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COMPTON *v.* STATE.

Opinion delivered June 15, 1931.

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Isaac McClellan, for appellant.

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

SMITH, J. This appeal is from a judgment sentencing appellant to a term of one year in the penitentiary upon a charge of stealing two hogs, the property of Nevia Schultz. For the reversal of this judgment, it is insisted (1) that the testimony was insufficient to sustain the conviction, and (2) that incompetent testimony was admitted over the appellant's objection.

As to the sufficiency of the testimony, it may be said that evidence was offered to the following effect. Miss Schultz, the owner of the stolen hogs, testified that about daylight on December 23, 1930, she was awakened by hearing her hogs squealing. She and her nephew, who lived with her, went to where her hogs, five in number,

bedded, and found all were gone. There was fresh blood in the hogs' bed, which had been covered over with loose earth to conceal it. There was a wagon track, which they followed until it left the public road and went out a private road which led to appellant's house. Miss Schultz then sent her nephew to Sheridan, the county seat, to obtain a warrant for the search of appellant's home and that of appellant's brother and brother-in-law, who lived nearby. Search was made by the officers that afternoon of appellant's home, and a freshly killed hog was found salted down in a tub. Fresh sausage was found in a pan, and in another pan two cooked hogs' heads were found. The noses had been cut off just below the eyes and had been cleaned in the usual way. The hogs' heads had been cooked to pieces but it looked as if the ears had been cut off both heads. Miss Schultz testified that she had marked the ears of her hogs.

Appellant was absent from his home when the officers arrived there, and they found his wife and another woman cooking the hogs' heads. An officer asked one woman where the ears were, and she said they were in the pan. The officer took a fork and stirred around in the pan until convinced the ears were not in it. The other officer asked the other woman about the ears, and she said they had eaten them. These statements were made by the women in the absence of the appellant, and the admission of this testimony was objected to on that account.

Miss Schultz and her nephew did not claim at the time that they had identified the hogs as the property of Miss Schultz, although she testified that she did recognize and identify them by certain marks on their noses, which she knew well, as she had fed the hogs every day. The officers went from the appellant's home to that of Nathan Wooley, his brother-in-law, where they found a fresh hog cut up and salted down except its head. There was no one at Wooley's house, and the officers then went and searched the home of Ed Compton, a brother of appellant, who was also absent, but no fresh meat was found.

The officers did find at Ed Compton's home a wagon which Ed owned, in the bed of which fresh blood spots were found.

On behalf of appellant, much testimony was offered to the effect that at about daylight on the morning of the 23d, which was about the time Miss Schultz was awakened by the squealing of her hogs, appellant was at a timber camp about four and one-half or five miles away.

As to this testimony, we can only say that it presents a question of fact for the jury. The court's charge upon the alibi defense is conceded to have been correct and in conformity to the law, and, if this defense was found by the jury not to have been established, it follows that the other testimony is legally sufficient to sustain the conviction.

The testimony on the part of appellant was to the effect that he and other members of his family owned a number of hogs, and that appellant's brother Joe killed a hog for appellant Monday afternoon, and that he killed another for his sister on the same day, this being the day preceding the killing of Miss Schultz's hogs.

It was the province of the jury to pass upon these questions of fact, and the testimony is legally sufficient to support the finding that appellant was found in possession of hogs belonging to Miss Schultz which had been recently stolen, and the reasonableness and sufficiency of his explanation of their possession was a question of fact for the jury. *Dennis* v. *State,* 169 Ark. 505, 275 S. W. 739; *McDonald* v. *State,* 165 Ark. 411, 264 S. W. 961.

We think no error was committed in admitting the testimony as to what the women said at appellant's home concerning the ears of the hogs in the absence of appellant. It is, of course, ordinarily true that the statements of third parties made in the absence of the accused are inadmissible against him; but this testimony related to a relevant fact in the case, that of the whereabouts of the hogs' ears and the failure to find them at the place where they would likely be. The women were cooking the heads, and they were asked where the ears were. It was

competent to show, even though appellant was absent when the hogs were found, that the ears could not also be found. One of the women answered that the ears were in the pan, and the other that they had been eaten. The absence of the ears, which contained the marks, made the identification of the hogs less certain, and we perceive no reason why the circumstances that the ears were missing might not be shown, even though appellant was absent when the hogs were found.

As no errors appears, the judgment must be affirmed, and it is so ordered.

SOUTHERN CITIES DISTRIBUTING COMPANY *v.* CARTER.

Opinion delivered June 15, 1931.

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Willis B. Smith and *Arnold & Arnold,* for appellants.

J. M. Carter and *B. E. Carter,* for appellee.

KIRBY, J., (after stating the facts). The referendum petitions were filed at a proper time. The initiative and

referendum amendment to the Constitution provides: "Municipalities may provide for the exercise of the initiative and referendum as to their local legislation. General laws shall be enacted providing for the exercise of the initiative and referendum as to counties. * * * In municipalities and counties, the time for filing an initiative petition shall not be fixed at less than sixty (60) nor more than ninety (90) days before the election at which it is to be voted upon; for a referendum petition at not less than thirty (30) nor more than ninety (90) days after the passage of such measure by a municipal council; nor less than ninety (90) days when filed against a local or special measure passed by the General Assembly." The amendment provides the time for filing a referendum petition at "not less than thirty (30) days nor more than ninety (90) days after the passage of such measure by a municipal council." This does not mean, of course, that the petition for a referendum cannot be filed less than 30 days after the passage of the measure sought to be referred, but only that the city must allow at least 30 days after the passage of the measure for the filing of a referendum petition thereon, and cannot allow more than 90 days. The evidence does not show that the city of Texarkana had attempted to provide in any manner for the exercise of the referendum on its local measures. It is true the referendum petitions were filed against the resolution of the city council, adopted on May 30, 1930, approving the increased rates, on June 27, 1930, less than 30 days after the adoption of such measure but they remained on file and were on file after 30 days after the passage of the gas rate resolution, and were passed upon and certified by the city clerk on the 31st day after the passage of the resolution, as containing sufficient signatures of qualified electors to authorize the referendum petitioned for. The referendum petitions, although they could not have been required to be filed in less than 30 days after the passage of the measure sought to be referred, were in no wise invalidated by having been sooner

filed. Although filed before the expiration of the 30 days allowed, they remained on file with the proper officer, who duly certified the sufficiency thereof after examination made on the 31st day from the passage of the resolution, and were therefore in all respects as valid and effective as though they had been filed on the 30th day thereafter. It may be that, after the signing of the petition, and before the expiration of the 30 days allowed for the filing thereof, any person who chose to do so could have insisted upon his signature being withdrawn therefrom; but where such petition was filed on time, and after its sufficiency was duly certified by the proper officer, any such signature could not be withdrawn as a matter of personal preference, nor without a sufficient showing that such signature had been fraudulently obtained. It then became a matter of public concern and part of the procedure necessary to invoke the referendum in determining the justness and reasonableness of the rates allowed to be charged under the resolution by the appellant company by approval or rejection of the resolution fixing rates for the supply and distribution of gas to the people within the city granting the franchise therefor. It is not questioned that the petitions for the referendum were sufficient, containing the number of qualified voters required under the Constitution before the names were wrongfully withdrawn and allowed to be stricken off by the city council on July 8, 1930, after the expiration of the time for filing thereof. The council then, of course, had no right to refuse to grant the petition and deny the referendum on any such grounds.

It is also true that no objection was made to the decision of the city clerk, or proceedings taken in the chancery court which only can review it, to challenge the correctness of the city clerk's decision and determination of the sufficiency of the petition for any reason—because not signed by the required number of qualified electors, or of not having a correct copy of the ordinance, the measure sought to be referred, attached to it—and

such objection cannot now be made in this suit, or in any other than the chancery court.

The amendment provides that, if the sufficiency of any petition is challenged, "such cause shall be a preference cause and shall be tried at once," but the failure to decide it "shall not prevent the question from being placed upon the ballot at the election named in such petition, nor militate against the validity of such measure, if it shall have been approved by a vote of the people." Amendment No. 5, Applegate's Constitution of Arkansas, 209.

It is next insisted that the resolution granting the increase in gas rates is not subject to the referendum, but this contention is without merit. The appellant company succeeded to all the rights of the old Southwestern Gas & Electric Company for supplying and distributing gas in the city of Texarkana, the transfer to it being recognized by the ordinances of the city and by the statute, act 248 of 1929, p. 1196.

The constitutional amendment provides: "Every extension, enlargement, grant, or conveyance of a franchise * * * whether the same be by statute, ordinance, resolution or otherwise, shall be subject to referendum and shall not be subject to emergency legislation."

In *Terral* v. *Arkansas Light & Power Co.,* 137 Ark. 523, 210 S. W. 139, a case involving the construction of act 135 of 1913, relative to the fixing of rates by a public utility in the city of Arkadelphia, a petition having been filed for referendum upon the ordinance granting an increase thereof, the court held that the fixing of such rates was not an exercise of the police power within the meaning of the statute, but the granting or extension of a franchise that was subject to the referendum. This constitutional amendment expressly provides: "Every extension, enlargement, grant, or conveyance of a franchise * * * whether the same be by statute, ordinance, resolution or otherwise, shall be subject to referendum and shall not be subject to emergency legislation." Such

language necessarily includes a resolution of the city council granting an increase of rates to the public utility for supplying and distributing gas to the people of the city under its contractual rights to do so, being but an extension or enlargement of its franchise. Moreover, such resolution is clearly included in the word "measure" as defined in the constitutional amendment, which states: "* * * includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character." Amendment also provides: "The initiative and referendum powers of the people are hereby reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character."

The making or fixing of rates is an act legislative and not judicial in kind within the meaning of this constitutional amendment. *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150; *Bacon* v. *Rutland Railroad,* 232 U. S. 134, 34 S. Ct. 283, 58 L. Ed. 538; *Keller* v. *Potomac Electric Company,* 261 U. S. 428, 43 S. Ct. 145, 67 L. Ed. 731; *Van Buren Water Co.* v. *Van Buren,* 152 Ark. 83, 237 S. W. 693; *Clear Creek Oil & Gas Co.* v. *Ft. Smith Spelter Co.,* 148 Ark. 260, 230 S. W. 897; *Coal District Power Co.* v. *Booneville,* 161 Ark. 638, 256 S. W. 871.

Although a right of appeal was provided by the law for any person aggrieved by any rate fixed by a municipal council or city commission, or by any order or ordinance made in pursuance of such law, for a review of the action of the municipal council or city commission, as to its legality, validity, fairness or reasonableness, it is not an exclusive remedy and did not prevent the proper application of the referendum to the resolution fixing the rates, nor did it amount to an enactment by the council of local legislation contrary to any general law of the State, within the meaning of such amendment. The purpose and effect of the referendum is only to allow the approval or rejection of the resolution and rates fixed there-

in by the council by vote of the people, who are not expected, of course, to establish a reasonable rate or rates in such referendum, but only to lend their approval to such rates as are fixed or proposed, or reject them by their votes.

The Texas cases relied upon by appellant, apparently holding contrary to our own decisions, are entitled to little weight in consideration and construction of the provisions of our dissimilar constitutional amendment, which is broad enough to and does grant the power of a referendum of the resolution or ordinance, which is but an extension or enlargement of appellant company's franchise.

The granting of a referendum on the resolution increasing the rates allowed to be charged by appellant company was not in effect a passage of a law or ordinance impairing any obligations of the contract or franchise of appellant company. Neither would the referendum of such ordinance, unfavorably acted upon by the electors, have an effect to deprive said company of any of its property or rights without due process of law. There is no evidence of any act or conduct of the city indicating the surrender or release of its right to regulate the rates charged by public utilities to its citizens for furnishing gas. *Milwaukee Electric Rd. Co.* v. *Railroad Commission,* 238 U. S. 174, 35 S. Ct. 820, 59 L. Ed. 1254.

The General Assembly had power, even under the Constitution permitting the revocation and annulment of charters found to be injurious to the citizens of the State, to permit the change and amendment of any franchise granted by any city attempting to bind itself irrevocably to any agreed schedule of charges or rates, regardless of the necessity that might exist for the regulation thereof. Sec. 6, art. 12, Const. of 1874; *Ry. Company* v. *Gill,* 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452; *Id.* 156 U. S. 649; *Spring Valley Water Works* v. *Schottler,* 110 U. S. 347, 4 S. Ct. 48, 28 L. Ed. 173; *Covington & Lexington Turnpike Road Co.* v. *Sandford,* 164 U. S. 578, 17 S. Ct. 198, 41 L. Ed. 560.

It follows from what has been said that the judgment of the circuit court in issuing the mandamus to compel the granting of the referendum upon the resolution or ordinance of the city increasing the rates allowed to be charged the consumers in the distribution of gas was correct, and the judgment must be affirmed. It is so ordered.

KEMP *v.* HUNTER TRANSFER COMPANY.

Opinion delivered June 22, 1931.

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Will Steel and *T. B. Vance,* for appellant.

W. H. Arnold, W. H. Arnold, Jr., and *David C. Arnold,* for appellee.

KIRBY, J., (after stating the facts). In *Wheeler* v. *Ellis,* 183 Ark. 133, 35 S. W. (2d) 64, where the negligence of the master was alleged to consist in the failure to exercise ordinary care to supply the servant with safe tools or appliances with which to do his work, the court said: "The action is founded on the alleged negligence of the master in failing to exercise ordinary care to furnish 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."

In *Railway* v. *Brown,* 67 Ark. 304, 54 S. W. 865, the court, quoting with approval an extract of the opinion in *Railway* v. *Gaines,* 46 Ark. 455, said: "Now notice of the alleged defect, or, what amounts to the same thing, the means of knowledge which the company failed to use, was a material fact which was necessarily involved in the verdict. Consequently, as no testimony was given from which the jury could infer that the company knew, or might by reasonable diligence have discovered, the defect in time to remedy it and prevent the casualty, the verdict is not supported by sufficient evidence."

In *Wheeler* v. *Ellis, supra,* a suit for damages for alleged negligence in respect to furnishing safe tools and appliances to the servant with which to do his work, and where the verdict was directed against the plaintiff, the court said: "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 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. L., I. M. & S. R. Co.* v. *Gaines,* 46 Ark. 555; *Graysonia-Nashville Lumber Co.* v. *Whitesell,* 100 Ark. 422, 140 S. W. 592; *K. C. Sou. Ry. Co.* v. *Cook,*

100 Ark. 467, 140 S. W. 579." See also *Central Coal & Coke Co.* v. *Lockhart,* 161 Ark. 97, 256 S. W. 37.

In *Missouri & North Ark. Rd. Co.* v. *Vanzant,* 100 Ark. 465, 140 S. W. 587, the court said: "Where a servant knows the methods that are adopted by the master, the place furnished in which to work and the appliances with which it is done, and continues in the employment without complaint, he assumes the risks which may result from such known methods and appliances." *Railway Co.* v. *Kelton,* 55 Ark. 483, 18 S. W. 933; *Patterson Coal Co.* v. *Poe,* 81 Ark. 343, 90 S. W. 538; *St. L., I. M. & S. R. Co.* v. *Goins,* 90 Ark. 387, 119 S. W. 277; and *Graham* v. *Thrall,* 95 Ark. 560, 129 S. W. 532.

There is no evidence of negligence of the master in failing to exercise ordinary care to furnish the servant with a safe appliance with which to do his work, except as the inference may arise from the fact of the injury to plaintiff from a defect in the rim and the explosion of the tire, which does not overcome the presumption that the master performed his duty in exercising ordinary care in the furnishing of such appliance and in having the repairs made thereon. The undisputed testimony shows that the rim, upon which the new casing was mounted, had been used on the wheel of the truck the day before on its run to Alexandria. That the casing thereon "blew out," and the necessity for repairs was caused thereby. The old casing was still on the rim when it was returned and reported for repairs, and the lock ring still in place on the rim. Appellee company, having no means for making repairs of its trucks and tires, sent it to Dixon & Horney, Inc., independent contractors with whom it had a contract for doing such work, as was their custom, for repairs, and, being advised by them that a new casing was needed, directed that one be put on. Dixon & Horney were experienced and skilled mechanics, reputed to be "the best repairmen in the city," accustomed to making such repairs. They mounted the new casing on the rim and returned it in the afternoon to appellee's place of

business in apparently first class condition, putting it on the platform in front for use next day on the truck.

There was no testimony indicating or tending to show that the repairs were not properly made, while there is much testimony showing they were carefully and well done, with proper inspections before and after completion thereof.

Thomas, of appellee company, and also Mr. Hunter, saw the mounted rim after its return from the shop, and it appeared to be all right; could discover nothing wrong with it. Appellant also said he examined it, and it appeared to be all right, and that he could discover nothing wrong with it. There was no method of making an inspection of the tire after it was returned repaired that would have discovered whether the lock ring was not properly seated, if such was the fact, in the groove therefor, as the foreman at the repair shop testified was the case when the tire was assembled, without tearing it down again; and, as already said, the manager of appellee company, Mr. Hunter, and the appellant himself, all observed it, found it to be apparently all right and "could find nothing wrong with it."

The master's duty to exercise ordinary care in repairing and making safe the appliance for appellant's use in the performance of his service was fully discharged by his sending the appliance to Dixon & Horney, Inc., independent contractors, experts in that line, for making the repairs, and the showing by them of how the repairs were made and the inspections thereof by the repairers in the making and completion of the repairs and the return of the tire to appellee company in apparently first class condition, with the new casing mounted on the rim. *O'Donnell* v. *Bourn,* 38 Mo. App. 245; *Runyan* v. *Goodrum,* 147 Ark. 481, 228 S. W. 397, 13 A. L. R. 1403; *Devlin* v. *Snell,* 89 N. Y. 470, 42 Am. Rep. 311; *McClaren* v. *Weber Bros. Shoe Co.,* 166 Fed. 714.

There was no testimony showing any failure to exercise ordinary care in having the repairs made or neg-

ligence on the part of appellee in furnishing appellant with the appliance as repaired for use in the performance of his service. The testimony being undisputed, the court did not err in instructing the verdict.

The judgment is affirmed.

COLLINS *v.* STATE.

Opinion delivered June 22, 1931.

Caviness & George and *B. F. Madole,* for appellant.

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

McHANEY, J. Appellant was convicted on a charge of grand larceny, for the theft of one brown Jersey heifer, of the value of $13.76, the property of Everett Matthews, and sentenced to one year in the penitentiary. He assigns and relies upon four errors of the trial court to reverse the judgment against him.

It is first said that the evidence is not sufficient to support the verdict. The facts are, as shown by the State's witnesses, that said Matthews was the owner of one brown Jersey heifer which disappeared from the pasture near appellant's home in Ola. Shortly after its disappearance, Matthews, senior, discovered its hide

hanging in front of George King's hide house in Ola, and King advised Mr. Matthews that he had purchased the heifer from appellant, and they butchered it in the pasture near the Carl Collins' home. He so testified in court. Appellant admitted that he sold a heifer to King, but denied that it was the property of Everett Matthews, and insisted that it belonged to him, his father and brother; that his father had bought a cow and her calf in 1929, and that the heifer sold to King was that calf. D. W. Matthews, Everett Matthews and his wife positively identified the hide. This made a question for the jury as to the identity of the heifer. But appellant says this evidence is insufficient to show that he had stolen it, and that this is all the evidence on the subject; that the fact that he, with King, butchered this heifer which he had sold to King, even though it were Matthews' property, is not sufficient to convict of larceny. We cannot agree with appellant. Section 2490, Crawford & Moses' Digest provides: "Every person who shall mark, steal or kill, or wound, with intent to steal, any kind of cattle, pigs, hogs, sheep or goats, shall be guilty of a felony, and upon conviction thereof, be imprisoned at hard labor in the penitentiary for any time not less than one year nor more than five years." Appellant and another killed the heifer, the property of Matthews, sold it to King, and the "intent to steal" could be inferred by the jury from such facts.

It is next said the court erred in refusing to give instruction No. 1, requested by him on circumstantial evidence. The evidence here was not circumstantial, but was positive and direct. No error was therefore committed, and we have held "that it is not improper to refuse to give such an instruction, even in cases where the conviction was asked wholly upon circumstantial evidence, where the jury was properly instructed as to the burden of proof resting on the State to establish the guilt of the accused beyond a reasonable doubt and where rea-

sonable doubt was properly defined." *Payne* v. *State,* 177 Ark. 413, 6 S. W. (2d) 832.

The court fully and correctly instructed on the credibility of the witnesses, the weight of the evidence, presumption of innocence, and reasonable doubt.

It is next said the court erred in refusing requested instruction No. 2 as follows: "Even though the evidence raises your suspicion of the theft of the yearling by the defendant, Bob Collins, yet, unless the theft is proved beyond a reasonable doubt, you will find the defendant not guilty."

This instruction was fully covered by others given by the court and would have been a repetition. The court is not required to multiply instructions on the same subject to the same effect.

It is finally said the court erred in refusing requested instruction No. 3 as follows: "If you find that the defendant, Bob Collins, took the yearling in question, in good faith, under the honest belief that he was the owner thereof, and even though, upon learning afterwards that said yearling was not his own property, converted it to his own use, you will find the defendant not guilty."

Conceding the correctness of such instruction, [see *Wilson* v. *State,* 96 Ark. 148, 131 S. W. 336, 41 L. R. A. (N. S.) 549, Am. Cas. 1912B, 339] it was abstract as there was no theory advanced by appellant on which to base it. He and his relatives testified it was their heifer—not that he had taken Matthews' property under the honest but mistaken belief that it was his.

Affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* FRY.

Opinion delivered June 29, 1931.

[redacted]

Moore, Gray & Burrow, for appellant.

Robert Bailey, for appellee.

HART, C. J., (after stating the facts). The common-law rule was that, after the lapse of seven years without intelligence concerning a person, the presumption of life ceased, and the burden of proof devolved upon the other party to show that he was alive. Greenleaf on Evidence (15th ed.), § 41; and case note to L. R. A. 1915B, p. 729. In this connection it may be stated that the presumption relates to the fact of death and not to the time of death. *Davie* v. *Briggs,* 97 U. S. 628.

Our statute on the subject is contained in § 4111 of Crawford & Moses' Digest, which is 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."

In *Wilks* v. *Mutual Aid Union,* 135 Ark. 112, 204 S. W. 599, this section of our statute was construed to mean that any person, a resident of this State, and who absents himself from his home or residence beyond the limits of the State for five successive years and who has not been heard from by near relatives, friends, or neighbors, who would naturally make inquiry concerning his whereabouts and who would most likely receive communication from him and be in a position to know whether or not he was living, will be presumed to be dead unless there is proof to the contrary.

The same construction was recognized in *Burnett* v. *Modern Woodmen of America,* 183 Ark. 729, 38 S. W. (2d) 24; but recovery was denied in that case because it was not shown that the insured had a residence in this State; and the statute therefore did not apply.

On the part of the appellant insurance company, it is insisted that the judgment must be reversed in this case because there is no showing made by appellees that the insured ever left the State of Arkansas. It will be observed that the case was tried by the court sitting as a jury, and that the court found the issues in favor of the plaintiffs. The evidence shows that the insured left his home at Russellville, Arkansas, to go to Morrilton, Arkansas, for the purpose of collecting and soliciting insurance. He expected to return home within a day or two and has remained away since that time, which was during the latter part of June, 1923. No intelligence has been received from him; and, although diligent search and inquiry were made by his father, his whereabouts have never been ascertained. His father inquired from friends and relatives in other portions of the State where they had lived and was informed that nothing had been heard from or of him. The district manager of the insurance company for which he worked, visited forty or fifty towns in the usual course of business and in each of

them made inquiry about the whereabouts of John N. Fry. So far as can be ascertained from the record, there was no occasion for him to leave his wife to whom he had been recently married. He was not in debt, and no cause of his disappearance was shown. In finding that he had gone beyond the limits of the State and disappeared for the period of five successive years, the court might properly take into consideration all the facts just recited as well as facts of which the court might take judicial notice such as the size and population of the State of Arkansas, the number and population of the various towns, and other matters which might make it more or less difficult to conceal one's identity in the State. The proof of absence from the State, like the fact of death, may rest upon circumstantial evidence. Neither death nor the fact of absence beyond the limits of the State can be inferred from the mere fact of disappearance; but when all the facts and circumstances connected therewith as recited above are considered, we think the court was warranted in finding that the insured had absented himself beyond the limits of the State for five successive years, and that this brought a presumption of death under the statute. *Kennedy* v. *Modern Woodmen of America,* 243 Ill. 560, 90 N. E. 1084, 28 L. R. A. (N. S.) 181; and *Fidelity Mutual Life Assn.* v. *Mettler,* 185 U. S. 308, 22 S. Ct. 662. See also Bacon on Life & Accident Insurance, page 1594, § 648, and Cooley's Briefs on Insurance, (2d ed.) vol. 6, pp. 5167-5168.

It is next contended that the court erred in allowing the plaintiffs to join in one action the suit on the two different policies. It is pointed out that, while Charles L. Fry and John N. Fry are named as the beneficiaries in the $1,000 policy and may be entitled to recover on that policy, the $125 policy is payable to the estate of the insured, John N. Fry, and that they have no right to recover on it. Under our statute relating to the law of administration, where a person dies leaving only adult heirs and no creditors, they may take possession of the

decedent's estate without administration. Crawford & Moses' Digest, § 1. Our statute also favors the bringing of suits by parties in interest. The undisputed proof shows that John N. Fry's wife secured a divorce from him after he had disappeared for something over a year, and that she has no interest whatever in his estate. His parents, Charles L. Fry and Jennie B. Fry, were entitled to his estate, and, there being no creditors, were entitled to maintain this action. *Metropolitan Life Ins. Co.* v. *Fitzgerald,* 137 Ark. 366, 209 S. W. 77.

The court was also warranted in finding that the plaintiff, Charles L. Fry, overpaid the premiums on said policies in the amount of $50, and that plaintiffs were entitled to recover that sum.

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

McDougall *v.* Hachmeister.

Opinion delivered June 29, 1931.

Joseph Morrison, for appellant.

Trimble, Trimble & McCrary, for appellee.

HUMPHREYS, J. This suit was brought by appellees against appellants to obtain a judgment upon an additional interest note for $1,472.72 and accrued interest after maturity, of date May 23, 1921, and to foreclose a second deed of trust of even date executed to secure same covering certain real estate in Arkansas County.

Appellant filed an answer admitting the execution of the instruments and pleading as a defense thereto that they were parts of an usurious transaction which was void as to interest if construed according to the usury laws of Illinois and void as to both interest and principal if construed according to the laws of Arkansas.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a judgment against appellants for $4,913.98 and a decree of foreclosure and order of sale of said real estate to satisfy same, from which is this appeal.

The record reflects the following facts: On May 23, 1921, Gilbert H. McDougall and wife and Chas. W. McDougall and wife executed 28 first mortgage bonds in the amount of $500 each, due December 1, 1931, bearing interest at the rate of 7 per cent. per annum; and, to secure same, executed a deed of trust to Charles Foreman, trustee for George M. Foreman & Company on said real estate. On the same date and as a part of the same transaction, said appellants executed an installment note for additional interest on the main note of $14,000 to George M. Foreman & Company for $1,472.72, the first installment of $72.72 being due December 1, 1921, and the balance in installments of $70 each due respectively on June 1 and December 1 and including December 1, 1931, and, to secure same, executed a second deed of trust on said real estate to Herman Hachmeister, trustee for Charles Foreman, but for the benefit of George M. Foreman &

Company, who advanced the funds on all the bonds and note. At the time the instruments were executed, Gilbert H. McDougall resided in the State of Illinois, Chas. W. McDougall in the State of Arkansas, and Herman Hachmeister, Chas. Foreman and George M. Foreman & Company in the State of Illinois. Each deed of trust contained the following clause:

"The deed of trust, and the notes hereby secured, shall be construed according to the laws of the State of Arkansas."

Charles W. McDougall executed all the instruments in the State of Arkansas and Gilbert H. McDougall in the State of Illinois. The bonds and note were made payable at the office of George M. Foreman & Company in the city of Chicago, Illinois. After the delivery of the bonds and note and the deeds of trust to George M. Foreman in the State of Illinois, the said George M. Foreman & Company issued its checks to appellants and to H. B. Allen Sickle as follows:

On June 3, 1921, $2,000 to Chas. W. McDougall.

On July 1, 1921, $1,000 to Gilbert H. McDougall, Chas. W. McDougall and H. B. Allen Sickle.

On July 1, 1921, $9,600 to Gilbert H. McDougall, Chas. W. McDougall and H. B. Sickle.

This made a total of $12,600. From the total loan of $14,000, $1,400 was deducted by George M. Foreman & Company as a cash commission, and out of the checks that were issued, H. B. Allen Sickle collected $700 as a commission. The McDougalls indorsed the checks out of which H. B. Allen Sickle received $700 as an additional commission, but testified that they did so because it was the only way to get the money. H. B. Allen Sickle was instrumental in obtaining the loan and wrote a number of letters to George M. Foreman & Company in Chicago in procuring same. In making the application for the loan, the McDougalls stated that H. B. Allen Sickle was their agent and authorized the payment of the loan to him as such. The evidence was conflicting as to whether

H. B. Allen Sickle represented the lender or the borrowers.

The first question arising on the appeal is whether the law of Illinois or Arkansas shall govern in determining the issue of usury. This court has decided "that where parties to a mortgage of land reside in different States, they may, in good faith, contract that it shall be construed with reference to the laws of the State where the mortgagor resides and the land is situated." *Lanier* v. *Union Mortgage, Banking & Trust Co.,* 64 Ark. 39, 40 S. W. 466; *Ward* v. *Blythe,* 92 Ark. 210, 122 S. W. 508. There is nothing in this record indicating that said clause was inserted in the contract in bad faith or for the purpose of avoiding the force of the usury law in Illinois. Louis M. Watson testified that, in making loans on farms, George M. Foreman & Company always agreed therein that the contract should be construed in accordance with the laws of the State in which the real estate was situated. We are convinced from reading the record that the clause was inserted in the best of faith, and, under our rule, is binding upon appellants.

The next question arising on this appeal is whether the contract before us is usurious when construed according to the laws of this State. Under our law, the highest rate of interest that can be charged for the use of money is 10 per cent. per annum, and any charge above that renders a contract void both as to principal and interest. Constitution of 1874, article 19, § 13; Crawford & Moses' Digest, §§ 7364, 7365, 7366 and 7367. The test in this State as to whether a contract is usurious is whether the total amount to be paid under its terms by the borrower, in the event of performance, is in excess of the principal received plus 10 per cent. interest per annum for the term thereof. In applying this test to the contract before us, it will be necessary to determine whether the principal shall be treated as received on the date of the contract or on the day same was actually paid to appellants; and whether the amount of $700 received by

H. B. Allen Sickle was received by him as the agent of appellants or as the agent of appellees.

(1) There was a delay in paying the money to appellants after the execution of the instruments, but it was caused by a defect in the abstract of title to the land, which appellants agreed to furnish. The delay after the defects were corrected was not unreasonable, but, on the contrary, the transaction was wound up expeditiously. There is nothing in the record to indicate that the delay was a subterfuge resorted to in order to obtain more than 10 per cent. per annum for the use of the money. This court said in the case of *Matthews* v. *Georgia State Building & Loan Assn.*, 132 Ark. 220, 200 S. W. 130, 21 A. L. R. 789, that "a contract is not usurious when the parties acted in good faith, where 10 per cent. interest is charged, where the agreement was dated May 21, 1915, but was not closed and the money delivered until June 9, 1915." As the delay was not occasioned by the fault or bad faith on the part of appellees, the principal must be regarded as received by appellants on the date of the contract in determining whether same is usurious.

(2) It was ruled by this court in the case of *May* v. *Flint*, 54 Ark. 574, 16 S. W. 575, that "to affect a loan with usury on account of a commission paid to an intermediary, it must appear that he was the agent of the lender and took the commission under authority express or implied from his principal." According to the record before us, H. B. Allen Sickle was appointed appellant's agent in their written application for the loan, and the letters written by him to appellees show that he was acting for appellants in the procurement of the loan. Before the money was paid over to appellants by appellees, they were specifically informed that H. B. Allen Sickle was not their agent, and that, if anything was paid to him as a commission, they would have to pay it on their own account.

Although forewarned, appellants indorsed the checks and allowed H. B. Allen Sickle to appropriate $700 of

the money paid to them. H. B. Allen Sickle had never represented appellees in making loans and cannot in good conscience be regarded as their general representative by reason of past services or on account of an intimate relationship. In determining, therefore, whether the contract is usurious, we cannot treat the $700 paid by appellants to H. B. Allen Sickle out of the money as so much interest paid by them.

Pursuant to the test and rules stated above by which the validity of the contract must be determined, we proceed to a calculation of the cost of the loan under the terms of the contract as compared with the amount of money actually received as of date May 23, 1921, plus interest thereon at the rate of 10 per cent. per annum from said date to December 1, 1931.

CALCULATIONS AS PER TERMS OF THE CONTRACT.

Principal loan		$14,000.00
Additional interest notes		1,472.72
Interest on $14,000.00 at 7% from May 23 1921, until December 1, 1931		
$14,000.00 at 7% for 10 years	$ 9,800.00	
$14,000.00 at 7% for 6 months	490.00	
$14,000.00 at 7% for 7 days	19.04	10,309.04
Total cost of contract		$25,781.76

CALCULATIONS OF PRINCIPAL RECEIVED BEARING INTEREST AT RATE OF 10 PER CENT. PER ANNUM FROM MAY 23, 1921 TO DECEMBER 1, 1931.

Principal received		$12,600.00
$12,600.00 at 10% for 10 years	$12,600.00	
$12,600.00 at 10% for 6 months	630.00	
$12,600.00 at 10% for 7 days	24.50	13,254.50
Total cost of principal and interest at 10%		$25,854.50

The rate of interest actually charged under the contract on a principal sum of $12,600.00 is 9.945 per cent.

The interest charged being less than 10 per cent. on the principal sum received, the decree of the trial court is affirmed.

CAMDEN GAS CORPORATION *v.* CAMDEN.

Opinion delivered June 29, 1931.

Bryan, Williams, Cave & McPheeters, Crawford, Johnson, Powell, Smead & Knox, Robinson, House & Moses and *Harry E. Meek*, for appellant.

Haynie, Parks & Westfall and *Gaughan, Sifford, Godwin & Gaughan*, for appellee.

HUMPHREYS, J. This suit for an injunction was brought by appellant against appellees in the circuit court of Ouachita County to restrain them from enforcing ordinance No. 303 of the city of Camden of date April 1, 1929, reducing the rate of gas to domestic consumers to 55 cents for each 1,000 cubic feet and allowing a minimum charge of $1.50 a month against each consumer regardless of the amount of gas consumed by him. It was alleged in the complaint, in substance, that said ordinance

is void, being violative of a charter contract awarded by the city of Camden by ordinance No. 215 of date April 24, 1923, to H. B. Scofield and W. J. Colegrove and later duly assigned by their assignee to appellant to furnish the inhabitants of said city gas for domestic purposes at the rate of 75 cents per 1,000 cubic feet; but that, if the passage of ordinance No. 303 was not void because inhibited by article 1, § 10 of the Constitution of the United States and article 2, § 17 of the Constitution of Arkansas prohibiting the impairment of the obligation of contracts, it is void because the rate of 55 cents per 1,000 cubic feet is unreasonable, arbitrary, confiscatory, and, in effect, the taking of its property without compensation in violation of both constitutions.

On application, a temporary restraining order was obtained preventing the enforcement of the reduced rate upon execution of a bond obligating a refund of the difference between the rate paid by the consumer under ordinance No. 215 and the rate fixed in ordinance No. 303 in case the reduced rate should be sustained by the court.

Appellant filed an answer denying *seriatim* the material allegations of the complaint.

The cause was submitted to the court upon the pleadings and testimony introduced by the respective parties, resulting in a dismissal of the complaint, a dissolution of the temporary restraining order, and the rendition of a judgment against appellants for $17,819.17 under the terms of the bond together with all costs incurred by them, from which is this appeal.

The first question arising for determination is whether ordinance No. 303, reducing the rate, is violative of the charter contract awarded appellant's predecessor. The charter contract was awarded to its predecessor by ordinance No. 215 under the power delegated to municipal corporations of this State by act No. 124 of the Acts of the General Assembly of the State of Arkansas for the year 1921, which not only accords to the municipalities of the State of Arkansas the exclusive right,

but makes it their duty "from time to time to make all reasonable rules and regulations with reference to the operation within such municipalities of any such utility and to order the performance of any duty devolving upon such public utility under its franchise or contract, if any, or under this or any other statute or law and from time to time to initiate, fix, promulgate, regulate, modify, amend, adjust, readjust, or otherwise make and determine fair and reasonable rates to be charged by all public utilities for furnishing public service within such municipalities, which rates shall be so determined and fixed by an order or ordinance, after a hearing made, either upon its own initiative or upon application of any such utility to such council or city commission."

This section of the act became a part of the charter contract, as much so as if it had been incorporated verbatim therein, under the rule adopted and announced by this court in the case of *Arkadelphia Electric Co.* v. *Arkadelphia,* 99 Ark. 178, 137 S. W. 1093, and *Lonoke* v. *Bransford,* 141 Ark. 18, 216 S. W. 38. When this section is read into the contract, the contract itself provides for a reduction of any unreasonable rate theretofore fixed by ordinance. The passage of ordinance No. 303 reducing the rate was within the reservation and right of the original or charter contract, and, on that account, did not impair the obligation of the contract. Even if the charter contract itself had not reserved the right to reduce the rate, under the rule adopted and announced by this court in the cases of *Camden* v. *Ark. Light & Power Co.,* 145 Ark. 205, 224 S. W. 444, and *Clear Creek etc.* v. *Ft. Smith Spelter Co.,* 148 Ark. 275, 230 S. W. 897, ordinance No. 303 would not have been void as impairing the obligation of a charter contract. In those cases it was ruled that the right to regulate or alter rates agreed upon between public utilities and municipalities is an inherent attribute of police power or sovereignty existing in the State, which may be exercised at any time through any State agency for the purpose of establishing just, equit-

able, and reasonable rates, and this attribute of sovereignty cannot be contracted away by the State or its agencies. Such contracts must be made in full recognition of and subject to the sovereign power, as much so as if such a reservation were written into the body of the contract. Ordinance No. 303 is not therefore void as impairing the obligation of a contract.

The next question arising is whether the reduction of the rate to 55 cents per $1,000 cubic feet in ordinance No. 303 is confiscatory in the sense of depriving appellant of a fair return upon its investment. Many elements enter into a determination of such a question. Testimony was introduced *pro* and *con* touching the original cost of the improvement, the cost of additions after the original installation of the plant, the reproduction value of the property, the depreciation thereof, the working capital, the going value, etc. The value at which the property was assessed was also shown. If we should attempt to set out the testimony of each lay and expert witness relative to the various elements entering into the reasonableness or unreasonableness of the reduced rate, and especially with reference to the reproduction value of the property, it would extend this opinion to great length without serving any useful purpose as a precedent. Suffice it to say that, after a very careful reading of all the evidence, we are of the opinion that the weight thereof sustains the following finding of the trial court, to-wit: "The provisions of ordinance No. 303, enacted on April 1, 1929, are reasonable, fair, equitable, and in all things just to the plaintiff (appellant) and that the gas rates provided for in said ordinance No. 303 are amply sufficient to give and insure the plaintiff (appellant) a reasonable and adequate return and income on the money and property, both tangible and intangible, owned and invested by it in the city of Camden, Arkansas, and which is being used and to be used by it in furnishing and distributing gas to the gas consumers of the said city of Camden, Arkansas." Especially are we convinced that

the finding of the trial court upon the facts is correct in view of the rule that the burden rested upon appellant to show that the reduced rate was unreasonable. This court said in the case of *Clear Creek Oil & Gas Co.* v. *Ft. Smith Spelter Co.*, 161 Ark. 12, 255 S. W. 903, that: "On the question of the reasonableness of rates fixed by the Corporation Commission for the transportation of gas by a pipe line company, there is a *prima facie* presumption in favor of such rates." The same presumption exists in favor of rates fixed by an ordinance.

No error appearing, the judgment is affirmed.

CHEROKEE PUBLIC SERVICE COMPANY *v.* HELENA.

Opinion delivered June 29, 1931.

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[redacted]

[redacted]

[redacted]

Donham & Fulk, for appellant.

Buzbee, Pugh & Harrison, for appellee.

KIRBY, J., (after stating the facts). Appellant contends that, under the terms of its franchises, it was only bound to furnish the gas in accordance with its contract, "contingent upon acts of God, and other things beyond the control of the grantee herein;" and that it was not liable for failure to perform its contract; being unable to procure a supply of gas for distribution to the cities under its franchises from the pipe line company, a common carrier of gas through the State. It alleged that all the parties to the franchises knew that appellant company had no gas wells or supply of its own, and must procure the gas from the pipe line company in order to perform its contracts for distribution. The franchise for the city of West Helena expressly states it is granted with a full knowledge on the part of the city that the natural gas to be furnished by the grantee under this franchise is not to be secured from wells owned by the grantee, but is to be furnished the grantee by other parties through pipe lines. That, because thereof, the supply of gas available for distribution "may be interrupted or entirely discontinued from causes beyond the control of the grantee," in which event there shall be no lia-

bility against the grantee therefor; the requirements of this franchise being that, so long, during the term of it, as the grantee has a supply of gas available, it shall furnish such gas to said city and the inhabitants thereof in accordance with the conditions and terms of the franchise.

In the franchises granted by the other appellees, the gas was agreed to be furnished in accordance with the ordinance within a year after the passage thereof and its acceptance by appellant, and to insure the supply a bond was required to be posted with the city council within 30 days after the acceptance of the ordinance; "it being understood, of course, that the grantee's inability to furnish such gas within the period above named shall be contingent upon acts of God and other things beyond the control of the grantee herein."

The allegations contained in the complaint that it was beyond the control or power of appellant company to procure a supply of gas for distribution under its franchises to the different cities from the pipe line company, notwithstanding it was ready and willing to contract and pay for such gas and entitled to its delivery from the said company, were not sufficient to relieve appellant from liability for its failure to perform its contracts in accordance with the terms of the franchises. It is not an allegation of facts showing "inability to furnish the gas contingent upon acts of God and other things beyond the control of the grantee herein." The failure or inability of appellant to make a contract with the pipe line company for delivery of the supply of gas for distribution under its franchises can in no wise be considered due to an "act of God," nor can it be construed to come within the meaning of the term "other things beyond the control of the grantee herein." The meaning of this latter general clause is limited by the expression preceding "acts of God," and includes, under the doctrine *ejusdem generis,* only such things as are similar in character, it being an old and settled rule of

statutory construction, which confines the meaning of additional and general descriptive words to the class to which the preceding specific words belong. *Hempstead County* v. *Harkness,* 73 Ark. 600, 84 S. W. 799; *State* v. *Ry. Co.,* 95 Ark. 114, 128 S. W. 555; *Eastern Arkansas Hedge Fence Co.* v. *Tanner,* 67 Ark. 156, 53 S. W. 886; Ex parte *King,* 141 Ark. 213, 217 S. W. 465; *Greene County* v. *Smith,* 148 Ark. 33, 228 S. W. 738.

If it was not shown that appellant's inability to procure the gas for distribution was due to the fact that the fields from which the pipe line carrier was operated had ceased to produce gas, or that the pipe line company, because of the exhaustion of production of gas in the fields from which its supply of gas had been produced and inability to discover other fields of production to supply its needs, had ceased operation, it might have relieved appellant of the obligation of its contract for distribution of gas under its franchises, or rather for damages for breach of it, according to its terms, and been a complete defense to the suits. Or it may be that, if it was shown the public enemy had destroyed the pipe line, or the government or State had taken it over under some necessity for operation, this would have excused the performance of the contract by the appellant.

It certainly cannot be said, within the meaning of the term "and other things beyond the control of the grantee herein," following the words "acts of God," that the refusal of the pipe line company, alleged to be a common carrier of gas, to make a contract with appellant company to supply gas for distribution under its franchises, was a thing beyond the appellant's control, excusing it from the performance of the contract, and the court did not err in sustaining the demurrer.

Appellant contends, in any event, that the court erred in not considering the acceptance bonds, required by the cities, as providing a penalty or forfeiture, instead of liquidated damages. In *Nilson* v. *Jonesboro,* 57 Ark. 168, 20 S. W. 1093, a case where the city brought suit

to recover on a bond given it to guarantee the performance of a contract to complete a line of street railway within a year, the court considered the contract as liquidated damages and gave judgment for the stipulated amount. It was there said:

"The only question to be decided in this case is, whether the sum mentioned in the third clause of the contract should be treated as a penalty or as liquidated damages. * * * The authorities, however, show that where the intention to liquidate the damages is not obvious, the stipulated sum will usually be given the effect of a penalty if it exceeds the measure of a just compensation and actual damage sustained is capable of proof. But where the contract is of such nature that the damage caused by its breach would be uncertain and difficult of proof, the sum named by the parties is generally held to be liquidated damages, if the form and language of the instrument are not unfavorable to that construction and magnitude of the sum does not forbid it. * * *

"In the case at bar the appellee is a municipal corporation and could not in its corporate capacity suffer any injury by a breach of the contract. If an actual loss was contemplated by the stipulation in question, it could only therefore have been such as would result to the public. And, as the parties must have known that it was wholly impracticable to measure this by any rule of damages, it is reasonable to suppose that they intended to fix the terms of the contract the precise sum recoverable for its breach. *Clark* v. *Barnard,* 108 U. S. 436, 460, [2 S. Ct. 878.]"

In *Robbins* v. *Plant,* 174 Ark. 639, 297 S. W. 1027, 59 A. L. R. 1128, the court, after a review of the authorities, said:

"These cases hold that, if the contract provides for a definite sum as the liquidated or stipulated amount to be paid upon a breach thereof, then the amount so fixed upon by the parties may be sued for; and it is not necessary for plaintiff to prove any actual loss by reason of the defendant's breach of the contract. All that is nec-

essary to entitle the plaintiff, in such a case, to recover the stipulated sum, is to show the breach of the contract upon which the payment thereof depends. In other words, the effect of a clause for stipulated damages is to substitute the amount agreed upon as liquidated damages for the actual damages resulting from the breach of the contract, and thereby prevent a controversy between the parties as to the amount of damages." See also *City of Salem* v. *Anson,* 40 Ore. 339, 67 Pac. 190, 56 L. R. A. 169.

In the Blytheville franchise it is expressly stipulated that the damages for breach of this section (the one requiring the giving of the $5,000 bond) will be $5,000, to secure the payment for which the above mentioned bond is given.

The contracts and franchises of the other cities and the bonds for the performance of which appellant was required to give are all of such nature as to show that the damages caused by the breach thereof would be uncertain and difficult to prove, and the sum named by the parties was correctly held to be liquidated damages, the form and language of the instruments not being unfavorable to that construction, and since, if any loss was contemplated by the parties for the breach of the contracts, it could only have been such as would have resulted to the public, "and (as said in *Nilson* v. *Jonesboro, supra*), as the parties must have known that it was wholly impracticable to measure this by any rule of damages, it is reasonable to suppose that they intended to fix by the terms of the contract the precise sum recoverable for its breach."

It follows from what has been said that no error was committed by the court in sustaining the demurrer to the complaint of appellant company, and to its answer to the cross-complaint of appellee cities; nor in holding the amounts of the bonds to be liquidated damages and recoverable as such, and the decree is in all things affirmed.

CRAIG *v.* GOLDEN RULE LIFE INSURANCE COMPANY.

Opinion delivered June 29, 1931.

J. A. Watkins, for appellant.

Verne McMillen, for appellee.

KIRBY, J., (after stating the facts). It is insisted for appellants that, October 10th being the day the policy was delivered and received by the insured, it thereafter fixed the 10th day of each succeeding month as the due date of the premium thereon, and the insured being entitled to 20 days' grace on the payment of premiums, the policy was in force on June 29, 1930, when the insured was killed.

The meaning of the contract is clear and unambiguous, and its terms were well understood and recognized by the insured and the insurer. The application made on September 28, 1929, recited that the second premium would be due on November 1, 1929; the policy was dated October 9, 1929, the day it was mailed to the insured, and recited that it was granted in consideration of the application and the payment of 85 cents on or before the first day of October, 1929, and a like payment on or before the first of each month during the calendar year and monthly payments in advance thereafter, increasing annually on January first of each year in accordance with the Cash Savings Step Rate Plan.

The policy was mailed to the insured on October 9, 1929, received by him on October 10, 1929, and kept in his possession, apparently, during the entire period, until his death.

There is no contention that he was not thoroughly familiar and conversant with the terms thereof, and it is specifically agreed that the premiums were due on the first day of each calendar month when he made application for reinstatement on January 23, 1930.

The parties both evidently interpreted and construed the contract when the application for reinstatement was made, and their construction is entitled to great weight in the correct interpretation of it.

In *National Equity Life Ins. Co.* v. *Bourland,* 179 Ark. 398, 16 S. W. (2d) 6, where the insured recognized the correctness of the quarterly premium due, of which he was notified frequently by his insurer, his failure to pay a quarterly premium, when due, was held to forfeit his policy; the court saying:

"It is a well-established principle of law that, in the interpretation or construction of the contract, 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 cases of ambiguity in the written contract. Two of our recent cases to this effect are:

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."

In the instant case the insured recognized the correctness of the date for payment of the monthly premiums, and specifically agreed that the first day of each month was the due date thereof. He was notified each month that the premium would be due on the first day of the month, and paid it prior to the 20th day of each month, while the policy remained in force with the exception of the month of January. He did not pay the January premium until after the 20th, and on the 23rd made application for reinstatement, recognizing the first of the month as the due date and the necessity for reinstatement of his insurance because of his failure to pay by the 20th and thereby prevent the lapse of the policy. After his reinstatement, he recognized the first day of the month as the due date and paid the premiums accordingly. He was notified of the date of the premium becoming due, the premium for the nonpayment of which the policy lapsed. He had a second notice of that date, and afterwards was notified that his policy had lapsed because of the failure to pay the premium on the due date, and he made no objection or claim that there was any mistake about the date for the payment of the premium or contention that the policy did not lapse because of the failure to pay then or within the period of grace allowed therefor.

