were saved to all the instructions which submitted the question whether appellant was guilty of a higher degree of homicide than that of involuntary manslaughter, for the reason that the undisputed testimony shows that he was not guilty of any higher degree of homicide than that of involuntary manslaughter. It is also insisted, for the reversal of the judgment of the court below, that error was committed in the admission of the testimony concerning the threats alleged to have been made by appellant, for the reason that the testimony did not identify the deceased as the person against whom the threats were made.

We are of the opinion that no error was committed in the admission of this testimony, nor in charging the jury upon the higher degrees of homicide.

The defense interposed was that the killing was accidental, and that appellant had no intention of killing

any one; but the threats had been but recently made, and were of a character to indicate that appellant was harboring a murderous intent towards some one, and it cannot be said that the testimony did not warrant the inference that deceased was the person referred to. Deceased had been at appellant's home the night before, this being the time and place when and where appellant was insulted. Appellant did not call deceased's name when asked the name of the person to whom he referred, but he did point in the direction of deceased's home and place of employment; but far more significant than this circumstance is the fact that appellant ceased the work upon which he was engaged when deceased came into his room, got his pistol, which could not be fired until it had been cocked, and shot the deceased with such accuracy of aim that a single shot killed him instantly. The truth of appellant's statement, and that of Smith, that Smith had struck appellant's arm, and had thereby caused the pistol to fire, was, of course, a question of fact for the jury, as was also the reasonableness of appellant's statement concerning the removal of the pistol from under the pillow. In fact, he made no reasonable explanation of the removal of the pistol, except to say that he had no intention of firing it.

At page 732 of Underhill's Criminal Evidence (3d ed.) it is said: "Under certain circumstances the vague and uncertain threats of the accused may be shown to prove the condition of his mind at the time of the crime. The rule is applied to his declarations that he is going to kill somebody, without mentioning any names, or that he is going to make trouble, or that he is going to shoot some one, or similar indefinite threats which indicates that he is in an ugly frame of mind and disposed to commit some crime, though not the particular crime for which he is on trial." The numerous cases cited in the note to the text quoted fully sustain the law as stated, among these being an Arkansas case, which does not appear as having been published in our official reports.

The testimony covering the threats was therefore competent upon the question of the condition of appellant's mind at the time of the killing, and if it was found by the jury, as it might have been, that deceased was the unnamed person to whom appellant referred, the testimony was competent and sufficient to show the malice and premeditation essential to constitute the crime of murder in the first degree, of which crime appellant was convicted.

Appellant requested an instruction numbered 3, reading as follows: "3. If you believe from the evidence in this case that the defendant, by accident or misadventure and not intentionally, shot and killed Crossly, against whom he had no evil design, he would not be guilty of unlawful homicide, and you will acquit him." The court modified this instruction by adding thereto the following clause: "unless he killed the deceased in a careless and reckless manner," and an exception was saved to this modification.

No error was committed in this respect. It is provided by statute (§ 2356, Crawford & Moses' Digest) that "if the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter." Certainly, in this case the jury might have found that, even though brandishing the pistol was a lawful act, it had been done without due caution and circumspection, and it was therefore not improper to submit this question to the jury, as was done by the modification of instruction numbered 3.

Another instruction numbered 4, also requested by appellant on the same subject, was modified to conform to instruction numbered 3, which was given as modified, and these instructions, as given, fully and correctly declared the law applicable to involuntary manslaughter.

Upon a consideration of the whole case, we find no error in the record; and, as we are also of the opinion that

the testimony is legally sufficient to support the conviction of murder in the first degree, the judgment must be affirmed, and it is so ordered.

KIRBY and BUTLER, JJ., dissent.

ROBINSON *v.* KNOWLTON.

Opinion delivered June 29, 1931.

H. T. Harrison, R. E. Wiley and *Roy D. Campbell,* for appellant.

George W. Emerson, Price Shofner, Fred A. Isgrig, John L. Krumm, J. H. Carmichael and *June P. Wooten,* for appellee.

MEHAFFY, J. A primary election was held in the city of Little Rock on the 10th day of November, 1930, in which there were three candidates for the office of mayor; Horace A. Knowlton, the appellee, Pat L. Robinson, the appellant, and Bob Brown.

The Democratic City Central Committee convened on November 12, 1930, and certified the vote as follows: Horace A. Knowlton, 4,537; Pat L. Robinson, 4,554; Bob Brown, 61.

The appellee, after the election, filed a petition with the Central Committee, asking that the clerk be directed to take the poll registers of the various precincts from the ballot boxes to the end that copies might be made of same. The appellee also requested the Central Committee for a recount of the ballots, and that illegal votes be cast out. This request was denied by the Central Committee.

On the 15th day of November the appellee filed his complaint in the Pulaski Circuit Court, contesting the nomination of the appellant for the office of mayor. In this complaint it was alleged that many illegal ballots had been cast and counted for appellant, and that certain votes which had been cast for the appellee had not been counted, and that in one precinct 10 unsigned ballots which had been cast for appellee had not been counted by the judges. It was also alleged that 10 persons living outside of the city of Little Rock had voted for appellant; that 150 persons voted in precincts in which they did not live, and had voted for appellant; that one of the polling precincts had been changed without authority of law; and that certain absentee ballots had been made out on Sunday preceding the election.