The parties made their own contract, which is free from ambiguity and necessarily must be enforced according to its terms. The beneficiaries must stand in the shoes of the insured and will be bound by the terms of the policy issued; and the insured accepted and retained, without objection, the policy until it was forfeited for nonpayment of premiums upon the date fixed by its terms. *Methvin* v. *Fidelity Mutual Life Association*, 129 Cal. 215, 61 Pac. 1112; *Wilkinson* v. *Commonwealth Life Ins. Co.* 176 Ky. 833, 197 S. W. 557. See also *Tibbits* v. *Mutual Benefit Life Ins. Co.*, 159 Ind. 671, 65 N. E. 1033; *Jewett*

v. *Northwestern Nat. Life Ins. Co.*, 149 Mich. 79, 112 N. W. 734; *Wilkie* v. *New York Mutual Life Ins. Co.*, 146 N. C. 520, 60 S. E. 427; *Tigg* v. *Register Life & Annuity Ins. Co.*, 152 Iowa 720, 133 N. W. 322; *Rose* v. *Mutual Life Ins. Co.*, 240 Ill. 45, 88 N. E. 204.

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

PARAGOULD MOTOR COMPANY *v.* MCDONALD.

Opinion delivered June 29, 1931.

Huddleston & Hughes, for appellant.

Jeff Bratton, for appellee.

KIRBY, J., (after stating the facts). Appellant challenges the validity of the act giving the justice of the peace jurisdiction to enforce statutory liens of the kind claimed herein as unconstitutional; and claims also that the circuit court erred in not making one J. L. Dacus a party to whom it claimed it had sold and delivered the truck before the filing of the lien and suit, a party defendant.

The lien claimed, and for the enforcement of which the suit was brought in the justice court, is one given by statute, act of February 27, 1919 (§ 6866, Crawford & Moses' Digest); and the jurisdiction to enforce the lien is conferred upon justices of the peace by an amendment to § 8, of said statute (§ 6873, Crawford & Moses' Digest) by act of February 28, 1923, which provides:

"Liens accruing under the foregoing provisions of the act may be enforced at any time within four months after such accounts are filed, by suits in the chancery courts of the county or in the municipal courts of the counties having such courts, or by justices of the peace of the township in which the action would accrue in coun-

ties having no municipal courts, and the cause shall proceed to judgment and final disposition as other matters of equitable cognizance and jurisdiction."

In *Shelton* v. *Little Rock Auto Co.*, 103 Ark. 142, 146 S. W. 129, in an action to enforce a laborer's lien for repairing an automobile for an amount in excess of $300, this court only held that the justice court was without jurisdiction, because the amount claimed to be due was greater than $300, the maximum amount of such court's jurisdiction as limited by the Constitution. It was also held there that the act of April 15, 1903, repealed the act of March 16, 1899, and that the laborer's common-law lien was superseded by the statutory lien.

In *Lowe Auto Co.* v. *Winkler*, 127 Ark. 433, 191 S. W. 927, the court held that the laborer or mechanic repairing an automobile or furnishing supplies therefor was without right to recover and hold possession of the repaired automobile upon which he may have had a lien until the amount was paid, as was the case in regard to common-law liens. It was also held that such lien could not be enforced by a counterclaim in the suit for the possession of the car, no lien claim having been previously filed with the clerk.

In *Corning Motor Co.* v. *White*, 173 Ark. 144, 293 S. W. 46, it was held that the lien of the seller of an automobile for the balance of the unpaid purchase price under a contract retaining the title until the purchase money was paid was superior to that of an automobile repairer as provided in the statute, § 6874, Crawford & Moses Digest.

The undisputed testimony shows that the amount claimed to be due and for which the lien was sought to be enforced is correct, and also that the claim of lien was duly filed with the clerk of the circuit court in accordance with the statute on the day the suit was brought; and that the truck upon which the repairs were made for which the lien is claimed was in the possession and control of the appellant company according to the finding of the jury.

The statute giving justices of the peace jurisdiction to enforce the lien given by statute in cases of this kind was not an attempt to confer equity jurisdiction upon such courts but only an authorization of such courts to enforce such liens, and is not in conflict with the Constitution or beyond the power of the Legislature to provide, so long as the amount sued for is within the limitation placed on such courts by the Constitution.

Appellant cannot complain of any error, if there was such, in determining the cause without J. L. Dacus, to whom it claimed to have sold the truck under such circumstances as to have made him an innocent purchaser thereof, since it did not ask to have him made a party to the suit at the time of the trial.

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

GREGORY *v.* RUBEL.

Opinion delivered June 29, 1931.

Madison K. Moran, for appellant.

Trimble, Trimble & McCrary, for appellee.

MEHAFFY, J. J. A. Coleman and wife gave to A. Rubel a mortgage on certain lands on the 9th day of July, 1917, to secure the payment of $670.89 due and payable January 1, 1918.

On the 16th of July, 1918, J. A. Coleman deeded the land described in the mortgage to F. A. McDonald, and at the time did not tell McDonald about the mortgage to Rubel.

In January, 1919, McDonald and wife made a deed to J. A. Coleman of all the land described in the mortgage except 40 acres. McDonald paid taxes on the 40 acres since 1918.

On December 1, 1928, F. A. McDonald sold the 40 acres of land to D. C. Jordan, and executed and delivered a deed to Jordan, and on the same day Jordan executed a mortgage to McDonald on the 40 acres involved, and other lands, for the sum of $800.

On December 31, 1928, D. C. Jordan and wife executed and delivered to J. E. Gregory a mortgage on the same 40 acres for the sum of $300.

After the death of A. Rubel, his widow, Sarah J. Rubel, on the 29th of April, 1930, brought suit to foreclose the mortgage and summons was issued and served on J. A. Coleman, D. C. Jordan and Alice Jordan, wife of said D. C. Jordan, and on July 11, 1930, a decree was taken, but not at that time put on record; it was, however, noted on the judge's docket. Thereafter J. E. Gregory was made a party, and summons was issued and served on him on July 19, 1930.

The attorney for Gregory, some time prior to October 3, 1930, went to the office of the chancery clerk of Lonoke County for a copy of the complaint in the case of Sarah J. Rubel *et al.* v. J. E. Gregory, and was informed

by the clerk that Gregory was made a party in the case of Rubel v. Coleman *et al.*

Gregory's attorney secured from the clerk's office what he thought was a copy of the complaint, but, after reaching home, he discovered that the paper was a copy of the decree. He thereafter received a copy of the complaint from the attorney for the plaintiff.

J. A. Coleman filed separate answer in which he admitted that he and his wife, Effie A. Coleman, executed their promissory note on July 9, 1917, and gave the mortgage described in plaintiff's complaint to secure the payment of said note. He neither admitted nor denied the correctness of the credits shown on the note.

J. E. Gregory, on October 3, 1930, filed answer and cross-complaint. In his answer he denied that plaintiff held a mortgage on the 40 acres involved in this suit. His cross-complaint was against D. C. Jordan and Alice Jordan his wife, and he asked for judgment against them for the sum of $300, and that the same be declared a lien, and that said land be sold to satisfy the lien.

Gregory thereafter, on November 12, 1930, filed an amendment to his answer in which he stated that the mortgage given by J. A. Coleman was executed July 9, 1917, due January 1, 1918; that it was barred by the statute of limitations because there had not been any marginal entries made on the record in the recorder's office in Lonoke County, and that said mortgage was void as to third persons under § 7408 of Crawford & Moses' Digest, because it had been more than 12 years since the mortgage was due. He alleged that his mortgage was paramount to the mortgage held by plaintiff.

J. E. Gregory also filed a petition for the production of a certain letter alleged to have been written to the judge of the chancery court, and he alleged that the letter was pertinent to the matter in controversy. He also filed a motion to set aside the sale.

F. A. McDonald also filed a warranty deed to the 40 acres and alleged that the mortgage to Rubel was barred by the statute of limitations.

The court entered a decree in favor of Sarah J. Rubel and for the sale of the lands to satisfy the decree, and adjudged the cost against J. A. Coleman. The decree recited that, if the property sold for more than the amount of indebtedness due the plaintiffs, the overplus should be held in the registry of the court, and the cause of action in the cross-complaint of J. E. Gregory against J. A. Coleman, D. C. Jordan and Alice Jordan was continued until the next term of court. This decree was rendered on the 3rd day of October, 1930, and was noted on the judge's docket, but was not placed on record until the 17th of November.

This appeal is prosecuted to reverse said decree. Letters were introduced and several witnesses testified. There was some conflict in the evidence. While we have carefully considered all the evidence, we do not deem it necessary to set it out here.

Appellant contends first that the court erred in entering a decree against J. E. Gregory until after 20 days from the time notice was given him that the plaintiffs were wanting to take his rights out of 40 acres of land in controversy and that he was a defendant with J. A. Coleman *et al.*

Summons was served on Gregory on July 19, 1930. The evidence shows that Gregory's attorney, some time prior to October 3, asked the chancery clerk about the case of *Rubel* v. *Gregory* and was told that Gregory was wanted in the case of *Rubel* v. *Coleman et al.*

The attorney for Gregroy stated to the court that he supposed that Gregory had been summoned in the case of *Rubel* v. *Coleman,* and he was advised that that was true. Gregory's attorney then filed answer. He had been there before and got what he thought was a copy of the complaint, but he later found that it was a copy of the decree.

Mr. Moran, Gregory's attorney, testified that Mr. Trimble, attorney for appellees, announced to the court that he denied that appellees had a mortgage, and there-

upon Mr. Walls, who represented Mr. Coleman, said that there was no use to deny it, that Coleman had given the mortgage. Moran testified that the mortgage was not produced and not introduced in evidence. It is admitted, however, that a decree of foreclosure was agreed to and the notation made on the judge's docket. Thereafter when Trimble mailed Moran a copy of the decree, Moran declined to agree to the decree as written by Trimble.

After the decree had been agreed to, and after the case had been decided by the court, Moran discovered that there was no memorandum on the mortgage record, and he then contended and now contends that the appellee's cause of action was barred by the statute of limitations. This contention however, comes too late. The court had already decided the case.

It is next contended that the court erred in receiving the papers from Mr. Trimble, who had withdrawn the papers from the file of the clerk without an order from the court.

Section 1186 of Crawford & Moses' Digest, provides that original pleadings and papers shall not be taken from the office of the clerk unless by order of the court. The evidence shows that these papers were mailed to the judge of the court. The judge of the court would have a right to make an order permitting any one interested to take the papers, and there could certainly be no wrong or violation of the statute in sending the papers to the judge himself.

The parties had agreed on a decree when the court was in session, and when the attorney for appellees mailed the precedent to the attorney for the appellant, the attorney for the appellant declined to agree to the decree as written, and the attorney for the appellee mailed all the court papers, together with the correspondence between the attorneys, to the judge, who then prepared a decree according to his findings when court was in session October 3rd, and this decree prepared by the court was

placed on record the 17th day of November, when the court was again in session at Lonoke.

The court did not render a decree in vacation. The decree was rendered when court was in session the 3rd day of October and when all parties interested were present.

It is next contended that appellee did not prove her debt by introducing the note and mortgage. The evidence shows that the note and mortgage were both introduced in evidence. The attorney for the appellee testifies that this was done, and the decree recites the fact. The decree was rendered the 3d of October, and there was not another or different decree, but it was the same decree, that was placed on record November 17th.

The appellant contends that the court erred in refusing to enter an order requiring T. C. Trimble, attorney for appellee, to furnish Gregory a copy of the letter written to the court when the papers were mailed to him. The evidence does not show what was in this letter. It was written after the decree was rendered and could not have had any effect on the decision of the court in any way because the decision had already been reached by the court.

It is also contended that the sale should not have been confirmed because the land had not been appraised.

Section 7404 of Crawford & Moses' Digest, relied on by appellant, refers to foreclosures where the mortgaged property is personal property, and this sale was not made under the power of sale in the mortgage, but was made under the foreclosure decree of the chancery court.

Appellants next contend that the attorney for the plaintiff prepared the decree, and that it should therefore be construed more strongly against him. As we have already said, the decree was agreed to in open court, and it would make no difference who prepared it, it would have to be prepared in accordance with the finding of the court.

There are some other objections to the action of the court and to the decree and sale, but we do not think it necessary to discuss them, because what we have already said disposes of the questions raised.

The decree is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* MILLER.

Opinion delivered June 29, 1931.

Thos. B. Pryor, W. L. Curtis and *Thomas B. Pryor, Jr.,* for appellant.

Partain & Agee, for appellee.

BUTLER, J. About six o'clock on the afternoon of April 22, 1930, Cruce Miller was traveling in an automobile on the public highway which crossed the line of the Missouri Pacific Railway about four miles east of Sallisaw, Oklahoma, at approximately right angles. The highway ran in a general north and south direction, and the railroad in an east and west direction, and the crossing which Cruce was approaching at the time of the accident was commonly called the Jack Bradley crossing. As Cruce Miller approached this crossing from the north, one of defendant's trains, operated by Frank Hedrick, the engineer, was approaching from the east. Both the automobile and the engine of the train reached the crossing at approximately the same time, resulting in a collision which wrecked the car and injured Miller, from which injuries he died within a few hours. The owner of the automobile, Bryan Miller, a brother of Cruce Miller, and W. F. Miller, as administrator of the estate of Cruce Miller and next of kin, brought suits against the defendants, the owner of the car to recover for damages to same, and the other, as administrator and next of kin, for damages for the injury and death of Cruce Miller. This suit was brought in the circuit court of Crawford County against Frank Hedrick, the engineer, a citizen and resident of the State of Arkansas, and the Missouri Pacific Railroad Company, a foreign corporation. In apt time a petition, accompanied by the proper bond, was filed in the circuit court for the removal of the cause to the Federal court. The petition was denied, and the prayer for removal refused, to which action of the court timely and proper objection was made and exceptions reserved.

A trial was had which resulted in a verdict against both defendants in favor of the plaintiff, the owner of the car, for damages in the sum of $200, and in favor of

the plaintiff, W. F. Miller, as administrator of the estate of Cruce Miller, in the sum of $5,000 and for benefit of next of kin in the sum of $500. Judgment was entered in accordance with the verdict, and within the time provided by law the defendant, Missouri Pacific Railroad Company, filed its motion for a new trial, which was overruled. Thereupon the railway company duly excepted and appealed to this court.

It is first insisted that the trial court erred in denying the petition of the defendant railway company for the removal of the cause of action from the Crawford Circuit Court to the United States District Court. The complaint alleged that the train which struck the automobile was being operated by Frank Hedrick at the time of the accident as a servant of the railway company and as the engineer controlling and operating the locomotive, and that he operated such at a careless and reckless rate of speed, to-wit, fifty miles an hour, while approaching the crossing and failed and neglected to ring a bell or sound a whistle or to give any other signal or warning of the approach of said train, and neglected to exercise ordinary and reasonable care to keep and maintain a proper lookout for persons and property approaching, or upon, the crossing; that he failed to exercise ordinary and reasonable care to avoid striking the automobile driven by plaintiff's intestate, and injured him by not giving the proper signals and warning or by stopping and slowing the movement of said engine and train.

In the petition for removal the several allegations of negligence were denied, and the plea of contributory negligence on the part of Cruce Miller was interposed with the further allegation that:

"Your petitioner states that all of the allegations of negligence charging Frank Hedrick jointly with this defendant do not state facts, and the said Frank Hedrick is made a party to this suit for the sole and only purpose of preventing your petitioner herein from removing this cause to the Federal court."

"That the grounds of negligence alleged in the complaint state no joint liability on the part of defendants. The employee of the railroad company, so far as the cause of action is concerned, is neither a proper or necessary party. The allegations of the complaint, if conceded to be true, would not render this petitioner and the resident employee jointly liable. Your petitioner states that this is true of each and every material allegation of the complaint. That there are separable controversies involved in this suit, and in none of said controversies is the defendant, Frank Hedrick, a necessary or proper party."

There is no question that the right of a nonresident defendant, sued in a State court, to remove the case to the Federal court cannot be defeated by the fraudulent joinder of a resident employee as codefendant who was in no way responsible for plaintiff's injuries, and that, where an issue of fact is raised upon the petition for removal of a cause to a Federal court, that issue must be tried in the Federal court and not in the State court. *St. L. S. W. Ry. Co.* v. *Adams,* 87 Ark. 136, 112 S. W. 186; *St. L.-S. F. R. Co.* v. *Britton,* 163 Ark. 255, 259 S. W. 730; *Wecker* v. *National Enameling Co.,* 204 U. S. 176, 27 S. Ct. 184.

It is clear from the allegations of the complaint that the negligence of Hedrick was the proximate cause of the collision, and therefore he was liable personally for resulting damages, and the defendant railway company was also liable, as it was alleged that Hedrick was in its employ and the engineer who was in control of the locomotive at the time of the collision. Consequently, a joint cause of action was stated against the employee and the employer under the laws of the State of Oklahoma. *Kugler* v. *White,* 91 Okla. 130, 216 Pac. 903. It will be observed that in the petition there was a mere denial of the allegations of negligence and the declaration that "Frank Hedrick is made party to this suit for the sole and only purpose of fraudulently preventing your petitioner herein

from removing this cause to the Federal court." However, there is no allegation in the petition of any state of facts from which this conclusion might be drawn. It is not denied that Hedrick was the engineer or that he was in charge of, and operating, the locomotive at the time of the collision. The allegations in the petition are much the same as those in the case of *Chicago, R. I. & P. Ry. Co.* v. *McKamy,* 180 Ark. 1095, 25 S. W. (2d) 5, where it is said: "No facts were set forth therein (the petition for removal) tending to show that the joinder of appellant and E. G. Medlock in that part of paragraph 'C' was a fraudulent device to prevent a removal of the cause."

In the case of *So. Ry. Co.* v. *Lloyd,* 239 U. S. 496, 36 S. Ct. 210, the court said: "Allegations in the petition for removal of an alleged separable controversy to the Federal court for diverse citizenship are not sufficient where they amount simply to a traverse of the facts alleged in the plaintiff's petition and in that way undertake to try the merits of the cause of action, good upon its face."

In the case of *Ches. & Ohio Ry. Co.* v. *Cockrell,* 232 U. S. 146, 34 S. Ct. 278, where the allegation of the complaint and those in the petition for removal are in all essential matters the same as those in the case at bar, in passing upon the question of whether or not the case was removable from the State to the Federal court, the court said:

"Rightly understood and much abbreviated, the plaintiff's petition, after stating that the train was being operated by the engineer and fireman as employees of the railway company, charged that the injury and death of the intestate were caused by the negligence of the defendants (a) in failing to maintain an adequate lookout ahead of the engine (b) in failing to maintain any lookout upon the left or fireman's side from which the intestate went upon the track, (c) in failing to give any warning of the approach of the train, and (d) in continuing to run the train forward after it struck the intestate, and was pushing her along, until it eventually ran

over and fatally injured her, when it easily could have been stopped in time to avoid material injury. * * *

"The railway company's petition for removal, while not denying that the engineer and fireman were in the employ of the company or that they were operating the train when it struck and injured the intestate, did allege that the charges of negligence (all being specifically repeated) against the defendants were each and all 'false and untrue, and were known by the plaintiff, or could have been known by the exercise of ordinary diligence to be false and untrue, and were made for the sole and fraudulent purpose of affording a basis, if possible, for the fraudulent joinder' of the engineer and fireman with the railway company, and of 'thereby fraudulently depriving' the latter of its right to have the action removed into the Federal court; and that none of the charges of negligence on the part of the engineer or fireman could be sustained on the trial. * * *

"* * * As in other pleadings, there must be a statement of the facts relied upon, and not otherwise appearing, in order that the court may draw the proper conclusion from all the facts, and that, in the event of a removal, the opposing party may take issue, by a motion to remand, with what is alleged in the petition. * * *

"* * * As they (the engineer and fireman) admittedly were in charge of the movement of the train, and their negligence was apparently the principal matter in dispute, the plaintiff had the same right under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company. We conclude, therefore, that the petition for removal was not such as to require the State court to surrender its jurisdiction." *C. R. I. & P. Ry. Co.* v. *Schwyhart,* 227 U. S. 184, 33 S. Ct. 250; *C. R. I. & P. Ry. Co.* v. *Dowell,* 229 U. S. 102, 33 S. Ct. 684; *Hay* v. *May Dept. Stores Co.,* 271 U. S. 318, 46 S. Ct. 498; *New Coronado Coal Co.* v. *Jasper,* 144 Ark. 58, 222 S. W. 22.

It will be seen from a consideration of the decisions above cited that there were no facts alleged by which a conclusion of fraud could be reached. The petition, therefore, was insufficient on its face, and the trial court did not err in denying the same.

The principal reliance for reversal of this case is that the court erred in overruling appellant's request for a directed verdict. This brings in question the sufficiency of the evidence to sustain the verdict. As the injury occurred in the State of Oklahoma, the rights and liabilities of the parties must be governed by the laws of that State. *Mo. Pac. Rd. Co.* v. *Coca-Cola Bottling Co.,* 154 Ark. 413, 242 S. W. 813. It is first insisted that, under the undisputed testimony in the case, the injury was the result of the negligence of the deceased in going upon the crossing in front of the moving train. This question was submitted to the jury under proper instructions, and, regardless of what we might think the undisputed evidence would disclose, we are concluded by the verdict of the jury under art. 23, § 6 of the Constitution of the State of Oklahoma, which section provides: "The defense of contributory negligence or of assumption of risk shall in all cases whatsoever be a question of fact and shall at all times be left to the jury." This provision was considered and construed in the case of *Dickinson* v. *Cole,* 74 Okla. 79, 177 Pac. 570, where it was held that the constitutional provision, *supra,* required that the defense of contributory negligence and assumption of risk should be questions of fact in all cases whatsoever to be determined by jury, and that the finding of the jury upon those defenses is conclusive upon the court. The defendant in that case took the position that art. 23, § 6, of the Oklahoma Constitution, as construed by the court, took from him a vested right and was in violation of the 14th Amendment to the Federal Constitution. The Supreme Court of the United States on appeal affirmed the judgment of the State court, holding that the provision of the Oklahoma Constitution did not contravene the 14th Amendment to the Federal Constitution and that the defendant had

only such right to the defense of contributory negligence as that Constitution allowed.

This was an extreme case. The Oklahoma court, in disposing of the question said: "The uncontradicted evidence shows that the deceased, without anything to obstruct his view of the approaching train for more than a block away, stepped in front of it and was instantly killed. Were it not for art. 23, § 6 of the State Constitution which provides that 'the defense of contributory negligence or of assumption of risk shall in all cases whatsoever be a question of fact and shall at all times be left to the jury,' it would be necessary to hold as a matter of law that the negligence of plaintiff precludes a recovery. * * * The uncontradicted evidence shows that the train was running on acquired momentum with steam cut off and was being controlled by the air brakes; that the automatic bell ringer was ringing and the whistle was sounded for the crossing. Both the engineer and fireman were keeping a careful lookout. The engineer, whose view was obstructed by the boiler, could not see the deceased as he was on the opposite side of the track, but he was seen by the fireman. The latter assumed that the deceased would use the care of an ordinarily prudent person and would not attempt to cross the track in front of the train."

Therefore, in the case at bar, irrespective of the contributory negligence of the deceased, the action of the court in refusing to direct a verdict for the defendants must be upheld if there was any substantial evidence tending to establish any negligence on the part of the defendants which was the proximate cause of the injury.

On the question of the negligence of the operative of the defendant railway company, the evidence is in conflict. Hedrick, the engineer, testified that he was in charge of the train at the time of the accident and saw the automobile before the collision at a time when it was about a thousand feet away from the track; that there was some underbrush quite a way after leaving the rail-

road track on the highway and that he could see the car through that brush; that there was a little hill before reaching the crossing which necessitated the acceleration of the speed of the train to the top of the hill, and from there the ground sloped down to the crossing; that he whistled at the whistling post in the proper manner and at that time he saw Miller approaching; that the latter slowed down about fifty feet before he got to the track—had practically stopped—and then started up again; that at the time Miller stopped he looked in the direction from which the train was coming, and witness assumed that he would remain in a place of safety, but he started up again; that after he saw this witness applied his brakes and sounded the whistle, but it was then impossible for him to stop before hitting the deceased; that, as he approached the crossing after having reached the summit of the hill, the train was not making more than 25 to 30 miles an hour.

The testimony of the engineer, both as to the speed and the whistling for the crossing at the proper and designated point, was corroborated by other operatives on the train, but no one of them saw the automobile immediately before the collision except the engineer. This testimony was supported in part by the testimony of other witnesses and was sufficient to establish due care on the part of the engineer, but for other witnesses who disputed this testimony. Several testified that they were in the immediate vicinity and did not hear any whistle or bell until they heard one or two sharp blasts which attracted their attention, and on immediately looking saw the train strike the automobile. The engineer had testified that he immediately applied his brakes in an endeavor to stop the train when he first became aware that a collision was imminent, but there was other testimony to the effect that the train was a freight train of sixty or seventy cars and that when the train was brought to a standstill the engine had passed over the crossing and was approximately a half mile from the crossing.

A fourteen-year-old boy who lived about 75 yards from the crossing testified that he was standing on the porch facing the direction from which the train was approaching and saw it before it reached the whistle post; that he had been reading about locomotives and the number of drive-wheels some of them had and he was wondering how many this one had and was looking at it to see; that the whistle did not sound before it reached the post, or at it, nor was any bell rung, and the train was coming at a very high rate of speed—faster than witness had ever seen a train run; that it did not whistle until it had reached within about two rail lengths of the crossing when witness heard it whistle twice in quick succession, and, learning that there had been an accident, he went down there. There was some evidence corroborative of this boy's testimony which disputed the testimony of the engineer and from which the jury might have found that the train was running very fast, and that the required and customary signals to apprize of its approach were not given.

In the case of *Oklahoma Ry. Co.* v. *Houck,* 109 Okla. 187, 235 Pac. 499, cited and relied on by the appellant, the following declaration is made: "While it is the well-settled rule in this State that a verdict based upon conflicting testimony will not be disturbed where there is evidence reasonably tending to support such verdict, yet in a case where there is no competent evidence reasonably tending to support a verdict and judgment, it will be reversed."

The appellant contends that, although contributory negligence as a defense is concluded by the verdict of the jury, yet the circumstances tending to establish such negligence may be examined and considered in determining whether the defendant was negligent. But, assuming that this is true, the plaintiff in the instant case has adduced direct and positive evidence of the omission of the engineer to make the signals required by law and that the train was running much faster than 25 or 30

miles an hour. There is no evidence which precludes the doubt that Miller failed to see the approaching train. The engineer is the only witness as to Miller's conduct just before the collision, and, while he testified that Miller saw the approaching train, he also testified that he saw Miller put his automobile in motion at a point fifty feet from the track and approach directly toward the track down which the train was swiftly moving. The jury might well have felt that there was a doubt from all the circumstances as to whether or not Miller saw the train or knew that it was approaching, and might have concluded that, had the engineer sounded the whistle for the crossing at the whistle post, such warning would have apprized Miller of the approach of the train.

In *St. L., I. M. & S. R. Co.* v. *Gibson,* 48 Okla. 553, 150 Pac. 455, the court said: "If the evidence had left a doubt as to whether or not deceased saw the train or knew that it was approaching, then the failure of the defendant to ring the bell and sound the whistle would have raised a question as to whether that failure was not the cause of his going upon the track and thereby losing his life." * * *

The appellant contends that there was no testimony tending to support the allegation of the complaint that at the time of the collision and immediately before the train was being operated at a high or reckless rate of speed. The engineer testified that he was operating the train in an ordinarily careful manner and that the rate of progress was not in excess of 25 or 30 miles an hour. The jury had a right to assume from that testimony that any rate of speed greatly in excess of that at which the engineer testified he was traveling might have, under the circumstances, been negligence. There was testimony from which the jury might well have found that the train was traveling much faster than testified to by the engineer. At a short distance from the crossing the train came through a cut and around a bend and there was a rise between that place and the crossing from the

summit of which the ground sloped toward the crossing. The highway was a public one, and it was reasonable to suppose that travelers might at any time be at, or in, the neighborhood of the crossing. Therefore, in operating the train, care should have been exercised in the rate of speed maintained, and from all the circumstances in the case there would be a question of fact to be determined by the jury as to whether or not the train was running at an excessive speed, and, if so, whether or not that constituted negligence. *St. L.-S. F. Ry. Co.* v. *Rundell,* 108 Okla. 132, 235 Pac. 491.

A number of instructions were given to the jury over the objection of the defendants, to the giving of which defendants excepted, and they are assigned as error. Most of these instructions were objected to on the ground that there was no competent testimony offered to sustain them on the theory that there was no evidence of primary negligence on the part of the defendants. What we have heretofore said disposes of those questions except as to instruction No. 11. By that instruction the rule for assessing damages was given in the event the jury should find for the plaintiff, W. F. Miller, as administrator of the estate of Cruce Miller, deceased, and it is urged that this instruction was erroneous for the reason that there was no competent testimony tending to show that plaintiff's intestate suffered any conscious mental suffering or physical pain. It is argued that the record discloses that immediately following the accident plaintiff's decedent was unconscious, and some of the witnesses thought he was dead, and there is no testimony other than that of Bryan Miller, his brother, which tends to establish to the contrary. The testimony of all the witnesses was to the effect that plaintiff was breathing when he was extricated from the car and was alive when placed in the ambulance a short time after the accident. Just how long plaintiff lived from that time is not shown, but it is sufficiently certain that he lived for several hours and died in a hospital to which he had been taken. There were no witnesses who testified as to whether or not he

was conscious or as to the extent of his suffering from the time he was put in the ambulance at the scene of the collision until he died in the hospital except that of Bryan Miller. Just why witnesses were not called to testify as to his condition while being transported in the ambulance or while he was in the hospital before his death is not shown. It is likely that some one besides Bryan Miller saw him and observed him during that time; but, if so, the brother was the only one who testified. From that testimony, however, it is very clear that he was conscious and that he did suffer. The witness testified that "he groaned and took on" and "wanted to roll over, and I had to hold him," and it was necessary to give him a hypodermic which relieved him to some extent. As before suggested, the evidence on this point is meager, but it is sufficient to warrant the giving of the instruction complained of.

It is our conclusion that there was some substantial evidence tending to establish primary negligence on the part of the defendants, and that there was no prejudicial error committed by the trial court. The judgment is therefore correct, and must be affirmed. It is so ordered.

CLARKE *v.* JOHN WANAMAKER.

Opinion delivered July 6, 1931.

Oscar E. Ellis, for appellant.

I. J. Friedman and *Northcutt & Northcutt,* for appellee.

HART, C. J. This is an appeal from a judgment by default for the plaintiff in a suit on an account for merchandise in the sum of $4,507.14. An itemized account was duly filed as an exhibit to the complaint, and this was verified by an agent of the corporation.

It is first insisted that the judgment should be reversed because it was by default, and the complaint was not verified. The suit was based upon an account for merchandise which was exhibited with the complaint and duly verified by the affidavit of the plaintiff. If the defendant desired that the complaint also be verified, it should have made a motion to that effect, instead of demurring to the complaint, and, upon the court overruling the demurrer, refused to plead further. Like any other action, the defendant waived its right to have the complaint itself verified by not making a motion to that effect. *Payne* v. *Flournoy,* 29 Ark. 509; *Randall* v. *Sanders,* 71 Ark. 609, 77 S. W. 56, and *Queen of Arkansas Insurance Co.* v. *Taylor,* 100 Ark. 9, 138 S. W. 990.

It is next insisted that the affidavit to the account was not verified as required by § 4200 of Crawford & Moses' Digest. The agent of the plaintiff corporation who verified the account stated on oath that he was the duly authorized agent of the plaintiff and certified that the account against the defendant, Emma Peters Clarke, in the sum of $3,677.46, principal, and interest to October 1, 1930, in the sum of $829.68, being in the aggregate $4,567.14, was correct and past due after allowing all proper credits and offsets. The affidavit was duly certified and sworn to before a notary public. The effect of § 4200 of Crawford & Moses' Digest is to make a verified account, when undenied, *prima facie* proof of its correctness. The defendant did not deny the correctness of the account by affidavit or by verified answer. She did not offer any testmony whatever, but contented herself with demurring to the complaint. By virtue of the stat-

ute above quoted, the account verified by the affidavit of the agent of the plaintiff was evidence of its correctness, and, not having been attempted to be contradicted by the defendant, warranted a judgment in favor of the plaintiff. *Chicago Crayon Co.* v. *Choate,* 102 Ark. 603, 145 S. W. 197.

The judgment will therefore be affirmed.

FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* COWAN.

Opinion delivered July 6, 1931.

[redacted]

Sam Costen and *Wils Davis,* for appellant.

Nelson & Crawford, Roy E. Nelson and *Harrison, Smith & Taylor,* for appellees.

HART, C. J., (after stating the facts). Appellant contends that $10,000, the amount which it paid into court as surety for Cowan, is the full amount of its liability, and that the court erred in holding that the $5,000, the proceeds of the Montague bond, was subject to the claims of the various plaintiffs superior to the right of appellant to offset its judgment against Cowan against it. Cowan contends that he should have judgment against appellant, to the extent of Montague's shortage during the years 1923 and 1924, which is shown by the master's report to be $3,250.61, and also for the full amount of the shortage of 1925, which exceeds the amount of the bond for which appellant would be liable as surety for Montague.

The record shows that Montague was appointed deputy clerk by Cowan when he first assumed the office of clerk in 1923, and continued as such deputy throughout the first term. Appellant signed his bond in the sum of $5,000 to Cowan, conditioned for the faithful performance of the duties of his office, and that he would pay over to his successor the amounts of money collected by him in his official capacity. When Cowan

entered on his second term in 1925, Montague continued as his deputy, and Cowan paid the premium to appellant of $25, continuing the former bond in force, conditioned for the faithful performance of Montague's duties as deputy clerk and for turning over the money collected by him in his official capacity. Montague continued to act as such deputy clerk until some time in the fall of 1925, when an examination of his books showed that he was short in a sum amounting to something over $11,000.

The public moneys in the hands of Cowan as clerk belonged to the various claimants, and the clerk was under a trust or a public duty to pay the same to them. The money collected by him belonged to the public, and he was charged with the duty of delivering it to the proper authorities entitled to receive it. The same rule would apply to the deputy clerk. The public moneys collected and held by him belonged to the county or to the proper authorities entitled to receive the same. The clerk and his deputy were not mere debtors to the county and to the improvement districts whose money was in their hands, but they sustained the relations of trustees. The money collected by them was impressed with a trust in favor of the county and improvement district officers.

As surety of Montague on his official bond to Cowan, appellant cannot rise any higher than its principal in right, and must stand in his shoes and take his remedies with all the equities and limitations in the premises. If the money misappropriated by Montague belonged to these improvement districts, they were entitled to receive it and to collect it from him as well as from Cowan. Montague could in no sense escape liability from misappropriation of the money because he had executed a bond to pay it back to Cowan. If the money belonged to the public, those in authority were entitled to recover it into whosever hands it could be traced, provided it could be shown that they had notice that it was public money. Montague collected the funds as deputy clerk, and, of course, had actual knowledge that they belonged to the public. Appellant signed his bond as surety to Cowan

for the faithful performance of his duties, and also conditioned that he should pay back the money to his successor or to those entitled to it. Thus the very terms of the bond signed by appellant show that it was liable for any misappropriation of the money by Montague. As we have already seen, appellant stands in the shoes of Montague and can acquire no greater rights or equities against those entitled to the money than he had. Hence neither appellant nor Cowan would be entitled to any offset against Montague for the funds he misappropriated.

If the moneys could be traced into the hands of any third person who had knowledge that they were public moneys when received by such third person, then appellant, as surety on the official bond of Montague, would be subrogated to any rights and entitled to recover the same from such third person. *Boone County* v. *Byrum,* 68 Ark. 71, 56 S. W. 532; and *Carroll County Bank* v. *Rhodes,* 69 Ark. 43, 63 S. W. 68.

The principle, as recognized in these cases, is that no right of subrogation would exist until the surety had paid the money into the proper public authorities. Hence Cowan would have no right to set-off against Montague, nor would appellant as surety have any right of subrogation until the money which was due by Montague to the public authorities had been paid by Cowan or by appellant as his surety. In holding the appellant liable as surety on Montague's bond as deputy clerk, the chancery court only held appellant to the discharge of the obligation of its contract in the premises. It was only required to do and perform the covenant of its bond for executing which it had received a stipulated compensation.

It is insisted also that the court erred in consolidating the cases, and that the state of the pleadings did not warrant the decree entered of record by the chancery court. We do not agree with counsel in this contention. Equity abhors a multiplicity of suits and adjusts the rights of parties without circuity of action, whenever it is feasible to do so. This principle of equity jurisprudence is so well settled that we need cite only the follow-

ing cases: *State* v. *Atkins,* 53 Ark. 303, 13 S. W. 1097; *Bledsoe* v. *Carpenter,* 160 Ark. 349, 254 S. W. 677; *Martin* v. *State,* 171 Ark. 576, 286 S. W. 873; and *K. C. Sou. Ry. Co.* v. *Ft. Smith Suburban Ry. Co.,* 180 Ark. 492, 22 S. W. (2d) 21.

Then, too, the record shows that the parties understood that all their rights were being settled and adjudicated in one suit. Evidence was adduced by each of the parties to establish his contentions; and, under another settled rule of equity jurisprudence, the pleadings will be considered amended to conform to the proof. *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 14.

We now come to the cross-appeal of Cowan. On this branch of the case, but little need be said. The court held appellant as surety liable on the bond executed on the 30th day of December, 1924, for the period beginning January 1, 1925, and ending December 31, 1925. It makes no difference whether this is called a new bond or a continuation certificate. The premium demanded by appellant was paid by Cowan. The instrument itself shows that it was to be subject to all the conditions of the former bond. One of them was that Montague should pay to his successor all moneys received by him as such deputy clerk. The amount of his shortage was considerably more than $5,000. In fact, it was more than $11,000. The continuation certificate or new bond will be considered according to its terms and not according to the label on it. Therefore we think the chancellor correctly held that appellant was liable as surety on it as a new bond.

We are of the opinion, however, that the court erred in not finding appellant liable as surety for Montague's shortage under the first bond, which was for the years 1923-1924. His shortage for this time is reported by the master to be $3,250.61, and we think the chancellor erred in not holding the appellant liable as surety for this amount to the extent which was necessary to pay the claims of the various claimants and the costs of the action.

It follows that the decree on the appeal will be affirmed, and on the cross-appeal it will be reversed with directions to enter a decree in accordance with the views expressed in this opinion relating to the cross-appeal. It is so ordered.

DELAMAR & ALLISON *v.* WARD.

Opinion delivered July 6, 1931.

Frauenthal, Sherrill & Johnson, for appellants.

McRae & Tompkins, for appellee.

SMITH, J. State highways numbered 4 and 53 cross each other at right angles in Nevada County, and both of them were being improved by spreading gravel on them. While the work of hauling and spreading the gravel was in progress, John Ward, Jr., who was thirty-one years of age, drove a Ford touring car over the point of intersection of these roads. His car had the back seat cut away and the entire top removed so as to make a light truck which he called a "Hoopie." His car truck had only one seat, and seated thereon with him were his

father, John Ward, Sr., who was sixty-four years of age, and Henry Lewis, his father-in-law, who was sixty-eight years old.

Between nine and ten o'clock on Saturday morning, October 11, 1930, Buster Westmoreland drove a truck loaded with gravel across the intersection of these roads and a collision occurred with the car driven by Ward, which resulted in a serious injury to John Ward, Jr., and in the death of his father and father-in-law. Suits were brought by Ward, Jr., and by the administrators of the estates of his father and father-in-law to compensate these injuries. These cases were consolidated and tried together.

There was a verdict and judgment for John Ward, Jr., in the sum of $5,000. There was a verdict and judgment in the Lewis case for the benefit of the widow in the sum of $2,500, but no verdict was returned in favor of the estate for pain and suffering. In the case of Ward, Sr., there was a verdict in favor of his widow in the sum of $2,000, and a verdict and judgment for the benefit of his estate in the same amount.

The truck driven by Westmoreland was owned by A. C. and Charles Bratcher, and they were made defendants, but the suit was dismissed as against them before the trial. Delamar & Allison were original defendants, and were sued upon the theory that Westmoreland was their servant at the time of the collision, and that his negligence had caused the collision.

A reversal of these judgments is prayed upon the following grounds: (1) That the relationship of master and servant did not exist between Westmoreland and Delamar & Allison; (2) that no negligence was shown upon the part of Westmoreland; (3) that the injury was caused by the contributory negligence of the occupants of the automobile; (4) that error was committed in making proof that Delamar & Allison carried indemnity insurance; and (5) that error was committed in submitting the issue whether either deceased had suffered conscious

pain and suffering, and in permitting the estate of Ward, Sr., to recover on that account.

The most difficult question in the case is the one first stated, that is, whether the relationship of master and servant existed between Westmoreland and Delamar & Allison.

Upon this question it may first be said that no objection is made to the instructions which submitted this issue to the jury, and it remains therefore only to determine, in the decision of that question, whether the evidence was legally sufficient to support the finding of the jury that the relationship of master and servant existed, and, in the decision of that question, we must, of course, view the testimony in the light most favorable to the plaintiffs.

This testimony may be summarized as follows: The State Highway Department was spreading gravel upon a force account, and was shipping by railroad freight the gravel so used. Delamar & Allison suggested a cheaper gravel might be obtained by hauling it from local gravel pits, and they entered into a contract with the highway department to furnish and deliver the gravel. Their contract required them to deliver it on the roads. Delamar & Allison employed a large number of persons, about 302 in fact, to haul and deliver this gravel, and all of them were paid the same price for this service. No one hauled gravel until their trucks had been employed and put to work by Delamar & Allison.

Allison testified that Bratcher applied to the highway department engineer for employment, but Bratcher denied this. One of these trucks was driven by Buster Westmoreland. The gravel was purchased from Clifton Graham, who stayed in the pits to keep check on the amount of gravel hauled, but the undisputed testimony appears to show that Delamar & Allison were in control of the pits, and that the trucks were loaded by their employees.

A number of the truck owners testified that they were paid by Delamar & Allison, after one per cent. of the

amount due them had been deducted for insurance, at least they were advised that the deduction was made on that account. Delamar & Allison denied that the deduction was made for that reason, but testified that this one per cent. was deducted on account of the advance payment, and that when the truck owners waited until the regular pay day no deductions were made.

There was testimony to the effect that a number of the laborers who were employed to load the trucks in the gravel pits were discharged for shooting dice, and that this was done with Allison's approval. There was testimony to the effect that certain of the truck drivers drove off the usual road through the field of a colored man, and that Allison stopped this, and that Allison also directed certain of the drivers where to deliver the gravel, and that he also stopped some of the drivers from driving over loose gravel.

A number of placards were furnished the truck drivers to place on the trucks reading as follows: "No passengers allowed on this truck. Delamar & Allison." No placards were placed on the Bratcher trucks, but this was because the supply of placards was exhausted. It was testified on behalf of Delamar & Allison that the placards were placed on the trucks under the direction of the supervising engineer of the highway department.

There was a controversy as to whose servant the man was who supervised the dumping of the gravel. The drivers obeyed the directions given by the dumper at the end of the haul. Unquestionably the dumper was obeying the orders of the engineer of the highway department as to the places where and the manner in which the gravel should be dumped, but in so doing he was enabling Delamar & Allison to perform the essential part of their contract by dumping the gravel as their contract required them to do. The dumper was therefore engaged in the performance of a necessary part of the contract of Delamar & Allison, and the jury might have found that he was loaned to Delamar & Allison for a particular service and was therefore their servant. *Arkansas Natural Gas*

Co. v. *Miller,* 105 Ark. 477, 152 S. W. 147; *St. L. I. M. & S. R. Co.* v. *Washington,* 114 Ark. 192, 169 S. W. 770; *Arkansas Logging Co.* v. *Martin,* 116 Ark. 325, 173 S. W. 184; *Dubisson* v. *McMullin,* 163 Ark. 191, 259 S. W. 400.

As a matter of fact, the haulers did not require any considerable control. Their trucks were loaded in the pits by men who were admittedly the servants of Delamar & Allison, and the dumper told the men where and how to dump the gravel.

Delamar & Allison testified that they did not in any case employ the driver of any truck, and that these drivers were employed and paid by the truck owners, and that they had no control over any of the drivers and were not concerned as to the manner in which they did their work, and were interested only in the result thereof. But this was the principal question of fact in the case, and we think the testimony was sufficient to support the finding that Delamar & Allison employed the trucks, and none were engaged except those employed by them, and the right to discharge necessarily implied, and that they had the right to direct and control the drivers of the trucks and had exercised that authority, although but few directions were required.

We conclude therefore that the testimony warranted the finding that there were not three hundred independent contractors engaged in hauling the gravel, but that all the drivers were employees of Delamar & Allison, and that the relation of master and servant existed between Westmoreland and the other truck drivers and Delamar & Allison. *Ellis & Lewis* v. *Warner,* 180 Ark. 53, 20 S. W. (2d) 320; and *Ellis & Lewis* v. *Warner,* 182 Ark. 613, 32 S. W. (2d) 167.

Upon the question of the negligence of Westmoreland, and that of the contributory negligence of the occupants of the automobile, but little need be said. Westmoreland was a boy twenty years old, and had hauled only one load, the day before the collision, and was hauling his first load on that day. He was late reporting for work, and a son of one of the Bratchers had taken his

place, and the jury might have found that Westmoreland was trying by speed to make up for his lost time. On account of the work in progress at the crossing, the view of the drivers of both the truck and the car was obstructed.

Ward testified that he was driving up grade with his car under control, while Westmoreland drove into the intersection like a cyclone, and it appears to be undisputed that when the truck struck the car it turned completely over the car and covered the occupants thereof with the gravel. Westmoreland admitted that he was driving twenty or twenty-five miles an hour, but he had stated to the sheriff prior to the trial that he did not think he was driving over thirty or thirty-five miles an hour. In other words, the case presents the usual conflict in the testimony which is found in nearly all collision cases as to whose negligence caused the collision. This question was submitted to the jury under instructions which are not questioned as being correct declarations of the law, and the question is concluded by the verdict of the jury.

It is earnestly insisted for the reversal of the judgment that the attention of the jury was repeatedly and unnecessarily called to the fact that Delamar & Allison carried indemnity insurance, although they testified that they carried no insurance covering the collision out of which this litigation arose. On the other hand, it is insisted that a deduction of one per cent. was made to cover such insurance.

In overruling the objection to this testimony when it was first offered the court said: "Gentlemen of the jury, the testimony of the witness, Mr. Pruitt with reference to what Mr. Allison told him in Arkadelphia about the reason for withholding a certain part of his pay may be considered by you gentlemen for one purpose alone, and for no other purpose. One of the questions in this case, gentlemen, is whether or not Delamar & Allison, the defendants, were exercising any control over the operation of the truck which figured in the accident or

injury in this case. This testimony is submitted to you as a circumstance only for you to consider in determining whether or not Delamar & Allison, the defendants, had any control or dominion over the truck which figured in the case that you are now trying, and you will not consider that testimony, gentlemen, for any other purpose, and it would be highly improper, gentlemen, and would not only be improper but would be absolutely unlawful for the jury to be influenced in any manner or degree by any statement with reference to insurance in the case, or what Mr. Pruitt said about it. The only purpose for which that is submitted to you is to assist you, if it does assist you, in arriving at a determination as to whether or not Delamar & Allison had any control or dominion over the truck driven by Buster Westmoreland at the time of this collision." The same admonition was given in the instructions which finally submitted the case to the jury.

We think no error was committed in this respect. The fact that Delamar & Allison were insured, if it was a fact, against liability for injuries committed or damage done by the truck drivers was a circumstance to be considered in determining whether the truck drivers were their employees or were independent contractors. So also, would be the fact, if it was a fact, that Delamar & Allison deducted one per cent. to pay for such insurance, whether they actually carried the insurance or not.

No complaint is made of the amount of the verdict in the case of John Ward, Jr., or that in the Lewis case, but it is earnestly insisted that no verdict should have been returned in the case of Ward, Sr., for the benefit of his estate, for the reason that the undisputed testimony shows that he died without enduring conscious pain or suffering.

Upon this question the testimony is to the following effect: Dr. Hirst, the coroner, viewed the bodies of both men after their death, and testified that "both men were broken up pretty badly, fractured arms and legs, and one was crushed in the chest, and one I remember had a frac-

ture I think about his ear, a place almost large enough to put your fist in. The skull was crushed entirely in." The positive opinion was expressed that this man, and the coroner was not sure which one he was, had not suffered any conscious pain. He did not examine the other man very closely, although both men were lying on a stretcher in the undertaking parlor. The coroner also expressed the opinion that one whose skull was fractured by a blunt instrument was much more likely to be rendered unconscious than was one whose brain had been pierced by a sharp instrument like a knife.

John Ward, Jr., testified that the collision rendered him unconscious for a few minutes, and that when he regained consciousness his father was breathing and struggling and making curious noises, and that he saw him try to raise his right arm; that he called to his father and "tried to arouse him, but I did not get an answer, just a curious racket." Ward, Jr., was picked up and carried away about ten minutes after the collision, and his father was still alive, but he died a few minutes later.

The coroner testified that any struggle or movement is some slight evidence that there might have been conscious pain. These questions were asked him and answers given: "Q. (By plaintiff's counsel.) Dr. Hirst, there is some proof in here that Mr. Lewis, who was not the man that was injured on the forehead, was seen, nine minutes after the collision, approximately, to try to move up his arm, which was badly broken, but he was seen to try to move up this arm; wouldn't you say to the jury that was some evidence that the man may have suffered some conscious pain after that time, or that length of time? A. Well, it might and might not be. If that was a co-ordinated movement, if he moved his arm and at the same time tried to move his head to see his arm, I think so. Q. Suppose after nine minutes they were breathing, and the breathing had not grown weaker, would that cut any figure in your opinion? A. Well, it might."

It will be remembered that there was no recovery for pain and suffering on behalf of the estate of Mr. Lewis.

The undertaker, who appears also to have been a doctor, testified that the heads of both men were badly crushed, and that the injuries to each had penetrated the skull, and that "the skulls were fractured through on both of them," and they had apparently received a blow on their skulls, which appeared to be crushed and mashed, and that the injuries were not of a character to have been inflicted by a sharp or pointed instrument. This witness answered questions as follows: "Q. Where were those fractures, doctor, as to whether they were at the front of the skull or at the back of the skull? A. Both. Q. They were fractured all the way around? A. Yes. Q. Could you tell from the outside whether there was any damage to the brain on the inside? A. Well, I could. There was a hole in the base; you could see the brain was damaged. Q. Well, how? Just describe that damage to the jury. A. Well, just the head was mashed so that you could just mash against it and feel the bone crush, you know. Q. Well, isn't that always true with a fracture—can't you press any fracture and feel a little give? A. I don't know that that is true with every fracture, no, sir. It might be very small and just be a crack that you couldn't feel, but these were crushed to where you could feel from the outside and tell. Q. Which one of the men was hurt the worst, or had the greater injury to the skull? A. It seems to me like it was Mr. Ward now. It is kind o' hard for me to separate the two just offhand." And on his redirect examination he further testified as follows: "Q. Which one had the fracture, the crushed skull on his forehead? A. The scalp was cut on his forehead? Q. Yes, sir. A. It seems to me like that was Mr. Ward. Q. And Mr. Lewis' injury was on the back part of the head? A. Well, principally the back part of his head."