It was further alleged that the appellant had received more illegal votes than the appellee, and that many persons had voted whose names were not on the printed list of electors, and whose right to vote was not proved, as required by law; that there were 300 of these, and 200 of them voted for appellant; that many persons voting for the first time had failed to make the affidavit required by law, but were permitted to vote for appellant. The appellee prayed that the ballot boxes be purged of illegal votes. This complaint was signed by a sufficient number of supporting affidavits.

The appellant, within 10 days, filed an answer and motion to make the complaint more specific. It was alleged in the motion that the complaint was too general, indefinite, and uncertain in certain particulars set out in the motion. The appellant's answer to the original complaint admitted the allegations as to the election and as to the casting up of the returns, but denied that there were any illegal ballots cast or counted for him. He denied there were any unsigned ballots cast for appellee but not counted. In fact, he denied all allegations as to irregularities or illegal votes.

On the 22nd day of November, the last day on which a contest could be filed under the law, the appellee filed an amendment to his complaint in which he stated that, in addition to the allegations of his complaint, he further alleged that the votes tabulated by the Democratic City Central Committee upon the race for mayor, showed Robinson received 4,454 votes, Knowlton, 4,537 and Brown, 63. He alleged that 1,432 persons whose names did not appear on the certified list, or those who paid their poll taxes within the time prescribed by law, were permitted to cast their votes in the election. It was also stated in the amendment that the persons named did not file with the judges of the election poll tax receipts or written affidavits of the attainment of the majority, where such voters had attained their majority since the time for assessing taxes. It was further alleged that the

total vote for appellee exceeded the total vote for the appellant. The amendment named several persons who it alleged it voted illegally.

Upon the filing of this amendment, the appellant filed an answer to it denying the allegations made by appellee. A response was filed by appellee to the answer and motion to make the complaint more specific.

There was a great deal of testimony taken, the transcript containing more than 1,800 pages. There were more than 9,000 votes cast in the election on the 10th of November, and, as shown by the face of the returns, appellant received 17 votes more than appellee.

After a thorough and painstaking investigation and trial, the circuit court found that appellee had received 10 votes more than the appellant.

There is no evidence that either of the parties knew of any irregular or illegal votes being cast for him in the election.

When the circuit court decided the case, holding that appellee was entitled to the nomination, his name was placed on the ticket as nominee for the mayor of the city of Little Rock, and he was elected at the election in April.

Appellant prosecutes this appeal to reverse the judgment of the circuit court.

Appellee contends that the appeal should be dismissed. He calls attention to §§ 3772, 3773 and 3774, which provide among other things that, if the contest is not determined until after the election, and the defendant in such proceeding is elected to the office as the nominee of the party, and it is determined that he was not entitled to the nomination, then such judgment shall operate as an ouster from office and the vacancy in it shall be filled as provided by law for filling vacancies in such office, in case of death or resignation. It is contended that this section has reference to the contestee alone, and does not mean that the contestant may be ousted if the decision is finally against him.

In the case of *Ferguson* v. *Montgomery,* this question was before the court. It was there contended that the ouster provision applied to the contestee only and not to the contestant, and the court in that case said: "We think that the word 'defendant' as used in the section was not intended to be used in its strictly technical sense, but that it should be given a broader interpretation so as to carry out the act instead of destroying or crippling its usefulness. This court has already declared that the act should receive a liberal interpretation so as to effectuate the wholesome purposes intended by its framers." *Ferguson* v. *Montgomery,* 148 Ark. 83, 229 S. W. 30.

It is manifestly the intention of the act that, if either party should be placed on the ticket as the nominee and elected to the office, and it was afterwards determined that he was not entitled to the nomination, the judgment of the court should operate as an ouster from office. It was not the intention of the act that the judgment should operate as an ouster if the contestee was successful in the election, and not operate as an ouster if the contestant was elected to the office.

As this court has said, these statutes should be liberally construed so as to effectuate the purposes intended by the framers. The evident purpose in providing that the judgment should operate as an ouster was to prevent a party from continuing to hold office when it was finally decided he was not entitled to it, and it makes no difference whether he is the contestant or contestee.

Whether the contestant or contestee is elected to office, the judgment of ouster would deprive the one elected of the office, but it would not put the other party in office. The statute itself provides that when the judgment operates as an ouster, there will be a vacancy which must be filled according to law.

Appellee also calls attention to and relies on *Cain* v. *CarlLee,* 169 Ark. 887, 277 S. W. 551, but the court in that

case said, quoting from *Ferguson* v. *Montgomery, supra*: "The object was to prevent one illegally nominated, and thereby securing an election at the general election, from holding the office during the term provided by law, or a material portion thereof, and thereby rendering abortive the contest proceeding. It would render the contest proceeding as abortive to permit the contestant to continue in office after the judgment finding against him as it would if he were the contestee. Whoever is placed on the ticket by the election commissioners in obedience to the certificate of nomination or in obedience to an order of the court is the nominee of the party, and, if it is finally determined that he was not entitled to the nomination, the judgment of the court operates as an ouster.