A Dr. Buchanan testified as an expert in behalf of the plaintiffs, and stated that not all brain injuries caus-

ing death produced unconsciousness, but he answered questions as follows: "Q. Now, if a man had received an injury to his skull that penetrated his skull, from some heavy blunt instrument, and after he received the injury he only lived for a few minutes, that the injury was of sufficient force and severity to cause his death in just a few minutes, would you say that man was rendered unconscious at the time he received the injury? A. You mean to say all of his trouble was with his head? Q. No, but the worst part of his injury. He might have received minor injuries, maybe a broken arm or hand? A. If his trouble, all of it, was his head, why I would say that he wasn't conscious. If all of his injury was his head, and he was dead in 15 minutes, I wouldn't say but what he was."

We conclude, from this testimony, that there is no substantial basis upon which to sustain the verdict and judgment for conscious pain and suffering in the case of Ward, Sr. The injury to him and to Mr. Lewis appears to have been very similar, and no recovery on this account was had in the Lewis case. The skulls of each appear to have been not only fractured but to have been crushed. The younger Ward was unable to arouse his father or to obtain recognition from him, and there is no testimony that the elder Ward said or did anything indicating consciousness. *St. L. I. M. & S. Ry. Co.* v. *Dawson,* 68 Ark. 1, 56 S. W. 46; *St. L. I. M. & S. Ry. Co.* v. *Stamps,* 84 Ark. 241, 104 S. W. 1114.

The judgment for pain and suffering must therefore be set aside; in all other respects the judgments are affirmed.

LITTLE ROCK STREET IMPROVEMENT DISTRICT NO. 508 *v.* TAYLOR.

Opinion delivered July 6, 1931.

[redacted]

Horace Chamberlin, for appellants.

Nat R. Hughes and *Sam Rorex*, for appellee.

SMITH, J. On February 28, 1931, appellants filed an intervention in the proceedings in the Pulaski Chancery Court wherein the affairs of the American Exchange Trust Company were being wound up as an insolvent bank.

The intervention contained allegations to the following effect. Street Improvement District No. 508 was organized under the provisions of c. 89, Crawford & Moses' Digest, and amendments thereto, for the purpose of paving certain streets in the city of Little Rock. Three surety companies, which are parties to the intervention, are engaged in the corporate surety business in this State.

The American Exchange Trust Company was a banking corporation, organized under the laws of this State, but was insolvent on November 15, 1930, at which time it was taken over by the State Bank Department for liquidation purposes. Notwithstanding its insolvency, the bank never had less than $375,000 in money on hand at any time after incurring the obligation therein stated since March 24, 1930. On the date last mentioned Improvement District No. 508 appointed the American Ex-

change Trust Company, hereinafter referred to as the bank, as its treasurer, and the bank accepted the appointment, pursuant to §§ 5702-5707, Crawford & Moses' Digest, and the district thereupon "placed with its said treasurer and in its trust department several hundred thousand dollars of its funds, accompanied by written instructions prepared by the treasurer but signed by the district, as follows: 'Funds are to be drawn out only in payment of necessary expenses and on engineer's monthly estimates.'" It was alleged that the bank charged, and the district agreed to pay, the fee allowed by § 5705, Crawford & Moses' Digest, as compensation for services as such treasurer and for disbursing funds by paying outstanding bonds and interest coupons. It was alleged that the relation thus created between the district and the bank was not one of creditor and debtor, but a fiduciary one authorized by the statute referred to.

That, to secure the faithful accounting and proper payment of such funds, the bank, at the date of its appointment as such treasurer, executed three separate bonds, aggregating $500,000, with the surety companies—parties interveners, as sureties. That on the date the bank closed it had on hand as treasurer of the district, "as a remainder of such funds so placed with it on March 24, 1930, the sum of $110,769.33," which the Bank Commissioner refused, on demand, to pay over, but did allow the same as a common claim.

It was further alleged that, upon the demand of the district, the surety companies paid it the full amount of the deposit on December 20, 1930, and took an assignment of the demand to themselves and thereby became subrogated to all the rights of the district.

It was prayed that the Bank Commissioner be ordered to pay the full amount of the demand as a preferred claim. A demurrer to the intervention was sustained, and it was dismissed as being without equity, and the interveners have appealed.

This case is sufficiently similar to the recent case of *Taylor* v. *Street Imp. Dist. No. 343*, 183 Ark. 524, 37 S. W.

(2d) 84, to be controlled by the principles there announced. In that case it was recited, in the agreed statement of facts upon which the case was tried, that certain improvement districts in the city of Little Rock had turned certain moneys over to the American Exchange Trust Company as treasurer of the districts, and that the bank had on hand at all times thereafter until it closed its doors a sum of money in excess of these deposits. It was agreed that the money had been deposited in the bank for the purpose of paying bonds and interest thereon outstanding against the districts. That each of the districts had executed a pledge, which had been duly recorded, of all assessed benefits and other resources of the districts, for the payment of the bonds and the interest thereon. This pledge required the boards of commissioners of the districts to draw vouchers against the deposits to pay bonds and interest when due, and authorized the bank, if such warrants were not drawn, to apply the funds on hand for such purposes and to charge the same to the districts, and that this had been done in several instances.

The pledges constituted the bank as the trustee and treasurer of the districts, and funds of the districts were deposited in the bank in that capacity, and in no instance were funds used by the districts other than for the purposes for which they had been raised.

Upon the trial of that case in the court below, it was held that the claims of the districts constituted trust funds and special deposits and entitled the districts to preference and to payment in full. In reversing the decree so holding it was pointed out that § 1 of act 107 of the Acts of 1927 had classified creditors of a bank of which the Bank Commissioner had taken charge as "secured creditors," "prior creditors," or "general creditors." We there quoted from that act as follows: "(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 per-

mitted 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 creditors of said bank, including the State of Arkansas and any of its subdivisions, shall be general creditors thereof."

Upon the authority of this statute, it was held that the claims of the districts were not preferred, but were common claims, and should be classed as such. In so holding we said that 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 was not permitted to use in the course of its regular business, and that the Legislature appeared to have restricted the definition of special deposits 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 deposits as not permitted to be used by the bank in the regular course of its business.

It was not alleged in that case, nor is it in this, that there was any written agreement between the bank and the district expressly making the deposits of the district special deposits, which denied to the bank the right to use the money in the course of its regular business. It is insisted, however, in the instant case that the law under which the deposit was made imposed this condition. Section 5706, Crawford & Moses' Digest, is cited to support this condition. This section reads as follows: "It shall be unlawful for the collector or treasurer of the improvement district, or of any other subordinate officer appointed by the board, to loan or use, or to be interested in the loan or use, of any funds raised by the improvement district."

We do not think, however, that this was the purpose or the effect of the statute. It was not made unlawful for an improvement district to make a general deposit in a bank. Indeed, act 182 of the 1927 session of the General Assembly, approved March 22, 1927, expressly gave the commissioners and treasurers of all improvement districts the right to deposit the funds of the districts in any bank, requiring a bond conditioned for the apt, full and complete payment of all funds so deposited, together with the interest thereon. It affirmatively appears, from the allegations of the intervention, that the commissioners of District 508 had proceeded under the authority of this act 182 and had taken bonds from the intervening surety companies to indemnify the district against loss on account of such deposits.

It may be conceded, as learned counsel for appellants contend, that, by subrogation, the surety companies had succeeded to all of the rights which the district possessed in this deposit; but they have no greater rights than the district had. The allegation of the intervention that the district's funds were placed in the bank, read in connection with all the other allegations of the intervention, mean nothing more than that the funds were deposited in the bank, and § 5706, Crawford & Moses' Digest, quoted above, has no application to this deposit. This deposit did not constitute a loan or use of this money, nor make the commissioners of the district interested in the loan or use thereof, and was nothing more than a deposit which the district was authorized to make, and had made, pursuant to the authority of act 182 of the Acts of 1927.

This was, of course, a deposit of trust funds of an improvement district, but so also was the deposit in the case of *Taylor* v. *Street Imp. Dist. No. 343, supra,* but we there said: "The deposit of the trust funds of the improvement districts, taxes collected and benefits assessed, although they were trust funds, so far as the particular officials collecting and depositing them is concerned, and known by the bank to be such, did not become special de-

posits, in the absence of a 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. (Citing numerous cases)."

We think, under the allegations of the intervention, that there was no such agreement, as is required by the act of 1927, to constitute the improvement district a secured or prior creditor, and its rights are those only of a general creditor, and its claim was therefore properly allowed as a common claim.

The decree of the court below to this effect must therefore be affirmed, and it is so ordered.

CLIMER *v.* STATE.

Opinion delivered July 6, 1931.

J. Arthur Spinks and *Partain & Agee,* for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Crawford County for selling liquor and, as a punishment therefor, was adjudged to serve a term of one year at hard labor in the State penitentiary, from which judgment of conviction, he has duly prosecuted an appeal to this court.

The only assignment of error urged for a reversal of the judgment is the action of the trial court in overruling appellant's challenge to W. V. Boatright as a

juror in the case. His *voir dire* examination revealed that he was a commissioner of the Fort Smith & Van Buren Bridge District, which was organized under authority of act 119 of the Acts of 1909. The district embraces Upper Township of Sebastian County and all of Crawford County except three townships. The district is divided into two divisions, one being called the Sebastian Division and the other the Crawford Division. Under an amendatory act to the act referred to, three commissioners are elected by each division, and the six commissioners constitute the board of commissioners who represent the property owners of the district in the management of same.

After appellant exhausted all of his challenges, he challenged W. V. Boatright on the ground that he was a county officer and subject to peremptory challenge under § 6382 of Crawford & Moses' Digest. That section is as follows:

"Whenever any juryman shall be presented for examination in impaneling any jury, it shall be a ground for peremptory challenge, that said juryman is a postmaster, justice of the peace or county officer."

Agents or representatives of the owners of the land in an improvement district are in no sense county officers. This court has so ruled in the cases of *State ex rel. Going* v. *Higginbotham*, 84 Ark. 537, 106 S. W. 484, and *Nakdimen* v. *Fort Smith & Van Buren Bridge District,* 115 Ark. 194, 172 S. W. 272. It necessarily follows that W. V. Boatright was not subject to a peremptory challenge as a juror under § 6382 of Crawford & Moses' Digest.

The judgment is affirmed.

SPANN *v.* LANGSTON-WILLIAMS LUMBER COMPANY.

Opinion delivered July 6, 1931.

Hughes & Davis and *Randolph, Randolph & Clifton,* for appellant.

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

HUMPHREYS, J. Appellee brought this suit against appellant to recover $2,500 for a breach of warranty in a deed to standing timber on certain lands in Lauderdale County, Tennessee, executed by appellant and her husband, J. C. Spann, to appellee on December 7, 1925.

Appellant filed an answer denying the breach or any liability on the warranty and a cross-complaint to reform the timber deed so as to show that she joined in the deed for the sole purpose of conveying her marital rights therein.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a dismissal of appellant's cross-complaint and a judgment against her for $2,600 upon her breach of warranty, from which is this appeal.

The facts in the case material to a determination of the issue involved on the appeal are undisputed and are as follows:

J. C. Spann bought the lands upon which the timber was standing from Rice and Kirkpatrick on August 11, 1920, and executed a mortgage thereon to secure a large part of the purchase money. On the 7th day of December, 1925, J. C. Spann and appellant executed a deed to appellee for the timber thereon in consideration of $9,500, which deed contained the following clauses:

"This indenture, made this 7th day of December, A. D. 1925, by and between J. C. Spann and Mary E. Spann, his wife, parties of the first part, and unto and with Langston and Williams Lumber Company, Inc., parties of the second part." * * *

"And the said parties of the first part do hereby covenant with the second parties, and their lawful heirs, successors and assigns, that they will forever warrant and defend the title of said timber and right-of-way, against all lawful claims whatsoever."

The deed was signed by J. C. Spann and Mary E. Spann and the acknowledgment is as follows:

"ACKNOWLEDGMENT.

"State of Arkansas, County of Mississippi, ss.

"Be it remembered, that on this, the 29th day of December, 1925, before me, Nora Wise, a duly commissioned and acting notary public in and for said county and State, personally appeared J. C. Spann, grantor in the foregoing indenture, and known to me to be the person whose name appears signed to the same, and acknowledged that he had signed the same for the consideration and purposes therein mentioned and set forth and desired me to so certify, which is accordingly done.

"And I further certify that on this day voluntarily appeared before me Mary E. Spann, wife of the said J. C. Spann, to me well known as the person whose name appears on the foregoing instrument, and in the absence of her said husband declared that she had of her own free will signed the relinquishment of dower and homestead therein contained for the purposes herein contained and set forth, without compulsion or undue influence of her said husband.

"In witness whereof, I have set my hand and seal the day and date first written above.

(Seal) "Nora Wise, Notary Public."

When the deed was presented to appellee by J. C. Spann, it refused to accept same and close the deal until Mary E. Spann had signed it. At the time she signed

and acknowledged the deed she told the notary public that she was doing so to convey her marital rights in the land and without any intention of binding herself personally on the warranty contained therein. This statement to the notary public was not communicated to appellee. After she executed the deed, appellee accepted it and closed the deal without demanding an abstract to the lands in reliance on the covenants and warranties contained in same. The mortgage held by Rice and Kirkpatrick on the lands for the purchase price was foreclosed and the land sold on January 25, 1927. The mortgagees purchased the land at the foreclosure sale and thereafter brought suit to enjoin appellee from cutting and removing the timber. About two years after the injunction suit had been pending, appellee compromised the claim and suit for $2,500 and by doing so prevented a $7,000 loss. It then brought this suit against appellant on her warranty, her husband having in the meantime, died.

The testimony failed to show a mutual mistake in the execution of the timber deed, so the trial court did not commit an error in refusing to reform the deed and in dismissing appellant's cross-complaint.

The only question remaining to be determined on the appeal is whether a married woman who joins in the execution of a deed with her husband to lands belonging to him is liable upon the covenants and warranties contained therein. Prior to the emancipation act, Crawford & Moses' Digest, § 5577, liberating married women from marital unity in respect to contracts, a married woman was not bound by the covenants in a deed executed by her and her husband to lands. *Benton County* v. *Rutherford,* 33 Ark. 640. Since the adoption of the emancipation act, a married woman may exercise all the rights of a *feme sole* and is liable upon her covenants and warranties just as much so as her husband or any third party would be. As we understand, the disabilities of married women with respect to their contracts have been

as completely removed by act in Tennessee as in Arkansas. In Tennessee a married woman is bound upon the covenants in a warranty deed to lands belonging to her husband in which she joins as a grantor unless she is entitled to a reformation thereof showing that she joined therein for the sole purpose of conveying her marital rights. *Watts* v. *Ramsey,* 156 Tenn. 463, 2 S. W. (2d) 411. In the instant case, appellant was not entitled to a reformation of the deed under the proof. Therefore, she is bound by the covenants of the timber deed.

No error appearing, the decree is affirmed.

CONNOR *v.* BOWERS.

Opinion delivered July 6, 1931.

June P. Wooten, for appellant.

Fred A. Isgrig, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Pulaski County, Second Division, sustaining on appeal on trial *de novo* the purported will of Mrs. Mamie Hollen Casaretto of date August 22, 1929, which was filed for probate in the probate clerk's office by appellee and rejected by the probate court upon the ground that the instrument was a forgery.

The purported will devised all the property of the testatrix to appellee, the beloved nephew of her departed husband except $1 to her surviving nephews and nieces of blood kin.

The testimony adduced upon the trial of the cause was in sharp conflict as to the genuineness of the instrument and signature of the testatrix thereto.

The testimony introduced by appellant tended to show that the instrument, including the signature, was a forgery, and the testimony introduced by appellee tended to show that the instrument and signature were genuine.

This issue of fact was submitted to the jury under correct instructions, and, in view of the conflict in evidence, this court on appeal is precluded from passing upon the weight of the testimony or the merits of the cause. We have carefully read the testimony and find that the verdict of the jury is sustained by substantial evidence.

Appellant contends, however, for a reversal of the judgment upon the alleged grounds that the trial court, in the course of the trial, admitted incompetent testimony and excluded competent testimony; and in overruling her motion for a new trial.

The testimony objected to as incompetent was that of John Monteath and James F. Moore, who testified to the genuineness of the signature of the testatrix to the purported will and the testimony of C. L. McWilliams to the effect that on or about the date of the will he took the attorney who prepared same to his office and was

requested by the attorney to witness a will he was going to prepare for a woman in case the witness returned from North Little Rock in time.

It is argued that witnesses Monteath and Moore did not sufficiently qualify themselves to testify as experts concerning the genuineness of the signature of the testatrix of the will. This court ruled in the case of *Newport Manufacturing Co.* v. *Alton,* 130 Ark. 542, 198 S. W. 120, that a witness might testify as an expert where experience and observation in the special calling of the witness gives him a knowledge of the subject in question beyond that of persons of common knowledge. Witness Monteath testified that he had 45 years' experience in handling checks in cotton transactions, and that in the position occupied by him it was necessary for him to compare signatures and handwriting. Moore testified that he had had 18 years' experience as a bank teller, in which position it was imperative for him to distinguish between genuine and fictitious signatures. Both witnesses sufficiently qualified themselves by experience to testify as experts concerning the genuineness of signature to instrument under the rule announced by this court in the case of *Newport Manufacturing Co.* v. *Alton, supra.*

The record reflects that testimony was introduced without objection to the fact that George M. Heard, about three weeks before he died, prepared the purported will, and it was not error to admit the testimony of McWilliams in corroboration of the testimony unobjected to.

The testimony excluded by the trial court, over the objection of appellant, consisted of letters written by the testatrix in her lifetime to appellant and her brothers and sisters, in which she expressed affection for them. The general rule announced by this court in the cases of *Leslie* v. *McMurtry,* 60 Ark. 301, 30 S. W. 33, and *Flowers* v. *Flowers,* 74 Ark. 212, 85 S. W. 242, is that declarations of a decedent either before or after the execution of a will, unless a part of the *res gestae,* are inadmissible where the issue is one of forgery.

The testimony of John Vick, excluded by the court over the objection of appellant, tended to show a desire on appellee's part to participate in the distribution of the estate of his aunt or to receive a gift of money from her nephews and nieces by blood. The issue involved was one of forgery of the instrument, and we do not think testimony of this character would tend to prove or disprove that issue.

The trial court did not abuse its discretion in overruling appellant's motion for a new trial on the ground of newly discovered testimony. The evidence alleged to have been discovered after the trial of the cause was testimony tending to contradict McWilliams as to the time he took the attorney who prepared the will to his office and to show that Mrs. Mary Bettis, who testified that she typed the purported will on August 22, 1929, was not in Arkansas at the time, and that some time before the filing of the purported will Winfield Heard, one of the subscribing witnesses, was seen tracing signatures and remarked that he could trace a signature so as to make it look like a genuine signature. It was not set out in the motion by whom the facts alleged could be proved or the whereabouts of the witnesses by whom such proof could be made. On account of the failure to set out the names and whereabouts of the witnesses by whom the newly discovered evidence could be established, the trial court did not abuse its discretion in overruling the motion.

No error appearing, the judgment is affirmed.

LANGE *v.* TAYLOR.

Opinion delivered July 6, 1931.

Carmichael & Hendricks, for appellant.

Sam Rorex and *Nat R. Hughes,* for appellee.

KIRBY, J. The only question for determination here is one of law, whether the owner of shares of stock in a failed bank in the hands of the State Bank Commissioner may set off a sufficient amount of her deposit in the bank to discharge the 100 per cent. assessment of her stock therein levied by the Bank Commissioner in accordance with the statute.

The statute, § 702, Crawford & Moses' Digest, reads as follows: "The stockholders of every bank doing business in this State shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock; provided, that persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to liability as stockholders, but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust fund would be, if living and competent to act and hold the estate in his own name."

In *Davis* v. *Moore,* 130 Ark. 128, 197 S. W. 295, the court construing this statute, said: "The language of this section, as well as many other provisions of the statute, are copied from the National Banking Act of Congress, which had been construed by the Supreme Court of the United States prior to the passage of our statute. In other words, our statute is a borrowed one, and, according to established canons of construction, we take the statute with its judicial interpretation. * * * The provisions of our statute are almost identical with the National Banking Act with regard to the enforcement by the Bank

Commissioner of the double liability of stockholders." * * * Each of the statutes declares the double liability in precisely the same language." See USCA, title 12, § 64, p. 112.

The liability provided by the statute to be enforced against the stockholders is not a debt due the bank, although it arises out of the contractual relation incident to the purchase or ownership of the stock, and can not be considered a penalty, but a sum of money equal to the par value of their stock, for which the statute requires they "shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock."

Stockholders in National banks, it is almost uniformly held, cannot set off their superadded and increased liability under the National Banking Act against their individual claims against the insolvent bank, since this would operate as a preference of the stockholder over all the other creditors. *Hobart* v. *Gould,* (D. C. N. J. 1881) 8 Fed. 57; *Wingate* v. *Orchard* (Wash. 1896) 75 Fed. 241, 21 C. C. A. 315; *Williams* v. *Rose* (D. C. N. J. 1914) 218 Fed. 898.

It was said in *Robinson* v. *Brown* (1901 C. C. A.) 126 Fed. 429: "The object of the double liability is to realize a fund for the ratable payment of all corporate debts. This fund could not be realized if those who were at once creditors of the corporation and its stockholders were permitted to offset their credits and liabilities. Such creditors would thus gain a preference over all others."

In *Duke* v. *Force,* 120 Wash. 599, 208 Pac. 67, 23 A. L. R. 1354, the court held, construing a statute like ours, that a stockholder creditor could not set off his claim against the bank against his statutory liability for the additional assessment, the two claims not being in the same right, one being a claim in favor of the creditor

against the stockholder, and the other in favor of the stockholder against the bank.

In *Wehby* v. *Spurway,* 30 Ariz. 274, 246 Pac. 759, the court, construing the liability of the stockholder of a bank under the National Banking Act, held his liability was such as could not be set off against the depositor's claim against the bank, saying: "The bank itself has no authority whatever over it; it can neither compel its payment nor release the stockholders from their liability for it. In the collection and distribution of it the receiver represents the creditors as distinguished from the bank, even though in collecting what is due the latter and paying what it owed at the time of insolvency he represents it." The Supreme Court of the United States denied a petition for a writ of certiorari in this case on November 1, 1926, 273 U. S. 722, 47 S. Ct. 112.

Under the Montana statute on stockholder's liability, which is identical with ours, the Supreme Court of that State held in *Barth* v. *Pock,* 51 Mont. 418, 155 Pac. 282, that the fund collected from the assessment of stock was of such a character as to preclude the idea that a stockholder can have his creditor's claim set off against his stockholder's liability. See also *Reimers* v. *Larson,* 52 N. D. 297, 202 N. W. 653, 40 A. L. R. 1177.

For construction of other like statutes holding that the superadded liability of a fund for equal and ratable distribution among the creditors of a bank is not subject to set-offs by stockholders of their claims against the bank, see *Hood* v. *French,* 37 Fla. 117, 19 So. 165; *Gentry* v. *Alexander,* 16 Ind. 471; *Parker* v. *Carolina Sav. Bank,* 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673. Also *Hughes* v. *Marvin,* 216 Ky. 190, 287 S. W. 561.

In 1 Morse on Banks and Banking (6th ed.), p. 788, it is said: "A stockholder is not entitled to set off against an assessment on his stock the amount of his individual claim against the bank."

Notwithstanding our statute on set-offs is a liberal one, it is readily apparent from the language of the stat-

ute fixing the liability of the stockholder of an insolvent bank "for all contracts, debts and engagements of such bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock," that it was not the intention to permit the settlement of such liability by a set-off of the failed bank's indebtedness to such stockholder.

It follows from what has been said that no error was committed in sustaining the demurrer to the intervention of appellant in which it was attempted to set off against her double liability as a stockholder to the bank a sufficient amount of the indebtedness due her by the bank as a depositor to satisfy and discharge her additional liability as a stockholder.

The judgment is accordingly affirmed.

HOWELL *v.* STATE.

Opinion delivered July 6, 1931.

Cravens & Cravens, for appellant.

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

KIRBY, J. Upon information filed in the Fort Smith municipal court a slot machine, known as a "Mills Mint Vending Machine," was seized as a gambling device, and upon a hearing H. C. Howell, one of the proprietors of the Hattaway Drug Company's stores where the machine was being operated, filed an intervention claiming that he was the owner of the machine and prayed that it be returned to him.

The intervention was denied, and an appeal was taken to the circuit court, where, upon trial, the mint vending machine was held to be a gambling device and subject to seizure as such, and the intervention of appellant was denied accordingly, from which judgment this appeal is prosecuted.

The undisputed testimony shows the machine was operated as a mint vending machine, and upon the deposit of a nickel in the slot and the pulling of the operating lever it uniformly released one package of mints of the usual value of 5c, never more or less, and when the container was empty, the machine automatically returned the nickel to the player.

Upon depositing a nickel in the slot and a lever being pulled, reels are caused to revolve displaying pictures of fruit and bells; and at irregular intervals, in addition to the mints delivered, brass tokens or slugs, which can be played back into the machine, are delivered in number from 2 to 20, the machine not releasing a package of mints when a token is put into the slot, but the reels do spin showing the pictures of the fruits, etc.

The contract between the owner of the machine and the operator recites that the tokens would not be used as trade checks for any purpose other than the playing of the machine when delivered. The machine upon being operated by a nickel put into the slot, not only delivered a 5c package of mints upon the lever being pulled, but also displayed on the reels the "fortune" of the player or wise sayings or maxims. The fortune telling feature was removed from the machine by the owner or operator upon advice of counsel that it would not be considered a gambling device after this was done before it was set up and operated. The machine as operated only delivered a nickel package of mints and the tokens on uncertain and irregular occasions, and although the tokens upon being put back into the machine operated it, nothing resulted from such operation except the spinning of the reels with the pictures of the advertisements thereon. No mints

could be delivered except by playing the machine with a nickel deposited in the slot.

In *Rankin* v. *Mills Novelty Co.*, 182 Ark. 561, 32 S. W. (2d) 161, this court held that a mint vending machine of like kind as the one exhibited herein, except that the tokens delivered at irregular intervals with the mints could be put back into the machine, enabling the player to play a game of "symbolic baseball," was a gambling device, the operation of which was prohibited by statute. It was there said: "In order to constitute a gaming device under the statute, it must be one that is adapted or designed for the purpose of playing any game of chance or at which any money or property may be won or lost, and any one who shall bet any money or other valuable thing, or 'any representative of any thing that is esteemed of value,' is guilty under § 2634 of Crawford & Moses' Digest of betting on a gambling device. By § 2640 of the same chapter of the Digest, gambling is defined as the betting of any money or any valuable thing on any game of hazard or skill. It is clear from these sections and the entire chapter on gaming that the word 'property' as used in § 2630 and words 'valuable thing' mentioned in other sections are used synonymously, and that any valuable thing or 'any representative of any thing that is esteemed of value' is 'property' within the meaning of § 2630, *supra.*"

In 27 C. J. 989, in describing rules formulated by courts for determining when a slot machine is a gambling device, it is said: "But one which seems to have been accepted very generally is that, where one who plays a slot machine stands to win or lose money, trade, or checks, by hazard of chance, the machine is a gambling device. The machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition." See also *State* v. *Marvin,* 233 N. W. (Iowa) 486; *Harvie* v. *Heise,* 150 S. C. 277, 148 S. E. 66; *Moberly* v. *Deskin,* 169 Mo. App. 672, 155 S. W. 842.

The machine is usually held to be a gambling device where its operation is such that, although the player in any event will receive something, "he stands a chance to win something in addition."

The majority is of opinion that since, by the operation of the machine, the player stands a chance to win something in addition to the package of mints sold and delivered him at the regular price by the delivery at irregular intervals of the tokens, which may be played back into the machine, causing the machine to operate and the pictures to be exhibited thereon, that they are included in the expression in the statute "any representative of anything that is esteemed of value," and that the machine as operated is a gambling device within the meaning of the statute, as construed in *Rankin* v. *Mills Novelty Co., supra.*

The judgment is accordingly affirmed.

COURTNEY *v.* REAP.

Opinion delivered July 6, 1931.

Carmichael & Hendricks, for appellant.

J. S. Utley and *E. G. Shoffner,* for appellee.

MEHAFFY, J. On December 3, 1930, the State Bank Commissioner took over the Citizens' Building & Loan Association of Little Rock, Arkansas, an insolvent building and loan association. The bank commissioner brought

suit in the Pulaski Chancery Court alleging that the officers and directors had made illegal and unlawful loans without taking proper security. On December 17, A. J. Reap was appointed receiver by the Pulaski Chancery Court for the Citizens' Building & Loan Association.

On March 19, 1931, the appellant, Ethel Courtney, filed an intervention in the Pulaski Chancery Court, alleging that about nine years ago she borrowed $4,000 from the building and loan association. She alleged that she intended to pay this back in installments, and did not intend to buy stock in the association. She received a little less than $4,000 from the association, and paid $53.35 monthly for 108 months, the total payments being $5,761.80. She alleged that the receiver refused to credit her with any amount whatever, and that she was entitled to an offset in satisfaction of the loan.

She also alleged that she paid more than 10 per cent. interest, and that the loan was usurious and void on that account.

Answer and cross-bill was filed by the receiver. It was alleged at the time that appellant borrowed the $4,000 she purchased 160 shares of stock of the par value of $25 per share, and that, as collateral security for the money borrowed, appellant hypothecated and pledged to the association the shares of stock; that she at the time executed and delivered a bond to the association and a mortgage on lot 5 in block 3 of W. B. Worthen Addition to the city of Little Rock, Arkansas.

The receiver asked judgment against the appellant, and that the real estate included in the mortgage be sold for the payment of said judgment.

The case was tried in the chancery court on an agreed statement of facts. The court dismissed the intervention of appellant and decreed a foreclosure. The appellant had paid a total of $5,761.80.

We do not deem it necessary to set out the agreed statement of facts because, as stated by appellant, the main question is the right of set-off, or whether the ap-

pellant is entitled to any credit for dues paid, on the value of her stock against the loan.

It is conceded by appellant that she is not entitled to a set-off unless the cases of *Hale* v. *Phillips*, 68 Ark. 382, 59 S. W. 35, and *Taylor* v. *Clark*, 74 Ark. 222, 85 S. W. 231, should be overruled.

Appellant calls attention to the rules adopted by the different courts, but it would serve no useful purpose to discuss these rules or to decide whether one or the other is more equitable and just because the cases referred to establish the rule in this State, and, the rule having been established and followed for many years, we think it should not now be departed from. We do not think the former decisions should be overruled.

The facts in the case of *Hale* v. *Phillips, supra,* are the same as in this case, so far as this question is concerned, and the court there said, speaking of the principle of the building and loan association: "Its principal object is to raise a fund to advance to those of its members who may desire to borrow money. For this purpose each member subscribes for the number of shares in its stock he desires, and at stated times and short intervals pays upon the same small sums of money, called dues. He continues payments until they, with the profits derived from other sources, after deduction of expenses and losses, equal the face value of the stock, when the stock is matured. The shares are then called in, and the owner receives the face value thereof in cash, unless he has received an advance on his shares, and in that event the obligation based upon such advance is canceled. * * * The member who has received the advance on his stock still holds his interest in the common fund and in the management and success of the association. He is as much interested as the members who have received no advance. All are bound in proportion to the amount of their shares for the payment of the expenses and losses of the association. The latter class of members is interested in the increase of the common fund because upon it depends the payment of its shares; and the former is interested be-

cause upon it depends his discharge from the obligation to pay dues and interest until the maturity of his shares."

Whether one who subscribes for stock is a borrower or not really makes no difference. If one subscribes for stock and is not a borrower, he makes payment on the stock in exactly the same way and the same amount that one does who has subscribed for stock and pledged it as collateral security to pay the loan.

The non-borrowing stockholder may pay dues for years, and if the association becomes insolvent and the stock is worthless, he loses all he has paid. The same is true of the borrowing member. He pays on his stock, and, if the association becomes insolvent, he loses all he has paid on his stock, but in addition to paying on stock, the borrowing member pays interest on the money he has borrowed, and if he has paid no more than the interest on the loan, he of course still owes the entire amount of his loan. Both the borrower and the investor lose all they have paid on the stock if the stock becomes worthless. There is no difference between the situation of the borrower and the investor as to the stock.

In case of insolvency, if the stock is worthless, the borrower should be charged with the amount advanced to him, together with the interest agreed on, and should be credited with all the amount he has paid on the loan, but he should not be credited with the amount paid on the stock. He owes the debt as a borrower, and as a stockholder, if the stock becomes worthless, he loses what he has paid on the stock. So far as the stock is concerned, and the payments thereon, he bears his part of the burden in the same way that the non-borrowing stockholder does.

As said in *Hale* v. *Phillips, supra*: "Were it otherwise, and he entitled to be credited with dues on the amount of his indebtedness for advances, it is evident that he would receive the value of his shares, so far as that value is the result of dues, while the members who have received nothing would be compelled to bear all the losses."

In other words, if the payments made on stock by the borrowing members were applied on the debt, the borrowing member would receive for his stock all that he had paid on the stock if it were worthless, and the non-borrowing member would lose everything he had paid on his stock.

The rule adopted by this court requires each to bear his part of the burden, and, so far as the payments on stock are concerned, each stockholder, whether he is a borrower or not, is treated like every other stockholder. The borrowing member's duty as a stockholder is not changed because he borrows money from the association.

The court said in a later case: "The court is of the opinion that the rule adopted in *Hale* v. *Phillips, supra,* and here followed, more nearly conserves than any other the principles of equality, mutuality and fairness, upon which building and loan associations are supposed to be founded." *Taylor* v. *Clark,* 74 Ark. 220, 85 S. W. 232.

The rule adopted in *Hale* v. *Phillips, supra,* is followed here, and the decree is therefore affirmed.

Mr. Justice McHaney not participating.

LUMMUS COTTON GIN COMPANY *v.* DAGGETT.

Opinion delivered July 6, 1931.

H. B. Mixon and *Earl King,* for appellant.

Smith & Fitzsimmons, for appellee.

McHaney, J. Appellant sold and delivered to Lem Banks and Soudan Mercantile Company certain cotton gin machinery in September, 1926, under a conditional sales contract by which title to the gin machinery was retained in it until two certain notes were paid, one due in January, 1927, and the other in January, 1928. Neither of said notes were paid. This machinery was installed in certain buildings owned by Banks and the Soudan company, located on Missouri Pacific Railway Company's right-of-way. In December, 1929, appellee purchased said buildings at an execution sale under a judgment against Banks and the Soudan company. The machinery was still in the building, but no claim was made by appellee to it. Shortly after acquiring title to the buildings, appellee notified appellant's agent that it would have to pay rent to keep the machinery in the building, at the rate of $40 or $50 per month. In October, 1929, appellant made a contract with Lee County Planting Company to sell the gin machinery to it, but such contract was never carried out. John W. Mann, as receiver, operated the Soudan plantation prior to the organization of the Lee County Planting Company, and rented the gin machinery at $1 per bale from appellant, with consent of Banks, the rentals to be applied on said notes. July 24, 1930, Banks and the Soudan company reconveyed the machinery to appellant on the return of the two unpaid purchase money notes, and on August 12, 1930, this suit was brought to collect $308 in rent, and a trial resulted in a verdict and judgment for $300.

A reversal is first sought on the ground that a directed verdict should have been given at appellant's re-

quest for the lack of any substantial evidence to support a verdict against it. The court, at appellant's request, correctly told the jury that, if it "did not actually retake possession and regain the use and control of the gin machinery until August 6, 1930," there was no occupation of the gin buildings by it, and no verdict could be returned against it; and that the mere fact that default was made in payment of the notes by Soudan Mercantile Company did not work a forfeiture of its right to possession, use and control of the machinery, but on the contrary it retained such right until appellant either demanded the property or repossessed it. This is true because the conditional vendee has an interest in the property which he can sell or mortgage. *Clinton* v. *Ross,* 108 Ark. 442, 159 S. W. 1103; *Loden* v. *Paris Auto Co.,* 174 Ark. 720, 296 S. W. 78. But we think the evidence, although meager, was sufficient to take the case to the jury, under the above instructions. If appellant retook possession after default in the payment of the last note on January 1, 1928, or after January 1, 1927, under the accelerating clause in such notes, it became liable to appellee for a reasonable rent after his purchase of the buildings, as the occupancy thereafter was its occupancy and not referable to Banks or the Soudan Mercantile Company. There being sufficient evidence to go to the jury on this question, its verdict is binding here.

Mr. Mann testified that in his opinion the reasonable rental value of the gin buildings was $40 or $50 per month. Appellant objected to this testimony for the reason that the witness did not qualify to give his opinion. He had lived there about a year, had been in charge of the property and operated it, and we think it sufficiently appears that he was qualified to give his opinion. Moreover, appellee had warned appellant that it would be expected to pay at that rate if it continued to occupy the building after December 21, 1929. It did so for nearly eight months thereafter. Nor do we think the verdict excessive. Appellant offered no evidence of the rental value, so the jury was justified in finding it to be ap-

proximately $40 per month. Neither the cost to appellee at the execution sale, nor its sale price to his vendee, furnishes a safe criterion for the rental value of the buildings.

Affirmed.

WILSON *v.* STATE.

Opinion delivered July 6, 1931.

Dean, Moore & Brazil, for appellant.

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

MEHAFFY, J. Appellant was indicted and convicted of the crime of forgery and the crime of uttering a forged instrument, and his punishment was fixed at two years' imprisonment in the penitentiary.

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

He was charged with forging a check and the name of the supposed maker, who was alleged to be a fictitious person. He was also charged with uttering the forged instrument.

The evidence on the part of the State tended to show that the appellant had drawn a check on the Bank of Scotland, bearing the signature of R. O. Jones, for the sum of $6; that said check was returned marked No. AC.; and that there was no R. O. Jones in Van Buren County. A number of witnesses testified to different checks alleged to have been forged and passed in the same way, and the evidence also shows that the persons whose names were signed to the checks were fictitious persons.

The evidence on the part of the appellant tended to show that he was a dentist, and did work in 4 or 5 counties, and that he did dental work for R. O. Jones and received the check in part payment of the account. The appellant testified that he made special engagements at different towns in Van Buren County and had done this for 15 or 16 years for the practice of dentistry; that he did not know R. O. Jones personally, but that he knew his face, and that Jones came in and spoke to him as if he were glad to see him, and Jones told him he lived out 4 or 5 miles from Scotland; that he took the checks because he thought Jones would be back to get the work finished. He testified about the other checks that were introduced, but he did not know the parties from whom he claimed to have received the checks, and these parties could not be found.

The appellant contends that the court erred in admitting testimony relative to other checks than the one to R. O. Jones. The appellant was tried for forging the R. O. Jones check and uttering the R. O. Jones check.

The court admitted in evidence a list of checks ranging in amount from $2.50 to $12.50, one of the checks being dated July 14, 1927, one in 1928, one in 1929, and the others during the year 1930. All of the checks introduced were passed by the appellant about the same time that the check of R. O. Jones was cashed, but the State introduced evidence of these other checks of an earlier date, but did not introduce the checks themselves. All of this testimony was introduced over the objection of appellant. This court recently said:

"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." *Williams* v. *State,* 183 Ark. 870, 39 S. W. (2d) 295.

The above is a statement of the general rule to which there are many exceptions. Evidence of similar forgeries is admissible to show a uniform course of acting from which guilty knowledge and criminal intent may be inferred. In other words, the evidence of other forgeries is admissible, not to prove the commission of the crime for which the party is being tried, but to prove guilty knowledge or intent. Underhill's Criminal Evidence, § 629.

"Evidence of collateral offenses often becomes relevant where it is necessary to prove *scienter* or guilty knowledge, even though the reception of such evidence might establish a different and independent offense. * * * It is equally important in forgery or counterfeiting to establish *scienter*. The accused is charged with holding or circulating forged paper. He may hold one without

being justly chargeable with knowledge of its character; when 3 or 4 are traced to him, suspicion thickens; if 15 or 20 are shown to have been in his possession at different times, then the improbability of innocence on his part decreases in proportion to the improbability that such paper could have been in his possession without his knowledge of the true character of the paper. If the accused is charged with knowingly making or holding or passing the forged paper, the possession being shown but knowledge of its character being disputed, the fact to be proved is that the knowledge was guilty knowledge; and it is admissible to show that shortly before or after the fact charged he had made or had held or had uttered similar forged instruments to an extent that renders it improbable that he should have been ignorant of the forgery." 1 Wharton's Criminal Evidence, page 135 *et seq.*

As a general rule, it must appear that the evidence of other offenses relate to offenses that occurred shortly before or after the commission of the offense for which the accused is being tried. *Melton* v. *State,* 165 Ark. 448, 275 S. W. 701; *Beck* v. *State,* 141 Ark. 102, 216 S. W. 497; *Yellington* v. *State,* 169 Ark. 359, 275 S. W. 701.

It would be difficult to lay down any rule fixing the time of the commission of the collateral offenses before or after the commission of the crime for which the party is being tried. All the checks that were introduced in this case were competent, because they tended to show a system of operating from the date of the first check continuously to the date of the check for the forgery for which he was being tried.

"The evidence of these crimes tended to show the system or method of procedure employed by appellant to defraud, and the comparison of the handwriting in the check here alleged to be forged, and the signature written in the presence of the jury tended to identify him as the author of all the writings and as the person who bought the clippers and tendered the forged check in

payment thereof." *Walker* v. *State,* 171 Ark. 375, 284 S. W. 36.

Moreover, this class of evidence must be limited within such a period that it may naturally be seen to throw light as to the intent with which the act under investigation was committed; and the question of time during which other acts may be proved seems to be largely within the trial court's discretion. However, evidence of distinct offenses of the same character committed by the accused is admissible, though not contemporaneous nor a part of the same transaction, if it shows or tends to show that the accused had adopted the same plan to utter forged instruments in other cases as is charged by the prosecution in the case on trial." 12 R. C. L. 168.

The testimony as to the other checks tended to show that the appellant had adopted a certain plan to utter forged instruments, and that all of the checks were forged in the prosecution of this plan.

It is next contended that the court erred in giving the jury instruction No. 7, which is as follows: "The defendant is specifically charged in this indictment with forging the check signed by R. O. Jones, and in the second count specifically charged with uttering a forged instrument, the same being a check of R. O. Jones. The other checks alleged to have been written by the defendant have been introduced in evidence, and the court instructs you that you cannot convict the defendant of any of these other alleged checks. They are only introduced to you for the purpose of shedding some light on whether the defendant is guilty or innocent of the charge in this particular indictment."

The appellant does not set out any other instruction. No specific objection was made to this instruction. There was a general objection. The instruction is not inherently wrong. Doubtless the trial court would have made any corrections suggested by appellant, but no modification was suggested. The purpose of introducing evidence of collateral offenses is to show intent or guilty

knowledge, but the instruction was not objected to on this account.

"The instruction was not inherently defective and the intention of the court should have been called particularly to the objectionable language. It is true the language was an exaggeration, but we do not think it was prejudicial." *Ross* v. *State,* 181 Ark. 331, 25 S. W. (2d) 769; *Edwards* v. *State,* 180 Ark. 363, 21 S. W. (2d) 850.

There is substantial evidence to sustain the verdict, and the judgment is affirmed.

HOSKINS *v.* ADKINS.

Opinion delivered July 6, 1931.

Paul McKennon, Barber & Henry and *Troy W. Lewis,* for appellant.

C. T. Cotham, for appellee.

McHANEY, J. This case is an aftermath and grows out of the case of *Adkins* v. *Hoskins,* 176 Ark. 565, 3 S. W. (2d) 322. We there affirmed the action of the court in refusing to cancel certain instruments executed by appel-

lant in that case to his wife, the appellee here, conveying certain property to her in settlement of their marital rights. This action grows out of that settlement. Appellee sought to employ appellant as her attorney in that matter. She had separated from her husband and was living in Texas. She communicated the facts to him and desired him to meet her in Clarksville, the home of her husband. He demanded and received from her a retainer of $100 before he would go to Clarksville. When they met there and conferred about the case, he refused to have anything to do with it until an agreement was had as to his fee. They then entered into a written agreement in this regard in which appellant agreed to bring for her a suit for divorce against her husband, and to recover her separate estate in the sum of $3,766, which had been invested in property, title to which stood in the name of her husband, and also to recover her dower, alimony, attorney's fees and costs, for a compensation of $100 which had already been paid as a retainer, and 25 per cent. of the recovery of her separate estate, and 33 1/3 per cent. of the recovery of dower and alimony, which sums were to be paid whether the recovery was had either by suit or compromise, and she was to pay his necessary traveling expenses. It was provided that this contract should not interfere with a reconciliation between the husband and wife.

Acting as her attorney, appellant entered into negotiations with the husband of appellee and succeeded in effecting the settlement mentioned in *Adkins* v. *Hoskins, supra.* After that was accomplished, appellant and appellee entered into another agreement settling the amount of the fee based on the contract above mentioned. Appellee figured out the amount she was due appellant according to the percentages fixed in said contract on a valuation of the property deeded to her by her husband, which she fixed at $7,000, and agreed that appellant was due $2,019.50, for which amount she executed and delivered to him her note and a mortgage on said property to secure same. This suit was brought to foreclose said mortgage to collect the amount of said note. It was de-

fended on the ground that the consideration therefor had failed; that her title to said property had been assailed by her former husband, and that she had been forced to employ other counsel to represent her, and had expended large sums of money in attorneys' fees and expenses, due to his neglect in properly defending said suit, and that he had otherwise breached the contract of employment She prayed a cancellation of the note and mortgage and a judgment on cross-complaint in the sum of $956.70, which she itemized as having been paid out by her in attorney's fees and expenses. The court found that the contract was void because of fraud practiced by appellant upon appellee, she being a client without means and inexperienced in business; that the fee contracted for was out of proportion to the work done; that the change in the original contract, from an interest in the property recovered to a sum of money certain secured by a mortgage on the same property, was accomplished by fraud upon her, she having placed confidence in him; that he did not perform his contract with her, and for that reason she contracted with another attorney to do the work appellant should have done, and that he exacted excessive expense money from her, which amounts constituted ample compensation for all work done by him; and that the contract was champertous, against public policy and void. For these reasons the court decreed a cancellation of the note and mortgage.

We think the court erred in decreeing a cancellation of the instruments sued on. There is nothing in this record to show that appellee was overreached or that fraud was practiced upon her. She is a grown woman, *sui juris*, is not *non compos*, but, on the contrary, she is shown to be a good business woman, having accumulated nearly $4,000 which she permitted her former husband to invest in property, which was recovered for her. She is a woman of ability, being a school teacher, and knew what she was doing when she made the contract with appellant. The courts will not make contracts for parties, nor relieve them of their contracts for fraud unless

it be proved by clear and convincing evidence. In *Adkins* v. *Hoskins, supra,* it was said: "It has been said that the cancellation of an executed contract is an assertion of the most extraordinary power of a court of equity, and that it ought not to be exercised except in a clear case upon strong and convincing proof, and a court would not be justified in canceling a contract unless the proof was clear, strong and conclusive."

The original contract between the parties was executed before the relation of attorney and client was consummated. The $100 retainer fee paid appellant did not establish this relation, and the undisputed proof is that appellant refused to have anything to do with the case until an agreement was had regarding his compensation. They were therefore dealing at arms' length when it was made. The proof further is that the note and mortgage were executed after the settlement had been made with appellee's husband, and that it was entirely satisfactory at that time and presumably remained satisfactory to her until this suit was brought. The execution of the note and mortgage put her in no worse condition, except as to interest on the note. As they stood, they were tenants in common, he owning an undivided one-third in some property and one-fourth in other. He could have immediately brought suit for partition and caused the property to be sold, if not susceptible of division in kind, which we assume it to be. So we fail to find in the evidence anything to satisfy the rule above announced, and hold that the court erred in so deciding.

Shortly after the settlement was made with appellee's husband, he became dissatisfied and brought suit against appellant and appellee to cancel his conveyances. It then became the duty of appellant to defend the action both on his own account and that of appellee. While he had secured a conveyance to appellee of her interest in the property, such conveyance was almost immediately attacked from the source from whence it came. Her agreement to pay expenses related to such expenses as might be incurred in getting title to the property and not

such as were incurred in keeping it. She made no contract with appellant agreeing to pay the expense of that litigation or his personal expenses, for traveling or otherwise, nor was it her duty to hire other counsel. It appears that appellant employed and associated with him in the defense of that action other counsel. Since it was his duty to defend, the employment of other counsel must be held to be at his expense, for the settlement made with appellee's husband and the recovery of the property by it were without value to either, unless the conveyances were sustained. We therefore hold that the court should have decreed a foreclosure of the mortgage for the amount of the note and interest, less all fees and expenses paid by appellee subsequent to the date of the mortgage.

The decree will be reversed, and the cause remanded with directions to enter a decree of foreclosure in accordance with this opinion, and for other proceedings according to law and the principles of equity.

CASTERA *v.* COMMERCIAL BUILDING & LOAN ASSOCIATION.

Opinion delivered July 6, 1931.

D. K. Hawthorne, for appellants.
Tom F. Digby, for appellee.

BUTLER, J. Frank Castera procured a loan from the Commercial Building & Loan Association of $1,200 which was evidenced by his promissory note for that amount with interest. To secure the payment of the note, he conveyed to M. L. Altheimer, as trustee for the loan association, block No. 33, Choctaw Addition to the city of North Little Rock, with power to sell the property in default of payment of the note when due. F. Castera died intestate, not having paid the indebtedness aforesaid, and leaving surviving him as his sole heirs the appellants, Arthur Castera and Lytle Castera, his wife. Arthur Castera and wife entered into possession of block 33 and impressed a part of said block to the extent of one-fourth of an acre with their homestead rights. Subsequent to this, Arthur Castera, being indebted to C. E. Smith, mortgaged said block to the latter to secure the payment of that indebtedness, but his wife, Lytle Castera, did not join in the execution of the deed or acknowledge her relinquishment of dower and homestead rights therein.

The indebtedness to Smith becoming due and being unpaid, Smith brought suit to foreclose his mortgage. The appellee, Commercial Building & Loan Ass'n, intervened in that suit, setting up its rights under the deed of trust executed by Frank Castera. The appellant, Arthur Castera, answered admitting the allegations of the intervention of the loan association and his indebtedness to Smith, but alleged that a part of block No. 33 included in the deed of trust and mortgage was his homestead at the time of the execution of the mortgage to Smith, and that such mortgage, in so far as it affected that part of the block constituting his homestead, was void for failure of his wife to join in the execution of the deed or its acknowledgment. Mrs. Castera intervened, alleging that she had not signed the mortgage to Smith, and set up her right of dower and homestead. A decree was rendered adjudging the amount due the loan association to be $11,471.25 and declaring its lien by virtue of the deed of trust aforesaid paramount to the mortgage lien

of Smith and to the homestead and dower rights of Mrs. Castera. The decree adjudged to Smith, as the sum due him, $871.25, and declared a lien on all the property subject to the paramount lien of the loan association and the homestead of one-fourth of an acre. The decree ordered that the homestead be set apart by certain boundaries, and further that, if the sum adjudged to be due the loan association should not be paid within three days from the date of the decree, the commissioner appointed by the court should proceed to sell first all of block 33, except the one-fourth acre, and apply the proceeds to the payment of the debt due the loan association, and, in the event it should not be sold for enough to pay the debt, with accrued interest and costs, that the one-fourth acre set aside be also sold and the proceeds from that sale be applied first to the satisfaction of the debt of the loan association. The decree contained other recitals as to the disposition of any moneys remaining which it will not be necessary to notice as will later appear.

This decree was rendered on June 18, 1929. The judgment debt remaining unpaid, the commissioner gave notice of the sale of the property by publication in the "Arkansas Legionnaire" on June 29, 1929, July 7, 1929, and July 13, 1929, in which notice the day of sale was fixed for the 26th day of July, 1929, on the usual terms, and to be had at the usual place for judicial sales in Pulaski County, and within the hours prescribed for such by law. It provided that the sale was by the authority and direction of a decretal order of the court made on the 21st day of January, 1929, giving the style of the case. The property to be sold was properly described. On the date fixed in the notice the sale was duly had and conducted in the manner ordered in the decree and sold in parcels as therein directed. At this sale the loan association became the purchaser, the total amount for which the parcels sold not being in excess of the debt and accrued interest adjudged to be due it. The commissioner duly reported the sale as having been made under the authority of the decree rendered on June 18, 1929, which

report was filed on August 10, 1929. The report came on for a hearing on August 13, 1929, and was examined, approved, and the sale confirmed. The deed to the purchaser having been executed, it, too, was presented and acknowledged in open court, and by the court duly approved.

On February 27, 1930, the loan association sold lots 4, 5 and 6 of said block 33 to Annie B. Shaeffer for the sum of $4,500, conveying the same to her by warranty deed of that date, and on April 8, 1930, sold lot 9 of said block to W. M. Robinson and his wife, Lucile Robinson, for the sum of $3,657.50. Before the sales by the loan association aforesaid, and in September, 1929, the loan association had taken possession of the property under its conveyances by the commissioner of the court and had collected the rents from the dwelling houses situated thereon.

On May 7, 1930, the appellants, Arthur Castera and Lytle Castera, filed a pleading designated "Petition of Arthur Castera and Lytle Castera to Redeem," in which all the facts hereinbefore stated were recited, and the allegation made that the sale by the commissioner to the loan association was void for the reason "that the mortgage on said property given by Arthur Castera to C. E. Smith was void because his wife did not join with him in the mortgage and the property described in the mortgage embraced his homestead, and that Lytle Castera, wife of Arthur Castera, has a right to redeem from said sale because the sale of the property was advertised under the decree rendered on the 21st day of January, 1929, and notwithstanding the commissioner's report of sale mentioned that decree was rendered on the 18th day of June, 1929, wherein the Commercial Building & Loan Association was a party to the suit; but a sale under the decree of June 18, 1929, would be void for the reason that M. L. Altheimer, as trustee, held the legal title to the property, and he was not a party to the suit, and the title still remains in him." The petition concluded with a prayer that the report of the commissioner and the sale made by

him be set aside and the deed executed by him to the loan association be canceled; that the deeds executed by the loan association to its vendees hereinbefore named be canceled, and that petitioners be permitted to redeem the property sold under the decree of the court, and offered to pay the sum adjudged to be due the loan association as its debt, together with the interest that had accrued on the same from the date of the decree and the costs that had accrued, and offered to pay any other sum which might be lawful and necessary to pay in order to effect the redemption of the property and the investiture of the title free of the liens and mortgages in the petitions, and for an accounting of the rents and profits received by the loan association and its grantees, etc.

On the 23rd day of May, 1930, the loan association filed its motion to dismiss the petition on the ground that the petition shows on its face that the term of court at which the sale was reported and at which the same was confirmed had expired for an approximate period of nine months before the petition to redeem was filed. The matter coming on to be heard on the petition to redeem and the motion to dismiss, the court sustained the motion and dismissed the petition, from which order is this appeal.

It was and is the contention of the appellants that (1) the decree and the proceedings had pursuant to its orders were void because M. L. Altheimer, the trustee named in the deed of trust executed by Frank Castera to secure the indebtedness due the loan association, was not named as a party in the intervention filed by the loan association; (2) that the sale was improperly made because notice was published in a paper not having a general circulation as prescribed by statute; (3) that the sale was void because the notice stated that it was to be made in accordance with, and by virtue of, a decree rendered January 21, 1929, whereas the decree was rendered on June 18, 1929; (4) that the time limit fixed in the decree was three days, after which the commissioner might proceed to make sale; (5) that the time of sale fixed in the

notice by the commissioner was too limited, and, because of that, the appellant did not have sufficient time to arrange for the payment of the money found due by the decree.

Assuming that any one or all of the grounds alleged by the appellants were sufficient cause for setting aside the decree or the sale made pursuant thereto in the original proceeding, which we do not decide, these were unavailing to the petitioner in this proceeding. From the recitals in the decree of June 18, 1930, it appears that the appellants were present in court by their attorney; that they had filed their answer and intervention and the court, in its decree, gave them all the relief prayed, namely, that their homestead should be exempted from sale under the mortgage given to Smith. They did not complain of the failure to make the trustee, Altheimer, a party, nor of the time limit of three days fixed in the decree in which they might pay the judgment before the commissioner should proceed to make the sale. It was their duty to take cognizance of all of the steps taken by the commissioner, and, if they felt their rights had been in any way prejudiced by the error in the notice regarding the date of the decree or the newspaper in which the notice was published, or the length of time intervening between the first publication of the notice and the date of sale, they should have made their objections at the time the sale came on for confirmation or at least on some day of the term of the court in which the proceedings were held.

The court judicially knows that the original proceedings were concluded during the April term, 1929, of the Pulaski Chancery Court, that that term expired by operation of law prior to the first Monday in October, and that the October term of the court expired before the first Monday in April, 1930. Therefore the petition to redeem filed on May 7, 1930, was filed at a term of the court subsequent to that when the orders complained of were made and over which the court had lost jurisdiction ex-

cept for the grounds set out in § 6290 of Crawford & Moses' Digest. There are eight grounds for which a judgment or decree may be vacated or modified after the expiration of the term, for newly discovered evidence; where defendants have been constructively summoned; for misprision of the clerk; for fraud practiced by the successful party; for erroneous proceeding against an infant, etc.; for the death of one of the parties before the judgment; for unavoidable casualty or misfortune preventing the party from appearing or defending; for errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in § 6277. It is obvious that the petition sets out none of these grounds. As early as the case of *Mayer* v. *Bullock,* 6 Ark. 282, the rule was declared that a final decree becomes absolute at the end of the term and cannot be opened for a new hearing at a subsequent term of the court. With that rule in mind, the Legislature in 1868 promulgated that statute which is now found in § 6290, *supra,* and in the case of *Turner* v. *Vaughan,* 33 Ark. 454, we held: "After the expiration of a term at which a decree is rendered the court rendering the decree has no power to set it aside or modify it except upon application under the statute and for some cause therein specified." The case of *Turner* v. *Vaughan* was where a decree had been rendered condemning the whole of the lands of the judgment debtor to be sold by a commissioner under a decree of foreclosure, and at a subsequent term the debtor sought to have exempted from the sale under the decree a part of the lands and to show that he had impressed the homestead character upon the same. In denying his right to have these lands exempted, the court said: "If, therefore, appellee had, in his answer to appellant's bill, not only denied, as he did, that he procured the lands to be conveyed to his wife to defraud his creditors, but, as a further defense, shown that he had impressed the homestead character upon a part of the lands, and asked the court, if it found the conveyance fraudulent and set it aside, to

decree to him the benefit of the homestead exemption provided for by the Constitution, the court should have so decreed." After holding that the court rendering the decree had no power to set aside or modify the decree after the expiration of the term except upon application under the statute, the court further said: "If it be said that it is a hardship for a man to lose his homestead exemption because he failed to assert it at some particular time, or in some special mode, or in some particular proceedings, it may be replied that such is the law in relation to any defense which a man has an opportunity to make and fails to interpose it."

In a number of decisions subsequent to the case of *Turner* v. *Vaughan, supra,* we have recognized the doctrine therein announced which is controlling in the case at bar. We therefore conclude that, appellants having failed to set up any of the matters alleged in the petition for redemption in the original proceeding, which appellants well might have done, the court at a subsequent term could not entertain these objections as its decree had become final. The decree of the chancellor is correct, and it is therefore affirmed.

RAINES *v.* BOLICK.

Dissenting opinion delivered July 13, 1931.

For opinion of the majority of the court, see 183 Ark. 832.

MEHAFFY, J., (dissenting). I do not agree with the majority that act 126 of the Acts of 1923 is a general law. I think it is a local law.

The courts have generally held that a law is general, not because it embraces all the governed, but that it may, from its terms, when many are embraced in its provisions, embrace all others when they occupy like positions to those who are embraced. Such a law must be based upon some substantial difference between the situation

of a class or classes and another class or classes to which it does not apply.

The constitutional provision prohibiting local legislation 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." Amendment No. 12.

By this constitutional provision the Legislature is prohibited from passing any local act, except it may repeal a local act.

This court held that the power to repeal, given by this amendment, carries with it the power to repeal the original act in part. Therefore, if act 126 of the Acts of 1923 is a local act, the Legislature had the authority, under the decisions of this court, to repeal this act or any part of it. All agree that act 231 is a local act, which the Legislature would have had no authority to pass unless it repeals in whole or part act 126 of 1923, which it could not do unless act 126 is a local act.

This court has frequently held that in determining whether a statute is general or local the form of the statute does not control, and a statute in the form of a general act would be a special act if it could only apply to one city or town. *McLaughlin* v. *Ford,* 168 Ark. 1108, 273 S. W. 707.

This court has also held that, while proper classification is allowable, such classification must not be arbitrary. Act 126 of 1923 expressly provides in § 24: "This act shall be operative only in counties with a population exceeding 75,000 inhabitants as shown by the last Federal census."

The act also provides that the last Federal census shall mean the most recent Federal census taken prior to the filing of the petition for the formation of the improvement district.

This act was passed in 1923, and the last Federal census taken at that time and also at the time the Mabelvale District was formed, shows that Pulaski County is the only county in the State having a population exceed-

ing 75,000. By the Federal census taken in 1920 Pulaski County had approximately 109,000 inhabitants. There are 75 counties in the State and in 1920 there were only four or five counties that had one-half of the required population, 75,000. Ten years later the report shows that there were only eight counties, outside of Pulaski County, that had one-half the required population, and some of these counties had fewer inhabitants in 1930 than they had in 1920.

I do not think it is a reasonable classification because in 40 or 50 years there might be other counties that would come within the provisions of this act. It is wholly unreasonable to suppose that one-fourth of the counties will have the required population in the next 40 years, and in determining whether it is a local or general act, the things above mentioned, I think, should be considered. I think it is manifest that there was no intention that this act should ever apply to more than a few counties, and it is certain that it could only apply to Pulaski County for 15 or 20 years. It therefore seems to me that there can be no question about act 126 being a local law.

This court has held that when the Legislature passes an act leaving out two counties the act is local because it can never apply to the two counties left out, and this court holds in this case that, although leaving out two counties makes the act local, leaving out 74 counties does not make it local. If leaving out two counties makes an act local, how can it be said that an act is general when it never could apply to half the counties in the State?

This court said in a very recent case: "The effect of excepting from the provisions and operation of the act the Gosnell Special School District and the counties of Faulkner and Sharp was to leave the law applicable only to the remainder of the State not so excepted and the law as to the excepted territory unchanged, as though act 149 of 1929 had not been enacted." *Casey* v. *Douglass,* 173 Ark. 641, 296 S. W. 705. "The exclusion of a single county from the operation of the law makes it

local, and it cannot be both a general and a local statute." *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617.

Nothing can be more certain than that act 126 of 1923 left out more than one-half of the counties, and if leaving out one county makes it local, leaving out more than half the counties, to which it never could apply, certainly makes it local.

This court held that an act was unconstitutional and void because it applied only to Mississippi County, and the court quoted with approval the following: "If its operation and effect must necessarily be special, the act is special, whatever may be its form." *Ark-Ash Lumber Co.* v. *Pride & Fairley,* 162 Ark. 235, 258 S. W. 235.

There are statements in some of our cases to the effect that in no other way could certain counties or cities and towns be given relief except by such legislation as act 126 of 1923. That may have been true at one time, but our Constitution not only provides that the Legislature shall not pass any local act, but it also expressly provides in Amendment No. 7 for municipalities and counties to pass local and special legislation of every character.

There is no longer any reason for the Legislature to pass local acts. The Constitution says that the municipalities and counties may pass all kinds of local acts.

It was certainly known when act 126 was passed that it could only apply to Pulaski County, and it was just as certain that it never could apply to a majority of the counties. It was therefore intended as a local act, although it was general in form.

As to whether act 231 of the Acts of 1931 repealed in part the provisions of act 126 is a more doubtful question. The Constitution authorizes the Legislature to repeal a special act, and this court held in *Gregory* v. *Cockrell,* 179 Ark. 719, 18 S. W. (2d) 362, that under this provision of the Constitution the Legislature could repeal a local act or it could repeal any part of it.

I think act 231 of 1931, under the decision of *Gregory* v. *Cockrell,* repealed that portion of act 126 of 1923 that authorized the creation of the Mabelvale Road District, and I therefore think the case should be affirmed.

SPENCE *v.* STATE.

Opinion delivered July 13, 1931.

Peyton D. Moncrief, J. M. Brice, A. G. Meehan and *John W. Moncrief,* for appellant.

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

HART, C. J. Ruth Spence prosecutes this appeal to reverse a judgment of conviction against her for mur-

der in the second degree upon the verdict of a jury fixing the punishment at five years in the State penitentiary. Counsel for appellant argue three assignments of error, all relating to the admission of evidence.

In the first place, it is insisted that the court erred in the admission of nonexpert evidence on the question of the insanity of appellant. Appellant shot and killed Jack Worls in the courthouse at DeWitt, Arkansas, while he was on trial for the murder of her father. The killing occurred about six o'clock in the evening just after the jury had been excused for the day and were leaving the court room. Appellant at the time was eighteen years of age and gave as a reason for killing Worls that she was afraid that the jury trying him might turn him loose. Her counsel interposed as a defense that she was insane at the time of the killing. The State introduced several jurors in the Worls case who testified that they had observed the appellant while she was on the witness stand in that case and expressed the opinion that she was sane. She was not on the witness stand over five minutes, and the jurors who testified in the instant case had no previous acquaintance with her upon which to base an opinion as to her sanity or insanity.

In a case note to 72 A. L. R. at page 579, it is said that the general rule is that nonexpert witnesses will not be permitted to express a general opinion as to sanity. They cannot give an opinion independent of the facts and circumstances within their own knowledge. They may detail the relevant facts known to them, and then express an opinion as to the sanity of the defendant. The author cites Arkansas cases which support the rule. *Bolling* v. *State,* 54 Ark. 588, 16 S. W. 658; *Shaeffer* v. *State,* 61 Ark. 241, 32 S. W. 679; *Green* v. *State,* 64 Ark. 523, 43 S. W. 973; *Byrd* v. *State,* 76 Ark. 286, 88 S. W. 974; *Schuman* v. *State,* 106 Ark. 362, 153 S. W. 611; *Dewein* v. *State,* 120 Ark. 302, 179 S. W. 346; *Thurman* v. *State,* 176 Ark. 88, 2 S. W. (2d) 50; *Davis* v. *State,* 182 Ark. 123, 30 S. W. (2d) 830.

In *Shaeffer* v. *State,* 61 Ark. 241, 32 S. W. 679, it was held that the nonexpert witnesses who testified as to the sanity of the defendant did not show that they were possessed of information sufficient to form an opinion entitled to be adduced as evidence. J. L. Moore, one of the witnesses, testified as follows: "I have seen the defendant for five or six years. During that time I have seen him on the street very often. I have never had him work around me. From what I have seen of him during that time and have observed, I don't think there is anything wrong with him." B. C. Black testified: "I have seen the defendant on the street for several years. I never noticed anything peculiar about him. From what I have seen of him, I never thought but that he was all right."

In *Hankins* v. *State,* 133 Ark. 38, 201 S. W. 832, L. R. A. 1918D, 784, it was held that the court erred in admitting the testimony of nonexpert witnesses who gave their opinion as to the insanity of the accused without stating any facts upon which they based their opinion and without showing that they were qualified to express such an opinion by stating the facts upon which such opinion was based. In that case, the nonexpert witnesses had no intimate acquaintance or association with the defendant and were allowed to testify that they saw the defendant at a show on the night of the killing, and that there was nothing in his conduct to indicate that he was insane.

In *State* v. *Von Kutzleben,* 136 Iowa 89, 113 N. W. 484, it was held that it was not competent for the State to call nonexpert witnesses from the bystanders at a trial to express their judgment based alone on observation made during the trial of the accused on the issue of his sanity.

In *State* v. *Turner,* 126 Maine 376, 138 Atl. 562, the court said: "We certainly know no jurisdiction in which the opinion of a lay witness as to the sanity of a man, whom he has seen less than twenty minutes, would be regarded as admissible."

As we have just seen, the witnesses in the present case were jurors in the Worls case and had no previous

acquaintance with appellant. They had no reasonable opportunity to observe her acts and conduct except for a period of time not exceeding five minutes while she was a witness in the case of a man charged with killing her father. The nonexpert witnesses in the present case detailed no facts at all upon which they based their opinion, and the court erred in permitting them to testify as to the sanity or insanity of appellant whose legal accountability was the main matter in issue before the jury.

The next assignment of error is that the court erred in allowing Dr. Brown, an expert witness for the defendant, to be contradicted upon a collateral matter. As we have already seen, the defense was that appellant was insane at the time of the killing. Dr. Brown, the superintendent of the State Hospital for Nervous Diseases, was introduced as an expert witness in her behalf, and, after reading the hypothetical question propounded to him, stated that in his opinion she was insane at the time of the killing. He was cross-examined at length by counsel for the State, and in this connection we will state that much latitude should be allowed in the cross-examination of expert witnesses in order to test their credibility by eliciting knowledge of matters about which they give an opinion. Counsel for appellant, however, insisted that the error committed by the court was not in the cross-examination, but in allowing his testimony on the cross-examination to be contradicted by other testimony when the question elicited on cross-examination was collateral to the main issue. Dr. Brown had testified that another person who had been committed to the State Hospital for Nervous Diseases from Lonoke County was insane, and that the court erred in permitting testimony to the effect that such person was sane. This evidence was given by a nonexpert witness who based his opinion upon an acquaintance of thirty years.

It is well settled, however, in this State that a party who cross-examines a witness on collateral matters for the purpose of testing his credibility as a witness is

bound by his answers and cannot contradict his testimony on a collateral issue. The reason for the rule is to avoid a multiplicity of issues which would tend to confuse and divert the minds of the jury from the main issue. *McAlister* v. *State,* 99 Ark. 604, 139 S. W. 684; *Peters* v. *State,* 103 Ark. 119, 146 S. W. 491; and *Williams* v. *State,* 175 Ark. 752, 2 S. W. (2d) 36.

In the case last cited, the court said that the object of cross-examination in a collateral matter is to enable the jury to comprehend just what sort of person they are called upon to believe; but because the character of the witness is collateral to the main issue, which is the guilt or innocence of the defendant, the latter is bound by the answer of a witness on a collateral matter.

The reason for the rule would apply with just as much force in cases of contradiction of an expert witness as where an attempt is made to contradict a nonexpert witness on a collateral issue. It is only where the examining party is allowed to inquire about collateral acts that the opposing side will usually be allowed to contradict the witness by evidence showing to the contrary. *McArthur* v. *State,* 59 Ark. 431, 27 S. W. 628; and *Howell* v. *State,* 141 Ark. 487, 217 S. W. 457.

The present case especially calls for the application of this settled rule of evidence, when we consider the expert witness was attempted to be contradicted by the testimony of the regular judge of the circuit court who was the principal witness for the State at the trial. We think that the special judge who tried the case committed error in allowing the introduction of evidence to contradict the answers given by the expert witness in the cross-examination on collateral issues.

It is next insisted that the court erred in allowing the State to show on the cross-examination of appellant's witnesses that her father had been convicted of murder in killing one Jed Wilsey and had been sentenced to the penitentiary for nine years therefor. The State attempts to justify this action on the ground that in the hypothet-

ical question propounded to Dr. Brown the killing of Jed Wilsey by the father of appellant was treated as an undisputed fact, and that no prejudice resulted to appellant from the admission of the testimony. The State was permitted to ask on cross-examination several witnesses for the appellant if her father had not been convicted of the murder of Jed Wilsey and sentenced to nine years in the penitentiary for the killing. In one instance Wilsey was referred to as an old man seventy years old. These questions were all asked before the appellant placed Dr. Brown on the stand and propounded the hypothetical question to him. Later on in the trial the same questions with regard to the murder of Wilsey by the father of appellant were asked other witnesses for the State. The repeated and persistent question was such a departure from the legal methods in the introduction of evidence as in our opinion was calculated to prejudice the rights of appellant and call for a reversal of the judgment of conviction.

Counsel for appellant also complain that the court erred in refusing to give certain instructions asked by appellant. We do not deem it necessary to set out or comment on these instructions. We have carefully considered the instructions given by the court and are of the opinion that they fully conform to the rule with regard to the defense of insanity laid down by this court in *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658; and *Bell* v. *State*, 120 Ark. 530, 180 S. W. 186.

For the errors indicated in the admission of evidence, the judgment will be reversed, and the cause will be remanded for a new trial.

MISSOURI PACIFIC RAILROAD COMPANY *v.* PENNINGTON.

Opinion delivered July 13, 1931.

R. E. Wiley and *Henry Donham,* for appellant.

J. H. Lookadoo, for appellee.

HART, C. J., (after stating the facts). This court has uniformly recognized that the operation of a railroad is a complicated business, and that it is necessary for the railroad company to make reasonable rules and regulations for its employees and to prescribe the duties which they are to perform. The court has also recognized that, like every other business, there are exigencies which are not anticipated and which require the employee to act for the immediate protection of his employer's interest, and that he has implied authority to make a contract in such cases which is reasonably necessary to carry out his prescribed duties. *St. L. I. M. & S. Ry. Co.* v. *Jones,* 96 Ark. 558, 132 S. W. 636, 37 L. R. A. (N. S.) 418; *Henry Quellmalz Lbr. & Mfg. Co.* v. *Hays,* 173 Ark. 43, 291 S. W. 982; and *Booth & Flynn* v. *Price,* 183 Ark. 978, 39 S. W. (2d) 717.

There is nothing in the duties usually performed by a station agent which would lead to the conclusion that he had authority to make a contract with a person to remove an automobile or other thing from the right-of-way of a railroad and to store it. In the present case, however, the situation, as shown by the undisputed evidence, was one with which the assistant station agent was suddenly confronted and which had a tendency to seriously interfere with the traffic over the line of the defendant's railroad, and to endanger the lives of passengers and train operatives. The assistant station agent had the authority to act in the place of the station agent

during his absence and could make any contract which the station agent was authorized to do under the circumstances. The assistant station agent, as an agent of the defendant, had the implied authority to remove the wrecked automobile from the tracks of the defendant's line of railroad so as not to endanger the lives of passengers and train operatives who might pass over the line of railroad at that place. It may be inferred from the evidence that the assistant station agent knew that Cargile, the owner of the automobile, had been injured in the wreck and had been removed from the scene thereof. The automobile had valuable parts which might be stripped from it if it was not protected. Under these circumstances, the assistant station agent had authority not only to engage the plaintiff to remove the wrecked automobile from the right-of-way of the defendant, but also to temporarily store it in his garage until the owner could be notified.

The evidence shows that the plaintiff soon afterwards notified Cargile that his automobile was stored in his garage, and Cargile told him that he would have nothing more to do with it. The plaintiff no longer had authority to keep the automobile in storage without a contract from an agent of the company who had express authority to make such a contract. He would only have been entitled to recover the cost of removing the wrecked car from the line of the company, his storage charges until he notified the owner of the car, who refused to take it, and the cost of removing the car from his garage to some junk pile in case the railroad refused to receive it. There was no testimony to warrant a verdict for $173 in favor of the plaintiff under the principles above announced. Therefore the judgment must be reversed, and the cause will be remanded for a new trial.

GUNNELS *v.* FARMERS' BANK OF EMERSON.

Opinion delivered July 13, 1931.

McKay & Smith, for appellant.

R. H. Peace and *Henry Stevens,* for appellee.

SMITH, J. The Farmers' Bank of Emerson brought this suit on the 17th day of October, 1929, to foreclose a deed of trust executed to E. L. Owen, as trustee for its benefit, by C. A. Richardson and his wife on May 20, 1920. The deed of trust secured a note executed by Richardson to the order of the bank and any renewal thereof. The last renewal was executed December 19, 1925, and that renewal note was due November 1, 1926. The deed of trust was duly recorded July 3, 1920, but no notations were made on the margin of the record where the instrument was recorded showing the renewal of the note which it secured until May 9, 1929.

J. D. Gunnels was made a party to the foreclosure suit upon the allegation that he claimed to own the land described in the deed of trust under an invalid foreclosure of a second and subordinate deed of trust.

Gunnels filed an answer and cross-complaint, in which he alleged that on March 2, 1923, C. A. Richardson and wife had executed to E. L. Owen, as trustee, (the same party named as trustee in the deed of trust to the bank) securing the note of Richardson to the order of Gunnels, which fell due October 1, 1923.

The Gunnels deed of trust recited that it was a "second mortgage on" the lands described in the deed of trust to the bank, and Gunnels admitted that the deed of trust to which it was second was the one to the bank. Gunnels alleged that more than five years had expired after the maturity of the note of Richardson to the bank without any notation having been made upon the margin of the record where the bank's deed of trust had been recorded, and he therefore alleged the bank's deed of trust was barred by the statute of limitations.

The court held that the renewal of the note from Richardson to the bank had kept alive the deed of trust which secured it, and decreed accordingly.

This court held in the case of *Mullins* v. *Wilcox,* 124 Ark. 17, 186 S. W. 290, in an opinion delivered May 8, 1916, that the failure to make indorsements of payments upon a debt secured by a mortgage upon the margin of the record under Kirby's Digest, § 5399 (§ 7408, Crawford & Moses' Digest), does not operate to defeat the mortgage where it had been kept alive by a subsequent written agreement, or payments thereon. At the ensuing session of the General Assembly an act was passed (March 24, 1917, Acts 1917, page 1805), which appears, in part as § 7382, Crawford & Moses' Digest, which provides that no agreement for the extension of a debt or note secured by mortgage, deed of trust, or vendor's lien, or for the renewal thereof, whether made in writing or otherwise, should, so far as the same affects the rights of third parties, extend the operation of the statute of limitations, unless a memorandum showing such extension or renewal is indorsed on the margin of the record where the instrument was recorded, which indorsement should be attested by the clerk, the custodian of the record.

No such indorsement was made on the margin of the record where the deed of trust to the bank was recorded until 1929, and it is therefore insisted, upon the authority of this act of 1917, that the foreclosure of the bank's deed of trust was barred, and the correctness of this contention is the controlling question in the case.

We think the decision of this question is ruled by the decisions of this court in the cases of *Haney* v. *Holt*, 179 Ark. 403, 16 S. W. (2d) 463, and of *Wells* v. *Farmers' Bank & Trust Co.*, 181 Ark. 950, 28 S. W. (2d) 1059. The facts in the Haney case were that S. H. Haney executed a chattel mortgage to W. H. Haney, which recited that "This mortgage is second to a previously recorded mortgage." The mortgage referred to as being previously recorded was executed on the same property by S. H. Haney to H. H. Holt, but, as a matter of fact, the mortgage to Holt had never been recorded, and it was contended that the mortgage to W. H. Haney, which was duly recorded, was a superior lien to the Holt mortgage, for the reason that the filing or recording of a mortgage was essential to its validity as against third persons, even though the subsequent mortgagee had actual notice of the existence of the first mortgage. We held, however, that this rule had no application to the facts stated, for the reason that the recorded mortgage had been made subject to the unrecorded mortgage. Among the cases there cited in support of that view was the case of *Young* v. *Evans-Snider-Buel Com. Co.*, 158 Mo. 395, 59 S. W. 113. That case involved the construction of the Arkansas statute with relation to the registration of mortgages, which was the law of the Indian Territory, where the mortgages in question had been executed. We quoted from that case as follows: "This agreement of plaintiffs, substantially recited in their mortgage, to take their security subject to the defendant's prior mortgages, which were an equitable lien upon the cattle, valid between the parties thereto, obviously takes the defendant's case, upon this issue, out of the principle of the Arkansas case aforesaid, upon which plaintiffs rely, and brings it within the well-settled doctrine recognized and enforced in that State, as well as in the other States of the Union, that 'one who takes a conveyance, absolute or conditional, which recites that it is second or subordinate to some other lien or incumbrance, can in no proper sense claim that he is a pur-

chaser of the entire thing. He purchases only the surplus or residuum after satisfying the other incumbrance;' and 'a mortgage expressly providing that it shall be subject to a prior mortgage is subject to it, independently of the fact that the prior mortgage is not of record; nor will it alter matters to record the subsequent mortgage first.' Jones Chat. Mortg., § 494; 5 Am. & Eng. Enc. Law (2d ed.) 1015; 2 Cobbey, Chat. Mortg., § 1039; *Clapp* v. *Halliday,* 48 Ark. 258, 2 S. W. 853. The plaintiffs, by accepting their subsequent mortgage under the circumstances aforesaid, ceased to be strangers to the defendant's prior mortgages, and were thereby brought into contractual relations with said mortgages, and they imposed limitations upon the interest acquired by them in the property, to the extent of defendant's equitable lien under said prior mortgages, subject to which they agreed to take. There is nothing in the statutes of Arkansas, or in the rulings of the Supreme Court of that State thereupon, prohibiting the making or impugning the validity of such a contract."

The bank's deed of trust was taken May 20, 1920, and would not have been barred until five years after its maturity, and the deed of trust to Gunnels was executed March 2, 1923, so that Gunnels contracted with reference to a valid subsisting lien securing a debt not barred by any statute of limitations, and if, by agreeing, in the deed of trust to him, that that instrument should be second to the one held by the bank, Gunnels assumed a contractual relation with reference to the bank's deed of trust, and ceased to be a stranger thereto, then he is in no position to say that the bank's deed of trust was barred. The renewal of Richardson's note to the bank had kept the bank's deed of trust alive as between the parties thereto, and, if Gunnels is not a third party to that instrument, he is not protected by § 7382, Crawford & Moses' Digest.

We think this view is not in conflict with our holding in the case of *Wells* v. *Farmers' Bank & Trust Company,*

supra. There the second mortgage contained no reference whatever to a prior mortgage, and it was not therein agreed that it should be second to another, although it was alleged that when the second mortgage was given it was agreed between the parties to that instrument that an outstanding mortgage should be first paid. But this contemporaneous agreement was not incorporated into the second mortgage, as was done in the case of *Haney* v. *Holt,* and it was pointed out in the Wells case that, when the alleged agreement was made, the earlier mortgage was then barred as to third parties. The bar of the statute had already fallen in that case as to third parties when the second mortgage was taken, and the second mortgage itself contained no reference to it.

In the instant case, as in the case of *Haney* v. *Holt, supra,* the second mortgage was taken while the first mortgage was a subsisting lien, and there was a contractual agreement incorporated in the second mortgage, which became a condition upon which the conveyance was made, that is, that it was second to a prior mortgage.

In the Wells case such agreement as existed was made after the first mortgage was barred as to third parties, and was not incorporated into the second mortgage and made a condition upon which the mortgage was given, and we said this difference was the controlling distinction between that case and such cases as *Hancy* v. *Holt, supra,* and *Merchants' & Planters' Bank* v. *Citizens' Bank,* 175 Ark. 417, 299 S. W. 753.

The instant case is like that of *Haney* v. *Holt, supra,* and unlike that of *Wells* v. *Farmers' Bank & Trust Company, supra,* and we therefore hold that appellee bank's debt was not barred, and that Gunnels was not a third party with reference thereto.

The decree of the court ordered the sale of the property described in the bank's deed of trust in satisfaction thereof as a first lien, and, as we think that order was proper, the decree must be affirmed, and it is so ordered.

HAZELRIGG *v.* BOARD OF PENITENTIARY COMMISSIONERS.

Opinion delivered July 13, 1931.

[redacted]

Hal L. Norwood, Attorney General, *Robert F. Smith* and *Walter L. Pope,* Assistants, for appellee.

SMITH, J. This appeal questions the right of the State, acting through the State Penitentiary Board, to issue bonds pursuant to act No. 208, approved March 26, 1931.

Section 1 of the act reads as follows: "Section 1. The board having charge of the State penitentiary is hereby empowered and authorized to execute in the name of the State of Arkansas coupon bonds of the State of Arkansas in the sum or sums of not to exceed six per cent. (6%) per annum, payable annually, said bonds to run for a period of not more than five (5) years, and to be so arranged that the annual payments may be sub-

stantially equal. The full faith and credit of the State of Arkansas is pledged for the payment of said bonds."

Section 2 of the act provides that the proceeds of the bond sale shall be credited to a fund to be known as the emergency penitentiary fund.

Section 3 appropriates $200,000, or so much thereof as may be necessary, to be payable out of the emergency penitentiary fund, for the purpose of discharging certain outstanding obligations of the penitentiary commission.

It is insisted that the act does not fix any maximum limit upon the amount of bonds to be issued, indeed, does not specify any amount whatever, and is therefore so vague and indefinite that no authority to issue bonds in any amount has been conferred. On the other hand, it is insisted that, when the act is read in its entirety, it sufficiently and certainly appears that the obvious purpose of the General Assembly was to authorize a bond issue in a sum not to exceed $200,000, and the act should therefore be construed as conferring that power.

The courts of the country have been called upon many times to construe defective legislation, and their power in this behalf is well-defined. The annotated cases on the subject collect an almost innumerable number of cases, but it is unnecessary to review these cases, as the law of the subject has been frequently declared and is well settled by the decisions of this court.

It has been well said that it is not the province of the courts to be present at the making of the law. This is the function of another department of government, and the courts have the power only to construe an act as it comes from the hands of the lawmakers, in connection with other legislation *in pari materia*. *Snowden* v. *Thompson,* 106 Ark. 517, 153 S. W. 823; *Reynolds* v. *Holland,* 35 Ark. 56.

It is the duty of the courts to construe legislation as passed for the purpose of ascertaining the legislative intent, and to give effect thereto when the legislation is not inhibited by some constitutional restriction. But this

intention must be ascertained from the act under review and other legislation *in pari materia,* and the courts cannot legislate under the guise of construction. If the Legislature has not declared its will, the courts may not do so. But, while this is true, it is true also, as is said in Lewis' Sutherland Statutory Construction, vol. 2 (2d ed.), § 410, that "legislative enactments are not any more than any other writings to be defeated on account of mistakes, errors or omissions, provided the intention of the Legislature can be collected from the whole statute."

Another statement of the power and duty of the courts in this behalf appears in the chapter on Statutes, 25 R. C. L., page 975, where it is said: "But, while the courts cannot add to, take from or change the language of a statute to give effect to any supposed intention of the Legislature, words and phrases may be altered and supplied when that is necessary to obviate repugnancy and inconsistency and to give effect to the manifest intention of the Legislature. Especially will this be done when it is necessary to prevent a law from becoming a nullity."

The annotated cases cited in the note to the text quoted fully sustain the text. See also *Road Imp. Dist.* v. *Glover,* 89 Ark. 513, 117 S. W. 544; *Hodges* v. *Dawdy,* 104 Ark. 583, 149 S. W. 656; *Snowden* v. *Thompson,* 106 Ark. 517, 153 S. W. 823; *State* v. *Trulock,* 109 Ark. 556, 160 S. W. 516; *McDaniel* v. *Ashworth,* 137 Ark. 280, 209 S. W. 646; *Summers* v. *Road Imp. Dist.,* 160 Ark. 371, 264 S. W. 696; *Gay Oil Co.* v. *State,* 170 Ark. 587, 280 S. W. 632; *Turner* v. *Edrington,* 170 Ark. 1155, 282 S. W. 1000; *Breashears* v. *Norman,* 176 Ark. 29, 2 S. W. (2d) 53; *Gill* v. *Saunders,* 182 Ark. 453, 31 S. W. (2d) 748.

Applying these principles to the act under construction, we have concluded that it is valid legislation and authorizes a bond issue in a sum not to exceed $200,000.

Obviously, it was the intention of the Legislature to authorize the board having charge of the State peni-

tentiary to issue bonds to discharge past-due obligations. This intention is so clearly expressed in the act that there can be no doubt upon that subject. It is also clear and certain that the proceeds of the bond sale were to be credited to a fund known as the emergency penitentiary fund, and out of this fund so created by the sale of the bonds $200,000, or so much thereof as was necessary to carry into effect the declared purpose of the act, was appropriated.

There appears to be no other provision of law relating to an emergency penitentiary fund and no other means to supply the money appropriated out of that fund except upon the sale of bonds. Bonds are to be sold under the authority of the act to supply the money appropriated, and no other source of supply exists, and we therefore conclude that the legislative intent, as deduced from the entire act, was to authorize a bond issue not exceeding $200,000 to supply the money appropriated, and, as the decree here appealed from was in accord with that view, it is affirmed.

MIDLAND COAL MINING COMPANY *v.* RODDEN.

Opinion delivered July 13, 1931.

A. M. Dobbs and *John W. Goolsby,* for appellant.

Harper & Harper and *George W. Johnson,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $3,000 recovered in the circuit court of Sebastian County, Greenwood District, by appellee against appellant for the alleged negligent killing of its employee Thomas Rodden on the 20th day of July, 1930, by a gas explosion within its coal mine while he was engaged in operating the pump therein. The gist of the action was the alleged negligence of appellant in failing to prevent gas from accumulating in quantities sufficient to cause an explosion which resulted in the death of appellee's intestate.

Appellant interposed the defenses that deceased was not its employee, that he was guilty of contributory negligence, and that he assumed the risk of his employment.

The testimony offered in support of the recovery is, in substance, as follows:

Thomas Rodden was killed by a gas explosion in appellant's coal mine which was caused by gas coming in contact with fire at or about one-thirty A. M. on Sunday, July 2, 1930, when substituting as pumper for Bill White at his request. Bill White was and had been the regular pumper for a year, and, in addition to operating the pump, it was his duty after shots had been fired to tear down coal to search for fire, and when found, to put it out so as to prevent gas explosions in the mine. At the time of the explosion, a fan which was operated by the company with steam had been stopped in order to clean

out the boilers. This fan was operated in order to meet the requirements of § 7284 of Crawford & Moses' Digest to carry air currents to sweep the gas out of the mine which was continually entering same through crevices commonly called gas feeders. When the fan was operating, it prevented an accumulation of gases sufficient to cause an explosion. Gas was constantly entering the mine and in the greatest volume in the third west entry room. It was a large room, and a "gob" was built eight feet wide and as high as the roof to hold the refuse and was filled with the debris. There was a large gas feeder behind the "gob wall" with a pocket around it, and, in order to reach this feeder, a passageway eighteen inches wide was cut through the "gob wall" the day before, of which Bill White had no knowledge. In firing the shots to tear down the coal, it frequently happened that the gas feeders would catch fire and burn until the fire searcher discovered same and put it out. When Bill White requested deceased to substitute for him, he directed him to go through the mine, search for, and put out all fire after the shots had been fired but did not tell him that a gas feeder was back of the "gob wall" and that there was a passageway leading to it. He told him the greatest quantity of gas accumulated in the west third entry and that he would have to wade through water to reach the gas feeders therein. In the judgment of all the witnesses, the explosion was caused by an accumulation of gas coming in contact with fire in the west third entry. They came to this conclusion from the fact that the "gob wall" therein had been damaged and that the things in the mine indicated that the force of the explosion came from that direction. A search party was organized, and they found the deceased lying in the second east entry and his cap, carbide lamp, flashlight, and other belongings scattered about at different points. He was dead when they found him, and was the only man working in the mine at the time of the explosion. Deceased was White's predecessor and was promoted to the

position of machine runner, which position was filled by him until some two months prior to the explosion. He did not take employment elsewhere and was used as a substitute by other employees at intervals. Bill White had used him as a substitute at least four times. Bill White procured several others to substitute for him during the year he was engaged as pumper whenever he did not want to work himself. When he procured a substitute, he wrote his name on a time sheet, which was handed to one of appellant's directors, who transmitted it to the clerk who in turn made it the basis of the payroll. These substitutes were paid by John Conroy, the president and manager of appellant.

The first contention of appellant for a reversal of the judgment is that no evidence was introduced tending to show that appellant was its employee. We cannot agree with appellant in this contention. A custom had grown up in the operation of the mine to allow the regular pumper to select a substitute to temporarily take his place in case he did not want to work. The president and manager of appellant company would and did pay such substitute for their work without question. In the instant case, he paid appellee after the death of deceased for several nights' work including the night of the explosion without even suggesting that the employment was without authority. It was bound by the custom it allowed to grow up with respect to substitutes and cannot be heard to say that deceased was not in its employ.

The second contention of appellant for a reversal of the judgment is that the evidence failed to show any negligence on its part. Section 7284 of Crawford & Moses' Digest requires that operators of coal mines shall maintain a current of air through the mine while men are at work in it. Appellant operated a fan for this purpose but stopped it in order to clean out its boiler and allowed deceased to remain at his post of duty before renewing the operation of the fan. The violation of the statute

tended to show negligence on its part, and this issue was submitted to the jury under a correct instruction.

The third contention of appellant for a reversal of the judgment is that the death of deceased was due entirely to his own negligence in failing to extinguish the fires after the blasting was finished. It is in evidence that the large gas feeder was behind a "gob wall" in the west third entry, to which a passageway had been cut for the purpose of reaching it and putting out the blaze in case it caught fire from the shot.

Although deceased was directed to go to the west third entry and put out any fire that might be there after the blasting, he was not told of the crevice behind the "gob wall" or the passageway leading to it which had been cut through the "gob wall" the day before the explosion. This crevice was in a manner hidden and was at the place where the witnesses concluded the explosion originated. The jury was warranted from this evidence in finding that deceased was not guilty of contributory negligence resulting in his death.

The fourth contention of appellant for a reversal of the judgment is that deceased assumed the risk of his employment. He did not assume the risk or dangers resulting from the negligence of appellant in failing to notify him of gas feeders or crevices obscured from view. He had no knowledge of this negligence on the part of appellant, and could not have appreciated the dangers incident to his employment. Before an employee can assume the dangers incident to his employment, he must know of them and appreciate the dangers arising therefrom.

We have examined the instructions given by the court and have concluded that they are correct and that they have fully covered all the issues in the case.

No error appearing, the judgment is affirmed.

WOFFORD *v.* TWIN CITY BRICK & TILE COMPANY.

Opinion delivered July 13, 1931.

[redacted]

[redacted]

[redacted]

Hill, Fitzhugh & Brizzolara, for appellant.

A. M. Dobbs, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that Wilkins, a trustee of the common-law trust, could not purchase for himself or his wife the property which was acquired for development and operation of the business of the trust, and that such purchase must necessarily operate for the benefit of the trust, and the land be held by him for it, as he agreed would be the case in the purchase thereof. Wilkins did not deny that he had agreed that it would be for the best interest of the trust to purchase the 10 acres of land from the lessor, nor that he later notified the appellant that he had purchased it, paying $800 therefor, and the trust could have

it when they wanted it upon payment of the purchase price.

Within the doctrine and principles announced in *Haskell* v. *Patterson,* 165 Ark. 65, 262 S. W. 1002, and *Oil Fields Corporation* v. *Dashko,* 173 Ark. 533, 294 S. W. 25, a trustee under a common-law trust agreement is impliedly prohibited from purchasing on his individual account the property necessary for the use of the trust in the operation of its business for the purposes for which it was organized. The testimony herein shows that Wilkins acquired the title to the property in controversy under such circumstances as constituted a constructive trust, and that it would be a fraud upon the members of the trust to allow him to hold it in his individual right or to have the title conveyed to another to be so held against the interest of the trust, and he could not purchase said property for himself or another under such circumstances; hence it must be considered held for the benefit of the trust upon payment of the purchase price by it, as he gave assurance would be done upon making the purchase. In other words, the trust would be required to pay the amount of the purchase price of the land with interest to the purchaser, and this must be held to have been done in the payment to said purchaser of more than this amount in royalties for shales used off the tract of land in accordance with the terms of the lease under which it was first held. The court erred in decreeing otherwise, and, since the undisputed testimony shows that the holder of the title to the 10 acres of land so purchased has more than been paid, the entire amount of the purchase money with interest, it must be held to be the property of the trust and subject to the payment of its debts and liabilities. The chancellor's finding otherwise is not supported by the preponderance of the testimony, and is contrary thereto.

The decree is accordingly reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

KILMER *v.* KILMER.

Opinion delivered July 13, 1931.

Tom J. Terral, for appellant.

Carmichael & Hendricks, for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony shows that the land upon which the building

was erected was the property of the son, W. H. Kilmer, and recognized as such by his father when the agreement to build thereon was made.

It is also virtually undisputed that there was no intention of either of the parties to the agreement that the building when erected upon appellant's land should ever be removed, but only that it should be used and occupied by the father and mother during their lives and the life of appellant. The great weight of the testimony shows that there was no expression by either of the parties of any intention at the time of the agreement to the building of the residence on the land that it should be the property of the father or could be removed or separated from the land upon which it was built. It was the intention only that it should be erected thereon and used and occupied as a home by the father and mother of appellant during their lives; and the statement that, if the land were sold during the life of the father, the son could repay him the value of the house is but confirmatory of the agreement that the father and mother should only have the right to the use and occupancy of the house and land during their lives; and the chancellor's finding otherwise is contrary to the preponderance of the testimony.

Appellee, the widow of the deceased father, who married him after the building was constructed on the land, understood that he had no title to the land when she married him, or certainly could have acquired this information if she had made inquiry. Where the building was erected upon appellant's land for the father, who knew it to be his son's land, without any intention of it being separated or removed therefrom, or any agreement between the parties that it could be done, it became, of course, a part of the realty and the property of appellant, the owner of the land, subject only to the use and occupancy of his father and mother, which was enjoyed by them during their lives. 11 R. C. L., p. 1081, § 24; 26 C. J., p. 672, §§ 29 and 30.

In Ewell, Fixtures, p. 77, it is said: "It is a rule of great antiquity, that whatever is affixed to the soil becomes a part of the realty, and subject to the same rules of law as the soil itself. The rule is best expressed in the words of the maxim: *Quicquid plantatur solo cedit.*"

In *Ozark* v. *Adams,* 73 Ark. 227, 83 S. W. 920, the court, quoting one of the rules for ascertaining whether an article is a fixture as laid down in a former case, *Choate* v. *Kimball,* 56 Ark. 55, 19 S. W. 108, said:

"3. The intention of the party making the annexation to make the article 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."

When the house in this case was erected on appellant's land, there was no agreement nor presumed intention that it should ever be removed, in fact, the agreement and intention as expressed and all the surrounding circumstances indicate the contrary intention. The court erred in holding that the house so erected upon the land of appellant was personal property and subject as such to a claim of widow's allowance and dower.

We think that the exception that the transcript did not contain all the evidence is without merit. It shows the introduction of certain witnesses by each party, their testimony and the announcement of each attorney after the introduction of the testimony that "We rest." Also a proper certificate of the stenographer that the testimony was correctly transcribed and the order of the court reciting the names of the witnesses who testified in the case, that the testimony was reported by the court stenographer, "and the same, being examined by the court, is found to contain an accurate report of all the testimony of all the witnesses heard before the court at said time, and the same is therefore approved and

ordered filed as the depositions of said witnesses and made a part of the record in this cause." Neither is any testimony specified as omitted by appellee in its objection that the transcript does not contain all the evidence that was heard by the court in the trial of the case.

For the error designated, the decree is reversed, and the cause is remanded with directions to dismiss the complaint for want of equity.

JONES *v.* VAUGHAN.

Opinion delivered July 13, 1931.

[redacted]

John E. Miller and *C. E. Yingling,* for appellant.

J. F. Holtzendorff and *Emmet Vaughan,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists the court erred in not directing a verdict in his favor, which he urges is the only question for determination here.

The undisputed testimony shows the sale of the timber by appellee to George Wright Jones, the terms there-

of, and the purchase of the lumber in the open market by appellant, who paid the market price therefor without any actual knowledge that the timber had been cut from the lands of appellee, who retained the title thereto in the contract of sale until it was fully paid for. There was some testimony tending to show that George Wright Jones, from whom appellant purchased the lumber, was reporting to appellee, the vendor thereof, the timber cut and lumber manufactured from it during the time it was being removed from the land. The timber contract was duly recorded, and was such an instrument as the law requires to be recorded in order to become effective as notice, since it conveyed an interest in lands. This sale contract, however, authorized the cutting of the timber by George Wright Jones in accordance with its terms, notwithstanding it reserved the title in the timber and logs and lumber until the obligations of the contract were fully paid and satisfied. Appellant, who purchased the lumber manufactured from the timber without actual knowledge of the terms of the contract and the reservation of the title and knowing nothing about where the timber came from, could not be held to the payment to the owner of more than the stumpage price of the timber as specified in the contract, unless George Wright Jones, who cut the timber and removed it, was a wilful trespasser, as the court correctly instructed the jury.