The appellant contends that the pleadings filed by the contestant were not sufficient upon which to base a contest of an election.

The case of *Hill* v. *Williams*, 165 Ark. 421, 264 S. W. 964, is cited in support of appellant's contention. The court however, in that case, said: "Suffice it to say that it (complaint) contained many allegations of irregularities and fraud in general terms, partaking of the nature of conclusions."

A demurrer was interposed to this complaint and sustained by the circuit court, and this court said: "It was incumbent upon the appellant to allege facts and not conclusions which would disclose, if true, that he received a plurality of all the votes cast for sheriff and collector in said county. The allegation that certain votes were cast for and accredited to one of the three opponents, would not of itself show that he received the highest number of votes in the election for said office. There should have been an allegation in the complaint showing the number of votes received by each candidate, so that it would appear, after deducting the alleged fraudulent votes from the number accredited to appellee, that appellant would then have more votes than either one of

his opponents." *Hill* v. *Williams*, 165 Ark. 421, 264 S. W. 964.

The allegation that the court said the appellant should have made in the Hill case was made in the instant case.

This court has said that the statute providing for contesting elections should be liberally construed. The purpose of the contest is to determine what candidate received the greatest number of votes.

The pleadings, in an election contest case, should be sufficiently specific to give reasonable information as to the grounds of contest. The statute provides that the contest shall be begun in a certain number of days, and this court has held that, after the time for filing a contest has expired, the contestant cannot so amend his complaint or petition as to set forth any new cause of action. He can, however, even after the time has expired, amend his complaint by making it more definite and certain as to any charge in his original complaint, and if a motion to make it more specific is filed, it would be his duty to make the amendment.

He cannot, however, amend after the time expires by alleging a cause for contest not mentioned in his original complaint.

"Since such contest is generally held not to be a civil action subject to the rules of pleading in actions at law, but to be a special statutory proceeding, varying in its nature as well as in the sufficiency of the pleadings, according to the statutes of the different States, the same strict technical accuracy in pleading is not usually required as in civil action *inter partes*." 20 C. J. 225.

"But it is not essential that the contestant set forth the grounds of his contest with the precision required of a pleading in a civil action, certainty to a common intent being all that is generally required, and technical objections will be disregarded. The petition or complaint must apprise the contestee of the particular facts relied upon as invalidating his election and general

charges of fraud, mistake, intimidation, etc., will be disregarded unless the alleged acts relied on are set out in detail." 20 C. J. 227-8.

"It is impossible to state with precision the rule with regard to amendments of the pleadings. Much must be left to the discretion of the court, or the very object of the statute will be defeated. On the other hand, the contestant should not be allowed to make amendments which would necessarily unduly delay the trial of the contest, and on the other hand he should be allowed to make amendments in all cases where no such delay would result and where the amendment was made for the purpose of presenting the issues with due diligence. * * * The rule must not be so strict as to afford protection to fraud by which the will of the people is set at naught, nor so loose as to permit the acts of sworn officers chosen by the people to be inquired into without an adequate and well-defined cause." *Bland* v. *Benton,* 171 Ark. 805, 286 S. W. 976; *Gower* v. *Johnson,* 173 Ark. 120, 292 S. W. 382.

The former decisions of this court are practically unanimous in holding that the original pleading must state a *prima facie* case and must be filed within the time allowed by law, and that no amendment will be allowed which states a new and different cause of action, but that amendments will be allowed at any time that simply make more specific the statement of the cause of action in the original complaint.

It is next contended by the appellant that the court, having found from the testimony that the printed list of electors furnished to the judges and clerks holding the election had not been compiled and printed in compliance with the statute, the contest should have been dismissed, and they cite and rely on *Brown* v. *Nisler,* 179 Ark. 178, 15 S. W. (2d) 314.

In that case the court said, speaking of the contestant: "He is contesting appellee's right to the nomination, and claims that he received a majority of the

legal votes, but he bases his contest almost entirely on the printed list, and since, as we have already shown, the printed list was invalid, not having been compiled in substantial compliance with the provisions of the statute, his contest must necessarily fail, and the circuit court was correct in dismissing his complaint."

The contest in the case at bar is not based either entirely or almost entirely on the printed list. Appellee stated in his complaint that many illegal ballots were cast and counted for appellant, and that certain votes cast for appellee were not counted; that in precinct C of the 8th Ward 10 ballots which were unsigned by the voters and not counted by the judges were cast for appellee; that 10 persons living outside of the city limits voted in precinct C of the 8th Ward for the appellant.

There is a number of other allegations in plaintiff's complaint besides the allegations based on the printed list. It is alleged, however, that these allegations are not definite, and the testimony was objected to by appellant on that ground, and the court held that the only testimony that could be admitted would be that to substantiate the specific charges made in the complaint and sustained appellant's objection.