The jury might have found from the testimony that appellee, the owner of the timber, was informed by the purchaser thereof, during the time of its removal from the land, that it was being removed and manufactured; and under such circumstances that appellee was not entitled to recover the enhanced value of the timber when manufactured into lumber, even though it had been wrongfully done by a wilful trespasser. In other conditional sales of personalty, where the title is retained by the vendor, this court has frequently held that the buyer may dispose of his interest in the property purchased, and in doing so does not affect adversely the vendor's

right to the property so long as the purchase price therefor remains unpaid.

Since the purchaser of the timber could remove same and legally dispose of his interest therein, the vendor's right to payment of the purchase money therefor, under the retention of title contract, not being adversely affected by such sale, the purchaser from the conditional vendee would only be bound to pay the balance of the purchase money due in order to protect his title therein, and could not be held liable for more than the purchase money, for the payment of which the title was retained.

The jury had the right to determine the conflicts in the testimony, and its verdict is supported by substantial testimony.

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

STATE LINE LUMBER COMPANY *v.* SHULTS.

Opinion delivered July 13, 1931.

[redacted]

James D. Head, for appellant.

Henry Moore, Jr., for appellee.

KIRBY, J., (after stating the facts). Appellant urges that the court erred in giving appellee's requested instruction No. 1, which it claims is virtually a direction to the jury to find against appellant. Instruction No. 1 reads in part as follows:

"The testimony further shows that the defendant knew that the plaintiff claimed to have certain land adjoining the Temple land, and that the true boundaries between the Temple land and the plaintiff's land were not ascertained and known by the defendant; the jury is further instructed that, if you find from a preponderance of the evidence that the defendant caused the plaintiff's timber on his land to be cut for the purpose of making same into lumber, without having the metes and bounds of the land on which it had purchased timber surveyed, marked and plainly established, you will find for the plaintiff.

"The jury is instructed to find the amount of timber cut by defendant or the amount of timber received or purchased by defendant cut from plaintiff's land, and to find the value of such timber so cut; and the jury shall return a verdict in favor of the plaintiff and against the defendant for double the value of said timber."

The cause of action for double damages is based upon the statute, § 7004, Crawford & Moses' Digest. This instruction not only tells the jury that the evidence shows that the appellant knew that plaintiff claimed to have certain lands adjoining the Temple lands; that the true boundaries between the Temple lands and appellee's lands were not ascertained and known by the defendant, but further that, if the jury found from the preponderance of the evidence that the defendant caused the plaintiff's timber on his land to be cut for making it into lumber, "without having the metes and bounds of the land

on which it had purchased timber surveyed, marked and plainly established, you will find for the plaintiff." This was an instruction on the weight of the testimony, telling the jury it showed that the true boundaries of the Temple land upon which the appellant had the right to cut timber were not ascertained and known by the defendant, and that, if the defendant cut the timber without first having a survey of the lands on which he bought, the timber made and the boundaries located, they should find for the plaintiff. Appellee alleged that a survey showing the boundaries between the Temple and Shults lands was made by Ayers, an engineer, in 1923, and was agreed to and acquiesced in by both owners; and the testimony shows that this line was pointed out by Temple's agent upon the sale of the timber to appellant company; and was also located by the county surveyor in making the survey after the timber was cut from the lands. It is undisputed in fact, notwithstanding which the court told the jury that appellant knew that plaintiff claimed to have certain lands adjoining the Temple lands on which the timber was purchased, and that the true boundaries of the land were not ascertained and known by defendant; and that, if the timber was cut without a survey first made to locate the boundary line, when the undisputed testimony shows that no such survey was made, they should find for the plaintiff.

The statute provides double damages for cutting timber from lands only where the trespasser had no probable cause to believe, and did not believe, the land on which he committed the trespass was his own, or that he had entered into a contract to purchase it. *Rosengrant* v. *Matthews,* 55 Ark. 441, 18 S. W. 541.

In *Sawyer & Austin Lumber Co.* v. *State,* 75 Ark. 311, 87 S. W. 431, the court, in construing the statute providing punishment for cutting timber from lands requiring a survey to be first made, "unless the same has been surveyed and the boundaries ascertained and known," said: "The owner must, before cutting timber for the purposes named, cause an official survey to be made by

the county surveyor, whose certificate thereof is *prima facie* correct (Kirby's Digest, §§ 1142, 1146; *Jeffries* v. *Hargis,* 50 Ark. 65, 6 S. W. 328; *Hobbs* v. *Clark,* 53 Ark. 411, 14 S. W. 652), unless a correct survey has already been made, and the true boundaries thereof ascertained and known."

This instruction was given in the face of appellee's allegation in his complaint that a correct survey of the lands establishing the boundaries thereof had been made by Ayers and agreed to by himself and Temple the owners thereof. The instruction was virtually peremptory and certainly erroneous.

The court also erred in not giving appellant's requested instructions Nos. 1, 2, 3 and 6. In instruction No. 6, the jury was told that, if they found from the preponderance of the testimony that the timber was cut wilfully and intentionally after notice that it was the property of appellee, the jury might find appellant liable for double damages for such timber, although it could only recover actual damages, the market value of the timber at the time it was cut, in accordance with requested instructions Nos. 1, 2 and 3.

The court erred also in the admission of testimony showing that appellant's grantor and appellee had, after the timber was cut and removed, agreed upon a boundary line between appellee's land and the land upon which appellant cut the timber, which was different from the old boundary line established by Ayers, and which appellee alleged to be the true boundary in his suit for damages, and which the undisputed testimony shows was pointed out to appellant as such when the timber was purchased. This memorandum or agreement had not been signed by Temple, appellant's grantor, but only by appellee, and certainly it could have no effect to invalidate the sale of the timber already made to appellant, nor to reduce the quantity or area of the land included in his grant conveying it. *Richardson* v. *Taylor,* 45 Ark. 472; *Hughes Bros.* v. *Redus,* 90 Ark. 149, 118 S. W. 414; *Cox*

Wholesale Grocery Co. v. *National Bank,* 107 Ark. 601, 156 S. W. 187; *Collin County Grain Co.* v. *Andrews,* 110 Ark. 597, 162 S. W. 1098; *Wilkinson* v. *James,* 164 Ark. 475, 262 S. W. 319. This agreement showing the line contrary to the boundary as established by Ayers' survey, alleged to have been agreed upon as the correct boundary, under which the area of appellee's land on that side of the river was a fraction more than 25 acres, could not have been helpful to the jury in ascertaining the true boundary line between the appellant's timber lands and appellees land, and was certainly prejudicial.

It follows that the judgment must be reversed for the errors designated, and the cause remanded for a new trial. It is so ordered.

VAUGHAN *v.* BROWN.

Opinion delivered July 13, 1931.

S. Brundidge, for appellant.

W. A. Leach, for appellee.

MEHAFFY, J. The appellant brought this suit on a contract entered into between him and C. B. Brown on August 28, 1918. He filed with his complaint a verified and itemized account, the items ranging from 75 cents to $1,813.05. The total amount sued for was $4,633.27. There was a great number of items making up this amount.

The appellees filed a demurrer, stating as grounds of said demurrer that the account showed on its face that each item was barred by the statute of limitations.

After these pleadings had been filed, the attorneys for the respective parties agreed to a judgment for $3,000.

A decree was entered for $3,000, and appellant insisted that interest should be added to the judgment from the date that the services were rendered. Appellant states that the only question on appeal is whether or not the lower court, under the record in this case, erred in its refusal to decree interest with its judgment.

Appellant contends that in the absence of an agreement to waive the interest, the law fixes the rights of appellant in this regard, and that the lower court is not invested with power to arbitrarily fix them. He cites and relies on *Rogers* v. *Atkinson,* 152 Ark. 167, 237 S. W. 679. That was a suit on a promissory note for $250 with interest at 10 per cent. per annum from date until paid. The note constituted the contract and expressly provided for interest. The face of the note was for $250, and the jury returned the following verdict: "We, the jury, find for the plaintiff in the sum of $250."

The court said in that case, that the right to recover interest follows as a matter of law, once the right to recover on the note itself is established.

The court quoted with approval the following: "By the weight of authority, when it is undisputed that, if a party is entitled to a verdict, he is entitled to interest, and the jury brings in a verdict for the principal sum without mentioning interest and this is a mere matter of computation, the court may correct the verdict by adding interest."

As we have said, the contract in the case of *Rogers* v. *Atkinson, supra,* was for $250 and interest. The agreement between the parties in the instant case is as follows: "It is by consent of counsel and parties agreed that the plaintiff is entitled to judgment on said account in the sum of $3,000, and that said amount sued on herein is correct to the extent of $3,000." Nothing was said about interest.

Where a suit was based on an account, the amount claimed being $193.22, for which amount the jury returned a verdict, no reference being made to any interest, the Oklahoma court said: "The court, so far as we are able to determine from the transcript, rendered judgment for $22.46 interest in addition to the amount of the verdict. This the court was without authority to do. * * * There is nothing in the record to indicate that the jury did not, in the assessment of damages, include the total amount that they deemed the defendant in error entitled to, and, in the absence of any indication to the contrary, the presumption is that they included in their award of damages, every element that the landowner was entitled to." *Wyant* v. *Beavers,* 63 Okla. 68, 162 Pac. 732.

In a later case decided by the Supreme Court of Oklahoma, the court said, quoting from *Wyant* v. *Beavers, supra*: "The judgment of the court must follow the verdict, and where the verdict is general and for a sum in gross, and the question of interest was not reserved by the court, and there is nothing in the record to indicate that the jury omitted interest, it will be presumed that it is embraced in the amount on their finding, and the court cannot add interest to the amount found by the verdict of the jury." *Enterprise Seed Co.* v. *Leonard Seed Co.,* 96 Okla. 122, 220 Pac. 633.

In the instant case the parties agreed on a judgment for $3,000. This was a contract; a contract for $3,000 and not a contract for $3,000 and interest. Where a suit was brought in replevin for an automobile, the verdict of the jury, after finding the defendant to be entitled to the possession of the automobile, concluded as follows: "And we do find the value of said automobile to be $700." There was no special mention of interest. In entering up the alternative money judgment, the clerk added interest.

The court said: "Although interest upon the value of the property from the date of the unlawful taking or detention to the date of the verdict is allowable as an element of damage, like all other elements of damage,

such interest or its equivalent, if the latter be the measure appropriate to the property in controversy, is to be ascertained by the jury and assessed in the verdict. The clerk was therefore without authority to include in the alternative money judgment, interest from the date of the institution of the suit to the date of the judgment upon the value of the automobile as found and fixed by the jury, and the judgment is to that extent erroneous." *Cary & Co.* v. *Hyer,* 91 Fla. 322, 107 So. 684.

In a case where the jury assessed damages for the plaintiff in the sum of $542.62, and there was no specific mention of interest, the court said: "Although interest upon the amount found to be due by the jury, from the due date to the date of the verdict, is allowable as an element of damage, like all other elements of damage it must be ascertained by the jury and assessed in the verdict." *Shoup* v. *Waits,* 107 So. 769.

Instead of submitting the question here to the jury, the parties agreed on the amount. They agreed that judgment should be entered for $3,000. They did not mention interest. Moreover it would be practically impossible, in a lengthy account like the one sued on, to say just what items were considered by the parties, and it would therefore be impossible to say for what length of time interest should be calculated, and on what particular items, but, even if the items are named, and the dates known, still, when the gross amount is agreed on, nothing could be added to it by the court.

"Had the jury found for the appellee the entire amount for which he sued, and dismissed appellant's counterclaim and set-off, his position about being entitled to interest from April, 1919, might be sound. But the verdict of the jury is unquestionably a balancing of accounts. It credited the appellee's claim by what it found for appellant on his counterclaim and set-off. The balance which it found for appellee was what it thought the appellant then owed him, and necessarily must have taken into account all matters of proper debit and credit

appearing in the lawsuit. Interest was such a matter of proper debit and credit. Hence on the verdict of the jury, appellee was entitled to interest only from the date of judgment." *Parsley* v. *Parsley*, 224 Ky. 254, 6 S. W. (2d) 234.

In the instant case there was a lengthy account containing many items, and doubtless the parties considered and took into account all matters of debit and credit, and the amount agreed on, $3,000, must necessarily have taken into account all matters involved in the lawsuit.

"Judgment of this kind is to be distinguished from judgment by default; its special characteristics being the settlement between the parties of the terms, amount, or conditions of the judgment to be rendered." 34 C. J. 129.

"Consent excuses error and ends all contention between the parties. It leaves nothing for the court to do, but to enter what the parties have agreed upon, and when so entered, the parties themselves are concluded." *Schmidt* v. *Oregon Gold Mining Co.*, 28 Ore. 9, 40 Pac. 406, 52 A. S. R. 759.

In the instant case, the parties had consented to judgment for $3,000, and there was nothing for the court to do but to enter what the parties had agreed upon.

The decree is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* DIFFIE.

Opinion delivered July 13, 1931.

[redacted]

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

Oscar Barnett, for appellee.

MEHAFFY, J. This suit was instituted in the justice of the peace court by appellee to recover from the appellant $13.55, wages due him, and penalty for their nonpayment. On the day of trial the appellant paid the wages due, and judgment was entered against the appellant for $128.40 penalty.

An appeal was prosecuted to the circuit court, where the case was tried before a jury, which returned a verdict in favor of appellee in the sum of $128.40, and judgment was entered accordingly. The case is here on appeal.

The appellee had worked about a month and a half for the appellant under C. E. Vannest, who was foreman in charge of an extra gang. Appellee worked until the 16th day of May, when, according to his testimony, he was discharged, and he requested the foreman to send his money or check to Malvern. The work was being done at Donaldson. The foreman testified that he did not discharge him.

The evidence was conflicting as to whether appellee was discharged in the manner described by him, and, being in conflict, it was a question of fact for the jury, and the jury's verdict is conclusive.

There was evidence introduced tending to show that the extra gang went to another place to work and offered to give appellee the same kind of work there that he had been doing, but this is denied by the appellee. It is unnecessary to set out the evidence on this question, because, if the foreman discharged him, or refused to further employ him, it is immaterial where they worked. The evidence is also conflicting as to whether he was offered employment at the other place.

The evidence is undisputed that, at the time appellee claims to have been discharged, the appellant did not

pay him his wages that were due. He claimed to have been discharged on the 17th day of May, 1930, and he filed suit on the 14th day of June, 1930. The trial was had in the justice of the peace court on July 30, 1930, and his wages, $13.55, were paid him at that time. Appellant does not dispute that it owed the $13.55.

The suit is based on § 7125 of Crawford & Moses' Digest. This statute reads in part as follows: "When a railroad company or corporation engaged in operating or constructing any railroad * * * shall discharge with or without cause or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to further employ. Any such servant or employee may request his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept, and, if the money aforesaid or a valid check therefor does not reach such station within seven days from the day it is so requested, then as penalty for such nonpayment the wages of such servant or employee shall continue from the date of discharge or refusal to further employ at the same rate until paid, provided such wages shall not continue more than 60 days, unless an action therefor shall be commenced within that time."

The evidence shows that appellee requested that his money or check be sent to Malvern. Appellant admits it owed him the money, and does not claim that it sent it to Malvern or anywhere else.

The burden of proof was upon the appellee. He was required to show, by a preponderance of the evidence, that the foreman discharged him, or refused to further employ him; that he requested that his money or check be sent to Malvern; and that it was not sent there within seven days.

All these questions, however, were questions of fact for the jury. The jury passes on the credibility of the witnesses and the weight to be given to their testimony, and their verdict as to the facts is conclusive here, if based on substantial evidence.

Appellant insists that appellee was not discharged; that it did not refuse to further employ him; and that for these reasons the judgment should be reversed. No objection is made to the instructions given by the court except, it is contended, that there was not sufficient evidence to justify the instructions, and that a verdict should have been directed for the appellant.

Appellant contends that, because appellee was working with an extra gang, he knew the work would not last long, and that the statute does not apply. The facts in this case are wholly unlike the facts in the case of *Chicago, R. I. & P. Ry. Co.* v. *Russell,* 173 Ark. 398, 292 S. W. 375. In that case the employment arose out of an emergency, and it was not contemplated that the employment would extend beyond the expiration of the emergency, and in that case he could not have been longer employed because the agreed statement of facts in that case shows that he was employed by the engineer to watch an engine until orders were received for said engine to proceed. He was employed for that specific purpose. He knew his employment would end as soon as the order came for the engine to proceed. He could not have been employed in the same class or kind of employment because, after the order to proceed with the engine, there was no such employment.

In the instant case there was no emergency; he was employed to work with the extra gang some time about the first of April, 1930, and the foreman was still with the extra gang according to his testimony, on the 31st day of January, 1931, and while appellee knew it was an extra gang, he did not know whether the work was permanent or not.

There is no evidence that there was any emergency; there is no evidence that the work of the extra gang was at an end; there was no evidence that it was not permanent.

There was substantial evidence to support the verdict, and the judgment is affirmed.

BURFORD *v.* STATE.

Opinion delivered July 13, 1931.

Shinn & Henley and *Shouse & Rowland,* for appellant.

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

McHANEY, J. Appellant was convicted of murder in the second degree, on an indictment charging murder in the first degree, for the killing of R. O. Lawhorn, and sentenced to ten years in the penitentiary.

The first assignment of error urged for a reversal of the case relates to the refusal of the court to permit the witness, Dr. C. M. Routh to answer a question as to

about how long, in his opinion, he thought appellant would live. It was developed in the testimony of this and other witnesses that appellant was afflicted with Hodgkin's disease and had been so afflicted for about two years, and that a person so afflicted would probably live from eighteen months to four years. We do not see the importance of the testimony sought to be elicited by the above question, nor its relevancy. If it were sought to show the physical condition of appellant, that fact was fully developed by other testimony, as was also the fact of his mental condition. The length of time the witness might have thought appellant would live from the date of the trial was unimportant and properly excluded.

The next assignment of error relates to the refusal of the court to permit the witness, Pumphrey, son-in-law of appellant, to testify that the deceased had the reputation of having a violent and uncontrollable temper. The record reflects that the court permitted the witness to testify to the deceased's reputation for having a violent and uncontrollable temper. For instance the witness was asked this question and gave this answer: "Q. Are you acquainted with his reputation in the community where he lives for being a man with a violent temper and uncontrollable? A. Yes, he had a right smart of temper." He further answered that he was a high tempered man and quick to fly to pieces. It will therefore be seen that the witness was permitted to answer the question.

The next assignment of error relates to the refusal of the court to permit the witness, Dr. G. I. Jackson, to answer a question, based on his knowledge of appellant's physical condition as to whether appellant had such control of his mental and nervous faculties as to be rationally responsible for his acts. The record reflects that this witness was permitted to testify concerning appellant's affliction and its effect on his nervous system, and in his opinion that he did not have that control that a normal person would have. We think the court properly excluded the testimony called for in the question because it

called for a conclusion of law. In Underhill on Criminal Evidence, § 269, p. 383, it is said: "A medical expert may testify as to the mental condition of one whom he has examined and give his opinion as to his sanity on the date of his alleged crime. But the expert who testifies as to the insanity of the accused should not be permitted to testify that in his opinion the accused was or was not capable of determining between right and wrong nor that he appreciated the enormity of the crime, nor whether the defendant was a fit subject for extreme punishment, nor that he was of weak mind when he was neither an idiot or insane person, nor whether he was mentally responsible while suffering from an insane delusion, nor to state the symptoms of one claimed to be shamming unconsciousness."

Another assignment of error relates to the refusal of the court to grant a continuance on account of the physical condition of appellant, the motion for which alleged that he was incapacitated to stand trial and incapable of rendering to his counsel the necessary assistance for the preparation and trial of the case. Several physicians supported the motion by testimony tending to show his incapacity. At the suggestion of the prosecuting attorney, the court appointed three reputable physicians to examine appellant with the view of determining whether he was able to attend the trial. These physicians reported that appellant was able, and the court thereupon overruled the motion. He did attend the trial, testified in his own behalf, and there is nothing in the record to show his incapacity to do so or to lend the necessary aid and assistance to his counsel. He was ably represented by eminent counsel, and the verdict of the jury was not a harsh one, as it might have been much more severe under the testimony in the case. Motions for continuance rest in the sound discretion of the trial court, and this court does not reverse the trial court's action in refusing to grant a continuance unless an abuse of discretion is shown. See *Morris* v. *State,* 102 Ark. 513, 145 S. W. 213.

Another assignment of error relates to the admission of certain testimony over appellant's objection and to the giving of instruction No. 9. We have examined both assignments of error and find them without merit. The record reflects that appellant had a fair and impartial trial. We find no error, and the judgment is accordingly affirmed.

BINGHAM *v.* WILLIAMSON & SONS.

Opinion delivered July 13, 1931.

H. A. Northcutt and *Oscar E. Ellis,* for appellant.

Williamson & Williamson, for appellee.

McHANEY, J. G. R. Gambill was a subcontractor of W. P. McGeorge & Company in the construction of one mile of State Highway on the Salem-Ashflat road. He became indebted to appellees and others, and on April 21, 1930, gave them an order on W. P. McGeorge & Company to pay appellees $500. The order reads as follows:

"You will please mail to R. P. Williamson & Sons, East Sylamore, Arkansas, check for $500, and deduct the same from my estimate on first mile completed on your Salem-Ashflat job.

"Yours truly,

"G. R. Gambill."

McGeorge & Company accepted this order under date of May 2, 1930, as follows: "Replying to yours of April 29th, beg to advise that it is our intention to honor your order on Mr. Gambill's next estimate, as outlined in same."

Thereafter on June 20, 1930, appellant sued Gambill for $1,316 and garnisheed McGeorge & Company. The garnishee answered that he was indebted to Gambill in the sum of $1,541.59, but that it had accepted orders from Gambill in favor of appellees for $500 and another in the sum of $480, and asked that they be made parties to the suit, which was done. McGeorge paid into court the sum of $1,084.28 and asked the court to determine the respective rights of appellant and appellee therein. On a trial the court allowed appellee the $500 claimed by him and the balance was awarded to appellant in the sum of $584.28. This appeal challenges the correctness of this holding for two reasons: first, that there was no unconditional acceptance of the order given to appellee; and second, that, even though there was an unconditional acceptance of the order, there is no proof that as much as $500 of the $1,084.28 was due out of estimate on the first mile completed on the Salem-Ashflat job.

We think appellant is wrong in both contentions. The order above quoted speaks for itself as well as the language of the acceptance. The giving of the order by Gambill and its acceptance by McGeorge constituted an assignment of that much money to appellees. McGeorge after accepting the order held that much of the indebtedness to Gambill for appellees, and it constituted a segregation of that amount from the amount due Gambill, and was not subject to garnishment for the debt of Gambill to appellant. *Samstag* v. *Orr,* 101 Ark. 582, 142 S. W. 1127.

As to the second point, that there is no proof that McGeorge owed Gambill as much as $500 on the first mile of the road, we think it is clearly established that this amount was due out of the first mile. McGeorge testified

that the next estimate after the date of the order did not come in until July 30th, and in the meantime two garnishments had been served on them, and that he did not know to whom to pay the money. He further testified that he did not have the figures on the first mile until July 30th, which was to cover the balance due Gambill on the first mile. This was more than sufficient to pay appellee's claim.

Affirmed.

[redacted]

MISSOURI PACIFIC RAILROAD COMPANY *v.* PATY.

Opinion delivered July 13, 1931.

[redacted]

R. E. Wiley and *Henry Donham,* for appellant.

J. H. Lookadoo, for appellee.

BUTLER, J. This suit was brought by the appellee as administrator of the estate of J. W. Moss, deceased, for the benefit of his mother as next of kin and of his estate, for damages sustained because of his death, which occurred in a collision between a freight train on which he was riding and a switch engine in the Kenova yards of the appellant company in the town of Smackover. It was alleged that at the time of the collision plaintiff's intestate was riding on a flat car just in front of a load of poles where an employee of the appellant had directed him to ride, and where he was riding with the knowledge and consent of such employee; that the cause of his death was due to the gross negligence of the employee of appellant in running the freight train into a switch engine, such negligence consisting of the careless operation of the freight train and "in not knowing that the switch engine was just ahead," in not having the train under control in the yards, and in not stopping the train before it ran into the switch engine.

The appellant answered denying all the material allegations of the complaint, including the allegation that the deceased was riding upon the freight train with the knowledge and consent of the servant of the appellant, and alleged that he was a trespasser on said train and was negligent in riding thereon. On a trial of the case there was a verdict and judgment for the appellee, from which is this appeal.

At the close of the testimony in the case the defendant requested the court to instruct as follows: "Instruction No. 1. You are instructed to return a verdict for the defendant." The court refused this instruction over the objection and exception of the defendant, which objection and exception were preserved in the motion for a new trial and which are here urged as the principal ground for a reversal of the case.

It is also assigned as error and here argued that the court erred in giving a number of instructions for the plaintiff over the objections and exceptions of defendant

and in refusing to give an instruction requested by the defendant.

Our conclusion on the first assignment of error makes it unnecessary to consider the others. We are of the opinion that the court should have instructed the jury to return a verdict for the defendant as requested by it. The evidence is in conflict as to whether or not the deceased was known to be riding upon the freight train by the servants of the appellant operating the train. Each member of the train crew testified that it was against the rules of the company to allow any one to ride upon the freight car and that the deceased had boarded the train and was riding thereon without their knowledge and consent. But, in view of the verdict of the jury, we must consider the evidence adduced on behalf of the appellee in its most favorable light and give it its strongest weight in favor of the appellee. When thus considered, it tends to show that the deceased was invited by one of the train crew to ride upon the train and to occupy the flat car where he was at the time of the collision, and that the servant with whose knowledge and consent he was riding was either the fireman or the engineer on the locomotive of appellant. It is admitted by the appellee that the deceased was but a licensee, and that the only duty devolving upon the servants of the appellant was not to be wilfully or wantonly negligent of his safety and only to exercise ordinary care to avoid injuring him after becoming aware of his peril.

We agree with the appellee that this is the true rule and that it is so held in a long line of our decisions, among which is the case of *St. L. S. W. Ry. Co.* v. *McLaughlin,* 129 Ark. 377, 196 S. W. 460, cited by appellee; *St. L. I. M. & S. R. Co.* v. *Reed,* 76 Ark. 106, 88 S. W. 836; *Kruse* v. *St. L. I. M. & S. R. Co.,* 97 Ark. 137, 133 S. W. 841; *Williams* v. *C. R. I. & P. Ry. Co.,* 139 Ark. 562, 215 S. W. 605; *Ark. & La. Ry. Co.* v. *Sain,* 90 Ark. 278, 119 S. W. 659; *Prescott & N. W. Ry. Co.* v. *Hopkins,* 122 Ark. 168, 182 S. W. 551; *Webb* v. *K. C. S. R. Co.,* 137 Ark. 107,

208 S. W. 301; *St. L. S. F. R. Co.* v. *Bley,* 168 Ark. 814, 271 S. W. 455.

The deceased was a young man of about twenty years of age who appears to have been of average intelligence, and when he elected to ride on the flat car seated in front of a load of poles he assumed the perils incident to the situation, and there was no affirmative duty on the part of the servants of appellant to warn him of the dangers which might ordinarily ensue.

The evidence is undisputed that the freight train was a light one, described by the operatives as "half a train," traveling at approximately twenty-five miles per hour before it reached the confines of the yards; that, as it approached and passed the block signal at the yard boundary, it showed a green light which indicated that the way ahead was clear. The speed of the train had been slackened as it passed the signal to about fifteen miles an hour, and this was the rate of its progress through the yards, which was the customary speed for trains of that weight. The engineer and fireman were keeping a lookout ahead, but, as they traveled along the yards, the engineer's view of the track was obscured because of a sharp left-hand curve in the track. Therefore, the engineer could not see the track ahead, but the fireman testified that he maintained a lookout and when at about 1,100 feet away he saw the switch engine and thought when he first observed it that it was on a siding, but when they had gone perhaps 400 feet further he discovered that the switch engine was not on the siding but on the main line on which the freight train was approaching. Upon this discovery the fireman immediately notified the engineer of that fact, who at once applied the emergency brakes in an effort to stop the train and prevent a collision. On account of the rate of speed the train could not be stopped in time to keep from hitting the switch engine, and the locomotive did strike the same with sufficient force to break the pilot of the engine and knock off its headlight and to damage some of the box cars of the train and to cause the poles on the flat car on which the deceased was

riding to slide forward upon him, injuring him so that he died within a few minutes. Just preceding the time of impact and after the emergency brakes had been applied, the engineer stepped from the cab to the platform on the right, and the fireman to the platform on the left. While the shock was considerable, it was not enough to jar either of them from the platform or to injure any of the brakemen who were in the caboose or on the train. A short time after this occurrence and while it was being investigated by the railway authorities and the Interstate Commerce Commission, a test was conducted with the situation reconstructed as near as could be to that of the date and time of the collision in question for the purpose of ascertaining how quickly a train under proper control could be stopped. The one who conducted the test brought his train to a stop within a shorter distance than did the engineer at the time of the collision—approximately sixty feet from where the collision occurred. The engineer was laid off because of the collision for several months before being put back to work. These facts, perhaps, would be sufficient evidence of the improper movement of the train or want of an adequate lookout to support a finding of negligence in the operation of the train, but would not be sufficient to establish the liability of the appellant, for there is no testimony to the effect that there was any element of wilfulness or wantonness on the part of the employees of the appellant in these matters, and, as the deceased was a mere licensee, his administrator, the appellee, is in no position to complain, for these were, at most, mere acts of negligence. The duty to the deceased must be estimated from the moment when the fireman first became aware of the engine on the track ahead, for it is only from that time that the operatives of the locomotive knew of any unusual and impending peril to themselves or any one on the train, including the deceased. Before that time there was no duty resting upon the employees with respect to the deceased except not to wilfully or wantonly injure

him, but from this time there arose the duty when the obstruction ahead was discovered and the peril apparent, to use ordinary care to avoid the collision and prevent the injuries which might result therefrom to those upon the train. From the time of the discovery of the switch engine on the track the conduct of the fireman and engineer must have been moved by the instinct of self-preservation, and as reasonable men it was to be expected that they would do all in their power to prevent the collision and avoid injury. This the uncontradicted testimony shows they did. There is nothing in the evidence to indicate that there was any act possible for the engineer to perform other than he did that could have averted the collision when he was notified by the fireman of the danger, nor anything to dispute the testimony of the fireman that he gave the warning when he first became aware of the obstruction on the track. Therefore, since there was no negligence shown after the engineer and fireman became aware of the obstruction ahead which might cause a collision and imperil the safety of the deceased, but on the contrary the undisputed evidence showed that they exercised ordinary care to avoid the collision, under the rules above announced and supported by the authorities, *supra,* we hold that there was no liability shown.

The judgment of the trial court is therefore reversed, and, as the facts appear to have been fully developed, the case is dismissed.

NEAL *v.* STATE.

Opinion delivered July 13, 1931.

Reinberger & Reinberger, for appellant.

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

BUTLER, J. The appellant, Emma Neal, was tried and convicted in the Jefferson County Circuit Court on a charge of keeping a disorderly house and has appealed to this court. The sole ground urged for reversal is that the proof is not sufficient to warrant conviction. The rule is laid down in the case of *Thatcher* v. *State,* 48 Ark. 60, 2 S. W. 343, where the court said: "The keeping of a common gaming house, bawdy house, disorderly ale house or inn, or any other disorderly house is a common-law offense on account, among other reasons, of its influence upon the public morals. The keeping of a disorderly house may consist in allowing the place to be so noisy and disorderly as to disturb the public peace and annoy the neighborhood. But it is not necessary to show such noise in all cases, because the keeping of such house may consist, in its drawing together idle, vicious, dissolute or disorderly persons engaged in unlawful or immoral practices, thereby endangering the public peace and promoting immorality. Such houses are prohibited, not only on account of noise, but because of their tendency to promote immorality and lead to breaches of the peace. 'If the doors of a house,' it is said, 'are practically open to the public, alluring the young and unwary into it, to indulge in or witness anything corrupting to their virtue or general good morals, the keeper cannot excuse himself by alleging that the public is not disturbed.' "

The testimony introduced at the instance of the appellant tended to show that she was a woman of family who made her living by taking in sewing, embroidery, and such like work, and supplemented her earnings by

keeping boarders; that she was a woman of good reputation, and that those who lived in the vicinity of her residence had not been disturbed by any disorderly conduct at her place of abode. A number of witnesses testified as to visiting her house both in the daytime and at night, and had seen nothing to indicate that she was engaged in any unlawful or vicious courses, or that she permitted others so engaged to frequent her house. In short, the testimony introduced in appellant's behalf tended to fully exculpate her from the charge made. A number of local officers in the city of Pine Bluff and Jefferson County, however, testified that they had made frequent raids on appellant's house, some of these stating that they had found no whiskey but a number of containers in which whiskey had been kept, and others stating that whiskey and home brew had been found. It was in testimony that on various occasions officers had found men and women there who had been imbibing freely of liquor. In the summer before the appellant's arrest an officer had broken up 500 bottles of home brew and some crocks. A number of men known to the officers to be idle and vicious frequented the place, and on several occasions some of these men had been found by the officers in bed with women who frequented appellant's house. Poker chips and other articles used in gaming were found on the premises, and at a dance which occurred at the time of a raid on the house prior to the trial, liquor was thrown into a stove and a pistol shot fired and a number of people were arrested.

The officers testified that the home of appellant had the general reputation of being a disorderly house. This testimony was in conflict with the evidence adduced on the part of the appellant. It tended to establish the truth of the charge and brings the case within the doctrine announced in *Thatcher* v. *State, supra.* The jury are the sole judges of the credibility of the witnesses, and in all cases where there is substantial evidence to support the verdict of the jury it is conclusive.

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

ARKANSAS POWER & LIGHT COMPANY *v.* WEST MEMPHIS POWER & WATER COMPANY.

Opinion delivered July 13, 1931.

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

Chas. E. Sullenger and *Davis & Brownback,* for appellee.

BUTLER, J. The appellant, Arkansas Power & Light Company, as assignee of a permit from the county court, and by virtue of an act of March 28, 1907, erected poles along the highway in Crittenden County which passed through, and was the main street of the village of West Memphis, with distribution lines and other equipment of the approximate value of $68,000. With this equipment so erected, the appellant power company, before and on March 21, 1927, was serving with electric current seventy residents, seventy-four commercial customers

and one gin in the said village, which service had been increased by the 20th day of November, 1930, so as to furnish electricity to 109 residents, 97 business customers and one industrial consumer.

On the 21st day of March, 1927, the aforesaid village became the incorporated town of West Memphis by order of the county court of Crittenden County, which order, on appeal, was affirmed by this court on July 2, 1928, in the case of *Bragg* v. *Thompson,* 177 Ark. 870, 9 S. W. (2d) 24. The appellant did not, and has not, procured any franchise from said incorporated town granting to it the privilege to use the streets, alleys and public grounds of the town in the conduct of its business, but continued to use said streets and alleys and to extend its lines thereon after the incorporation as before.

On May 14, 1930, at a meeting of the town council of said town, a grant of an exclusive franchise was made to Chas. E. Sullenger to erect and operate an electric light system, and at the same meeting and by separate ordinance he was granted an exclusive franchise to erect and operate a waterworks system. These franchises were assigned to the appellee, West Memphis Power & Water Company, on the 15th day of August, 1930, and appellant filed this suit on the 16th of August, following, setting up the above-mentioned facts and alleging that the franchise under which appellee sought to operate was invalid because it was passed at a special meeting of the council, of which no notice had been given, and no notice given or received by one of the councilmen who did not attend said meeting, and who had no knowledge thereof until after the meeting was had. Appellant further alleged that said ordinance granting the exclusive right to erect and operate equipment for the generation and distribution of electricity was an invasion of its rights, and that the appellee was threatening to proceed with the construction authorized by the franchises and, by virtue of the rights granted therein, to undertake to force the appellant to remove its equipment, etc., and prayed

for an order enjoining the appellees from constructing the electrical equipment and from in any way interfering with the rights of the appellant. On the 20th of October, 1930, the appellant filed its motion for a temporary injunction restraining the appellee, who at that time was proceeding with the erection of a light plant, from further proceeding, and from making any other expenditure until the final hearing of the case. This motion was overruled by the court, and the appellee proceeded with the erection of its equipment, completing the same about the 12th day of December, 1930, at a cost of approximately $50,000, and was on that date serving about sixty customers with electricity.

Much testimony was taken which established the facts above stated and which, in addition, was directed to the question of the validity of the franchise granted by the ordinance of May 14, 1930, but which will not be set out here because that question is immaterial, as will hereafter appear. On the final hearing the chancellor denied the relief prayed by the appellant, and dismissed its complaint for want of equity, from which decree is this appeal.

In the beginning of our investigation this question presents itself: Was the Arkansas Power & Light Company in a position to question the validity of the franchise under which appellee has acted? After a careful consideration, with the aid of such authorities as have been cited by counsel, we have concluded that that question must be answered in the negative, and such an answer renders all other issues raised unimportant. It is to be noted that the town of West Memphis is not contesting the validity of the ordinance of May 14, 1930, or attempting to disavow it in any particular. In an able and persuasive brief counsel for the appellant has contended that the right it acquired and asserted under the permit of the county court of Crittenden County and under the statute, *supra,* has invested it with property rights which would warrant its contesting an unwar-

ranted intrusion by another on the premises it occupied. It is doubtful whether the permit of the Crittenden County court has any validity, but, irrespective of that order, the appellant occupied the highway leading through West Memphis by virtue of the act of March 28, 1907, now § 4043 of Crawford & Moses' Digest, which provides:

"Any corporation organized under the laws of this State for the purpose of generating, transmitting, and supplying electricity for public use may construct, operate and maintain such lines of wire, cables, poles, etc., necessary for the transmission of electricity along and over the public highways, and the streets of the cities and towns of the State or across or under the waters, and over any lands or public works belonging to the State, and on and over the lands of private individuals, and upon, along and parallel to any railroad or turnpike of this State, and on and over the bridges, trestles and structures of such railroads; and in constructing such dams as the corporation may be authorized to construct, for the purpose of generating electricity by water power, may flow the lands above such dams with backwater resulting from such construction. Provided, the ordinary use of such public highways, streets, works, railroads, bridges, trestles, or structures and turnpikes be not thereby obstructed, or the navigation of said waters impeded, and that just damages shall be paid to the owners of such lands, railroads and turnpikes; and provided further, that the permission of the proper municipal authorities shall be obtained for the use of such streets."

It will be seen from this statute that when appellant erected its light poles and strung its wires along the highway leading through the village of West Memphis and served those with electricity who lived on the highway, it was rightfully doing so. When it entered on the streets of the village with its poles and other equipment, however, no right could be predicated on the statute, for at that time such streets and alleys were privately owned,

and no one had the right to use them in any way except the permissive right of passage given to the public.

Appellant cites the case of *Natural Gas & Fuel Corporation* v. *Norphlet Gas & Water Co.,* 173 Ark. 174, 294 S. W. 52, in support of its contention that the appellant in that case had made use of the streets and alleys of the village of Norphlet for the laying of its gas mains, as the power company in the instant case made use of them for the erection of its light poles, but in the Norphlet case the gas company obtained the right-of-way and used these streets and alleys under a contract with the owners, and was rightfully occupying the same. Such are not the facts in the case at bar. No contract is alleged or shown to have been entered into between the power company and the landowners, and therefore its occupancy was unauthorized and continued by sufference only. There are a number of cases holding that a public utility company is entitled to an injunction to prevent a competing utility from attempting to operate under a void franchise, a number of which have been cited and relied on by the appellant. *Bartlesville E. L. & P. Co.* v. *Bartlesville I. R. Co.,* 26 Okla. 453, 109 Pac. 228; *Lindsley* v. *Dallas Consolidated Street Ry. Co.,* (Tex.) 200 S. W. 209; *Northern Tex. Utilities Co.* v. *Community Natural Gas Co.,* (Tex.) 297 S. W. 904; *Citizens' E. I. Co.* v. *Lackawana & W. V. P. Co.,* 255 Pa. 145, 99 Atl. 462; *F. & M. Co-operative Tel. Co.* v. *Boswell Tel. Co.,* 187 Ind. 371, 119 N. E. 513; *Millville Gas & Light Co.* v. *Vineland Light & Power Co.,* 72 N. J. Eq. 305, 65 Atl. 504; *Springfield Gas & Elec. Co.* v. *Springfield,* 292 Ill. 236, 18 A. L. R. 934; McQuillin on Municipal Corporations (2d ed.), p. 1016; Dillon on Municipal Corporations, (5th ed.) p. 1992; *Kinder* v. *Looney,* 171 Ark. 18, 283 S. W. 9.

We have read all these cases with care and discover that they can have no application to the instant case because in all of them the utility held entitled to proceed against a competing utility had itself the lawful right to operate in the streets and alleys by grant of a franchise, although this right was not an exclusive one. Illustrative

of all of these cases is that of *Bartlesville E. L. & P. Co.* v. *Bartlesville I. R. Co., supra,* first cited by the appellant. In that case the plaintiff was operating an electric light and power plant under a franchise for a period of twenty-one years granted by the municipality, and the defendant, a competing utility, attempted without authority from the city to use its streets and public places for the purpose of erecting a light and power system for supplying the town and its inhabitants with electric light and power. In that case the plaintiff did not claim that it had an exclusive franchise, and recognized the authority of the city to grant a similar franchise to others, but insisted that, because the defendant had no authority from the city to use its streets, and because plaintiff's occupancy and use was by lawful permission, it was entitled to the relief prayed, namely, that the defendant be enjoined from proceeding further in occupying and using the streets for a purpose similar to that of the plaintiff. In upholding plaintiff's contention, the Supreme Court of Oklahoma held that, when plaintiff accepted its franchise, it did so subject to the power of the municipality to grant to others like franchises, and said: "But such cannot be said of the defendant who unlawfully occupies the streets and public grounds of the city in competition with the plaintiff."

"By its unlawful act defendant can and will take from the plaintiff a portion of its business. At the same time defendant is under no obligation to the city or its inhabitants, and is all the while maintaining upon the streets and public grounds of the city a public nuisance and the loss plaintiff sustains is to the defendant its fruits from its violation of the law."

As we have seen, the situation of the appellant here is quite different from the Natural Gas & Fuel Corporation in the Norphlet case, for it is not shown or alleged that it entered upon the streets and alleys of the village of West Memphis by authority from any one, but rather it would seem on the assumption that, as its services were

needed and welcomed by the inhabitants of the village, its occupancy would not be questioned and neglected to secure by contract the right from the landowners. Later on, when these streets and alleys, by virtue of the incorporation, became a part of the property of the municipality and subject to its regulation, the appellant acquired no greater right than it had before until it obtained from the proper municipal authorities permission to use the streets.

We have been unable to find, neither has counsel cited, any decision or text which is directly in point, but we think the general principle that one cannot challenge any statute or ordinance where he has no lawful interest in the subject-matter is controlling under the facts of the case at bar. It is true that the appellant is interested and may have expended considerable sums of money in the streets, but it merely assumed the right to do so, and therefore is in no position to challenge the validity of the ordinance in this case granting the privilege of using the streets of the municipality to another. *Thomas* v. *City of Missoula,* 70 Mont. 478, 226 Pac. 213; *Kansas City* v. *U. P. Ry. Co.,* 59 Kan. 427, 53 Pac. 468; *State* v. *Hoffman,* 159 Minn. 451, 199 N. W. 175; *Hazelton* v. *Atlanta,* 147 Ga. 207, 93 S. E. 202; *Board of Commissioners* v. *Reeves,* 147 Ind. 467, 46 N. E. 995; see also *Coffeyville Mining & Gas Co.* v. *Citizens Natural Gas Co.,* 55 Kan. 173, 40 Pac. 326; *Geneva-Seneca E. Co.* v. *E. P. & C. Co.,* 120 N. Y. Sup. 926; *Rambo* v. *Donnelly,* 9 Baxter (Tenn.) 418; *N. E. R. Co.* v. *Central Ry. & E. Co.,* 69 Conn. 4, 36 Atl. 1061; *Empire City, etc.* v. *Broadway, etc.,* 87 Hun 279, 33 N. Y. S. 1055; *Butt* v. *Colbert,* 24 Tex. 355; *Arpin* v. *Valdes,* 1 Porto Rico Fed. Rep. 394.

By act of the General Assembly, *supra,* any corporation organized for the purpose of generating, transmitting and supplying electricity for public use was permitted to construct its lines over the public highways. Therefore appellant's rights to the use of the highway running through the village stands upon a different footing to its occupancy of the streets. Appellant rightfully

used the highway for the erection of its lines and was rightfully using it at the time the municipality was formed. The statute, however, did not give it, or any other company of like character, the exclusive privilege, but any other company incorporated for a similar purpose or as many as might be formed might use the same highway, the only limitation to such use with respect to the appellant being that occupancy ought not to be allowed to injure or interfere with the physical property of the appellant. As appellee corporation was organized for the purpose of generating and transmitting electricity for public use, it, too, was privileged to use the highway, and the appellant cannot complain on that score.

Decree affirmed.

HUMPHREYS, J., dissents.

SIMPSON *v.* MATTHEWS.

Opinion delivered July 13, 1931.

Tom F. Digby, for appellant.

Chas. W. Mehaffy and *Rose, Hemingway, Cantrell & Loughborough,* for appellees.

HART, C. J. This is an appeal from an order of the circuit court upholding the validity of a statute permitting adjoining landowners to form an improvement district and to condemn land adjacent to a State highway in order to construct a reservoir for the alleged protection thereof. No separate or particular statement of facts is necessary, for the reason that, on the consideration of the motion for a rehearing, the court has concluded that this case should be decided upon the single point whether the act is unconstitutional as being local or special act.

In construing article 5, § 25, of our Constitution, this court has uniformly held that the Legislature is the exclusive judge whether a provision by general law is possible under the provision of the Constitution to the effect that no special law shall be enacted in cases where a general law can be made applicable.

Amendment No. 14 was initiated by the people and adopted as a part of the Constitution at the general election in 1926. It 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."

The Legislature of 1931 passed act No. 108, entitled, "An act to grant to county courts, in counties having a population of 75,000 or more, the right to condemn lands for the protection of public roads."

The preamble and so much of § 1 as we deem necessary for a proper consideration of the issue raised by the appeal are as follows:

"Whereas, in certain hilly or mountainous sections the rainfall is precipitated over State or public roads; thereby injuring the roads, and interfering with and endangering the use of them by the public, which precipitate flow of water could be controlled and regulated by the construction of suitable dams or reservoirs, which would protect the roads, and also the lower lands subject to such precipitate inundation; now therefore,

"Be it enacted by the General Assembly of the State of Arkansas:

"Section 1. Any five persons owning lands on or in the vicinity of a State highway or other public road on which the rainfall from the adjacent hills is precipitated so as to injure the road, or to interfere with its use by the public, may file a petition in the county court praying for an order condemning certain lands for a reservoir and authorizing the construction of a suitable dam, dams, or works, with the necessary reservoir or reservoirs, for impounding water to protect such road and lower lands from the precipitate flow of water thereon. The petition shall describe the road and lower lands to be protected, and shall be accompanied with plans and specifications for the proposed dams and reservoirs, with a description of the area to be flooded, and of lands to be condemned for such purpose," etc.

The remainder of § 1 and §§ 2, 3 and 4 relate to the method of procedure in the premises. Section 5 relates to the method of procedure in the premises. Section 5 provides that the act shall only apply to counties which now or hereafter may have a population of 75,000 inhabitants according to the last federal census.

It is manifest that, when the amendment prohibiting the passage of special acts by the Legislature is considered with the provision of the Constitution above referred to, it was intended that the action of the Legislature shall be subject to judicial review. We do not think that it was intended to do away with the classification of counties, cities and towns according to population or the topography of the country where such classification rests upon substantial differences in situation and needs. The amendment was intended to prevent arbitrary classification based on no reasonable relation between the subject-matter of the limitation and classification made. In determining whether a law was general or local, the Legislature might still make the classification where it was appropriate and germane to the subject and was based upon substantial differences which make one situation

different from another. The classification of counties and municipalities is legitimate when population or other basis of classification bears a reasonable relation to the subject of the legislation, and the judgment of the Legislature in the matter should control unless the classification is arbitrary or is manifestly made for the purpose of evading the Constitution. If the judgment of the Legislature must control in all cases, the amendment could serve no purpose, and the people might just as well not have initiated and adopted it.

In *State ex rel. Richards* v. *Hammer,* 42 N. J. Law, 435, the subject of statutory classification was thoroughly considered. The court said: "If it could be so sanctioned, then the constitutional restriction would be of no avail, as there are few objects that cannot be arbitrarily associated, if all that is requisite for the purpose of legislation is to designate them by some quality, no matter what that may be, which will so distinguish them as to mark them as a distinct class. But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation."

Again, the subject was comprehensively discussed by Mr. Justice Mitchell for the Supreme Court of Minnesota in *State ex rel. Douglas* v. *Ritt,* 76 Minn. 531, 79 N. W. 535. The learned justice said: "We have been over the whole subject of classification so often, particularly in *Nichols* v. *Walter,* 37 Minn. 264, 33 N. W. 800, and *State* v. *Cooley,* 56 Minn. 540, 58 N. W. 150, that it is unneces-

sary now to do more than restate two fundamental rules, *viz.*: First, that the basis of classification cannot be arbitrary or illusive, but must be founded upon a substantial distinction, having reference to the subject-matter of the legislation, between the objects or places embraced in the subject of the legislation and the objects or places excluded, as suggests the necessity or propriety of different legislation for the two in respect to the matter which is the subject of the legislation; second, that the act must include, and act uniformly upon, all of the class—that is, all whose conditions and wants render such legislation equally appropriate to them as a class. Judging from much recent legislation in this State, it would seem that the impression is prevalent that because classification on the basis of population may be proper for the purposes of legislation on certain subjects, therefore any classification on the basis of population is appropriate for the purposes of legislation on any subject. The sooner the minds of legislators and others are disabused of this erroneous impression, the better; for under any such rule the provisions of the Constitution against special legislation would become wholly nugatory. If it is permissible to adopt for any and all purposes a classification founded upon any and every arbitrary and illusive basis of population, we might have as many acts, general in form, but special in fact, as there are counties, cities, villages, townships, wards, and school districts in the State. It ought to be apparent to any one on a moment's reflection that, under the rules above stated, classification on the basis of population may be appropriate for one purpose, and not for another; that is, for legislation upon one subject, and not for legislation upon another. For example, a classification of counties or cities on the basis of population might be proper, as was held in *State ex rel. Anderson* v. *Sullivan,* 72 Minn. 126, 75 N. W. 8, for the purpose of fixing the compensation of county or city officers, inasmuch as the extent of their duties and labors presumably will bear some relation to the population of their respective counties and cities, while classification on any such

basis for the purpose of fixing the time at which elections should be held to elect such officers would be as arbitrary as if it had been based upon the initial letter of the names of the counties or cities."