The court also held that he could not treat the complaint as amended to conform to the proof because the amendment would have to have been filed within 10 days. That, of course, is true as to any new cause of contest.

The next contention of the appellant is that the court erred in permitting testimony on the part of the appellee after the appellant had rested his case. The manner of the introduction of testimony is very largely in the discretion of the trial court, and, as we have already said, the purpose of the statute authorizing contest is to determine which candidate received the greatest number of votes, and the statute should be liberally construed so as to accomplish its purpose. Of course, no injustice should be done to the contestee, and he should be given an opportunity to fully develop his case, and the

procedure should be such as to enable the court to determine who had received the greatest number of votes, and this should be brought about without injustice being done either party.

If the evidence offered was competent and did not result in any prejudice or injustice to the appellant, it was not error for the court to permit it, and it was proper to permit the appellee to show that persons voted illegally whether their names were on the certified list or not.

This court has said in speaking of the ruling of the trial court as to the introduction of evidence: "There was no error in this ruling, as trial courts are vested with a very large discretion in determining the orderly course of the trial, and this court will not reverse therefor except for manifest abuse of such discretion." *Taaffe* v. *Sanderson,* 173 Ark. 970, 294 S. W. 74.

The court also said: "Furthermore this court seems to have recognized the correctness of this procedure in the case of *Bland* v. *Benton,* 171 Ark. 805, 285 S. W. 380."

Appellant next urges a reversal because the court held that certain votes for appellee were legal and counted same for him. It is argued that they should not have been counted at all for appellee, because he had alleged that these votes were illegal, but that allegation was made when it was thought that the list was compiled according to law, and the names of these voters did not appear on the printed list, and it is insisted that the pleadings make these 13 votes in controversy illegal. These votes were legal, and no error was committed in counting them.

The appellant says that the court erred in refusing to count as legal ballots for contestee certain ballots which disappeared from certain boxes, with attached maiden affidavits which had been placed in the boxes accompanying the ballots.

The appellant argues that the proof is conclusive and uncontradicted, that the affidavits disappeared and were not with the ballots, and that all these ballots, with the exception of Mrs. Hum, were cast for the contestee. The appellant, however, does not call our attention to the evidence on this question, but the evidence in the transcript shows that the attorney for the appellant stated he was not going to consent to appointment of a committee and that he did not think the ballots ought to be inquired into; that the returns of the election are *prima facie* valid.

The committee appointed by the court reported and the list of maiden votes was introduced, accompanied by the affidavits, the list showing for whom the party voted.

It would make the opinion entirely too long, and it would serve no useful purpose to call attention to each ballot or each voter and comment on the separate rulings of the court. We have examined very carefully the entire abstract of the evidence and the rulings of the court, and have reached the conclusion that the court correctly declared the law under which it held votes legal or illegal, and, even if there is any doubt about the ruling of the court on the legality or illegality of any votes, the ruling applied to the contestant as well as the contestee. The record clearly shows that the ruling of the trial court on all these questions was fair and impartial, manifesting a desire and intention to ascertain which candidate received the most legal votes in the primary election.

While we have not discussed each particular ballot and objections made to each one, we have very carefully considered the entire evidence and all the objections raised and have reached the conclusion that both parties had a fair and impartial trial, and that no reversible error was committed by the trial court.

The judgment of the circuit court is affirmed.

STATE EX REL. POINSETT COUNTY *v.* LANDERS.

Opinion delivered June 29, 1931.

Hughes & Davis and *M. P. Watkins,* for appellant.

N. F. Lamb, for appellee.

J. G. Waskom, amicus curiae.

McHANEY, J. The State of Arkansas, for the use and benefit of Poinsett County, and Cecil Williams, a taxpayer, brought this action against A. H. Landers, as sheriff and *ex officio* collector of Poinsett County, Arkansas, and the bondsmen on his official bonds, to recover the alleged excess fees, salary and perquisites in excess of $5,000 net per annum in par funds that had been received by the sheriff and collector during his last three terms of office, 1925 to 1930, inclusive. It is alleged that the appellee, Landers, had fraudulently received and unlawfully appropriated and converted to his own use sums of money as fees, salary, emoluments and perquisites of office largely in excess of $5,000 per an-

num, which he had failed and refused to pay into the treasury of the county as he was required to do by law; that he had failed to make an annual report as required by law, under oath, at the end of each year and a final report at the expiration of each term of office to the judge of the circuit court of the county detailing the amount of money received by such office during the preceding year, whether from salary, fees, emoluments or perquisites of such office. It is alleged further that appellee Landers, during the last six years, as sheriff and *ex officio collector,* has transacted a very large volume of business, and that the amount and description of the different items of fees are derived from numerous and different sources which renders the account so difficult and intricate that appellants are unable to state the amount due the treasury of the county, but that it is believed that the sum received approximates $60,000, and that the account is so voluminous and complicated that it is necessary for a master to be appointed to state the account, and that they have no adequate remedy at law. Other allegations are made in the complaint which we deem it unnecessary to detail. A number of interrogatories were attached to the complaint, and an order of court was prayed requiring appellee Landers to answer same. The interrogatories related very largely to commissions received by the collector in the collection of improvement district taxes, several drainage districts and other improvement districts being located in that county whose assessments are collected through the collector's office.

To this complaint a demurrer was interposed on several grounds, which the court treated as a motion to dismiss, and sustained.

This appeal, according to appellants, raises two questions on the demurrer: (1) "In reckoning the income of the officer is income derived from fees and commissions on collection of improvement district taxes to be included?" (2) "Is the action barred?"

The basis of this action is art. 19, § 23, Constitution of Arkansas, and the enabling statute enacted pursuant thereto, §§ 4633-4644, Crawford & Moses' Digest, being the act of 1875, Acts 1875, p. 124. This act was so recognized as the enabling act of art. 19, § 23, of the Constitution in *Griffin* v. *Rhoton*, 85 Ark. 89, 107 S. W. 380. The above section of the Constitution reads as follows: "No officer of this State nor of any county, city or town shall receive directly or indirectly for salary, fees and perquisites more than five thousand dollars net profits per annum in par funds and any and all sums in excess of this amount shall be paid into the State, county, city or town treasury as shall hereafter be directed by appropriate legislation."

The learned trial court based its action in sustaining the motion to dismiss very largely on the fact that appellee Landers holds two offices, and that he is therefore two officers, and entitled to receive $5,000 net as sheriff and $5,000 net as collector. Also that the commissions received as collector from the improvement districts was not to be taken into consideration in determining whether his net income from office exceeded $5,000.

While it is true that the sheriff, under the Constitution (art. 7, § 46) holds two separate and distinct offices (Ex parte *McCabe,* 33 Ark. 396; *Falconer* v. *Shores,* 37 Ark. 393), and must give a separate bond for each office, it does not follow that he becomes two officers. We think that he is necessarily only one officer, but holding two separate and distinct offices, until such time as the Legislature sees fit to separate them. Art. 7, § 46, of the Constitution provides: "The qualified electors of each county shall elect one sheriff, who shall be *ex officio* collector of taxes, unless otherwise provided by law; * * * with such duties as are now or may be prescribed by law." Section 9147, Crawford & Moses' Digest, provides: "The qualified electors of each county shall elect one sheriff, who shall be *ex officio* collector of taxes, unless otherwise provided by law, for the term of two years, with such

duties as are now or may be prescribed by law." The sheriff by virtue of being sheriff holds the office of collector. Until the Legislature sees proper to separate the offices of sheriff and collector and require them to be filled and the duties performed by separate persons, we think the plain provisions of both the Constitution and the statute are that the two offices shall be filled by one officer, and that he is entitled to receive for performing the duties of both offices only the net compensation fixed by the Constitution for one officer. Art. 19, § 23. While to our minds it is clear that the person holding the office of sheriff and collector is not entitled under the Constitution and laws to retain for his own use net compensation of $5,000 for each office, still, if it were doubtful, under the rule announced in *Swaim* v. *Lonoke County,* 167 Ark. 225, 268 S. W. 366, and reaffirmed in *Prairie County* v. *Radican* 174 Ark. 622, 296 S. W. 80, that where the provisions of law fixing the compensation of an officer is in doubt, or not clear, the doubt should be resolved in favor of the Government, or, in other words, the law should be given that construction most favorable to the Government, we would be compelled to hold against the contention of appellee.

As to the contention that appellee is not required to account for that part of the income the collector derived from commissions on collection of improvement district assessments, we are of the opinion that such contention cannot be sustained. The collector of Poinsett County, appellee Landers, collects a large amount of improvement district assessments. These collections are not only authorized by law, but it is a duty imposed upon the collector either in the general law or in the special acts creating such districts. For instance, under the general drainage district law, § 3618, Crawford & Moses' Digest, the provision is: "The amount of the taxes herein provided for shall be annually extended upon the tax books of the county, and collected by the collector of the county along with the other taxes, and for his services in making

such collection the collector shall receive a commission of one per cent.; and the same shall by the collector be paid over to the county treasurer at the same time that he pays over the county funds." The provision under the special acts is similar. This is an additional duty imposed upon the collector by law and the plain provision of both the Constitution and the statute is that he shall perform "such duties as are now or may be prescribed by law." The collection of such taxes being a duty imposed by law, it is difficult to perceive on what theory he would be entitled to retain the compensation therefor in excess of $5,000 net compensation for these and all other duties performed. In *Durden* v. *Sebastian County,* 73 Ark. 305, 83 S. W. 1048, we held that the fees received by the clerk as *ex officio* recorder must be included in determining his total compensation under a salary act fixing his compensation at $3,500. In *Keeling* v. *Searcy County,* 88 Ark. 386, 114 S. W. 925, the act fixed the clerk's salary at $1,500 as "full compensation for all work and services of said clerk that he is now or may be hereafter required by law to perform and for all other official work." This court held that the fees received by the clerk for taking affidavits and depositions of homesteaders in making claims to Government land should be included. In *State* v. *Swaim,* 167 Ark. 225, 268 S. W. 366, we held that under the salary act of Lonoke County fixing the salary of the clerk at $4,000, the fees of the clerk as commissioner in chancery should be accounted for. While there is a distinction between the offices of sheriff and collector and that of clerk and *ex officio* recorder, in that the clerk under the Constitution must always be *ex officio* recorder and is one office, whereas the sheriff is *ex officio* collector of taxes until otherwise provided by law, and therefore holds two offices (*Durden* v. *Sebastian County, supra*), we are of the opinion that the above cases are persuasive that the commissions received by the collector in the collection of improvement district taxes must be accounted for in determining the total net com-