Our own court has expressly recognized that all classification must be based upon substantial distinction which makes one class really different from another. It must be based upon some material reason suggested by some difference in the situation of the subject which would suggest the necessity for different legislation with respect to them. *Le Maire* v. *Henderson,* 174 Ark. 936, 298 S. W. 327, and cases cited; and *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617, and cases cited.

The rule itself is fair and reasonable, and the main difficulty is in the application of the rule to a particular case. In the case at bar, according to the title of the act, its purpose is to grant to county courts in counties having a population of 75,000 or more the right to condemn lands for the protection of public roads. Its preamble recites that in certain hilly and mountainous sections the rainfall is precipitated over State or public roads to their injury, and that such matter could be controlled and regulated by the construction of suitable dams or reservoirs. Section 1 provides that any five persons owning lands in the vicinity of a State highway or road on which the rainfall from the adjacent hills is precipitated so as to injure the roads may file a petition in the county court praying an order condemning land for a reservoir and authorizing the construction of suitable dams with the necessary reservoirs for impounding water to protect such roads.

Now it will be seen that the subject of the legislation is not applicable or germane to a classification by population. The topography of a county with less population than 75,000 with relation to the State or public roads in such county would create the necessity for the construction of dams or reservoirs for the alleged purposes of protecting public roads just as much as it may do so in counties of 75,000 or more population. In each case the basis of the classification would result from the topog-

raphy of the county and in no sense from the population thereof. A classification by population would have no connection with the subject of the proposed statute. In everything except mere form, it is manifest from the language used, when considered in connection with matters of which the court will take judicial notice, that the Legislature intended that the act should apply only to Pulaski County; and this is just as apparent as if it had been expressly so stated in the act. The basis of classification was not germane to the purpose of the act, and a general act applicable to all counties could have been framed which would accomplish the same purpose which the present act was intended to accomplish.

It is a matter of judicial knowledge that Pulaski County is the only county in the State which contains over 75,000 inhabitants or which is likely to do so far any reasonable time in the future. No ordinary increase in population will place any other county in the same class within any reasonable time. No express words could have been used by the Legislature to limit the application of the act to Pulaski County more definitely than those employed. The avowed purpose of the act has no reasonable relation whatever to the supposed protection of State or public roads by the construction of dams or reservoirs. The condition sought to be remedied would be created and would exist wholly from the topography of the county and not in any sense from the population thereof. As said by Judge Sherwood in *State ex rel. Harris* v. *Herrmann,* 75 Mo. 340, "The section (act) in question may be a general law in form, but courts of justice cannot permit constitutional prohibitions to be evaded by dressing up special laws in the garb and guise of general statutes."

The majority of the court is of the opinion that the classification based on population in the present case, when considered with reference to the purposes of the act, is illusory and a mere subterfuge to exclude the other counties from the provisions of the act. In the opinion of the majority, the act is unconstitutional as being a

special act passed in violation of amendment No. 12. Other objections to the constitutionality of the act are not considered or decided. Therefore the judgment of the circuit court affirming the judgment of the county court which condemned the lands under the authority of the act will be reversed, and the cause will be remanded with directions to the circuit court to adjudge that the order of the county court in the premises shall be vacated and that its judgment to that effect shall be certified down to the county court. It is so ordered.

SMITH, J., concurs; HUMPHREYS, J., dissents.

RHINE *v.* STATE.

Opinion delivered September 28, 1931.

C. C. Elrod and *Williams & Williams,* for appellant.

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

HART, C. J. Lee Rhine prosecutes this appeal to reverse a judgment of conviction against him for manslaughter upon the verdict of the jury fixing his punishment at three years in the State penitentiary.

Henry Walker, sheriff of Washington County, Arkansas, was the first witness for the State. According to his testimony, on the 24th day of December, 1930, he was informed that Bill Brundidge had been killed in a wood pasture on the farm of Adam Rhine in Washington County, Arkansas. He first went to the house of Adam Rhine, and two of Rhine's little boys went with him to the wood pasture to show him where the body of Brundidge lay. When he arrived there, he found the body of Brundidge with his back to the ground and a shotgun on his chest with the barrel pointing upwards. There was a considerable amount of blood around the shoulders. Brundidge's throat had been cut right around from behind one ear under the jaw bone and back to the other ear. It was a deep cut, and just a little bit of the neck in the back was left. Brundidge's head was slightly uphill and his feet downhill. There was not much blood on the ground, the most part of the blood being on his shoulders. The gun was a twelve-gauge pump-gun and had four or five shells in the magazine. Bill Brundidge was a heavy-set, muscular sort of man and rather tall. The defendant, Lee Rhine, was also a very strong man. Several other cuts were on the arm and head of the deceased. The testimony of the sheriff was corroborated by that of Frank Fletcher, a deputy sheriff. The latter described the wound as a deep cut clear to the bone, and said that, as a matter of fact, Brundidge's head was almost cut off from his body. He stated further that Lee Rhine told them that he had cut Bill Brundidge's throat.

Ben Anglin, who assisted in preparing the body of Brundidge for burial, said that they found his throat cut from his left ear right around under his chin to be-

hind his right ear. There were seven cuts on his head and one in the back of his neck and one bad cut on the left shoulder. Another witness who assisted in preparing the body for burial testified that there was a cut on one shoulder and seven stabs or cuts on the head. One of these witnesses said that his throat was cut from ear to ear to his spinal column.

Charley Brundidge testified that he was a brother of Bill Brundidge and that Bill Brundidge's throat was cut from ear to ear clear to the neck bone. The blood appeared to have run from his neck to his shoulders. Bill Brundidge at the time he was killed was thirty years old and weighed 185 pounds. Other witnesses described the defendant as being as large and stout as the deceased, and some of them said he was the stronger and more active man of the two.

The knife with which the deceased was killed was exhibited to the jury, and it was fairly inferable from the evidence that the point of one blade had been broken off while the defendant was stabbing the deceased. One of the witnesses said that the blade appeared to have been broken recently.

According to the testimony of Adam Rhine, on the morning of the killing, he had sent his two little sons to drive up some of his horses from a wood pasture. He became uneasy because they did not come home as soon as he expected them, and he requested his son, Lee Rhine, to go after them, which he did.

According to the testimony of Andrew Rhine, he was ten years of age when he and his brother were sent to the wood pasture south of the house to look for the horses. They met Bill Brundidge in the pasture. He had a shotgun and told them to sit down. They did so, and he then said that if the boys were not so little he would shoot their brains out. While they were sitting there, he abused them and told them that he didn't intend for any more of his liquor to be stolen by the Rhine family. About that time, the defendant, Lee Rhine, walked towards them from behind Brundidge. Brun-

didge pulled back the trigger of his gun and started to shoot. Lee ran around behind a small tree, and the witness ran towards home and did not see any more.

According to the testimony of Charley Rhine, he was thirteen years of age, and, when he and his younger brother found the horses, they started to drive them home. After they had driven the horses twelve or fifteen steps, they met Bill Brundidge who told them to sit down. They did so, and Brundidge told them that, if they were not so little, he would shoot their brains out. He had a twelve-gauge pump shotgun. Brundidge said that he didn't want any more of his whiskey stolen, and that he was going down and kill the rest of the Rhine family. The witness told Brundidge that he had not stolen any of his whiskey. Witness first saw his brother Lee coming towards them about fifteen steps away. He came up behind Brundidge. When Brundidge saw Lee coming he picked up his gun and said: "There is another Rhine I am going to get." Lee then jumped behind a small tree. Brundidge then started towards him and knocked Lee down striking him with the barrel of his gun. Brundidge knocked Lee down and jumped on him. Lee got his knife out, got it open, and commenced cutting Bill Brundidge, who finally fell over on his back. Witness could see his brother Lee striking Brundidge on the head with his knife. Lee was down on his knees at the time. Lee grabbed the gun barrel in his left hand. The gun was cocked, and Brundidge was trying to get it away from Lee Rhine so that he could shoot him. He said that Brundidge was a little bigger than Lee Rhine, but that Lee was the better man of the two, meaning that he was of more physical strength and activity. As soon as he killed Brundidge, Lee went home and told his father about it, and his father directed another one of his brothers to go and notify the sheriff. Brundidge had his left hand on the barrel of his gun, and his right hand on the trigger when his body was found.

Two physicians testified that Lee Rhine suffered with epilepsy, and that, when he had an attack of it, he had no

knowledge of what was going on around him but was wholly unconscious.

According to the testimony of Lee Rhine, he went up to the pasture to find his little brothers at the request of his father. He saw his little brothers sitting down on the ground, and Bill Brundidge was about eight feet away from them and "sassing" the little boys. When Lee walked up, Brundidge said, "There comes another damn Rhine, and I'm going to kill him, and when I get through with him, I am going back down there and finish." Brundidge then started towards Lee Rhine with his shotgun in his hand. Lee Rhine jumped behind a small tree, and Brundidge came towards him and knocked him down with his shotgun. Lee Rhine got up on his knees, and Brundidge continued to strike him. Lee grabbed the gun with his left hand and with the other reached into his pocket and pulled out his knife and opened it. Brundidge had his gun cocked. Lee Rhine finally cut Brundidge's throat after they had been fighting for sometime. Brundidge then fell on Lee Rhine's breast, and he pushed him off, and Brundidge rolled down on the ground on his back.

Other evidence was introduced for the State and for the defendant, but we do not deem it necessary to set it out, because what we have stated substantially describes the situation of the parties and the circumstances attending the killing.

The law presumes malice from the intentional use of a deadly weapon in the commission of homicide unless the existence of malice is rebutted or overcome by the evidence which proves the killing. *Palmore* v. *State,* 29 Ark. 248; *Sullivan* v. *State,* 163 Ark. 353, 258 S. W. 980, and *Tatum* v. *State,* 172 Ark. 244, 288 S. W. 904. This proposition is well settled by a long and uniform line of decisions in this State, and no further citation of authority is necessary.

Every person is presumed to intend the natural and probable consequences of his act. Hence, his intention to kill may be inferred from the act of killing another person with a deadly weapon or a weapon calculated to

inflict great bodily harm upon another person; but this is an inference of fact to be drawn by the jury and not a presumption of law to be applied by the court.

In the present case, the jury found the defendant guilty of manslaughter, thereby negativing the idea that the defendant was actuated by malice in the killing, but rather that he had acted too hastily without any considerable provocation. *Freeman* v. *State,* 174 Ark. 1035, 298 S. W. 333.

Under § 2342 of Crawford & Moses' Digest, where the killing is proved, the burden of proving circumstances of mitigation that justify or excuse the homicide devolves upon the accused unless the evidence which proved the killing shows that the offense committed only amounted to manslaughter or that the accused was justified or excused in committing the homicide. *Cogburn* v. *State,* 76 Ark. 110, 88 S. W. 822; *Smith* v. *State,* 139 Ark. 356, 213 S. W. 403, and *Graves* v. *State,* 155 Ark. 30, 243 S. W. 855. This proposition is also well settled by the uniform current of authority in this State.

It is earnestly insisted by counsel for the defendant that the evidence introduced overcomes the case made by the State and that the undisputed evidence shows that the defendant acted in his own self-defense in killing the deceased. In making this contention, they rely upon the fact that the defendant and his two little brothers were the only eye-witnesses to the killing, and that their testimony, being consistent, conclusively shows that the defendant was justified or excused in killing the deceased. We cannot agree with the argument that the evidence for the defendant is undisputed and conclusively overcomes the case made by the State. The evidence for the State shows that the defendant killed the deceased. One of the officers testified that the defendant admitted the killing to him. Defendant also admitted the killing when he took the stand as a witness in his own behalf. The manner of the killing as described by himself and his two little brothers on the witness stand was in all respects similar, but we do not think that it can be said to be undis-

puted because it is not consistent with the evidence for the State. The evidence for the State shows that the deceased was found lying on his back with his gun cocked and his right hand on the trigger. He was a strong, able-bodied man, and the marks on his face and shoulder showed that he was stabbed seven times. His throat was cut from ear to ear, and his head was nearly severed from his body. This wound produced instant death, and thus the jury might have inferred that he had been stabbed at least six times before his throat was cut. The jury might have further found that, if his hand had been on the trigger and he was trying to shoot the defendant, there was nothing to prevent him from pulling the trigger while the defendant was stabbing him on the face and shoulders with his knife. The jury might have found that bad blood existed between the defendant and the deceased, and that they began fighting, Brundidge striking the defendant Rhine with his gun and the defendant striking back with his knife. The jury might have believed that the attendant circumstances negatived the idea that the defendant killed the deceased in his own self-defense. The jury were the judges of the credibility of the witnesses and the weight to be given to their testimony. The facts and circumstances warranted the jury in drawing the inference that the killing did not occur in the manner described to it by the defendant and his little brothers. The jury was not required to accept as true the testimony of any witness. They might believe one part of it and reject another part. In the exercise of the duty conferred upon the jury as the trier of the facts under our Constitution, there were facts and circumstances warranting the jury in finding the defendant guilty of manslaughter. *Houston* v. *State,* 165 Ark. 294, 264 S. W. 869; *Stepp* v. *State,* 170 Ark. 1061, 282 S. W. 684; *Ferguson* v. *State,* 92 Ark. 120, 122 S. W. 236; *Vaden* v. *State,* 174 Ark. 950, 298 S. W. 323; and *Freeman* v. *State,* 174 Ark. 1036, 298 S. W. 333.

The record shows that the court submitted the cause to the jury under approved instructions upon the law of homicide and that no improper evidence was admitted

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

HUMPHREYS and KIRBY, JJ., dissent.

RILEY *v.* STATE.

Opinion delivered September 28, 1931.

Feazel & Steel, for appellant.

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

SMITH, J. This appeal is from a judgment of the Pike Circuit Court, sentencing appellant to a term of one year in the penitentiary upon a charge of stealing certain wearing apparel from the Highland Stores, Incorporated.

The sheriff of the county, who was a very material witness against appellant, offered in evidence a letter, which he said had been written by appellant. This letter was signed in the name of appellant, and was addressed to Roy Henderson, who was suspected of complicity in

the larceny, and the statements therein contained were of the most damaging character.

Appellant testified that at the time of the date of the letter he was confined in jail in Howard County, and that his right hand was injured so that he could not write, and that he did not write the letter.

The sheriff was asked upon his cross-examination, "Where did you get this letter? You didn't get it from Lewis, [appellant] did you?" An objection to this question was made by the prosecuting attorney, which was sustained by the court. In so ruling, the trial judge said: "Court: I don't think that is competent. It is a question whether it is or is not his letter. It is immaterial where he got the letter. It is immaterial how he obtained possession of the letter, if it was his letter."

Counsel for appellant insisted that he be allowed to interrogate the witness as to the source of the letter, and stated that he was advised that the witness had said he obtained the letter from a Mr. McClure, and that Mr. McClure would testify that he did not deliver the letter to the witness.

We think error was committed in refusing to permit counsel for appellant to interrogate the sheriff as to the source of the letter. It was, of course, immaterial, as stated by the court, how the sheriff got the letter, if appellant wrote it. But that was the question in issue. The authorship of the letter was an issue in sharpest dispute, and appellant denied having written it. It was therefore highly relevant to develop the source of the letter and the means or agencies by which it had come into the sheriff's hands in determining the authorship of the letter. The sheriff, who offered the letter in evidence, did not claim to be a handwriting expert, but testified that he recognized the letter as having been written by appellant; that he knew appellant's writing, and he knew appellant had written this letter by the manner in which the letter "r" was made.

This testimony did not conclude the question of the authorship of the letter, and in passing upon this highly

important question the jury should have been permitted to hear any relevant testimony which would have aided them in so doing, and certainly the circumstances under which the sheriff had acquired possession of the letter could not be regarded as irrelevant or immaterial.

An instruction was given upon the possession of recently stolen property, to which the specific objection was made, that the stolen property was not found in appellant's possession. This, however, was a question of fact. Certain wearing apparel, which was identified as similar to that stolen from the Highland Stores, was found in a vacant house near that in which appellant resided with his father. Two shirts of a similar kind were found in appellant's room, but these he claimed had been given him by his brother-in-law, and the latter so testified. A path led from the house in which appellant resided to the vacant house, and in this path was seen a track which was made by a shoe having a hole in the sole. Appellant had on such a shoe. The stolen goods, although found in a vacant house had not been abandoned, and it was a question for the jury whether they were in appellant's possession when found.

Appellant asked an instruction, which the court refused to give, reading as follows: "You are told that you cannot convict upon proof, if any, that defendant was in possession of recently stolen property alone." No error was committed in refusing to give this instruction. *Yelvington* v. *State,* 169 Ark. 359, 275 S. W. 701; *Dennis* v. *State,* 169 Ark. 505, 275 S. W. 739. It was held in both of these cases that the possession of property recently stolen justifies the inference that the possession is a guilty one, and may be of controlling weight unless explained by circumstances or accounted for in some other way consistent with innocence. But we have also said that it would be improper to so charge the jury, as to do so would constitute a charge upon the weight of the evidence, and that it was "wholly within the province of the jury to draw or not to draw such inference," and that courts should not invade the pro-

vince of the jury by telling them, as a matter of law, what inference arose from such possession. *Mays* v. *State,* 163 Ark. 232, 259 S. W. 398.

Upon the whole case we find no error in the record except the refusal of the court to permit the sheriff to be interrogated as to the source from which he had obtained possession of the letter hereinabove referred to. But for this error the judgment must be reversed, and the cause will be remanded. It is so ordered.

PICKENS *v.* BAKER.

Opinion delivered September 28, 1931.

F. O. Butt, L. M. Poe, E. J. Lundy, R. E. Morgan and *H. R. Duncan,* for appellant.

SMITH, J. This appeal is from a decree which sustained a demurrer to a complaint containing the following allegations. The plaintiff recovered a judgment against defendant, which has become final and absolute, but which he has been and is now unable to collect. Defendant is a resident of the Western District of Carroll County, and the complaint was filed in the chancery court of that district.

The defendant possesses and owns two Osage headrights, one allotted her by reason of her being a member of the Osage tribe of Indians, and the other was acquired under the will of her deceased husband, who was also an Osage allottee.

The defendant is an Osage allottee of less than half-blood, and there has been issued to her a certificate of

competency long prior to the incurring of the indebtedness which plaintiff is attempting through this proceeding to collect.

That defendant receives, through such Osage headrights, an annuity, payable in quarterly installments, amounting to several thousand dollars each year, which, if impounded and applied to the payment of plaintiff's judgment, would soon discharge it.

It was prayed that defendant be enjoined from selling, assigning or transferring her interest in said headrights, and that a receiver be appointed to collect and receive the proceeds from such headrights, with directions to apply the same to the satisfaction of plaintiff's judgment.

The court below was of the opinion, as expressed in the decree, that if a receiver were appointed by the court no authority could be conferred upon him to collect funds that are being administered as a trust in the State of Oklahoma under the acts of the Congress of the United States, without the permission of such law-making authority, and that no such grant of authority had been given. The court therefore refused to appoint a receiver as prayed, and this appeal was prosecuted to reverse that decree.

The "Laws relating to the Osage Tribe of Indians" from May 18, 1824, to March 2, 1929, have been compiled by Mr. R. A. Barney and published in a book under the title of the language above quoted, but a summary of these laws, in so far as they relate to the creation and nature of the headright of an Osage Indian, is contained in the opinion in the case of In re *Denison,* 38 Fed. (2d) 662.

It is recited in this opinion that at the time of the passage of the Osage Allotment Act of June 28, 1906 (34 Stat. 539), the Osage Indians were occupying as a tribe their reservation in Oklahoma Territory containing approximately a million and a half acres of land largely underlaid with oil, gas and other minerals, and that the Government then held in trust for the two

thousand or more members of the Osage Tribe a fund of over eight million dollars received and held under various treaties as compensation for the relinquishment of other lands. This Allotment Act reserved the oil, gas, coal and other minerals to the Osage Tribe for a period of twenty-five years from and after the 8th day of April, 1906, as a trust to be administered by the United States Government, and by subsequent legislation this trust has been extended to April 8, 1958.

Legislation relating to this tribe of Indians removed the restrictions on Indians of less than one-half Indian blood except as to the trust estate held by the Government belonging to the tribe, and provided the manner of payment of quarterly annuities to non-competents and for the payment to those having certificates of competency of their portion of the fund as it accumulated.

The Denison and other cases defined an "Osage headright" to be the interest which a member of the tribe has in the Osage tribal trust estate, which trust consists of the oil, gas and mineral rights, and the funds which were placed to the credit of the Osage Tribe under Federal legislation relating to that tribe. The Federal Government has granted leases for the exploration and recovery of oil, upon which royalties are being collected and held in trust for the owners of these headrights.

The complaint alleges that the defendant is an Osage Indian of less than one-half blood and the possessor of a certificate of competency, which accorded to her full authority to manage her own business.

In the Denison case, *supra,* it was said that: "The only distinction as to alienation of property, between an Osage Indian of half blood or more and an Osage Indian of less than half blood, is that Osage Indians of half blood or more may have certificates of competency issued to them upon application, and in the discretion of the Secretary of the Interior (§ 2, par. 7, act of June 28, 1906, 34 Stat. 542), while all restrictions against the alienation of their allotment selections, both surplus and homestead, of all adult Osage Indians, of less than

one-half Indian blood, have been removed. Section 3, Act of Congress, March 3, 1921, amendatory of § 3, Act of Congress, June 28, 1906."

It was there also said: "An adult Osage Indian of half blood or more, with a certificate of competency has the right to sell and convey any lands deeded to him by reason of the act of June 28, 1906, except his homestead, while an Osage Indian of less than half Indian blood has the right to sell both his surplus and homestead. A 'competent' Osage Indian is one having a certificate of competency.

"The word competent has been defined as follows: 'The word "competent" as used in this act, shall mean a person to whom a certificate has been issued authorizing alienation of all the lands comprising his allotment, except his homestead.' Section 9, Act of April 18, 1912, 37 Stat. 86; *McCurdy* v. *U. S.*, 246 U. S. 263, 38 S. Ct. 289, 62 L. Ed. 706."

The Denison case was one which involved the question whether an Osage headright of an Indian who had filed a voluntary petition in bankruptcy constituted an asset of the bankrupt, to be administered by the trustee in bankruptcy as the other assets of the bankrupt. In an opinion reviewing much of the legislation on the headrights of Osage Indians, it was held in the Denison case that "Nowhere in the Act of 1906, or by an amendment thereto, does an Osage Indian of less than half blood with a certificate of competency, or with restrictions removed, have the right to dispose of his trust fund or his trust estate. Congress has the right at any time to modify the provisions for holding or disposing of the trust estate of the Osages. The whole purpose of Congress has been to protect the Indian, and provide for his maintenance, his education and his care, and the trust estate cannot be affected by any obligations created by the Indian, even though he has a certificate of competency."

It was there further said: "This does not, even by implication, empower him to sell his interest in a trust estate. Congress has provided that at the termination

of the trust period, whenever it may be, the interest of the individual Indian shall be delivered to him intact. *United States* v. *Thurston County,* (C. C. A.) 143 F. 287. Could Congress do this if taxes could attach or if liens could attach by virtue of judgments and obligations of any character? If the so-called Osage 'headright' is an estate in bankruptcy, then every Osage Indian, having had issued to him a certificate of competency, could absolutely defeat the original purpose of Congress. It would be an easy matter for him to incur obligations either in good faith, or otherwise, and through a bankruptcy proceeding destroy the control which the Government exercises over his trust estate and through the bankruptcy proceeding get control of same himself."

It followed, of course, from these declarations that the headright of an Indian did not constitute an asset of the bankrupt, to be administered by the trustee in bankruptcy, and the court so expressly held.

It was held by the Supreme Court of the United States in the case of *Choteau* v. *Burnet, Commr. of Internal Revenue,* decided May 25, 1931, 283 U. S. 691, 51 S. Ct. 598, that a member of the Osage Tribe of Indians holding a certificate of competency was liable for the income tax on his share of the income paid him for tribal mineral leases. But in an opinion in the case of *Taylor* v. *Tayrien,* by the United States Circuit Court of Appeals for the Tenth Circuit, 51 Fed. (2d) 884, it was pointed out that the Choteau case dealt only with moneys actually paid to and in possession of the individual Indian, which were his own to do with as he pleased.

This case of *Taylor* v. *Tayrien* involved the single question whether the headright of an Osage Indian of less than half blood, with a certificate of competency, passed to his trustee in bankruptcy. The court held that it did not. This case of Taylor sets out and approves an opinion, dated August 15, 1922, by the Solicitor of the Department of the Interior on the right of members of the Osage Tribe of Indians to assign oil and gas royalties. The solicitor concluded his opinion as follows: "True,

individual members did obtain a prospective right to share in the periodical distributions of royalties received from leasing the deposits mentioned, after certain authorized deductions therefrom had first been made. In the absence of specific legislation by Congress, which has not been had, prospective rights of this nature, even in the hands of those members of the tribe who have received 'certificates of competency' or the restrictions against alienation of whose lands have otherwise been removed, are not assignable. * * * Payments of these funds in any other manner, or to persons other than as authorized by these statutes, is not warranted. * * * Again, and speaking generally, funds in the hands of administrative officers of the government, whether for the benefit of Indians or otherwise, are not subject to attachment, levy, sale, execution, assignment, etc., in the absence of express legislation by Congress to that effect.

"I find no difficulty therefore, in holding that members of the Osage Tribe, including those to whom certificates of competency have been issued or whose restrictions have otherwise been removed, are without power to assign their right to share in the oil and gas royalties and other funds accruing to them as members of that tribe, and that such funds, as and when due, can be paid only to such of these allottees or their heirs as may be competent; the shares due incompetent members to be further administered for their benefit, as specifically provided for in the act of March 3, 1921."

Upon a consideration of these authorities, we have concluded that the chancellor properly refused to appoint a receiver in this case. The property of which the court is asked to take possession is not within the jurisdiction of the court, but is in another State and is there being administered as a trust under the Federal statutes above referred to for the benefit of all the members of the Osage Tribe.

The decree of the court below will therefore be affirmed, and it is so ordered.

KIDWELL *v.* STATE.

Opinion delivered September 28, 1931.

[redacted]

Hugh Williamson and *Coleman & Reeder,* for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Izard County of the crime of murder in the first degree for shooting and killing Shorty Moser on the 8th day of May, 1930, and his punishment was fixed at imprisonment in the State penitentiary during his natural life, from which conviction and sentence appellant has duly prosecuted an appeal to this court. Deceased was assassinated between six and seven o'clock on the eighth day of May, 1930, as he was entering the gate of the barnyard, and the theory of the State was that the shot was fired by appellant, who was concealed in the stable.

According to the testimony of two of the State's witnesses introduced in rebuttal, who testified over the objection and exception of appellant, they heard appellant say to Emmet Williamson, "I thought I would have to take the second shot to get him, but I got him the first shot." Emmet Williamson denied that appellant made such a statement to him, and the court admitted the testimony in rebuttal for the purpose of contradicting Emmet Williamson.

It is urged that the court committed reversible error in admitting the rebuttal evidence because there was nothing in the statement itself which connected it with

the death of Shorty Moser. It is true that Shorty Moser's name was not mentioned when the statement was made, but he was shot only one time when assassinated, and appellant was observed by Shorty Moser's widow leaving the barn immediately after the shot had been fired and was seen by others coming from that direction a short time after the shot was fired. Other circumstances, unnecessary to mention, tended to show appellant was the author of the crime, so we think this statement admissible as original testimony tending to connect him with it. Being admissible as original testimony, appellant was in nowise prejudiced by the admission of it in rebuttal.

A reversal of the judgment is also urged because the court gave instruction No. 4 relating to the alibi interposed by him as a defense. The instruction is the same in substance as that usually given in criminal cases where an alibi is interposed as a defense and has been approved by this court in the following cases: *Ware* v. *State,* 59 Ark. 379, 27 S. W. 485; *Rayburn* v. *State,* 69 Ark. 177, 63 S. W. 356; *Wright* v. *State,* 177 Ark. 1039, 9 S. W. (2d) 233.

No error appearing, the judgment is affirmed.

[redacted]

HARTLEY *v.* STATE.

Opinion delivered September 28, 1931.

[redacted]

[redacted]

A. H. Rowell, Jr., and *Rowell & Alexander*, for appellant.

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

HUMPHREYS, J. On January 15, 1926, appellant entered a plea of guilty in the circuit court of Jefferson County to a charge of selling liquor under a State statute making the unlawful sale thereof a felony punishable by imprisonment in the State penitentiary. The imposition of the sentence was postponed by agreement during the good behavior of appellant, and the cause was continued. On May 16, 1931, it was made to appear by petition of the prosecuting attorney that appellant had violated his agreement with the court by committing offenses against misdemeanor statutes of the State. He was brought into court on an alias bench warrant for the purpose of imposing sentence on the plea of guilty entered by him on January 15, 1926. He objected to the imposition of the sentence on account of the lapse of time between the date of his plea of guilty and his rearrest and because he did not commit any other felony. His objections were presented by proper pleas.

The court heard testimony upon the issues joined, overruled appellant's pleas, and imposed a sentence of service in the State penitentiary at one year on his plea of guilty for unlawfully selling liquor, from which is this appeal.

The sentence was postponed under authority of act No. 76 of the General Assembly of 1923. That act authorizes the circuit judge to accept a plea of guilty and postpone pronouncement of final sentence upon proper and reasonable conditions if he deems it to the best interest of defendant and not harmful to society. The condition imposed in the instant case was that appellant's behavior thereafter should be good. This condition necessarily implied that appellant should obey and not violate the law. Good behavior in the sense of being law-abiding means not to violate the law. The record reflects that appellant pleaded guilty to unlawfully carrying a pistol

and paid a fine for the offense a short time before the sentence in the instant case was imposed. The testimony also tends to show that he committed other misdemeanors for which he was not prosecuted and convicted. It cannot be said therefore that it was contrary to the best interest of society for the circuit court to impose the delayed sentence. The condition upon which the sentence was postponed had been broken.

It was pleaded, and now argued, that the court lost jurisdiction to impose the sentence by the lapse of time. Not so. Neither the statute in question nor any other statute contains a time limitation. No limitation was fixed in the order. It was clearly a continuing order and remains in force and effect until changed or modified.

This court announced the rule in *Davis* v. *State,* 169 Ark. 277, 277 S. W. 5, that a sentence of imprisonment can only be satisfied by serving and not by lapse of time. This rule was reaffirmed in the case of *Stocks* v. *State,* 171 Ark. 835, 286 S. W. 975. The same rule was applied by this court in construing act No. 76 of the General Assembly of 1923, saying: "That rule applies here in the absence of a statute limiting the time in which the court may revoke the suspended sentence." *Denham* v. *State,* 180 Ark. 382, 21 S. W. (2d) 608.

No error appearing, the judgment is affirmed.

Mr. Justice SMITH concurs.

KILLIAN *v.* STATE.

Opinion delivered September 28, 1931.

Northcutt & Northcutt, for appellant.

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

KIRBY, J., (after stating the facts). It is first urged that the court erred in allowing Dr. Smith to testify that in his opinion the wound inflicted on the marshal would have proved fatal if he had not received immediate treatment and the portion of the skull lifted from the brain. There was no error in the admission of the testimony as to the nature and extent of the wound inflicted for the consideration of the jury in determining the intent of the person committing the assault and the degree of the offense. Underhill, Criminal Evidence, 3d ed., § 540.

Neither did the court err in excluding the testimony relative to the indictment of Homer Scott for the offense for the commission of which appellant was on trial. There was no offer to introduce any testimony tending to show that Scott was the guilty person, but only that he had been charged as being such.

The instructions complained of, though erroneous, could not have been prejudicial, since, notwithstanding the jury was told that it would be possible for it, under the testimony, to find the defendant not guilty of the crime of assault with intent to kill and find him guilty of aggravated assault, the suggestion, if it amounted to such, was disregarded, and the appellant found guilty of assault with intent to kill. The instruction was not aptly worded, but the majority is of opinion, in which the writer does not concur, that it did not indicate the court's opinion, under the testimony, nor amount to a suggestion of the opinion of the court on the degree of importance to be attached to the testimony or an opinion of the court about the weight and sufficiency of the evidence.

Although the defendant denies that he threw the stone or struck the marshal and attempted to show that another had been indicted for the offense, there was some testimony that he did throw it, and the jury found it to be a fact, and there were no circumstances of mitigation, justification or excuse shown, and the law implies malice. If death had resulted it would have at least constituted murder in the second degree, and the testimony is sufficient to sustain the conviction of assault with intent to kill. *Turner* v. *State,* 175 Ark. 232, 298 S. W. 1028; *Cheeks* v. *State,* 169 Ark. 1192, 278 S. W. 10.

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

BUTLER, J., dissents.

ELMORE *v.* BISHOP.

Opinion delivered September 28, 1931.

Jeff Bratton, for appellant.

J. T. Craig, for appellee.

MEHAFFY, J. The appellant, R. L. Elmore, became sheriff of Greene County in 1916 and went out of office on January 1, 1920. Mrs. Bessie Cook died in 1918, and the appellant, sheriff of Greene County at the time, as public administrator, took charge of the estate of Bessie Cook, deceased. The record does not show that he was ever appointed administrator and does not show that he gave bond as administrator. He did, however, take charge of the property and made two settlements. The last settlement as public administrator was made January 16, 1923, and the following judgment was entered on the back of the last settlement: "Settlement examined and approved and administrator ordered and directed to pay over to guardian or curator or heirs of Mrs. Bessie Cook, $118.02 with interest, and judgment is rendered against said administrator and his bondsmen for balance, for which execution may issue. January 16, 1923, J. C. Honey, Probate Judge." The appellees, Clara Bishop, Margaret Mayo and Carl Cook, the heirs at law of Bessie Cook, deceased, on August 7, 1930, filed suit against appellant for $118.02.

Appellant testified that he took possession of the estate of Mrs. Bessie Cook and filed two settlements, and that he had had in his possession $118.02, payable to the estate of Bessie Cook and that he was directed to pay the money to Wm. Poole, and that he did pay the money to Mr. Poole according to the directions of the probate judge; that he took a receipt from Poole and carried it to the clerk's office. Mr. Poole was at that time working in the Security Bank & Trust Company. The receipt was not found, and appellant testified that he did not know what became of it. He thought he paid the money by check on the Bank of Commerce, and that the check was made payable to Poole. All his checks had been burned. He told Poole he was paying him the Bessie Cook money. Payment was made sometime after he filed his settlement.

Ted Rogers, assistant bookkeeper at the Bank of Commerce, testified that he could not find any account

that R. L. Elmore kept with the bank. Elmore Brothers had an account there, but he could find no record of a check given for $118. The period for which he examined the books was for 1914 to 1921 or 1922 and not for 1923.

Jim Poole, a brother of Wm. Poole, testified that he thought Wm. Poole left there sometime in the fall of 1922, and that he, witness, did not receive any money from Elmore in the bank.

It is undisputed that the appellees are the only heirs at law of Mrs. Bessie Cook, deceased, that Elmore had in his hands as public administrator, belonging to the heirs, $118.02, and the court submitted to the jury the following interrogatory: "Did R. L. Elmore, administrator of Cook estate, pay to the Security Bank & Trust Company the sum of $118.02?" and the jury found that he did not. The order of the court was that he pay over to the guardian or curator or the heirs of Mrs. Bessie Cook the sum of money mentioned. The Security Bank & Trust Company was the curator.

The settlement made by the appellant and the order or judgment of the court was quite a long while after appellant's term of office had expired, and at the time the suit was brought Clara Bishop was 25 years old, Margaret Mayo was about 24 years old and Carl Cook was 27 years old. There was judgment against appellant for $118.02, and he prosecutes this appeal to reverse said judgment.

The only disputed question of fact in the case is whether appellant paid the $118.02.

Appellant contends that because there is no record of the administration, no inventory filed, no application for appointment as administrator, no bond as administrator and no record entry of anything pertaining to the administration of the Bessie Cook estate, the case should be reversed.

Our statute provides: "The sheriff shall, by virtue of his office, be public administrator in and for his county." Crawford & Moses' Dig., § 245.

No appointment by the probate court was necessary. The sheriff was by virtue of his office public administrator. Appellant testified himself that he took possession of the estate and filed two settlements, and he also testified that he did have in his possession $118.02 payable to the estate of Bessie Cook.

"The general power to act as public administrator may be assumed by the officer taking the property into possession, if necessary, to prevent waste, or upon the order of the probate court directing him to do so." *Williamson* v. *Furbush,* 31 Ark. 539.

A public administrator may in the first instance act on his own judgment in taking charge of an estate, but the probate court has jurisdiction to determine all questions arising in the progress of the administration. *McCabe* v. *Lewis,* 76 Mo. 296.

The probate court in this case exercised jurisdiction and passed on two settlements filed by appellant as public administrator. "It does not appear, either by the petition or proofs, that the probate court ordered the plaintiff to take possession of the estate of Mrs. Taylor; but it is alleged in the petition, and was admitted on the trial, that plaintiff was the duly elected and qualified administrator of Lewis County, and that he took charge of the estate of Clarissa Taylor, and filed notice thereof in the probate court. Section 299, Rev. St. 1889, makes it the duty of the public administrator to take charge of the estates of deceased persons in the cases specified in the first seven subdivisions thereof. In those cases, the public administrator, in taking charge of estates, acts independent of any order of the probate court." *Leeper* v. *Taylor,* 111 Mo. 312, 19 S. W. 955. Appellant took charge of the estate as public administrator, filed his settlements in the probate court as such administrator, and the fact that no record was found showing the administration is immaterial. When appellant filed his second settlement, the probate court made the order above set out. This order was indorsed on the back of the settlement, but was not shown to have been recorded elsewhere.

It was, however, the judgment of the court, and appellant relies on it as finally settling and adjudicating his rights as administrator. It was a valid judgment although not recorded. *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44.

It is contended also that the evidence conclusively shows the judgment was paid. It is true that appellant testified that he had paid the amount, but a rule established by this court is that the testimony of a party to an action, who is interested in the result, will not be regarded as undisputed in determining the legal sufficiency of the evidence. *Metcalf* v. *Jelks,* 177 Ark. 1023, 8 S. W. (2d) 162.

Not only will the evidence of an interested party not be regarded as undisputed, but in this case the officers of the bank were unable to find any record of a check claimed to have been given in payment by the appellant, and appellant had no account at the bank at the time the payment was claimed to have been made. It also appears probable from the evidence that Poole, the man appellant thinks he paid it to, left in 1922, and the payment, if made, was made in 1923. As to whether the amount was paid was a question for the jury, and the verdict on this issue was against appellant. This finding is conclusive here.

It is contended that the claim is barred by the statute of limitations. The statute provides: "Actions on all judgments and decrees shall be commenced within ten years after cause of action shall accrue, and not afterwards." Crawford & Moses' Digest, § 6959.

This action was commenced within ten years, and was therefore not barred.

Appellant also contends that the trial court erred in holding that the action was barred as to the sureties on appellant's bond and not barred as to appellant. He says this action of the court was in effect holding that the appellant could not plead any statute of limitations. We do not agree with appellant in this contention. The suit was against the sureties on the appellant's bond as

sheriff, and not against the sureties on administrator's bond. It appears that he did not give any bond as administrator. "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 afterward." Crawford & Moses' Dig., § 6957.

The judgment of the circuit court is affirmed.

SHELL *v.* STATE.

Opinion delivered September 28, 1931.

Alexander & Cooper and *T. J. Crowder,* for appellant.

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

MEHAFFY, J. Appellant was convicted of the violation of act 121 of the Acts of 1925, the first section

of which reads as follows: "It shall be unlawful for any person, firm, or corporation to have in their possession any alcoholic, vinous, malt, spirituous or fermented liquor or any compound preparation thereof commonly called tonics, bitters, or medicated liquors for the purpose of sale as a beverage."

The second section of this act provides that on conviction the person shall be fined in any sum not more than $1,000 and not less than $50.

The jury found the appellant guilty and fixed his punishment at a fine of $100, and judgment was entered accordingly. This appeal is prosecuted to reverse the judgment of the circuit court.

The appellant lived in a small house on the premises of Mr. Spicer. The officers had a search warrant to search the premises of Mr. Spicer and went there about ten o'clock at night. Just before arriving at the premises, they met a Mr. Chapple coming out and stopped him and questioned him and let him go on. They then went on to the house and found at the front porch 10 gallons of liquor. The appellant came out on the porch partly dressed, and the officers arrested him.

The evidence showed that some time, possibly a year before this, 15 gallons of whiskey were found in this same house where appellant lived; he was arrested, entered a plea of guilty, and was fined. The appellant testified that he knew nothing about this 10 gallons of liquor, did not know that it was at his porch, it did not belong to him, and it was not in his possession, and he did not have it for sale. He admitted that on a former occasion the officers had found 15 gallons in his home, and that he paid a fine for possessing it for sale.

Appellant insists that the case should be reversed, first, because the evidence did not show that the liquor was the kind prohibited by law, and did not show that it was intoxicating. Both the State and appellant treated it as intoxicating liquor or whiskey, and Mr. Wilson, one of the witnesses, was asked the question: "Was the whiskey on the porch, or under the porch, or near the porch?"

He answered that when he saw it it was right against the porch. He also said that Mr. Lindsey got there before he did, and when he got there Mr. Lindsey said: "Here is ten gallons of whiskey I found at the front porch."

There was no contention that it was not intoxicating liquor. The evidence was sufficient to justify the finding by the jury that the liquor found was intoxicating. *Fuller* v. *State,* 179 Ark. 914, 18 S. W. (2d) 913.

It is next contended that the evidence does not show that it was in the possession of the defendant. The evidence, however, shows that the liquor was found at the porch of the house where appellant lived; appellant testified that it was his home, and that he had been living there several years.

The fact that the whiskey was found at appellant's front porch on the premises controlled by him, together with the fact that he had formerly engaged in the business, and had 15 gallons of liquor in his house, was sufficient to justify the jury in finding that the liquor was in the appellant's possession.

Possession is such control of property that the person having it may legally enjoy it to the exclusion of others, and it means that which one occupies or controls. He was in possession of this liquor in the sense that he was in possession of anything else on the premises. Of course, it is possible that liquor or anything else could be put on one's porch or in his house without his knowledge, but whether he was in possession or not was a question for the jury, and the evidence on this issue was sufficient to justify their verdict.

It is next contended that the evidence does not show that it was in his possession for sale. Before the appellant's conviction under the act would be justified, it must appear that he had the liquor for the purpose of sale as a beverage. The evidence tending to show that he had the liquor for sale as a beverage is not very strong. As to whether he did or not was a question of intention, and as a general rule the intention can be proved only

by circumstances. No one can testify as to what another's intentions are. One might have possession of whiskey, or it might be on his premises under such circumstances as would contradict the idea that he had it for sale; or it is possible that one might give such an explanation of its possession that would show that it was not kept for sale, but we have no explanation; the appellant simply denies that he possessed it, and denies any knowledge of it at all.

Intention or purpose is a fact which can not, in the nature of things, be positively known to others. Others can not testify directly as to what one's intention or purpose is. It is not a presumption of law, but an inference of fact that the jury may draw from the facts and circumstances introduced.

The fact that a ten gallon vessel of whiskey was found at his porch, together with the fact that he had, something like a year before that time, been in possession of 15 gallons of whiskey which he had for sale, and the fact that a person was coming from his house at this time of night, and the fact that there was no explanation or suggestion that the liquor was kept for any other purpose, was sufficient to submit the question to the jury, as to whether he possessed the liquor for sale.

The jury was composed of men of the county where appellant had lived a number of years, and the court told the jury that it was not a violation of the statute to possess intoxicating liquor in a private residence unless the possession is for some illegal purpose, and that in this case it was the duty of the jury to acquit, unless they found beyond a reasonable doubt that the defendant possessed the liquor in question for the purpose of selling it. They were told by the court that if they had a reasonable doubt either that the liquor was in his possession, or, if in his possession, for the purpose of sale, it would be their duty to acquit the defendant. The jury were therefore properly instructed. The jury was the sole judge of the credibility of the witnesses and the

weight to be given to their testimony, and we think the facts and circumstances introduced were sufficient to support the jury's finding.

The judgment of the circuit court is affirmed.

WILSON *v.* STATE.

Opinion delivered September 28, 1931.

Caraway, Baker & Gautney, for appellant.

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

McHANEY, J. Appellant was indicted for murder in the first degree for the killing of Dexter Carter. He was convicted of voluntary manslaughter, and sentenced to two years in the penitentiary.

For a reversal of the judgment of conviction against him, appellant first says the court erred in refusing to permit certain witnesses for him to testify concerning certain uncommunicated threats the deceased is said to have

made against appellant some weeks before the killing. Threats which are not communicated to the deceased are not always admissible, but only when there is doubt as to who the aggressor was. They are admitted in proper cases to show who the probable aggressor was. As said by this court in *Lee* v. *State,* 72 Ark. 436, 81 S. W. 385, "Former threats by the deceased against the accused may generally be given in evidence, as tending to show the defendant's motive, when they were communicated to him before the killing, and evidence of former threats by the deceased against the accused, even though they were not communicated to the defendant prior to the killing, may be received when there is a doubt as to who was the aggressor, and some evidence has been given which tends to show the act was done in self-defense. 25 Am. & Eng. Enc. Law (1st Ed.) pp. 1066, 1067." At the time this testimony relating to threats made by the deceased against appellant was offered, there had been no testimony given which in any way tended to show that the killing was done in self-defense, and, therefore, the testimony was not admissible at that time. Thereafter, appellant himself testified that at the time he hit deceased with the billet of wood, he did so in self-defense, or that deceased was walking towards him with his hand in his pocket. No offer was made thereafter to prove the uncommunicated threats, and, conceding that they would then have been admissible, it certainly was not error to exclude them at the time offered.

It is next argued that the court erred in refusing to give appellant's requested instruction No. 1 to the effect that the jury might consider the evidence of uncommunicated threats together with other evidence in determining who was the probable aggressor. As above shown all evidence relating to such threats was excluded, therefore such instruction was abstract, as there was no evidence on which to base it.

Finally, it is said that the court erred in its oral instruction urging the jury to try to come to an agreement. The remarks of the court in this connection are

lengthy, and we think no useful purpose can be served by copying them. We have examined the language of the court carefully in the light of appellant's argument, and cannot agree that it has the effect of expressing an opinion as to appellant's guilt. The court was very careful to explain to the jury that such was not the intention. We are convinced that appellant received a fair and impartial trial. He was ably represented by eminent counsel, and the results achieved testify to this fact.

Affirmed.

[redacted]

REEVES *v.* WISCONSIN & ARKANSAS LUMBER COMPANY.

Opinion delivered September 18, 1931.

[redacted]

Hogue & Burney, for appellant.

John L. McClellan, for appellee.

McHANEY, J. On May 9, 1919, appellee entered into a written contract with one H. G. Toler for the sale to him of sixty acres of land in Grant County, for a consideration of $450, of which $100 was paid in cash, and for the remainder two promissory notes were given, $175 each, due in one and two years after date, with interest at 7 per cent. from date. Said contract provided that, upon

the payment of said notes and interest and the surrender of the contract, appellee would execute to said Toler, his heirs or assigns, "a special warranty deed conveying the title to said aforedescribed lands and premises in fee simple." But, on a failure to pay said notes, or either of them, at the time and in the manner set forth, it is provided that said contract shall be null and void, "and the premises hereby contracted shall revert to and revest in" appellee, "time being the essence of this contract." A further provision is: "It being agreed and understood that deed, when made, is to carry the usual mineral, coal, oil and gas reservations."

On April 11, 1920, appellant bought this land from Toler, paying him a sum in cash and assuming the outstanding indebtedness to appellee, represented by the above mentioned notes. A copy of the Toler contract was delivered to him in 1925, and the original held by Toler was assigned to him on October 20, 1928. He made some small payments to appellee from time to time, but failed and refused to pay in full. Appellant being in default and refusing to pay after notice and demand, appellee brought this action to recover possession of the land, or to enforce a lien for the balance due, appellant having entered into possession when he bought from Toler and made valuable improvements thereon. A trial resulted in a decree for appellee declaring and enforcing a lien on said land for the balance of the purchase money represented by said notes, $378.50, including interest.

For a reversal of the judgment, appellant says the contract is void, first, for want of execution; and, second, that the exception clause, reserving the minerals, etc., above quoted, is ambiguous which renders the contract void. Appellant made no such contentions in the trial court, and these questions were not then and are not now issues in the case. He admitted the specific allegations in the complaint in these respects to be true, that is, that appellee and Toler made the contract upon the terms and conditions heretofore stated, that the copy thereof at-

tached to the complaint is a true copy, that the land was to be conveyed to Toler, or his assigns, upon the payment of the balance due, by special warranty deed, and further: "admit that plaintiff was to reserve title to all mineral, oil, coal and gas in and to said lands in the plaintiff," etc. Having admitted by answer that the contract was properly executed and that appellee was to reserve the minerals mentioned in the deed, when executed, no issue thereon was joined, and none can be raised now. It appears that the contract was executed in duplicate, each party receiving a copy signed by the other. The copy held by appellee and attached to the complaint was signed by Toler, but not by an officer of appellee. This could make no difference to either Toler or appellant. It was unnecessary for appellee to sign its copy. It was and is asserting that the contract was its act, which was not denied. Nor could any person of ordinary intelligence have been misled by the wording of the mineral reservation to be inserted in the deed.

It is finally contended that appellee's title to the land is not good, or that there has been a failure of title. The argument made by appellant under this heading appears to be based on the assumption that the written contract is void. Since, as we have already shown, the contract was a valid one, admitted to be such in his answer, and no contention thereon being made below, appellant must, of necessity, be concluded on this point. It will be remembered, however, that appellee contracted to give Toler, or his assigns, a special warranty deed only. Such a deed cannot be construed to be one of general covenants of warranty, but simply warrants the title against all defects therein done or suffered by the grantor. Appellee however offered to give appellant a deed with general covenants of warranty, if he would pay the purchase price and thereby avoid the necessity of this lawsuit, but the offer was refused. We think it unnecessary to decide whether the title in appellee is good or bad, but will observe in

passing that it acquired the title in 1905, the land at that time being unimproved and uninclosed, and that it and those through whom it claims have paid the taxes thereon for a great many years, more than seven, under color of title, and have continuously paid the taxes thereon since 1905 to 1919, when the land was sold to Toler.