pensation of the officer holding the office of sheriff and collector. It is argued that the collector is not required to account for his commissions on collections in improvement districts for the reason that under the law he is required to pay the excess over $5,000 net into the State, county, city or town treasury, and that, improvement district funds not belonging to either treasury, there is no provision of law as to where the excess of such funds should be paid. We do not decide where the excess funds should be paid arising from such collections because we do not deem it material to the decision in this case. But we have decided that the excess does not belong to the sheriff and collector, and that he must account for it and pay it over to the proper officials.

The applicable statute of limitations is § 6957, Crawford & Moses' Digest. "Actions on the official bonds of sheriffs, coroners, and constables shall be commenced within four years after the cause of action shall accrue, and not afterwards." This being an action against the sheriff and against his official bondsmen, this section would seem to be the applicable statute.

Other questions are argued in the briefs which we do not think it necessary to discuss. The complaint states a cause of action in equity, and no objection was made to the jurisdiction of the trial court.

The decree will be reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings according to law and the principles of equity, and not inconsistent with this opinion.

STAHL *v.* SIBECK.

Opinion delivered June 29, 1931.

Carl E. Bailey, for appellant.

Neil Bohlinger, Owens & Ehrman and *Donham & Fulk,* for appellee.

Carmichael & Hendricks and *B. H. Charles* and *Carl Trauernicht, amici curiae.*

McHaney, J. Proceeding under what is generally known as Amendment No. 11, correctly designated as No. 8 in Applegate's Constitution of Arkansas, and under the enabling act, 210 of 1925, the then county judge of Pulaski County took the necessary steps to issue bonds to refund the county's indebtedness existing on October 7, 1924, the supposed date of the adoption of said amendment. Subsequently this court held the amendment was adopted and became effective on December 7, 1924. *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22. Thereafter, in July, 1925, the county court ascertained and adjudicated the county's indebtedness to be $350,000 as of October 7, and entered a judgment or order to this effect. The court failed to include such indebtedness, if any, accruing and existing between October 7 and December 7, 1924, which amount is said to be $30,840.89 and expressly excepted certain (contingent at that time) indebtedness consisting of four claims filed against the county road fund which was found to be $95,376.50, and certain county road district warrants found to amount to $14,953. Bonds were thereafter issued in the sum of $350,000 for the purpose of paying the county's debts and was used for this purpose, which, together with annual current revenue since, has retired

all debts existing at December 7, 1924, and indebtedness accruing thereafter.

In February, 1931, proceedings were initiated by appellee, the present county judge, to have a supplemental bond issue for said county, on the theory that the former county judge had erroneously and incorrectly determined the indebtedness to be $350,000 as of October 7, 1924, whereas the correct indebtedness as of December 7, 1924, was $646,012.65, which left a balance of debts as of that date in the sum of $296,012.65. In April following, $296,000 in bonds were issued pursuant to the order of the county court. They were sold at par for 6 per cent. bonds to be converted into 4¾ per cent. bonds at the election of the buyer, and $325,000 in bonds were actually issued at 4¾ per cent., for which the county received $296,000, and which is now on deposit with the county treasurer, appellant. The above sum included an old bond issue of $66,000 and accrued interest of $1,287, which is conceded to be erroneous, and which was eliminated by the circuit court.

This controversy arises over the proper distribution of the proceeds in the treasurer's hands, and other parties, citizens and taxpayers, have intervened and attack the whole proceedings for the supplemental bond issue. The circuit court held the bond issue valid in part, and from such judgment this appeal is prosecuted.

Counsel for appellee seek to sustain the procedure on the authority of *Hagler* v. *Arkansas County,* 176 Ark. 115, 2 S. W. (2d) 5, but there is a wide dissimilarity in the two cases. There we were dealing with the surplus fund in the bond account resulting from an acceptance of warrants outstanding on October 7, 1924, in payment of county taxes, and the cancellation thereof prior to receipt of the bond money covering said warrants. In other words, the county court had made an order adjudging the amount of indebtedness of Arkansas County as of October 7, 1924, which included outstanding warrants that were accepted in payment of county taxes by the collector