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

RANSOM *v.* STATE.

Opinion delivered September 28, 1931.

Jackson & Blackford, for appellants.

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

BUTLER, J. Three youths, Raiford Ransom, Charles Ransom and James McElroy, were indicted for the murder of J. H. Jenkins. The cases were by consent con-

solidated for the purpose of trial, which trial resulted in a verdict of guilty of murder in the second degree as to each of them and punishment fixed at imprisonment for twenty-one years in the State penitentiary.

It is contended here that the evidence is not legally sufficient to support the verdict against any of the defendants. This is the only ground urged by counsel for the reversal of the case.

At the time of the homicide the defendants, who were from seventeen to nineteen years of age, had been trapping near the town of Bunny, and on the forenoon of December 11, 1928, returned from their trapping to the town where they had a Ford car in which they left going north on the highway leading past the town. Shortly after their departure a rural mail carrier followed along the same route, and, after having gone about two miles north and turned into an intersecting road going east for about 150 yards, he discovered the automobile of Jenkins near the center of the road and the body of Jenkins lying on the right side of, and parallel with, the car with his head toward the front end of the car. The body was lying on the right hand with the left arm straightened out, the feet being about five or six feet from the front end of the car. On approaching the body, it was discovered that the motor of the car was still running and that Jenkins was dead. His pistol scabbard which was attached to his belt was empty. A light rain had been falling, so that marks on the highway were easily discoverable. From these it appeared that only two cars had traveled the highway that morning before the mail-carrier reached the scene of the killing. From the tracks it appeared that the car, which afterwards was found to be the one in which the defendants had been riding, had been stopped near the right side of the highway going north, and Jenkins' car passed to the left and stopped about the center of the highway about twenty-five feet from the defendant's car. Foot tracks revealed that Jenkins had got out of his car on the

left and walked around the front end of it to a point about opposite the middle of the right-hand fender and stopped facing in the direction of defendant's car. The automobile tracks showed that, after having stopped, the defendant's car moved forward and around Jenkins' car and stopped again about thirty feet away from where the body of Jenkins lay, and from this point foot-steps led to the body of Jenkins and back to where the defendants' car had been stopped the second time. From this point the car of defendants moved on to where it was afterwards found at the home of the father of Raiford Ransom.

The three boys were arrested, and Raiford Ransom admitted having killed Jenkins. The statement of Raiford Ransom and that of the two other defendants were much alike and about as follows: When the defendants left Bunny, all three were riding on the front seat of the car, Raiford Ransom in the middle with a forty-five calibre Colt pistol on the seat by his side. They had in the car a gallon can of coal oil. They travelled north for about two miles and then east on an intersecting road about 150 yards in the direction of the home of the Ransom boys. Just before they reached this point they heard a car behind them which sounded its horn several times, and McElroy, the driver of defendant's car, was told by Raiford Ransom to stop. He drew over to the right hand side of the road and did so. As he stopped, the other car passed to the left and stopped about 25 feet away at about the center of the highway. The man got out on the left, walked around to the front of his car to its right side with a pistol in his hand and ordered the three boys to stand up and turn their pockets out, stating that he intended to search their car. None of the three defendants knew who the man was though it was afterwards discovered that he was Jenkins, a deputy sheriff. The defendants obeyed his command, and McElroy was told to stand where he was, and the others were told to get out of the car. There was no floor board

in the bottom of defendants' car and as Raiford Ransom arose he fell through the opening in the floor of the car. Jenkins immediately fired two shots in his direction and when he arose Jenkins fired two more shots at him. Jenkins then exclaimed, "If I haven't hurt you yet, I will," and unbreached his pistol, feeling in his pocket. At this time Raiford Ransom obtained the pistol from the seat of the car and fired twice at Jenkins, striking him twice in the breast, one of the bullets passing through his body and one not quite penetrating it. Jenkins fell to the ground. The defendants started their car and passed by Jenkins, running over one of his feet. About thirty feet further on they killed their engine. While starting it again, Raiford Ransom looked backward and saw Jenkins trying to reach his pistol which had fallen from his hand. Raiford Ransom then returned to Jenkins, took possession of the pistol, returned with it to his car, placed it in the back of same, and the three proceeded to the home of the father of the Ransom boys.

Several witnesses, who were from a quarter to a half mile away from the scene of the shooting, testified that they heard some firing in that direction, but were not very clear as to the number of shots fired or as to the intervals between them. Upon this state of facts counsel for appellant insist that the jury should have returned a verdict of not guilty on the ground of justifiable homicide, and that there is no case of unlawful homicide made against the defendants.

Raiford Ransom having admitted killing Jenkins, the burden of proving facts which would tend to justify or extenuate his act devolved upon him and the jury had the right to scrutinize his testimony and that of his codefendants in the light of attendant circumstances in order to determine whether his statements were made in good faith and true, or whether they were untrue and made simply to avoid the consequences of his act. Crawford & Moses' Digest, § 2342; *Houston* v. *State,* 165 Ark. 294, 264 S. W. 869; *Jimmerson* v. *State,* 169 Ark. 353, 295 S. W. 956.

His testimony and that of his companions is to the effect that they were unacquainted with Jenkins and did not know that he was an officer. While there is no direct testimony tending to contradict this statement, it is apparent from all of the testimony in the case that Jenkins had been an officer of the law for some time, active in the discharge of his duties, and had acquired the soubriquet of "Bugaboo Jenkins" among those with whom the defendants associated. Therefore, the jury might reasonably have doubted the truth of the statements of defendants regarding their acquaintance with the deceased. These statements were also to the effect that Jenkins approached within a short distance of defendants' car—about five feet—when he began firing, while the physical facts show that he never got beyond the center of the front fender of his car, nor was it reasonable that firing four shots within five feet of the car and its occupants that none of the bullets would have found its mark or struck any portion of the car. Again, it was testified by the defendants that the deceased threw the cylinder of his pistol out of position and was feeling in his pocket as if searching for cartridges, but it is significant that no exploded shells of the calibre of Jenkins' pistol were found at the scene of the killing and that the pistol itself had been taken away and kept by the defendant, Raiford Ransom, until recovered by the officers.

Another circumstance testified to by defendants might have appeared to the jury so out of the ordinary manner that men follow in a crisis of this kind as to render it unworthy of belief, *i.e.*, that after the defendants had started their car and were on their way Raiford Ransom returned some thirty feet to the body of Jenkins and picked up the pistol and carried it away because Jenkins was reaching for it as he lay on the ground. The position of Jenkins' body and the nature of his wounds were such that the jury might well have inferred that he fell in his tracks and probably never moved again. All of these circumstances were considered by

the jury and were sufficient to justify the conclusion that the statements of the defendants as to the manner in which the killing occurred was untrue. Since the jury is the sole judge of the credibility of the witnesses and the weight to be accorded their testimony, its conclusion must not be disregarded if there is any substantial evidence, direct or circumstantial, to support the verdict. *Ford* v. *State,* 167 Ark. 677, 268 S. W. 24.

The case of Charles Ransom and James McElroy stands on a different footing. They were not the actual slayers of Jenkins, and the burden was upon the State to show by some affirmative testimony, direct or circumstantial, that they in some way aided, abetted or encouraged Raiford Ransom in taking the life of Jenkins, or that they actively consented to such act. The mere fact that they were the companions of Raiford Ransom on the journey in question and were present at the scene of the killing is not sufficient to justify their conviction. The court should have so told the jury as requested by them in instruction No. 1. 29 C. J. p. 1069, § 42; 13 R. C. L., p. 727, § 27; *Vasser* v. *State,* 75 Ark. 373, 87 S. W. 635.

We have examined the record and fail to find any testimony which tends to establish the guilt of Charles Ransom and James McElroy. It is true that the jury has found that their testimony regarding the killing was untrue, but this only served to negative the defense offered by the principal defendant, and did not in any way tend to show that they had any previous knowledge of his intention or to establish the fact that they were aiding and encouraging Raiford Ransom in the commission of the homicide. All that the evidence shows with any reasonable degree of certainty is that Jenkins suddenly appeared on the scene without any previous knowledge on the part of the defendants that he was likely to do so. There is no proof of any circumstance tending to show that the defendants were on an unlawful mission or that there was any reason for them to appre-

hend danger at the hands of the deceased, or any reason offered as to why they should have borne any malice toward him. The bare fact that Charles Ransom and James McElroy were the companions of Raiford Ransom and present at the time of the shooting is all that has been disclosed by the testimony in this case. At most, there could arise but a mere suspicion of any guilty knowledge upon their part as to the intention of the principal defendant, or of any act upon their part which might have encouraged him in the commission of the deed. This is not sufficient to satisfy the law.

It is ordered that in the case of Raiford Ransom against the State of Arkansas, the judgment of the lower court be affirmed, and in the case of Charles Ransom and James McElroy the judgment is reversed and the cause remanded for a new trial.

FRANKLIN FIRE INSURANCE COMPANY *v.* BUTTS.

Opinion delivered October 5, 1931.

[redacted]

D. D. Terry, for appellant.

J. M. Jackson, Jas. S. McConnell and *J. S. Butt,* for appellees.

HART, C. J., (after stating the facts). It is first contended that A. R. Crumb acquired an interest in the land by the tax sale in 1926 for the taxes of 1925, and that thereafter E. M. Butts was not the sole and unconditional owner of the property, and therefore the fire insurance policy was null and void. We do not agree with counsel for the insurance company in this contention. We set out in our statement of facts the substance of the "sole and unconditional ownership clause" of the policy. We do not deem it necessary to set out the clause in full for the reason that, under the facts of the case, we do not think that it has any application. The mortgage foreclosure suit brought by A. R. Crumb against E. M. Butts, is reported in 182 Ark. 286, 31 S. W. (2d) 307. According to the pleadings in that case, as will be seen from an

examination of the transcript, Crumb did not claim any interest in the land by virtue of his purchase of the tax title, but only asked that he be allowed the sum of $448 paid for the conveyance of the tax title. The defendant contested this for the reason that the taxes only amounted to about $35. The defendant also contested the foreclosure suit on the ground of usury. Both of these contentions were found against the defendant Butts by the chancery court, and a decree was entered of record accordingly. The decree of the chancery court was affirmed upon appeal. These facts are inferentially shown by the opinion in that case and are conclusively shown by an examination of the transcript.

But it is claimed that the Franklin Fire Insurance Company was not a party to that suit and was not bound by the proceedings thereunder. In the first place, the insurance company could not claim any change of interest or ownership in the property which was not claimed by either of the parties to that proceeding.

In the second place, the record in the present case shows that the parties agreed that A. R. Crumb is claiming as garnishee creditor and not under the mortgage clause or as assignee of the mortgage. This shows that the parties agreed that Crumb was only asserting a right to garnishment of the proceeds of the insurance under his deficiency judgment in the foreclosure decree. This is made plain by the allegations of the complaint in the present case. The insurance company cannot claim that Crumb had any other or different interest in the property than that claimed and alleged by himself. This question was expressly adjudicated in favor of Butts in the foreclosure proceeding, and the decree in that case was affirmed upon appeal. Hence we are of the opinion that the policy did not become null and void under the so-called "sole and unconditional ownership clause."

In the present case, the policy contained a loss payable clause in favor of the John Guthrie Mortgage Company, as its interest might appear, and this showed actual knowledge of the mortgage to that company when

the policy was issued. The policy having provided what the effect of that clause should be, it precludes any possible idea that the commencement of foreclosure proceedings under the mortgage should render the policy void. The stipulation that the commencement of foreclosure proceedings should render the policy null and void evidently referred to other foreclosure proceedings than that by John A. Guthrie Mortgage Company or its assignee, for the policy was made payable to that company as its interest might appear, and further provided that the policy should not be invalidated by any foreclosure of the property or by any change in title or ownership under the mortgage.

In the forfeiture clause of the policy, among other things, it is stipulated that, if the property or any part thereof shall hereafter become mortgaged or incumbered, or upon the commencement of foreclosure proceedings, without the written consent of the insurer, the policy shall be void. The connection with which the phrase, "or upon the commencement of foreclosure proceedings," is used, indicates that it refers to mortgages to be executed in the future. After inserting clauses relating to lightning and other matters, the policy recites that there is an indorsement attached to the policy which is called the mortgage clause. It provides that the loss or damage to the buildings covered by the policy shall be payable to the John A. Guthrie Mortgage Company as first mortgagee, "as interest may appear, and this instrument, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property," etc.

It is argued that this means that foreclosure proceedings as to the John A. Guthrie mortgage would invalidate or render void the policy in so far as the mortgagor is concerned. We do not think so. This clause was inserted for the benefit of the mortgagee and was intended

to protect its rights, so that, if the mortgagor gave other mortgages after the issuance of the policy with the written consent of the insurance company, a foreclosure of such mortgage, while it would avoid the policy as to the mortgagor under the forfeiture clause, would not affect the rights of the mortgagee. It is the settled rule of law in this State that if any ambiguities appear in an insurance policy which may be susceptible of two reasonable constructions, the one which is most favorable to the insured and which will give life to the policy should be adopted. The reason is that such provisions are inserted in blank forms prepared by the insurance company for its benefit in which the insured has no voice. *Importers' & Exporters' Ins. Co.* v. *Jones,* 166 Ark. 370, 266 S. W. 286; *Connecticut Fire Ins. Co.* v. *Boydstun,* 173 Ark. 437, 293 S. W. 730; *National Union Fire Ins. Co.* v. *Henry,* 181 Ark. 637, 27 S. W. (2d) 786; and *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310.

Indorsements on an insurance policy form a part of it, and the policy of insurance with the indorsements or riders thereon must be construed as a whole. *American Ind. Co.* v. *Hood,* 183 Ark. 266, 35 S. W. (2d) 353.

We therefore conclude that the policy of insurance did not become void by the commencement of foreclosure proceedings by the assignee of the mortgage executed by the insured to the Guthrie Mortgage Company.

Having decided that the company is liable under the terms of the policy, we now come to the question whether Crumb or Butts is entitled to recover. The clause which we have copied in our statement of facts provides that the policy shall be payable to John A. Guthrie Mortgage Company as its interest may appear. Crumb became assignee of the mortgage and notes which the mortgage was given to secure, and the mortgage company thereafter ceased doing business. The assignment of the mortgage does not transfer the contract of insurance, where the mortgage clause is not for the benefit of the assignee, but is limited to the mortgagee, and the assignee of the mortgage has no right of action at law as mortgagee

to recover for a fire loss. *Weinberger* v. *Agricultural Insurance Co.*, 8 N. J. 202, 76 Atl. 343; and *Newark Fire Ins. Co.* v. *Simmon Turk*, 6 Fed. (2d) 533, 43 A. L. R. 496. See also 14 R. C. L. 1114; and 41 C. J. 682.

The reason is that the clause of a policy providing for payment of indemnity to the mortgagee as his interest may appear is not an assignment of the policy. It creates an agreement between the insurer and the mortgagee binding even after the insured owner has alienated his property. It will be readily seen that an insurance company might be willing to make a contract of this kind with the mortgagee and not with an unknown person as his assignee.

An additional reason why Crumb may not recover is because the parties have expressly stipulated that A. R. Crumb is claiming as garnishee creditor and not under the mortgage clause or as assignee of the mortgage, and the parties must be bound by their agreement.

The most troublesome question in the case is whether or not the proceeds of insurance become substituted for the property itself, and that therefore the insured may claim it is exempt from the deficiency judgment. The property which was insured against loss by fire in the present case was the homestead of Butts, and the question is does the insurance money take the place under our execution laws of the property destroyed and like it also exempt and not liable to garnishment? It is claimed that this question is answered in the affirmative by the weight of authority. Be that as it may, we think such holding constitutes the better reasoning on the subject. Under our Constitution and statutes, the homestead of a debtor is exempt from execution and is not subject to the lien of a judgment except in certain specified instances, and the record in the present case does not show that the debt belongs to one of the excepted classes. It is the settled policy of this court that our homestead laws are remedial and should be liberally construed to effectuate the beneficent purposes for which they are intended. *Davis* v. *Neal*, 100 Ark. 399, 140 S. W. 278, L. R. A. 1916A, 999.

Not to allow the insurance money to take the place of the property destroyed and be exempt from liability for the debts of the owner would be a mere evasion perverting the object and spirit of the law. The homestead is exempt under the Constitution and statutes from the lien of a judgment in cases like this, and the owner may insure it to protect himself and family from loss. It is well settled that if a mortgagor insure the premises, without any contract with the mortgagee binding him to do so, he is entitled to the insurance in case of loss, and the mortgagee has no lien on it; and we think the insurance represents the property and is exempt from the claims of creditors. *Culbertson* v. *Cox,* 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204, and cases cited; *Bernheim* v. *Davitt,* (Ky.) 5 S. W. 193; *Rulo* v. *Murphy,* (Ky.) 51 S. W. 312; *Houghton* v. *Lee,* 50 Cal. 101; *Chase* v. *Swayne,* 88 Tex. 218, 30 S. W. 1049, 53 A. S. R. 742; *Ellis* v. *Pratt City, Southern Ins. Co., Garnishee,* 111 Ala. 629, 20 So. 649, 33 L. R. A. 264, 56 Am. St. 76; and cases cited in a note to 45 A. S. R. at 238. See also 13 R. C. L. 585, and 29 C. J 839. These text writers and several of the cases above cited recognize that the weight of authority is in accord with the rule above announced.

In a case note to 45 A. S. R. at 238, it is claimed that those cases which hold that the proceeds of such an insurance policy is not within the homestead laws follow the letter and ignore the spirit of the law. The annotator calls attention to the object of the homestead laws which is to assure heads of a family the comfort and protection of a home. This object may be thwarted if the home may not be protected by insurance; and if, although so protected, when the home is destroyed, the family should be left without a house while the creditor is awarded the proceeds of the protection made by the debtor for his family. Hence, we hold that the better reasoning is that the proceeds of such an insurance policy take the place of the property itself, are substituted for it in fact, and cannot be reached in garnishment proceedings at the instance of a creditor in cases like this one.

We think this view is in accord with the decision in *Probst & Hilb* v. *Scott,* 31 Ark. 652. We call attention to the concluding language of the opinion, which is as follows: "The property being exempt, it is but reasonable that the compensation for the loss, which represents the property, should also be exempt." The case of *Houghton* v. *Lee,* 50 Cal. 101, is cited in support of the holding. In that case the court expressly held that if a wife declared a homestead on common property and a husband procures a policy of insurance thereon, and the house is destroyed by fire, the sum due from the insurance company is not subject to garnishment by a judgment creditor of the husband.

Finally, it is contended on the part of Butts that the court erred in not allowing him attorney's fees and penalty under the statute. In this contention we think his counsel is correct. No issue was made at the trial of the right of the company to deduct the outstanding premium note. The company denied any liability under the policy. If it merely wished to be released from the responsibility of deciding which of the two claimants was entitled to the proceeds of the insurance policy, it should have made a deposit of the amount in the registry of the court and thus relieved itself of any further responsibility in the matter. *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123, 235 S. W. 412; *Old Colony Life Ins. Co.* v. *Julian,* 175 Ark. 359, 299 S. W. 366.

The amount of the policy in the present case was $1,500, and we think $150 was a reasonable attorney's fee and should have been allowed by the court, and in addition the court should have allowed the statutory penalty of twelve per cent. In other respects, the decree of the lower court will be affirmed, and the clerk of this court will be directed to add the attorney's fee and statutory penalty as indicated in this opinion in favor of the defendant Butts against the insurance company.

TOWNSEND *v.* MCDONALD.

Opinion delivered October 5, 1931.

A. J. Russell, Osro Cobb, Sam M. Clark, A. J. Russell, Jr., and *Robert A. Zebold,* for appellant.

Hal L. Norwood, Attorney General, for appellee.

HART, C. J. Wallace Townsend, for himself and other legal voters, seeks by mandamus to compel Ed. F. McDonald, as Secretary of State, to file a petition for a referendum on act 345 passed by the last Legislature. Act 345 is entitled "An act to provide for the creation of county boards of election commissioners and the appointment of election judges and clerks." Acts of 1931, p. 1117. The Secretary of State refused to file the petition because there was not a full and correct copy of the act attached to it.

Our Initiative and Referendum Amendment to the Constitution was adopted at the general election in 1920, and the text of it may be found in the Acts of 1919 at page 481 and in Applegate's Constitution of Arkansas Annotated at page 203. The amendment commences as follows: "That § 1 of article 5 to the Constitution of the State of Arkansas and Amendment No. 10 thereto be amended so as to read as follows." Then follows the complete text of the amendment. It provides that the second power reserved by the people is the referendum, and any number, not less than six per cent. of the legal voters, may, by petition, order the referendum against any general act or any item of an appropriation bill, or measure passed by the General Assembly, etc. The amendment concludes as follows:

"SELF-EXECUTING. This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people."

"That this Amendment to the Constitution of the State be, and the same shall be in substitution of the Initiative and Referendum Amendment, approved February 19, 1909, as the same appears in the Acts of Arkansas for 1909, on pages 1239 and 1240 of the volume containing the same; and that the said amendment (and the act of the General Assembly to carry out the same, approved June 30, 1911, so far as the same is in conflict herewith), be and the same are hereby repealed."

The original amendment providing for the Initiative and Referendum above referred to provides that the referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety) either by petition signed by five per cent. of the legal voters or by the legislative assembly as other bills are enacted. The amendment concludes as follows: "Petitions and orders for the Initiative and for the Referendum shall be filed with the Secretary of State, and in submitting the same to the people he and all other

officers shall be guided by the general laws and the acts submitting this amendment until legislation shall be specially provided therefor." Acts of 1909, p. 1238.

Pursuant to the power given by the clause of the amendment to the Constitution just quoted, the Legislature of 1911 passed an act the title of which reads as follows: "An act to provide for carrying into effect the initiative and referendum powers reserved by the people in Amendment No. 10, to the Constitution of the State of Arkansas on general county and municipal legislation, to regulate elections thereunder and to punish violations of this act." Acts of 1911, p. 582. Section 2 of the act provides the form for the petition and order for a referendum and is § 9766 of Crawford & Moses' Digest. Section 7 of the act provides for printed copies of measures referred to be attached to the petition and is § 9768 of Crawford & Moses' Digest, which reads as follows:

"Copy of measure to be attached. To every petition for the initiative shall be attached a full and correct copy of the title and the measure proposed, and to every petition for the referendum shall be attached a full and correct copy of the measure on which the referendum is ordered. The Secretary of State shall cause every measure approved by the people to be printed with the general laws enacted by the next ensuing session of the General Assembly with the date of the Governor's proclamation declaring the same to have been approved by the people."

The general rule of construction applicable to constitutional amendments is that the later amendment governs to the extent that it is repugnant to or in conflict with the provisions of the former one. *Chessir* v. *Copeland,* 182 Ark. 425, 32 S. W. (2d) 301, and cases cited.

At the outset, it may be stated, that substance is more to be desired than form; and the will of the people, as expressed in the amendment, should be declared according to the plain and ordinary words used unless another and different meaning has been plainly expressed. It will be noted that the amendment provides that it shall be in substitution of the Initiative and Referendum

Amendment approved February 9, 1909, and that said amendment and the act of the General Assembly to carry out the same approved June 30, 1911, so far as the same is in conflict herewith, be and the same are hereby repealed. This manifestly indicates the will of the people to leave in force the act of the General Assembly approved June 30, 1911, which was for the purpose of carrying out the original amendment, except in so far as it is repugnant to or in conflict with the present amendment. It also indicates a purpose on the part of the people to authorize the Legislature to adopt a procedure in harmony with the amendment to carry out its provisions. Otherwise the amendment itself would have declared that the act of the General Assembly referred to was repealed. Section 9768 of the Digest, which is § 7 of the act of 1911, expressly provides that to every petition for the initiative shall be attached a full and correct copy of the title and measure proposed, and to every petition for the referendum shall be attached a full and correct copy of the measure on which the referendum is ordered. There is nothing in the section which is in conflict with or repugnant to the provisions of the constitutional amendment.

The purpose of the section with regard to petitions for initiative measures is clear. The people could not intelligently act on an initiative measure unless a copy of the measure itself was before them. The same reasoning would obtain in cases of a measure referred to the people. A full and correct copy of the measure attached to the petition would enable the signer thereto to act intelligently in the premises. Of course, he would not be required to read the measure, but it would be his duty to inform himself of its contents, and this would be a certain way for the signer to know that a different petition would not be presented from that signed by him. The signer would know that he was signing the measure passed by the Legislature and was not taking the opinion of any one else as to the meaning of it. Otherwise, those in charge of the petition, either designedly or ignorantly, might inform the petitioners that the meaning of the bill

proposed to be referred was essentially and substantially different from the one actually passed by the Legislature. If a full and correct copy of the bill is attached to the petition, the voter can decide that question for himself. Hence, a majority of the court is of the opinion that the requirement is clearly jurisdictional, and that the Secretary of State is without power to act in the absence of a substantial compliance with this requirement of the statute.

In determining whether the words of a statute shall have a mandatory or directory effect ascribed to them, the purposes of the act, the end to be accomplished, the consequences that may result from one meaning or the other, and the context are to be considered. The statute relates to the limits of the power of the Secretary of State to file the petition, which was not in compliance with the requirements of the statute, and does not relate to the manner in which the power is to be exercised. *Phillips* v. *State,* 162 Ark. 541, 258 S. W. 403.

The statute was not passed as a mere matter of convenience or direction to be observed either by those circulating the petitions or by the Secretary of State. The act was passed as a safeguard to the rights of the voters to whom the petition was offered for signature. The requirement was intended to secure the voters whose interests were to be affected an opportunity to know what they were signing, and to know that they were not signing something different from those whose signatures appeared on the petition. This is a right of great benefit to the voters, and we do not think the requirement should be regarded as merely directory, but that it is a substantial right which is of a mandatory character, and must be complied with or the proceeding will be void.

In short, a majority of the court is of the opinion that the provisions of the act of 1911 above referred to are not repugnant to any of the provisions of the amendment under consideration, and that there is nothing in it which restricts or impairs the exercise of the rights reserved to the people by the amendment. If the framers

of the amendment had thought otherwise, as above stated, the simple and natural thing to have done would have been to declare that the act of June 30, 1911, was repealed, and not merely that it was repealed in so far as it conflicted with the provisions of the later amendment to the Constitution.

We do not think there is anything in the case of *State ex rel.* v. *Olcott,* 62 Ore. 277, 125 Pac. 303, that is in conflict with this holding; but, on the contrary, we think that the decision in the present case is in harmony with that case. The court there held that, if the petition for referendum substantially complied with the requirements of the law, that was all that was necessary. The court held that it was not necessary to have a full and correct copy of the title and text of the measure proposed attached to each sheet of the petition. This would make each sheet a separate petition and would be putting form above substance. No matter how many signers there are to a petition and how many sheets are used, they are pasted together and become a constituent part of the same petition. It is only necessary that a full and correct copy of the measure on which the referendum is asked be filed with the petition and attached thereto, in order that the petitioners may have the opportunity to read it and inform themselves as to the act to be referred before signing the petition, if they wish to do so.

Therefore, it is ordered that the petition for mandamus be dismissed.

Mr. Justices SMITH, HUMPHREYS and KIRBY, dissent.

HUFFMAN *v.* HENDERSON COMPANY.

Opinion delivered October 5, 1931.

H. V. Betts, J. M. Shackleford and *Coulter & Coulter,* for appellants.

J. K. Mahony, H. S. Yocum, W. T. Saye and *J. N. Saye*, for appellees.

SMITH, J. Prior to the assessment for the general taxes of 1924, there had been a severance of both the timber and the mineral rights from the north half of the northwest quarter of the northeast quarter of section 8, township 18 south, range 15 west, in Union County, Arkansas, and this severance had been effected by deeds duly executed and of record in that county.

The land above-described was assessed for the year 1924, and, no taxes being paid thereon, the same was sold in June, 1924, to F. M. Betts. On June 30, 1927, the tax purchaser having died, the county clerk executed his tax deed to H. V. Betts, the administrator of the deceased tax purchaser. The owners of the separate interests in the above-described land have joined in this suit to cancel

the clerk's deed, and from a decree awarding that relief is this appeal.

In support of this decree, it is insisted that the sale of said land was void because the separate interests in said land were not separately assessed. It is also insisted that there was no authority to execute a deed to the administrator of the tax purchaser, as the statute requires such deeds to be made to the heirs or assigns of the purchaser, and that the court below was correct in canceling the deed to the administrator, whether the sale was void or not.

At the 1897 session of the General Assembly an act was passed for the assessment of mineral rights, which appears as § 9856, Crawford & Moses' Digest, and reads as follows: "When the mineral rights in any land shall, by conveyance or otherwise, be held by one or more persons, and the fee simple in the land by one or more other persons, it shall be the duty of the assessor when advised of the fact, either by personal notice, or by recording of the deeds in the office of the recorder of the county, to assess the mineral rights in said lands separate from the general property therein. And in such case a sale of the mineral rights for nonpayment of taxes shall not affect the title to the land itself, nor shall a sale of the land for nonpayment of taxes affect the title to the mineral rights." Acts 1897, p. 38.

"That mines may form a distinct possession and a different inheritance from the surface lands has been long settled in England," as was said in the case of *Caldwell* v. *Copeland,* 37 Pa. St. 427, 78 Am. Dec. 436, and the act quoted was not intended to create these different estates, but to provide for their separate assessment for purposes of taxation. As these estates might be separately owned, the intent of the statute quoted was that they should be separately assessed, so that each owner might pay the taxes upon his own estate, and upon that only. This intent is unmistakably manifested in the provision that " * * * a sale of the mineral rights for nonpayment of taxes shall not affect the title to the land

itself, nor shall a sale of the land for nonpayment of taxes affect the title to the mineral rights."

Many cases by this court have settled the law that a valid assessment is essential to a valid sale of the property taxed for the nonpayment of the taxes, and the description of the property assessed and sold must be such as to apprise, not only the owner, but all other persons, of the property to be sold. *Brinkley* v. *Halliburton,* 129 Ark. 334, 196 S. W. 118, 1 A. L. R. 1225; *Cotton* v. *White,* 131 Ark. 273, 199 S. W. 116; *Buchanan* v. *Pemberton,* 143 Ark. 92, 220 S. W. 660; *American Portland Cement Co.* v. *Certain Lands,* 179 Ark. 553, 17 S. W. (2d) 281.

Here the description employed at the sale described only the surface of the land, and contained no reference to the mineral or timber rights. Such description is ordinarily sufficient to cover both the timber rights and the mineral rights, as well as the surface rights and an assessment and a sale under a description of the surface only would operate to include both the timber and mineral rights, unless there had previously been a severance of these rights. But the statute quoted has provided that there must be a separate assessment where there has been a previous severance, and that in such case the sale of one does not affect the title to the other.

The State of Minnesota has a statute (§ 1973, Gen. Stat. 1913) which reads as follows: "That whenever any mineral, gas, coal, oil, or other similar interests in real estate are owned separately and apart from and independently of the rights and interests owned in the surface of such real estate, such mineral, gas, coal, oil, or other similar interests may be assessed and taxed separately from such surface rights and interests in said real estate, and may be sold for taxes in the same manner and with the same effect as other interests * * * are sold for taxes."

This statute is similar to ours except that it does not specifically provide, as does § 9856 of our statutes, that a sale of the mineral rights for the nonpayment of the

taxes thereon shall not affect the title to the land itself, nor that the sale of the land for the nonpayment of the taxes thereon shall not affect the title to the mineral rights.

A tract of land was sold in the State of Minnesota for the nonpayment of the taxes thereon, upon which the mineral rights had been severed by a conveyance thereof, and it was held that: "A tax certificate, based upon tax proceedings in which the property is described by its government description, without mentioning a mineral interest owned separately from the surface, does not cover such mineral interest."

In the opinion so holding (*Washburn* v. *Gregory Company,* 125 Minn. 491, 147 N. W. 706, L. R. A. 1916D, 304) it was said: "But it was the duty of the taxing officers, under the statute, as well as under the common law, to assess and tax separately the interests of plaintiff and those of the owner of the surface. The deed separating the mineral rights from the surface rights was of record at the time the tax was levied and became a lien. It is to be presumed that the taxing officers intended to follow the law. These considerations are helpful in reaching a decision whether the description of the property used in the tax proceedings includes the mineral rights. It contains no mention of any such right or interest. Manifestly it would have been easy to have described the property taxed as 'mineral rights,' as it would have been to describe it as 'surface rights.' The description used does neither, but is merely the government description. The interest of plaintiff in the minerals was plainly real estate, and properly taxable separately. The law directed the assessing officers to tax it separately. If the separate interest of the mineral owner is covered by this description, the result is that his property is taxed without notice to him, under the guise of taxing the property of another. The courts do not favor such a result. In *Eastman* v. *St. Anthony Falls Water Power Co.,* 43 Minn. 60, 44 N. W. 882, the question was as to what land was included in the description used in the tax proceedings.

Mr. Justice VANDERBURGH said: 'The title of each party being of record, it will not be presumed that the separate property of different parties is embraced under one general description in tax proceedings, if the same may be applied and limited to the land of one, and not to that of the other. The description, when applied to the subject-matter, * * * is susceptible of the construction claimed for it by the defendant. An opposite construction would be misleading, * * * and ought not therefore to be upheld.' This language seems particularly appropriate here. The description in the case at bar when applied to the subject-matter, and viewed in the light of the facts and the law as they existed at the time the tax was levied, is fairly susceptible of the construction claimed for it by the plaintiff and adopted by the learned trial court. We therefore decide that the mineral or mineral rights of plaintiff were not covered by the description in the tax proceedings, and were not taxed in those proceedings."

We have here the identical case except that § 9856 of our statutes declares the conclusions reached and announced by the Supreme Court of Minnesota in the construction of their statute, which is not as broad as ours.

Our statute upon the assessment of timber rights is more nearly like that of Minnesota above quoted. It was passed at the 1905 session of the General Assembly (Act April 7, 1905, p. 361), and appears as § 9855, Crawford & Moses' Digest, and reads as follows: "Hereafter all timber in this State which has been sold separately and apart from the land on which it stands shall be classed as personal property, and shall be subject to taxation as such. And the said timber interests shall be assessed and the taxes collected thereon in the county where said timber is located."

We feel constrained, therefore, to give our statute upon the assessment of timber rights (§ 9855, Crawford & Moses' Digest) the same construction as was given by the Supreme Court of Minnesota to the statute of that State above quoted. The statute of this State in regard to

the assessment of mineral rights (§ 9856, Crawford & Moses' Digest) is too unambiguous to admit of any other construction.

We therefore hold that, when there has been a severance of either the timber or mineral rights by a deed duly recorded in the office of the recorder prior to the assessment for taxation purposes, such rights must be assessed separately and apart from the surface rights, and when this has not been done the assessment made will be held to apply only to the surface rights, and a sale under this assessment will operate to convey only the title to the surface rights.

The case of *Peterson* v. *Hall,* 57 W. Va. 535, 50 S. E. 603, and other cases following it, which depended upon the construction of the taxation statutes of West Virginia, are cited as having reached the opposite conclusion. A headnote in the Peterson case reads as follows: "When the surface of land is owned by one person, the oil in place by another, a sale for taxes in the name of the owner of the surface will pass also the oil owned by the other person, his estate not being charged on the tax books, under § 25, chapter 31, Code 1899."

It was said in the opinion in the case of *Peterson* v. *Hall, supra,* that "Chapter 31, § 25, Code, makes a tax deed pass 'such right, title and interest in and to said real estate as was vested in the person or persons charged with taxes thereon for which it was sold, at the commencement of, or at any time during the year or years for which said taxes were assessed, and all such right, title and interest therein of any other person having title thereto, who have not in his or their own name been charged on the land book of the proper county or assessment district, with the taxes chargeable on such real estate for the year or years for the taxes of which the same was sold, and, having actually paid the same as required by law, shall be transferred to and vested in the grantee in such deed.' "

We have no such statute. It was further said in the Peterson case that "A lease for oil confers no actual

estate until oil is found, but only a right to explore and produce oil. *Urpman* v. *Lowther Oil Co.*, 52 W. Va. 501, 44 S. E. 433, 97 Am. St. 1027," and that "The South Penn Company had only an inchoate right. No taxable estate was then in the South Penn Company (the lessee) for want of development."

We have held, on the contrary, that a conveyance of the mineral or the timber rights, or a reservation of such rights in a deed conveying the surface rights, creates, in one case and reserves in the other, a separate estate, and the statutes quoted (§§ 9855 and 9856, Crawford & Moses' Digest) make this estate separately taxable. *Bodcaw Lumber Co.* v. *Goode,* 160 Ark. 48, 254 S. W. 345, 29 A. L. R. 578; *Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S. W. (2d) 390, 67 A. L. R. 1436.

The case of *State, ex rel. Attorney General* v. *Arkansas Fuel Oil Co.,* 179 Ark. 848, 18 S. W. (2d) 906, was a suit for back taxes on certain oil leases which had not been separately assessed for taxation, and we were there called upon to construe § 9856, Crawford & Moses' Digest, and we said: "We construe this statute to mean that the property conveyed to the lessee in mining lease is taxable separately from the land. This court has recently held that the rights granted to the lessee are not a license, but an interest and easement in the land itself," and a number of cases to that effect were there cited.

We conclude, therefore, that the Minnesota case, *supra,* and not the West Virginia case, is applicable to the facts in this case.

In so far as the clerk's tax deed to the administrator of the estate of the tax purchaser appears to convey title to either the mineral or the timber rights, it was properly canceled, and that decree is affirmed.

As to the form of this tax deed, it may be said that the statute (§ 10,108, Crawford & Moses' Digest) provides that, upon the expiration of the two years after the sale allowed for the redemption, the clerk of the county court, on the production of the certificate of purchase, shall execute "to the purchaser, his heirs or assigns," a deed

of conveyance for the land described in such certificate. The deed should therefore have been made to the heirs or assigns of the tax purchaser, and not to his administrator, as was done in this case.

This, however, was a mere error in the exercise of the power and duty conferred by the statute upon the clerk, and did not exhaust the power to execute a deed conforming to the requirements of the statute, and that officer may yet execute a deed conveying the land, but excepting from the conveyance the timber and mineral rights, which were not included in the assessment pursuant to the authority of which the land was sold for taxes.

At § 379 of the chapter on Taxation, 26 R. C. L., page 421, it is said: "When there has been a sale for nonpayment of taxes carried out in accordance with law, and all the conditions have been complied with so as to entitle the purchaser to a deed of the premises, the power of the collector to execute and deliver a valid deed is not exhausted by the execution and delivery of an invalid one, and, if the deed first delivered is defective and invalid, the collector may execute and deliver a substitute deed, which, if drawn up in accordance with the statutory requirements, will be as effective to pass the title as if the prior invalid deed had never been delivered. The length of time that has elapsed since the first deed was issued does not affect the right to issue a second one. The collector may make a valid substitute deed even after his term of office has expired, or his successor in office may make it."

The decree of the court below is therefore affirmed, and the heirs or assigns of the tax purchaser may yet apply to the clerk of the county court of Union County for a deed conforming to the directions and requirements of the statutes, but excepting the mineral and timber rights.

HAMPTON *v.* DODD.

Opinion delivered October 5, 1931.

W. M. Thompson, for appellants.

McCaleb & McCaleb, for appellees.

HUMPHREYS, J. Appellant brought ejectment in the circuit court of Independence County against appellees to recover lots 1 and 2, block 61, in the School Addition to the city of Batesville, Arkansas, in which he relied upon a tax title purchased from the State as a basis of the action. It was alleged in the complaint that the lots were forfeited and purchased by the State for the non-payment of the taxes of 1926, and that appellant bought them from the State in March, 1930; that appellees were in possession of the lots and refused to vacate same after notice and demand to do so. These allegations were followed by a prayer for possession and rents.

Appellees answered, attacking the validity of appellant's tax title upon the following grounds:

First, because the tax collector did not file with the clerk of the county court by the second Monday in May the list of delinquent taxes required by § 10,082 of Crawford & Moses' Digest.

Second, because the clerk of the county court did not, prior to the thirteenth day of June, 1927, make any record

of certification of the publication of the advertisement of said sale, required by § 10,084 of Crawford & Moses' Digest.

The cause was submitted to the court sitting as a jury upon the pleadings and testimony introduced by the parties from which it was found that appellant's tax title was void for the reasons set out in appellee's answer and upon which finding appellant's complaint was dismissed, from which is this appeal.

It must be presumed on appeal that the finding and judgment were correct unless some error appears on the face of the record as the testimony adduced on the trial has not been brought into the record by a bill of exceptions.

It is argued by appellant that the officers were excused from complying with §§ 10,082 and 10,084 of Crawford & Moses' Digest because on the 8th day of April, 1927, the Governor of the State of Arkansas issued and filed in the office of the Secretary of State a proclamation extending the day for the payment of taxes until the second Monday in June, 1927. Such proclamation postponed the date of payment and relieved the property owners from penalties for failure to pay same, but did not suspend the mandatory duties imposed upon the officers by said sections preliminary and prerequisite to selling the lands for nonpayment of taxes.

It is also argued by appellant that the decisions of this court construing said sections to be mandatory were rendered prior to the passage of act 129, p. 693 and act 296, p. 1235 of the Acts of the General Assembly of 1929. Neither of the acts referred to undertook to amend or repeal §§ 10,082 or 10,084 of Crawford & Moses' Digest.

No error appearing, the judgment is affirmed.

THOMAS *v.* SEWELL.

Opinion delivered October 5, 1931.

J. M. Carter and *B. E. Carter,* for appellant.

Will Steel and *James D. Head,* for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Miller County dismissing the complaint of appellant, a taxpayer of said county, for an injunction to restrain appellees from issuing and selling bonds in the sum of $150,000, bearing interest and maturing serially on October first of each year from 1931 to 1951, to construct a new county jail, said bonds to be paid by special levy of one and two-tenths mills per annum during said period on each dollar of all taxable property in said county according to the assessed value thereof, the estimated amount to liquidate the bonds being a total of $237,200.

The authority to issue and sell the bonds was attacked on several grounds, one of which was that the order of the county court, signed on October 3, 1930, approving the plans and specifications for the proposed new county jail and ordering and directing the question of the construction of same to be submitted to the qualified voters at the general election of November 4, 1930, was not entered on the judgment record of the county court prior to said election. This ground of the attack was based upon the language of § 3 of Amendment No. 17 to the Constitution of the State, providing that court houses and jails may be constructed in counties when a

majority of the electors voting on the question so authorize, which is as follows:

"Section 3. Any and all such plans, specifications and estimates may, when considered, be rejected by the county court and new ones or alterations of the original ones ordered to be made, and when such preliminary set of such plans and specifications and estimates is filed and shall meet the approval of the county court, an order approving the same shall be entered of record, and the court shall order and direct the question of the construction of such building or extensions to be submitted to the qualified electors of such county at the next general election held thereafter; provided, however, that if no general election for county and State officers will, under the law, be held within one year of the making of said order, then the county court may by order entered of record call a special election * * *."

The facts responsive to this ground of attack are undisputed. On October third, the county judge signed a precedent for an order approving the plans, specifications and estimated costs for a new jail which had been prepared and filed by the architects, made notation thereof on its docket and directed the clerk to enter the order on the judgment record. The precedent for the order had been prepared in triplicate, and one copy was certified by the clerk and handed by the judge to the election commissioners of the county. The clerk left a blank space on the judgment record properly numbered for entry of the order, and left the precedent for same in the book at the proper page to be entered later. It was lost out of the book, and was not entered on the record until February, 1931, and was entered then by *nunc pro tunc* order of the county court. This was about three months after the election at which the question was presented and approved by a majority vote of the electors.

A majority of the court, in which the writer and Mr. Justice McHaney do not concur, are of opinion that the provision in the amendment to the Constitution requiring the approving order of the plans, specifications,

and estimated cost of the county jail to be entered of record is a mandatory prerequisite to the construction thereof. It is their opinion that the only purpose for the requirement was to provide authentic information for the voters concerning the kind, character and cost of the jail to be erected, in order that they might intelligently cast their vote in favor of or against the construction thereof. This being the purpose, it follows that the requirement is mandatory and not merely directory, else the voter could derive no benefit whatever from it. The failure to enter the order on the record a reasonable time before the election was a jurisdictional defect which avoided the authority conferred at the election to construct a new jail and to issue and sell bonds to pay for the construction thereof by special levy. The building thereof is inhibited by the rule of construction announced and applied in the cases of *Gregory* v. *Bartlett,* 55 Ark. 30, 17 S. W. 344; *McAdams* v. *Henley,* 169 Ark. 97, 273 S. W. 355; *Venable* v. *Plummerville,* 130 Ark. 477, 198 S. W. 106; and *Morris* v. *Levy Lbr. Co.,* 103 Ark. 579, 148 S. W. 252.

On account of the error indicated, the decree is reversed and the cause is remanded with directions to the chancery court to enjoin appellees from taking any steps toward the construction of a new county jail.

ÆTNA LIFE INSURANCE COMPANY *v.* HEIDEN.

Opinion delivered October 5, 1931.

[redacted]

Frauenthal, Sherrill & Johnson, for appellant.

Donham & Fulk, for appellee.

KIRBY, J., (after stating the facts). The policy was issued and delivered. The premium was not paid, although twice demanded, but the parties swore to a different understanding about whether it was delivered on the condition that it was to cover the operation of a toboggan slide in the swimming pool. Finally appellant notified insured that it refused to cover this risk, the agent again demanding payment of the premium, and negotiations were begun with another agency for a policy that would cover the risks as desired by appellee. The evidence is in conflict as to what the agreement on this point and the surrender of the policy was; appellee claiming that, upon being informed that no other agency would probably issue a policy to cover the risk of a toboggan slide alone, agreed to procure another policy immediately covering all the risks and to surrender appellant's policy when this was done. Negotiations were begun with other agencies, and before any policy was issued, this policy having been demanded after insured's negotiations with other agents and their agreement to issue such policy as desired, was surrendered to appellant company on the morning of August 1, by appellee's wife; not for cancellation, she said, but to prevent her having to make a trip to town upon receipt of the other policy.

Appellant claimed the policy was canceled on the morning of the day of the accident in the evening and denied any liability under the terms of its policy therefor.

The evidence is in conflict, and a careful examination discloses it is sufficient to support the jury's verdict against appellant on the question of liability.

The court is of opinion, however, that, under the terms of the policy, conceding it to have been in force in accordance with the jury's finding, the lower court erred in refusing to allow the admission of the testimony as to the reasonableness of the fees paid for the defense of the suit and also in instructing the jury that, if they found for appellee, their verdict would be for the amount paid by him to the two firms of attorneys, $1,500 each, less the $100 premium due upon the policy. Appellant company was only bound under the terms of the policy for the defense of the suits, and, having denied any liability and refused to defend them, appellee could only recover reasonable attorney's fees for making the defense against the claims for damages that appellant had denied liability on, and refused to defend against.

Our statute provides for recovery of reasonable attorney's fee for the prosecution and collection of the claims under certain kinds of policies of insurance, and in its construction this court has held that it contemplates the employment of only one competent attorney; and that the reasonableness of the fee for the service performed can be shown by testimony of the opinions of experienced attorneys, qualified to make such statements, and the court's knowledge of such matters may be exercised to some extent in determining the value of such service—the company being required to pay only a reasonable fee for the service and not a speculative or contingent one. *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554, 164 S. W. 720; *Indiana Lumbermen's Mutual Ins. Co.* v. *Meyers Stave Mfg. Co.,* 158 Ark. 199, 250 S. W. 18; *Maryland Casualty Co.* v. *Maloney,* 119 Ark. 442, 178 S. W. 387 L. R. A. 1916 A 519; *Lilly* v. *Robinson Mercantile Co.,* 106 Ark. 571, 153 S. W. 820; *Valley Oil Co.* v. *Ready,* 131 Ark. 531, 199 S. W. 915; *Shackleford* v. *Arkansas Baptist College,* 181 Ark. 363, 26 S. W. (2d) 124; *Bayou*

Meto Drainage Dist. v. *Chapline,* 143 Ark. 446, 220 S. W. 807.

The general rule is stated in 36 C. J. 1113, under the title "Liability Insurance" as follows: "Where the insurer does not exercise its right or fulfill its duty to conduct the defense of the action by the injured person against insured, * * * insured should use reasonable care and diligence in conducting the defense, although the policy provides that he must not interfere with the litigation. In such case assured is under a duty to conduct the defense in such a manner as to make the loss as small as he reasonably can; and insurer has no right to control the defense as conducted by insured, and is not entitled to further notice of the proceedings."

In *Shackleford* v. *Ark. Baptist College, supra,* the court said: "The general rule is stated in 2 R. C. L., p. 1048, as follows: 'In the absence of an express contract of employment between an attorney and his client fixing the amount of the attorney's compensation, it is generally held that the attorney is entitled to what his services are reasonably worth, or what has usually been paid to others for similar services'."

No showing was attempted to be made by appellee of the reason of or the necessity for the employment of two attorneys or firms of attorneys in this case and the payment of a fee to each of them of $1,500. The allowance of such an amount for a fee or rather for compensation to two attorneys instead of one, no necessity being shown for the employment of two, was unwarranted and clearly excessive, and the court erred in the failure to allow the introduction of the testimony of experienced attorneys that $500 would have been a reasonable fee for the defense of the suit; and also in taking the question of the reasonableness of the amount paid for such attorneys' fees from the jury by its instruction telling the jury to find, if they found appellee entitled to recover, for him in the amount of the fees paid to both attorneys, $3,000, less the $100 unpaid premium due upon the policy.

Appellant cannot complain of the failure to introduce in testimony the policy sued on as the basis for the action, since it was alleged to be in its possession, and appellee's complaint requested that it be produced by said company. If the terms of the policy sued on were not correctly shown by the testimony, the appellant could have produced the policy, it being in its possession, and doubtless would have done so had it thought its production would be to its interest and its terms more favorable to its contention in the trial. It certainly cannot complain of its non-production, having it in its possession and refusing to produce it upon the request of appellee.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

KOLLAR *v.* NOBLE.

Opinion delivered October 5, 1931.