which had been turned in by the collector to the treasurer on settlement approved by the county court, canceled and the treasurer given credit therefor. This created a surplus in the bond account which the county court desired transferred to the county general fund. We held properly that this could be done under act 30, Acts 1927, p. 86. We also held, under act 165 of 1927, p. 591, that a county which had issued bonds to cover debts to October 7, 1924, was authorized to pay any debts to December 7, 1924, from the surplus bond account, or might have a supplemental bond issue to cover the debts incurred between October 7 and December 7, if the surplus bond account was insufficient to cover the difference. That is a vastly different proposition from what is sought to be done in this case. Here the county court is attempting to set aside its previous order solemnly adjudicating the total debts of Pulaski County as of October 7, 1924, on the ground that the court made a mistake in the amount of the indebtedness, in the very teeth of the provisions of § 1 of the enabling act, No. 210 of 1925, p. 608. This section of the act provides that: "The county court shall, by order entered upon its records, declare the total amount of such indebtedness." It is then provided that such order shall be published, etc.; "and any property owner who is dissatisfied may, by suit in the chancery court of the county brought within thirty days after the publication of such order, * * * have a review of the correctness of the finding made in such order, * * *; but if no such suit is brought within thirty days, such finding shall be conclusive of the total amount of such indebtedness, and not open to further attack * * *. If any officer of such county, * * * shall wilfully make any false statement as to the amount of its indebtedness, he shall forfeit his office and be ineligible to hold any other office of profit or trust in this State."

The order of the county court in 1925 found that the county was indebted in the sum of $350,000. No person brought any suit to review the finding within the time

limited, and it thereupon became "conclusive of the total amount of such indebtedness, and not open to further attack," and is *res judicata*. The order of 1925, having become conclusive and not open to further attack after 30 days from its publication, exhausted all the power of the county court thereafter to issue bonds under amendment No. 8 and under act 120 of 1925, adopted pursuant thereto. Otherwise, the county courts could continue to issue bonds as often as they were able to find auditors who could discover additional indebtedness existing at the time of the adoption of the amendment. Only one bond issue was intended, and the supplemental bond issue mentioned in the Hagler case referred to the possibility of correcting a mistake of law, as to when the amendment was adopted, and not one of fact, as to the amount of indebtedness.

It is contended on behalf of appellee that the question of the validity of this bond issue is not properly before this court, and that such attack is purely collateral. But the question is here—the question of the jurisdiction of the court and therefore the validity of the judgment. As we have already shown, the county court exhausted its jurisdiction, its power and authority by the order of 1925. The county court therefore had no jurisdiction to make the order in question, and it is void. A void judgment is always open to attack, either direct or collateral.

As to the rights of bondholders, we hold that they are not necessary parties to this controversy. It appears that the total purchase price of the bonds is held in the county treasury, and they may therefore receive back their money on surrender and cancellation of said bonds illegally issued.

We do not deem it necessary to discuss all the questions raised in the briefs of counsel, as we have reached the conclusion, on the grounds stated, that the proceedings for the issuance of $296,000 in supplemental bonds are *coram non judice* and void, and that the judgment

of the circuit court be reversed, and the cause remanded with directions to enter a judgment in accordance with this opinion, and that same be certified to the county court to be there entered upon its records.

It is so ordered.

BOYD *v.* SIMPSON.

Opinion delivered June 29, 1931.

O. E. Williams, for appellant.

Joe P. Melton and *Charles A. Walls,* for appellee.

BUTLER, J. The appellants, sole heirs of W. M. Daniel, deceased, claimed by inheritance the title to a lot in the town of Lonoke, which was the homestead of Daniel in his lifetime, and brought this suit against Joe Simpson who claimed under the widow of W. M. Daniel by virtue of a devise to her of the said property in the last will and testament of the said W. M. Daniel. In the complaint the court was asked to construe the will and declare the plaintiffs the owners of the homestead, and that the deeds executed by the widow and others based on their claim of title under the will be canceled.

Paragraph 1 of the will provided for the appointment of an executor with certain directions. Paragraph 2 under which the appellees claimed is as follows: "After the payment of my debts and funeral expenses, I give to my beloved wife, Georgia Daniel, part of the east half of block 24, Wright's survey to the town of Lonoke, Arkansas, and described as follows: (Here follows description).

Paragraph 3: I give the sum of $100 to each of my beloved daughters, Mrs. Etta Boyd and Mrs. Fannie Bell Thompson.

Paragraph 4: I give the income from residue of estate, both personal and real, to my beloved wife, Georgia Daniel, during her lifetime.

Paragraph 5: After the death of my wife, Georgia Daniel, I give the residue of my estate, both real and personal, in fee to my beloved daughters, Mrs. Etta Boyd and Mrs. Fannie Bell Thompson, or to their surviving heirs.

Paragraph 6 authorized the executor to sell any of the real or personal property except the homestead for the purpose of paying debts, funeral expenses and legacies, and for the balance of any money arising from the sale to be placed at interest, and it and as much of the principal as necessary to be used for the support of Mrs. Daniel during her lifetime. This paragraph concluded with the following language: "It being my intention to provide a comfortable living for my beloved wife, Georgia Daniel, out of my estate in addition to the home set aside for her, and any balance after her death shall go to my daughters, Mrs. Etta Boyd and Mrs. Fanny Bell Thompson or their heirs as hereinbefore provided for."

The court found that by the will William Daniel, deceased, devised and bequeathed the following real estate to his wife, Mrs. Georgia Daniel, in fee simple, to-wit: (Here follows the description of the property mentioned in paragraph 2 of the will.) The court further held that the plaintiffs take nothing by their complaint, and that the same be dismissed for want of equity. From that decree is this appeal.

We think the chancellor correctly construed the will. By paragraph 2 there was an unconditional devise of the homestead to the widow without any words qualifying or limiting it. This, as we have frequently held, would manifest a clear intention on the part of the testator to

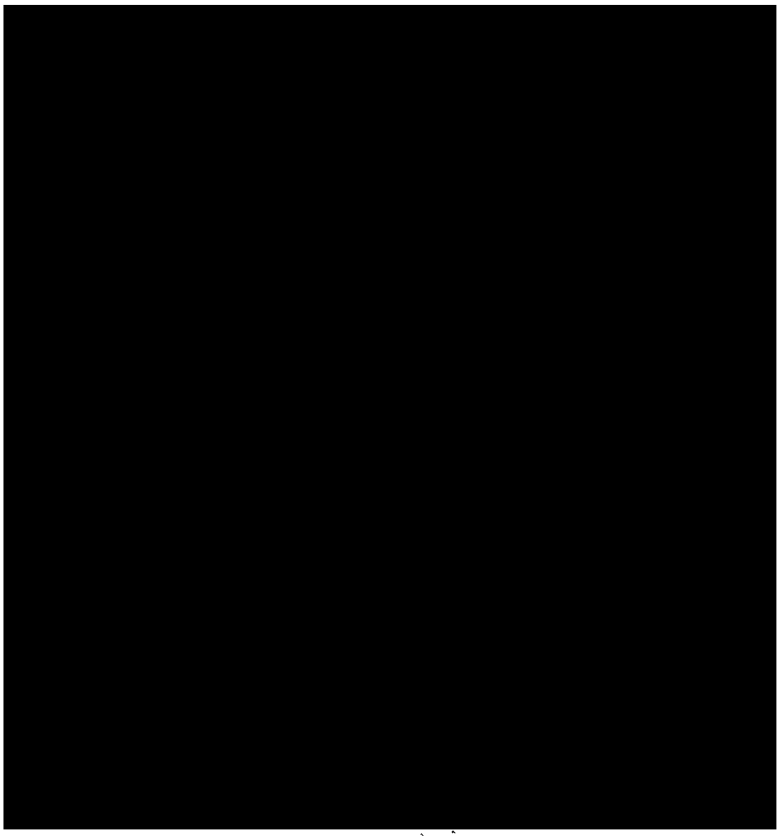
vest in her a fee simple estate. That intention in this case becomes more apparent upon a consideration of the entire will, for, after having devised the homestead to the widow, she is given the entire income from the residue of the estate during her lifetime with remainder over to the heirs as provided in paragraph 5. By this will the entire estate was disposed of in a manner prescribed by the testator in clear and unambiguous terms. The rules for the construction of wills are so well settled that we deem an extended citation of authorities unnecessary, but refer to the following cases which support and sustain the finding of the chancellor. *Hysmith* v. *Patton,* 72 Ark. 296, 80 S. W. 151; *Bernstein* v. *Bramble*, 81 Ark. 480, 99 S. W. 682; *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524; *Kelly* v. *Kelly*, 176 Ark. 548, 3 S. W. (2d) 305; *Witten* v. *Wegman,* 182 Ark. 62, 30 S. W. (2d) 834; *Letzkus* v. *Nothwang,* 170 Ark. 403, 279 S. W. 1006.

The decree of the trial court is in all things correct, and it is therefore affirmed.

STATE EX REL. ATTORNEY GENERAL *v.* WILLIAMS-ECHOLS DRY GOODS COMPANY.

Opinion on rehearing delivered March 19, 1928.

H. W. Applegate, Attorney General, *R. E. L. Johnson* and *John M. Rose,* for appellant.

Cravens & Cravens, for appellee.

HART, C. J., (on rehearing). According to a statement in the brief of appellant, plaintiff below, the complaint alleges that the defendant has not for any of the years 1915 to 1925, inclusive, filed an intangible property return with the assessor as provided by § 9965 of Crawford & Moses' Digest. Sections 9964 and 9965 were passed by the Legislature of 1917, and the construction of that statute was determinative of the issue raised by the complaint. The whole controversy arose as to the effect and constitutionality of the act. Having held the statute of 1917 to be unconstitutional, it is in legal contemplation as inoperative as though it had never been passed. *Norton* v. *Shelby County,* 118 U. S. 425, 6 S. Ct. 1121. It is well settled that when a statute is adjudged to be unconstitutional, it is as if it had never been. *Cochran* v. *Cobb, State Land Commr.,* 43 Ark. 180, and Cooley's Constitutional Limitations, (8th ed.) vol. 1, p. 382. Having held the act of 1917 in question to be unconstitutional, this leaves our former statutes on the subject of taxation of domestic corporations, and our decisions interpreting them, in force and unimpaired. We adhere to the views expressed in our original opinion, and the motion for rehearing will be denied.