M. F. Elms and *W. A. Leach,* for appellant.

Ingram & Moher, for appellee.

MEHAFFY, J. Anton Kollar, a resident of Christian County, Illinois, was the owner of a rice farm consisting of 490 acres in Arkansas County, Arkansas, and,

in order to enable him to make and harvest the crop for 1924, he borrowed from the First National Bank of Stuttgart, Arkansas, $1,824.54 and gave his note therefor.

Anton Kollar died at his home in Illinois on the 18th day of February, 1924, and left surviving him Anna Kollar, his widow.

The will of Anton Kollar was filed in the County Court of Christian County, Illinois, and letters testamentary issued to John Gillespie, February 27, 1924.

The appellant filed with the county court of Christian County, Illinois, her deed of renunciation of the will of Anton Kollar. When Kollar died, he owed the First National Bank of Stuttgart, Arkansas, a balance on the note above referred to. The First National Bank was the only Arkansas creditor.

E. H. Noble was appointed by the probate court of Arkansas County as ancillary administrator and filed a bond which was signed by E. C. Benton as surety. Noble took charge of the Arkansas lands belonging to the estate of Kollar and received the rents therefrom. The bank's claim was allowed and paid. The following is the settlement filed by the ancillary administrator:

RECEIPTS

Rents collected	$3,235.88

DISBURSEMENTS

Paid premium on policy	$44.61
Attorney's fee allowed by court	150.00
Administrator's fee	211.75
Court costs	4.85
Paid claim of First National Bank	2,770.59
	3,181.80
Balance on hand	54.08

Appellant's dower had never been assigned. The following is a copy of the will of Anton Kollar:

"I, Anton Kollar, of Pana in the County of Christian, and State of Illinois being of sound mind and mem-

ory, and considering the uncertainty of this frail and transitory life, ordain, publish, and declare this to be my last will and testament.

"First: I order and direct that my executor hereinafter named, pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

"Second: After the payment of such expenses and debts, I direct my executor hereinafter named to sell at private or public sale all my real estate and personal property not hereinafter disposed of to the best advantage possible within five years from this date and from the proceeds thereof pay all my just debts which are not paid at the time and then my wife the sum of fourteen thousand dollars which I owe her. The balance of the proceeds to be divided as follows: one thousand dollars to Rose Berniker of Springfield, Illinois. The balance of proceeds to be divided into three parts, one part to my wife, one part to my son, and one part to my daughter. Until said real estate and personal properties disposed of by my executor as above set forth, I empower him with authority to manage said property, to collect rents and to repair and keep property up, and when sold I authorize him to make deeds of conveyance for the real estate and bill of sale for any personal property in case I have now or do in the future deed any property to my said wife, the fair cash value of said property is to be deducted from the sum of $14,000 above mentioned as owing her. The son named above is Dr. John A. Kollar of Chicago, and the daughter is Mrs. Emma Laino, (nee Emma Kollar) of Springfield, Illinois. All household goods I hereby give to my wife for her own use forever.

"Lastly, I make, constitute and appoint John Gillespie to be executor of this my last will and testament, hereby revoking all former wills by me made. In witness whereof, I have hereunto subscribed my name and affixed my seal, the 11th day of February of the year of our

Lord one thousand and nine hundred and twenty-four.

"Anton Kollar (Seal)

"This indenture was on the day of the date thereof, signed, published and declared by said testator, Anton Kollar, to be his last will and testament, in the presence of us, who at his request have subscribed our names thereto as witnesses, in his presence and in the presence of each other.

"Ernest L. White,
"John P. Moroney,
"Adolph Fillipitch."

The appellant filed her complaint in the circuit court of Arkansas County, describing the lands owned by said Anton Kollar in his lifetime, and alleging the amount collected as rents from said lands and the payment to the bank, and prayed judgment against the administrator and his surety and the First National Bank of Stuttgart, Arkansas, in the sum of $1,628.62 with interest, as her dower in said property.

The case was tried before the circuit judge, sitting as a jury, and the court found for the defendants and dismissed her complaint. The case is here on appeal.

We deem it unnecessary to set out the evidence because there is practically no dispute about the facts. We do not deem it necessary to set out the plaintiff's request for finding of fact. Plaintiff's request for declarations of law are as follows:

"No. 1. Refused by the court.

"The provisions in the will of Anton Kollar, deceased, for his widow Anna Kollar, are a gift of personal property and not real estate.

"No. 2. Refused by the court.

"The provisions in said will made by the said Anton Kollar for his widow, Anna Kollar, are not in lieu of dower, but in addition thereto.

"No. 3. Refused by the court.

"The provisions of said will, being a gift of personal property, are not in lieu of dower, and the said

Anna Kollar was not required, under the law, to file a renunciation in Arkansas on the provisions of the will.

"No. 4. Refused by the court.

"The renunciation filed by the said Anna Kollar in the county court of Christian County, Illinois, was a renunciation of the provisions of said will in full compliance with the laws of Illinois in such cases made and provided.

"No. 5. Refused by the court.

"The plaintiff, Anna Kollar, is entitled to one third of all the rents that come off the lands in Arkansas County, Arkansas, free and clear of all expenses of administration, that came into the hands of E. H. Noble as ancillary administrator of the estate of Anton Kollar and the said E. H. Noble and his bondsman, E. C. Benton, are liable to the said plaintiff for the one third of the rents received by such ancillary administrator."

The court gave all the requests for findings of fact except one, and that one is as follows: "The said Anton Kollar left him surviving no child or children nor descendants of any child or children." The court refused to make this finding of fact.

It is conceded under the will there was no real estate devised, but that the property devised was personal property. It therefore becomes unnecessary to discuss or refer to the many authorities to which attention is called in appellant's brief.

Section 3538 of Crawford & Moses' Digest is as follows: "If any husband shall devise and bequeath to his wife any portion of his real estate of which he died seized, it shall be deemed and taken in lieu of dower out of the estate of such deceased husband, unless such testator shall, in his will, declare otherwise."

But, since the property devised was personal property and not real estate, this section had no application, and is not important except it might be considered in connection with § 3526 for the purpose of properly construing the latter section. This section reads as follows: "If land be devised to a woman, or a pecuniary

or other provision be made for her by will in lieu of her dower, she shall make her election whether she will take the land so devised or the provision so made, or whether she will be endowed of the lands of her husband."

It is contended by the appellees that the will made a pecuniary provision for the appellant in lieu of dower, and that it was therefore necessary for her to file a deed of renunciation in Arkansas County. If the provisions in the will for the wife were in lieu of dower, she would have no right to dower in the property in Arkansas, and the case should be affirmed.

If the provisions made for the wife were not in lieu of dower, then she was entitled to dower in the Arkansas property, and she would not be required to file any renunciation of the will.

Many authorities are cited and discussed by learned counsel on both sides, but we deem it unnecessary to review them here, the only question being whether the provisions in the will are in lieu of dower.

This court recently said: "Under the common law the testator will not be presumed to have intended a devise in his will to be a substitute for dower, unless the claim of dower would be inconsistent with the will, or so repugnant to its provisions as to disturb and defeat the will. In other words, at common law it is held that where the testator's intention was not apparent in the will, the devise would be presumed to be in addition to dower." *Gathright* v. *Gathright,* 175 Ark. 1130, 1 S. W. (2d) 809.

Again the court said in the same case: "The will under consideration bequeaths personal property and also contains a devise of real estate. It has been held under the statutes like that just referred to above that a legacy of personal property will not put the widow to her election as in the case of a devise of real estate unless expressly made in lieu of dower." The court cites *Booth* v. *Stebbins,* 47 Miss. 161; *Pemberton* v. *Pemberton,* 29 Mo. 408, and cases cited in note to 22 A. L. R. 50.

We do not think the claim of dower is inconsistent with the will, or repugnant to its provisions, so as to defeat or disturb the will. Since we hold that the claim of dower is not inconsistent with the will nor repugnant to its provisions, it becomes unnecessary to discuss or review the authorities cited on the question of election.

The declarations of law requested by the appellant should have been given.

It is next contended by the appellees that appellant's action was barred. We do not agree with this contention. The rents were collected by the ancillary administrator from February 1 to June 7, 1929, and the action was therefore not barred.

The court erred in refusing to make the declarations of law requested by appellant.

The judgment of the circuit court is therefore reversed, and the cause remanded for a new trial.

McHaney, J., dissents.

Goynes *v.* State.

Opinion delivered October 5, 1931.

Atkins & Stewart, for appellant.

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

MEHAFFY, J. The appellant was indicted for murder in the first degree and was convicted of manslaughter, and his punishment fixed at five years in the penitentiary.

It was alleged that he shot and killed one Jesse Campbell. The only assignments of error are as follows: (1) The prejudicial testimony of witness Homer Burke. (2) The error in admitting over appellant's objection the purported dying declaration of the deceased, Jesse Campbell.

It would serve no useful purpose to set out the testimony, as there is no contention that the evidence is not sufficient to support the verdict.

The testimony of Homer Burke which the appellant claims was erroneously admitted is as follows: "So he told us, says, 'Now I want you to lock Vernie Goynes up; he told me he was going home and get his gun and come back and kill me'."

Appellant contends that, the above testimony having been admitted over his objections, the error was not cured by the court excluding this testimony and directing the jury that they could not consider it. Appellant admits that the general rule is that, when the court admits incompetent testimony, and afterwards excludes it from the consideration of the jury, this cures the error.

In the trial of a case in the circuit court, it sometimes happens that incompetent evidence is admitted,

and when it appears to the court that any evidence admitted is incompetent, it is the duty of the court to exclude it from the consideration of the jury, and to instruct the jury not to consider it.

Trial courts must necessarily have large discretion in the admission and rejection of evidence. Of course, this discretion must be exercised carefully so as to result in no prejudice to the defendant. If, however, the court has admitted testimony that he afterwards concludes is incompetent, certainly he should not be required to continue in this error; but it is his duty to correct the error. The trial judge can only do this in the manner done in the instant case, or, at the request of the defendant, the case might be withdrawn from the jury and tried before another jury.

The Texas court said: "We think the true rule on this subject to be: If the testimony is not of a very material character, it may be withdrawn by the court, and the error thus cured; but if, on the contrary, the evidence is of a material character, and was calculated to influence or affect the jury, the withdrawal of the same from their consideration would not heal the vice of its admission." *Barth* v. *State,* 39 Tex. Cv. R. 381, 46 S. W. 228, 73 A. S. R. 935.

The evidence objected to in this case is the testimony of Burke, to whom Campbell went after the first difficulty and made the statement testified to by Burke. This same statement was in Campbell's dying declaration which was introduced in evidence, and no objection was made to the dying declaration of Campbell on this ground. Moreover, the appellant himself, when the evidence was introduced over his objection, asked the court to exclude it.

The dying declaration having already been introduced, containing the same evidence given by Burke, and no objection having been made to its introduction on this ground, the evidence of Burke was cumulative.

"The admission of objectionable evidence is not cause for reversal where the same or substantially the

same evidence has been previously received without or over objection, and it does not appear that the evidence, when admitted the second time, exerts more influence than when admitted the first time, or that other prejudice has resulted." 38 Cyc. 1418.

"The general rule is that, if evidence erroneously admitted during the progress of a trial is distinctly withdrawn by the court, the error is cured, except in extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remains despite its exclusion and influences their verdict." 38 Cyc. 1440.

"The general rule is that if inadmissible evidence has been received during the trial, the error of the admission is cured by its subsequent withdrawal before the trial closes, and by an instruction to the jury to disregard it." 38 Cyc. 1441.

Appellant objects to only a portion of the answer of the witness. The question was: "Well, what was his condition?" The witness answered: "Well, he had a few scratched places on his face and his left eye was blue."

The witness then volunteered the statement to which appellant now objects. The question was proper and was not objected to. That portion of the answer above quoted was competent. The appellant did not point out that portion of witness' statement to which he now objects, but after the witness had answered he stated: "Now, we object to that, your Honor."

It was his duty to point out the part of the answer of the witness to which objection was made. No one could have anticipated that the witness would volunteer the statement which is now objected to, and there was nothing the court could do to correct it except withdraw it from the consideration of the jury as he did. If the court could not do this, then any witness might cause a mistrial by making a statement that no one expected him to make, that the court could not have anticipated he would make, in answer to a proper question.

The court not only directed the jury not to consider this evidence, but they evidently did not consider it. Appellant was not found guilty of murder, but of manslaughter.

It is next contended by the appellant that the court erred in admitting the dying declaration of the deceased Jesse Campbell. The only objection made to the dying declaration as evidence, however, is that there was no competent testimony introduced on the part of the State to show that the deceased was mentally competent to make a statement. There is no evidence in the record tending to show that he was unconscious, but the doctor did not know whether he was competent or not, but stated that he was suffering. He also said that he answered the questions, told them how it happened, and made a clear statement of it.

It is the province of the court to determine whether a dying declaration was made under circumstances that it would justify the court in admitting it, and the weight to be given to the statement is to be determined by the jury. *Sanderlin* v. *State,* 176 Ark. 217, 2 S. W. (2d) 11; *Adcock* v. *State,* 179 Ark. 1055, 20 S. W. (2d) 120.

It was not the duty of the State to show that the deceased was rational, but the evidence in this case does not tend to show that he was not rational, and whether the deceased was of sound mind when he made the statement was a question of the credibility rather than the admissibility of the declaration. 30 C. J. 278; Underhill on Criminal Evidence 231; *Mathis* v. *State,* 15 Ala. App. 245, 73 So. 122.

The admissibility of the declaration was for the court, and it was properly submitted to the jury. It was the province of the jury to determine its weight and the credibility of the witness.

The judgment of the circuit court is affirmed.

DETROIT FIRE & MARINE INSURANCE COMPANY *v.* HELMS.

Opinion delivered October 5, 1931.

Horace Chamberlin, for appellant.

D. D. Terry, for appellee.

McHANEY, J. Appellant brought this action in the chancery court to cancel a policy of fire insurance issued by it to appellee, Scull, which had a standard mortgage clause attached making the loss, if any, payable to appellee, Commonwealth Building & Loan Association, hereinafter called the association, as its interest might appear, after the property covered by said policy had been destroyed by fire and liability, if any, had accrued. The facts, briefly stated, are as follows: The property is located in El Dorado and was left to Mrs. Helms by her husband. It was mortgaged to a bank in El Dorado

by her and insured in appellant with mortgage clause attached. This mortgage was foreclosed, the bank acquiring the property, and the insurance was transferred to it. Mrs. Helms desired to repurchase the property from the bank, which it was willing to sell for its debt, and sought to borrow the money from the Association for this purpose, but it was decided by all parties that she had better not apply for the loan on account of her financial irresponsibility. The Arkansas Finance Company, a corporation of El Dorado, of which Major O. L. Bodenhamer was chairman of the board, was the agent of the Association and also of appellant, and represented all parties to this lawsuit. It was decided that the son of Mrs. Helms apply for a loan of $1,750 to the Association, which he did on August 5, 1929, representing himself to be the owner, intending that the bank should convey to him and he, in turn, execute the mortgage if the loan was granted. This loan was refused by the Association because of an unsatisfied judgment against him. Thereafter, appellee Scull, a responsible business man of El Dorado made application to the Association for a loan, the application being similar to that of Mr. Helms, which was granted September 6, 1929. The bank conveyed to Mrs. Helms, who conveyed to Scull, and he executed the mortgage to the Association, and the deal was closed on September 10, by paying the proceeds of the loan to the bank and all deeds of conveyance being delivered and recorded. Thereupon the Arkansas Finance Company issued the policy in question to Scull with mortgage clause attached to the Association. Scull, Mrs. Helms and her son, thereafter, on the same day, entered into a written agreement that, if the Helms would pay all expenses incident to the transfers and all installments to the Association, Scull would convey the property to Mrs. Helms or her son as she should direct. This agreement, together with other papers, were left with the Arkansas Finance Company, some of whose officers were cognizant of all the foregoing facts. The September installment to the Association was deducted

from the loan. When the October installment became due, default was made, and the Association demanded payment of Scull, who, in turn, demanded same from Mrs. Helms and her son. Not being made, Scull executed a deed to the property back to Mrs. Scull, caused it to be placed of record and delivered it to Arkansas Finance Company, assuming, no doubt, by so doing, he would relieve himself of the embarrassment. On November 13, 1929, the property was totally destroyed by fire, which was reported to appellant, and it, after investigation, decided that fraud had been practiced upon it, that Scull had no title at the time of the fire, that Mrs. Helms had no contract relation with it, and that its policy should be canceled. It thereafter instituted this action for that purpose.

The chancery court took jurisdiction, no question thereto being raised, canceled the policy as to Scull and Mrs. Helms, but rendered judgment against appellant in favor of the Association for the amount of its loan on the property destroyed by fire, with interest, thereby refusing to cancel as to the Association. The court, however refused to give the Association judgment for a large sum paid by it for street taxes after the fire and for penalty and attorney's fees sought to be recovered by it on cross-complaint, so we have here an appeal and a cross-appeal. Neither Mrs. Helms nor Scull claim any interest in the policy and neither have appealed. The situation as to them is, that Scull had a policy but no property, and Mrs. Helms had property but no policy at the time of the fire.

Appellant insists that the policy is void by reason of the facts heretofore stated; that Scull's ownership was not sole and unconditional in violation of such a clause in the policy, as shown by the agreement between Scull and Mrs. Helms; that these facts were known to Arkansas Finance Company, and that the Association was affected with knowledge thereof through its said agent. If the knowledge of the Arkansas Finance Company must be imputed to the association, the same rule must

apply to appellant for the same agent represented both. So appellant had knowledge of the condition of said title through its agent, and with said knowledge issued and delivered the policy in question, and it is difficult to perceive how it can now be heard to say it has been defrauded, overreached or misled, for its agent knew all the facts. But we think the facts do not justify or sustain the charge of fraud. What Major Bodenhamer and his company did, in an effort to assist Mrs. Helms in regaining possession with the hope of acquiring title to her property, taken under foreclosure by the bank, as shown by the preponderance of the evidence, was done in good faith, with no purpose to injure or defraud any one. The property was good security for the loan, and the association makes no complaint. The amount of the policy was for a less sum than it had formerly been in the bank's favor. The record fee simple title was in Scull when the policy was issued, even though he had agreed to reconvey to Mrs. Helms under certain conditions. But, at the time of the fire, Scull had no interest in the property, and Mrs. Helms had no interest in the insurance. The court so held and canceled the policy as to them. But the court correctly held that the association could recover to the extent of its mortgage, as it is well settled that a mortgagee, under a standard mortgage clause, is not affected by the acts or omissions of the insured that would avoid the policy as to him. *Natl. Union Fire Ins. Co.* v. *Henry,* 181 Ark. 637, 27 S. W. (2d) 786.

With reference to the cross-appeal, the record reflects that Mrs. Helms had owned the property covered by the $3,000 policy in controversy and also an adjoining place on which she lived, all of which passed to the bank under foreclosure, and finally to Scull who executed two separate mortgages thereon to the association for $1,750 and $2,750, respectively, the proceeds of which went to pay the bank. It is contended by the association that under a clause in the former mortgage providing that it should stand as security for any other indebtedness due it by the mortgagor, it should have been permitted to recover

the full amount of $3,000 and apply the excess over the $1,750 mortgage on the $2,750 mortgage. Further that it had paid subsequent to the fire $551 improvement taxes on all the property and incurred other expenses which it ought to recover under the policy, as well as penalty and attorney's fees. The chancery court properly denied these claims. As to the taxes all rights accrued when the loss occurred, and, even though secured by the mortgage, they were not so secured until paid by the association which was after the loss. The "other indebtedness" clause does not give the association the right claimed. Under the mortgage clause appellant promised to pay it, in case of loss, as its interest may appear. This means as its interest may appear under the mortgage in question and not under another or wholly different mortgage on different property. The "other indebtedness" referred to some other indebtedness arising subsequent to the date of the mortgage and not indebtedness secured by mortgage on other property under another contract. See *Walker* v. *Whitmore,* 165 Ark. 276, 262 S. W. 678; *Berger* v. *Fuller,* 180 Ark. 372, 21 S. W. (2d) 419.

Not having recovered nor being entitled to recover the amount sued for on the cross-complaint, the association is not entitled to recover the statutory penalty and attorney's fee.

Affirmed both on appeal and cross-appeal.

FINCH *v.* WATSON INVESTMENT COMPANY.

Opinion delivered October 5, 1931.

[redacted]

[redacted]

[redacted]

[redacted]

Knott & Spencer and *Caraway, Baker & Gautney,* for appellants.

Buzbee, Pugh & Harrison, N. F. Lamb and *Frierson & Frierson,* for appellees.

BUTLER, J., (after stating the facts). The duty of the assignees and receivers was to take charge of the property conveyed to them, and they were obligated to faithfully account for all of such property and to make such disposition of it or the proceeds therefrom as the court might direct. The obligation of the surety on the bond was only that its principal should so do. There is no breach of the bond alleged in the complaint, the only allegation relating to the assignees and their surety being that a bond was executed by them upon their appointment as receivers, and that the court ordered them to turn over all of the assets of Taylor, real and personal, to the Watson Investment Company, and that they acted in obedience to said order. The mere fact that the proceedings of Taylor by which he sought to settle with his creditors might have been void could not impose any personal liability on the assignees or their surety where they fully accounted for all assets coming into their hands and paid such over under the direction of the court. This was a complete compliance on their part with their duties, and relieved them from liability under the terms of the bond, and the demurrer as to them was properly sustained.

The main question, however, is: Were the deeds, first to the assignees and then to Watson Investment Company, by which the property of Taylor was conveyed, and the decree of the court made and entered February 28, 1930, void and should they be set aside because in violation of the National Bankruptcy Act?

"It is well settled by a multitude of incontestable authority that the passage of the National Bankruptcy Law by Congress renders it the supreme law of the land, binding alike upon State and Federal tribunals. All State insolvency laws in force at the time must yield to it, and can no longer operate upon persons or cases within the purview of the Federal statute. The latter does not, indeed, repeal or destroy the State laws on the same subject, but it supersedes them and suspends their operation for the time being." Black on Bankruptcy, 4th ed., § 14.

Were the proceedings in the case at bar under the insolvency laws of the State within the meaning of the Federal Bankruptcy Act as construed and applied in the case of *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, 49 S. Ct. 108?

Chapter 93 of Crawford & Moses' Digest contains the State law on that subject, and it was a proceeding under that statute which was held void as in violation of the National Bankruptcy Act in *International Shoe Co.* v. *Pinkus, supra.* It is the contention of the appellants that this is a like proceeding. In this contention we think the appellants err. By the first section of chap. 93, *supra,* (§ 5885), in order to begin proceedings it is necessary for the insolvent debtor to file in the chancery court a complaint in which one or more creditors shall be made defendants, asking to be declared insolvent and for the appointment of a receiver to take charge of the property and to distribute the same among the creditors. The transcript in this case does not contain any such complaint.

By the 4th section of chap. 93 (§ 5888), it is made the duty of the receiver, under the order of the court or the

judge, to convert the assets coming into his hands in money and upon final hearing to distribute it among the creditors, not *pro rata,* but preferring first the salaries of employees earned within three months and all laborers' wages; and preferring second and directing payment *pro rata* among those creditors who should file in court a stipulation for the use of the debtor to the effect that, in consideration of the preference to be thus obtained, the debtor should be acquitted of all further liability in person to such creditors. After making the above payments, the remainder of the funds, if any, are to be distributed equally among the other creditors. In none of the exhibits filed by the plaintiffs with their complaints is there any order for distribution as provided by said section, nor is there any such in the order of the court of February 28, 1930, which is sought to be set aside. It is apparent, therefore, that the procedure was not under chap. 93, as claimed by the appellants.

In the bond executed by the assignees the recital is made, "Whereas, said J. P. Taylor has, by his deed of assignment dated November 1, 1929, conveyed all of his property to the above bound Aline Murray and F. N. Burke for the benefit of all of his creditors, under and by virtue of the laws of this State relating to assignments for the benefit of creditors." The deed of assignment was not made an exhibit with the complaint, but it is apparent from the bond above referred to, which was made an exhibit, that such deed was the first step in the proceeding. Where any person shall desire to make an assignment of his property for the benefit of his creditors, by § 486, chap. 9, Crawford & Moses' Dig., it is made the duty of the assignee named in the deed of assignment to take immediate possession of the property and within ten days thereafter to file with the clerk of the court having equity jurisdiction an inventory of the property, together with a bond with good security, which bond shall be conditioned that the assignee shall faithfully execute the trust confided to him under the provisions of said deed and the order of the chancery court or judge thereof in vacation.

There was no inventory exhibited with the complaint, so that we are unable to know whether or not such inventory was made and filed, but, the deed of assignment having been made and the bond filed, it would appear as if Taylor was attempting to proceed under chap. 9, of Crawford & Moses' Dig., entitled, "Assignment for benefit of creditors," as contended by the appellees, and from the recitals in the order made this also seems to have been the opinion of the chancellor. As we have seen, § 486, of chap. 9, the first section of that chapter presupposes the making of a deed of assignment, makes provision after the deed has been made for the filing of inventory and the giving of bond. By § 487, the assignee is made liable upon his bond for any loss that may occur by reason of his negligence or mismanagement after the property comes into his possession, or for failure to obey the orders of the chancery court in relation thereto, or to carry out the provisions of the assignment. Section 488 provides that the assignment may be contested by any creditor for fraud. Section 489 provides for limitation as to contest of the assignment. Section 490 provides for the sale or disposition of the property upon a showing made by any one interested that it is necessary, and provision is further made for the time, terms and place of sale and the manner thereof to be determined by the court. Other sections provide for the employment of counsel, for the filing of accounts by the assignee, and for the approval and examination of the accounts by the court.

It is contended by the appellants that as all the requirements of chap. 9, *supra,* were not complied with, the inference arises that the proceedings were not had under and by virtue of said chapter; and further, that, if they were so had, such chapter was repealed by the enactment of the insolvency law, now chap. 93 of the Digest, and appellants suggest that "a Philadelphia lawyer should be pardoned if, after reading the record presented to the chancery court in the so-called assignment proceeding, he had erred in determining whether assignees were at-

tempting to proceed under chap. 9 or chap. 93." We confess that the record as presented is somewhat confusing, but from the recitals in the bond and the order of the court of February 28, 1930, it is clear that the proceedings were not such as provided by the insolvency act, but more nearly approach the provisions of chap. 9, *supra,* as contended by the appellees. The right to convey one's property in any manner one might see fit, including the right to make voluntary assignments for the equal benefit of creditors, is one inherent in the ownership of property and which existed prior to the enactment of our statute, which merely regulated the previously existing right and surrounded its exercise with safeguards for the benefit of creditors. *Boese* v. *Ring,* 108 U. S. 379, 2 S. Ct. 765; In re *Ternowski,* 191 Wis. 279, 210 S. W. 836, 49 L. R. A. 686; *Stellwagen* v. *Clum,* 245 U. S. 605, 38 S. Ct. 215.

In this case it seems that there was first a deed of assignment for the benefit of creditors made by Taylor to the named assignees who proceeded to discharge that trust under the provisions of chap. 9, *supra;* but soon after the deed of assignment was executed and the bond filed the creditors of Taylor and Watson made a proposition which was acceptable to the debtor. All of his known debts were listed, and these debts Watson, for himself and his associates, agreed to satisfy in consideration of the transfer by Taylor to them of certain lands named and personal property in the hands of the assignees, except one small tract of land and certain insurance policies which Taylor was allowed to retain. Taylor accepted this proposition, and his acceptance put an end to the proceedings. The assignees and receivers were ordered to deliver to Watson Investment Company, a corporation formed for the purpose of administering the estate of Taylor and the estate of other insolvents, and were discharged from further duty and relieved from liability on account of their trust, and Taylor conveyed his property by proper instruments to the Watson Investment Company for the considerations aforesaid. The

effect of all this was the same as if, without ever having made any assignment for the benefit of creditors, Taylor should have made the trade with Watson by which Watson agreed to pay Taylor's debts, and Taylor in consideration therefor agreed to transfer his property to Watson, which trade was concluded by ascertaining from all available sources a list of the creditors and the amounts owing to each, the assumption of these debts by Watson, and the transfer of property by Taylor to Watson. This, we think, is the effect of the proceedings as finally consummated. Whatever the proceedings in the court, they were abandoned because the debtors and creditors devised a plan mutually satisfactory and more suited to their desires than the disposition of the matter through the agency of the court and of the assignees, and this proceeding can only be attacked for fraud which would hinder, delay or prevent the creditors from collecting their debts.

Every transaction for conveyance of property may be vitiated for fraud, since good faith is the basis of all contracts. *Herman* v. *McSpaulding,* 174 Ark. 184, 295 S. W. 353. But a general allegation to that effect is not sufficient. The complaint must allege facts upon which the conclusion is based. *Baxter County Bank* v. *Copeland,* 114 Ark. 316, 169 S. W. 1180. It is true the insolvency of the debtor is alleged, but this of itself is not sufficient to allege or establish fraud (*Melton* v. *State,* 177 Ark. 1194, 10 S. W. [2d] 500), although it may, when coupled with other circumstances, create a *prima facie* presumption of fraud. As this is a proceeding in equity, the general allegation in the body of the complaint, although of itself not sufficient, may be supplied by the exhibits, as these may be looked to to supply the specific facts upon which the general allegation of fraud is predicated, and, when they are the foundation of the action, will control the averments in the complaint, and are presumed to have been considered by the chancellor. *Cox* v. *Smith,* 99 Ark. 218, 138 S. W. 978; *Moore* v. *Exelby,* 170 Ark. 908, 281 S. W. 671. The most that is alleged is

that Taylor was insolvent at the time of the transfer, and "said deed of conveyance for said real estate and said contract for the delivery of personal property was made with the purpose and intent to hinder, delay and defraud the creditors of said John P. Taylor and was and is void." Here, it will be seen, is only a general allegation, not of facts, but of a legal conclusion, and an examination of the exhibits to which we may look fails to supply any facts upon which the general allegation may be based.

There is, therefore, no badge of fraud connected with the transaction warranting the interference of a court of equity unless the assignment itself might be so considered. While it might have been an act of bankruptcy, had the debtor belonged to any class coming within the provisions of the bankruptcy act, it by no means follows that it evidenced any bad faith, but rather that it was an act which might well be said to have been prompted by a sense of duty on the part of the debtor and a desire to treat all his creditors fairly and impartially. This is the effect of the holding in *Mayer* v. *Helman,* 91 U. S. 496. In *Reed* v. *McIntyre,* 98 U. S. 507, in effect it is held that where it appears that a debtor's assignment is made in good faith, the assignment is not to be impeached as fraudulent simply because it had the effect to prevent one creditor by means of execution levied from securing priority. The court, in that case, quoted with approval from the case of *Pickstock* v. *Lyster,* 3 Maule & Selwyn 371, where, speaking of the assignment, it was said that it was "to be referred to as an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors. * * * It seems to me that this confession, so far from being fraudulent, was the most honest act the party could do. He felt that he had not sufficient to satisfy all of his debts and he proposed to distribute his property in liquidation of them."

In the case of *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, 49 S. Ct. 108, the assignment was held to have been made for the purpose of hindering and delaying the creditor in the collection of his debt, but the facts there are quite different from those of the case at bar. In that case a creditor had proceeded to reduce his account against the debtor to judgment, and immediately thereupon the debtor filed a proceeding under the State insolvency statute (chap. 93, of the Digest), which necessarily had the effect found by the court; but here the debtor, a farmer, before any proceedings were begun by the creditors, realizing his involved condition made a general assignment for all of them, which, as was said in *Pickstock* v. *Lyster, supra,* "was the most honest act he could do."

The act of 1897, chap. 93, *supra,* is an insolvency law, and is so recognized by a number of our decisions, (*Hickman* v. *Parlin-Orendorff Co.*, 88 Ark. 519, 115 S. W. 371; *Baxter County Bank* v. *Copeland, supra; Morgan* v. *State,* 154 Ark. 273, 242 S. W. 384), and, so far as it is in conflict with the National Bankruptcy Act, was superseded thereby, *Baxter County Bank* v. *Copeland, supra.* And as it classified creditors, preferred those of a certain class, and gave preference to all others fully discharging the bankrupt in consideration of a *pro rata* distribution among them, operated within the field occupied by the bankruptcy act. *International Shoe Co.* v. *Pinkus, supra.*

But, as we have seen, it appears that the proceedings in the instant case were begun by an assignment to a trustee for the benefit of creditors and was sought to be conducted under chap. 9, of the Digest, *supra,* and had the debtor's estate been fully administered under the provisions of that chapter, we are of the opinion that those provisions, being essentially different from those of the insolvency act of 1897, were not repealed by the passage of that act as contended by the appellant. Nor is it an insolvency act within the meaning of *International Shoe Co.* v. *Pinkus, supra.* This act provides for no classification of creditors nor preference to one class of

such over another; nor does it provide for the discharge of the debtor from any claim or class of claims. It simply regulates the exercise of a common-law right, to-wit, the right of assignment for the equal benefit of all creditors, and, by certain salutary provisions, safeguards the administration by the trustee for the interest of the creditors. The manifest purpose of the assignment and the statute regulating such is to provide for a fair and equal distribution of the assets of the debtor among his creditors and the case of *International Shoe Co.* v. *Pinkus, supra,* and such other cases, holding a State insolvency act superseded by the National Bankruptcy Act, have no application.

In *Stellwagen* v. *Clum,* 245 U. S. 605, quoting from page 616, 38 S. Ct. 218, it is said: "In the argument of counsel of the defendant in error, the position is taken that the bankrupt act suspends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is, that the statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments; it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing a trust are substantially such as a court of chancery would apply in the absence of any statutory provision." To the same effect are the cases of *Mayer* v. *Helman, supra; Boese* v. *King,* 108 U. S. 379, 2 S. Ct. 765; *Pogue*

v. *Rowe,* 236 Ill. 157, 86 N. E. 207; In re *Gutwillig,* 92 Fed. 337; *Davis* v. *Bohle,* 92 Fed. 325; In re *Farrell,* 176 Fed. 63; *Green* v. *Rice,* 32 Fed. 504, 186 Pac. 249. Chapter 9 is similar in all respects to the Ohio statute referred to and construed in *Stellwagen* v. *Clum, supra.*

The statement is made by the appellants that the debtor Taylor was a farmer and engaged principally in farming, and upon that statement appellee insists that, even though Taylor had been proceeding under the State insolvent law, chap. 93, *supra,* as to him and those of his class, the act is not superseded by the National Bankruptcy Law, and that the chancery court might have proceeded to administer his estate under the provisions of the insolvency act, and its orders would have been valid. We pass this point as a decision of it is unnecessary in the instant case, for it follows from what we have said that the appellant must fail in this case; first, because the proceeding as finally consummated was a mere transfer by the debtor to another of his property with the express undertaking on the part of the grantee to pay the debts of the grantor, and that this transfer was not made to hinder, delay or defraud the appellant, and was not a proceeding under any statute, but the exercise of a right given him by common law. Second, that the order of the chancery court complained of did not attempt to prefer any creditor over the appellant, and in fact did no more than give its approval to the bargain made between Taylor and Watson and to discharge the assignee from any further duty after surrendering to Watson what property they might have held under the deed of assignment and to relieve them and their surety of liability on their bond. Third, that the proceedings, *viz.,* the deed of assignment, the filing of the bond in the chancery court, and the order of the court made, was not a proceeding under the State insolvency act, and was not in conflict with or superseded by the National Bankruptcy Act.

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

COCA-COLA BOTTLING COMPANY *v.* BENNETT.

Opinion delivered October 5, 1931.

Buzbee, Pugh & Harrison, for appellant.

Pace & Davis and *R. W. Robins,* for appellee.

BUTLER, J. Mrs. Laura Bennett purchased a bottle of Coca-Cola from one Ward, who had bought the Coca-Cola he vended from the appellant company. The bottle of Coca-Cola purchased by the appellee was opened by Ward in the presence of the customer. The opener used, in removing the cap from the bottle, was fastened on the edge of the "lard table" in Ward's grocery store and was "just a nail opener." The bottle was closed by a metal cap and was opened by inserting the cap under the nail opener and pressing down, thus removing the cap.

Mrs. Bennett testified that she was watching Ward when the bottle was opened. She had been chewing a flavored chewing gum just before she drank the Coca-Cola and stated that the Coca-Cola tasted peculiar, but that she thought it might have been on account of the gum she had been chewing; that she did not examine the bottle. She drank nearly all the contents when she felt some foreign substance in her throat and ejected it from her mouth to the sidewalk when it was discovered to be a large worm badly decayed, which mashed as it hit the sidewalk. It had a large head and two little horns. This worm was seen in the Coca-Cola that Mrs. Bennett spit up by the grocer and his wife, both of whom were present at the time. Mrs. Bennett became sick and sent for a doctor who testified that she was quite ill when he reached her and was vomiting and suffering from pains in the abdomen. He administered to her a hypodermic and saw

her twice a day for a week or ten days and once a day for about three weeks. The doctor further testified that she occasionally has cramping spells and her present condition is caused by gastritis or colitis and that a partially decomposed worm could cause this condition; that so far as he knew she was a healthy woman before this time.

Mrs. Bennett brought suit against the appellant company for damages and recovered a verdict of $500 in the court below. The appellant company, at the conclusion of the testimony moved for a peremptory instruction which was refused, which refusal is the error assigned for the reversal of the case.

The contention of the appellant is that as a matter of law the *prima facie* case established by the appellee when she testified that she became sick as a result of drinking a part of a bottle of Coca-Cola which contained a partially decomposed worm was overcome by testimony on the part of the appellant tending to show that the company had used ordinary care in cleansing and refilling the bottle. We are of the opinion that the evidence warranted the jury in the conclusion that the worm was in the bottle of Coca-Cola at the time it was purchased by Mrs. Bennett and that this case is ruled by the case of *Coca-Cola Bottling Co.* v. *McBride,* 180 Ark. 193, 20 S. W. (2d) 862. In that case, as in this, the testimony tending to show that there was a foreign substance in the bottle of Coca-Cola and the appellant company made proof that the bottle was filled with the most modern machinery which washed and cleansed the bottle with a strong alkaline solution heated to about 110 degrees. This solution was contained in four different compartments through which the bottles were passed, rinsing and turning them for about twenty minutes so as to thoroughly clean and remove all impurities. The appellant insists, however, that the instant case is differentiated from the McBride case in that, in addition to proving the plan and system of cleansing and refilling the bottles, there was testimony in the case at bar not offered

in the McBride case to the effect that three inspectors personally inspected the empty bottles before filling them and each of these inspectors, after testifying that they had examined the empty bottles and that each was clean and free from foreign substance, stated in answer to questions that it would not be possible for a worm to get into any of the bottles. Appellant argues that it was more likely for the worm to have gotten into the bottle when the cap was removed than that it was there when the bottle was filled.

The jury however had the right to weigh the testimony of the witnesses who testified as to the inspection in the light of the attendant circumstances, which were that the bottles passed before four 75 watt electric lights which were very bright; that they passed on a belt in front of the inspectors at the rate of 104 bottles per minute. There were three inspectors, Dunham, Henderson and Duvall. One hundred and four bottles passed by Dunham each minute and from there they divided, part passing by Duvall and part by Henderson. Each one of these inspectors testified that he inspected fifty-two bottles per minute and they worked ten hours a day under the bright lights. All of these inspectors testified that no foreign substance was in any of the bottles passing before them, but the jury might have believed from this testimony that their inspection must have been perfunctory considering the number of bottles passing before their eyes each minute and the long hours the inspectors worked; that their confidence in the efficacy of the machinery to properly cleanse the bottles was so great that they deemed a close inspection unnecessary and that they were negligent in the performance of their duty.

It seems to us that the testimony of the inspectors, considering the nature of the inspection made and the number of bottles per minute passing before them, adds but little weight to the testimony which describes the process of cleansing and refilling the bottles. Certainly, that question was one for the jury as we have stated.

Case affirmed.

TYLER *v.* CITIZENS' BANK.

Opinion delivered October 12, 1931.

[redacted]

Albert G. Sexton and *Reed & Beard,* for appellant.

George E. Morris and *Chas. A. Walls,* for appellees.

HART, C. J., (after stating the facts). The record shows that the complaint in this case was filed and summons issued on February 7, 1931. The Citizens' Bank & Trust Company suspended business and closed its doors on the 29th day of December, 1930; and five days thereafter, the State Bank Commissioner, under the statute, took charge of said bank as an insolvent banking corporation and proceeded to liquidate its affairs. On the 14th day of January, 1931, the Bank Commissioner issued a charter or articles of incorporation to the Citizens' Bank whereby all the assets of the insolvent bank were transferred to it under an agreement that the new bank was to assume all the debts of the insolvent bank.

The complaint further alleged, and this is admitted by the demurrer to be true, that the old insolvent bank could not pay its depositors dollar for dollar, and that the Bank Commissioner, with full knowledge thereof, permitted certain subscribers for stock in the new bank to pay for the same by checking out or drawing their deposits from the insolvent bank for the face value thereof.

It is conceded by counsel for appellees that the allegations of the complaint, which are admitted by the demurrer to be true, brings this case within the principles of law decided in *Krumpen* v. *Taylor,* 183 Ark. 1046, 40 S. W. (2d) 775. There, in considering our Constitution prohibiting the issue of stock by private corporations except for money or property actually received, and our statutes regulating banks, it was held that a new bank could not be legally organized to take over the assets of an insolvent bank by allowing the capital stock subscribed to be paid in checks on the old insolvent bank for the face value of the deposits.

It was also contended in that case that the existence of a corporation could be questioned only at the instance of a suit by the State. We pointed out in that

case that the legality of the new corporation was not an issue to be decided. The question before the court was whether or not the sale of the assets of an insolvent bank to a newly organized bank, which had been erroneously or illegally organized, should be ratified or approved by the chancery court. We are asked to overrule the decision in that case but decline to do so.

The record in the present case is an apt illustration of the reason and justice of that decision. No attack is made by the appellants in this case on the organization of the new bank, in so far as it is transacting a general banking business is concerned. This court only decides questions of law which are raised by the pleadings. The issue in this case, as it was in the Krumpen case, is that it is improvident for the chancery court to confirm and ratify a sale of the assets of an insolvent bank to a bank which was erroneously or illegally organized. One of the reasons given is that the State might question the legality of the new bank at any time it might see fit through its proper officers, and, if the court should decide that the new bank had been illegally or erroneously organized, this would leave the rights of the creditors to be adjusted and administered by persons not legally authorized to do so. The depositors are oftentimes widely scattered, and they would be in an unfortunate situation if their property was legally bound by an irregular transaction.

In the present case, under the allegations of the complaint, the depositors in the old bank are not entitled to receive dollar for dollar on the face of their deposits because the old bank is insolvent. If the Bank Commissioner could allow a new bank to be organized by allowing the stock to be paid by checks on an insolvent bank where the depositors could not be paid the face value of their deposits, this would, in effect, allow the bank which had been illegally organized to administer the affairs of an insolvent bank, and thus jeopardize the rights of the depositors and other creditors. If the Bank Commissioner should allow subscribers to stock

in the new bank to pay for the same by checks on their deposits in the old, insolvent bank at the face value of the deposits, this would give such depositors a preference over other depositors who did not subscribe for stock in the new bank, and over general creditors of the insolvent bank, and would thus violate our banking statutes which do not allow preferences except in certain specified instances.

It is not claimed that this case falls within one of the exceptions with reference to preferences. The action of the Bank Commissioner was not an attempt at re-organization of the insolvent bank in compliance with the terms of § 677 of our statutes regulating banks, and the amendment thereto by the Legislature of 1923, Acts of 1923, p. 515; and Castle's Supplement to Crawford & Moses' Digest, § 677. According to the allegations of the complaint, the act of the Commissioner was to grant a charter to a new bank, and no attempt whatever was made to re-organize the old insolvent bank under the statute.

Appellants were depositors in the old insolvent bank; and, whether their deposit was a general or a special one, they had a right to protect it and prevent a preference to other depositors which was not allowed under the statute. They were not parties to the application for the sale of the assets of the insolvent bank to the newly organized bank and are not estopped by that proceeding. They, as depositors of the bank, were creditors of it, and, having taken no part in the attempted sale of the assets of the insolvent bank to the newly organized one which was never legally accomplished, can in no sense be bound by what was done in that proceeding. *Davis* v. *Scott,* 129 Ark. 226, 195 S. W. 383.

It is also insisted that appellants were not entitled to maintain their action because they did not commence it within ten days as prescribed by § 724 of Crawford & Moses' Digest. This section applies to stockholders, and was enacted for the purpose of allowing them to have the affairs of the bank taken out of the

hands of the Bank Commissioner where the bank has been erroneously turned over to him for liquidation as an insolvent bank, and it has no application to a proceeding of this sort. Under the Acts of 1925, the chancery court of Lonoke County was in session at all times. *Sanders* v. *McClintock,* 175 Ark. 633, 300 S. W. 408. The record shows that the order of the chancery court was made on the 14th day of January, 1931, which was only a few days after the Bank Commissioner had taken charge of the insolvent bank for the purpose of liquidation. This complaint was filed at the same term of court at which the order of sale was attempted to be made, and there is nothing in the record tending to show that appellants were guilty of any acts which would estop them from having an attempted sale set aside as being an improvident one for the reasons above stated. It follows that the court erred in sustaining a demurrer to the complaint on this branch of the case.

Appellants also seek in this action to recover the amount of their deposit as a trust fund to which they claim they are entitled as a preference over the other depositors and creditors of the insolvent bank. We do not deem it necessary to enter into a discriminating discussion as to the difference between a general and a special deposit or one which the bank had no authority to mingle with its general funds. According to all our decisions bearing on the question, the evidence adduced in favor of appellees makes the deposit a general and not a special one. *Taylor* v. *Corning Bank & Trust Co.,* 183 Ark. 757, 38 S. W. (2d) 557; *Little Rock Branch of Federal Reserve Bank* v. *Taylor,* 183 Ark. 632, 38 S. W. (2d) 323; and *Taylor* v. *Dierks Lumber & Coal Co.,* 183 Ark. 937, 39 S. W. (2d) 724.

According to the testimony of the president of the insolvent bank, the insurance draft was deposited in the bank by J. E. Tyler upon the condition that no checks were to be drawn upon it until the draft had been collected. This condition was entered into because the bank did not wish the draft to be checked against

until it had been actually collected and the proceeds were in the hands of the bank. After the draft had been collected, Tyler drew several checks upon the fund, the largest of which was something over $1,500, and these checks were paid by the bank. On the other hand according to Tyler, he had deposited the draft with the bank as a trust fund upon the agreement that the bank would pay certain specified debts due by Tyler and then deliver the balance to him in money. This was done because Tyler had purchased a tract of land, and the vendor refused to take anything in payment thereof but money. The chancellor found this issue of fact against appellants, and it cannot be said that his finding is against the preponderance of the evidence. On the other hand, the testimony of the president of the bank is to some extent corroborated. The record shows that several checks, one of which was for over $1,500 were drawn by Tyler and paid by the bank after it had collected the insurance draft. If the deposit was to be a special one and constituted a trust fund, the original agreement would have been all that was necessary, and the bank would have been bound to pay the debts provided for in the agreement and to pay the balance to Tyler. The fact that checks were drawn in the usual manner payable to the debtors of Tyler and honored by the bank, tends to show that the deposit was a general one and that the checks were drawn in the usual course of business. It seems that a deposit slip was not given to Tyler at the time of the deposit of the insurance draft because there was a condition attached to the deposit that Tyler should not check upon the account until the insurance money had been collected by the bank. This was to protect the bank in case the insurance company would not honor the draft without the policies being attached to it or for any other reason.

The result of our views is that the decree adjudging the deposit to be a general and not a special one was correct, and the decree in that respect will be affirmed; but the court erred in dismissing the complaint

for want of equity because the chancellor erred in holding that the sale of the assets of the insolvent bank to the newly organized bank was not improvident for the reason that some of the subscribers for stock in the newly organized bank were allowed to pay for same by checks on the insolvent bank at the face value of their deposits when the Bank Commissioner knew that they were not worth their face value. Therefore, the decree will be reversed on this branch of the case, and the case will be remanded with directions to the chancery court to overrule the demurrer and for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

McGraw *v.* State.

Opinion delivered October 12, 1931.

[redacted]

Fred A. Snodgress, for appellant.

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

HART, C. J. Jerry McGraw prosecutes this appeal to reverse a judgment of conviction against him for murder in the first degree upon a verdict fixing his punishment at life imprisonment in the State penitentiary.

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

According to the testimony of Clark Fulton, he lived at Jacksonville, Pulaski County, Arkansas, about 175 yards from the home of Jerry McGraw. Between six-thirty and seven o'clock one morning, his children cried out that Jerry's house was on fire. He at once started towards the house and saw Jerry before he got there. He went to the kitchen door, and there was no fire in the kitchen; but the living room next to it had been consumed when he got there. The door from the kitchen to the living room was shut. He then said, "Let's pull this window open and see where the woman is." They pushed a window of the front room open, and the flames came out. Jerry did not ask them to help him get his wife out, and they did not hear her cry for help.

According to the testimony of Clayton Carradine, who lived back of the home of the defendant, he first saw smoke coming out of the defendant's house, and called to him two or three times. When he got to the defendant's house, he didn't have on any shoes or hat. He did not at that time say anything about his wife being in the house. They found both the front and back doors of the front room locked. The back door led into the kitchen. He did not hear Jerry's wife making any cries for help. He lived about thirty yards from the defendant's house, and the front room where the body of Jerry's wife was found, was all on fire

when he got there. Jerry was out at the back of the house, and his hair was singed. He was fixing to go over there when he saw Jerry come out of the house. When he got there, no one could have gone in the front room of the house.

According to the testimony of Bertha Neely, she lived across a vacant lot from the defendant's house and heard the defendant and his wife come home early in the morning before daylight before the fire. She heard them talking, but couldn't understand what Jerry had to say. She recognized their voices, and heard Jerry's wife say, "You did, you did; you know damn well you did."

According to the testimony of T. W. Littlejohn, he went to Jerry's house while it was burning, and was among the first to get there. He never at any time heard Jerry make any cry for help to get his wife out of the burning house. A few days later he passed there and examined the locks on the front and back doors, and both doors were locked.

Other witnesses testified about examining the doors and finding them locked after the fire.

According to the testimony of S. E. Thompson, those who found the body put some water on the fire around it. The body was lying across the foot of the bed on the left side with the head of the body to the west. The bed was sitting with its head to the south. The overhead joists of the room had fallen. It seems that one joist missed the foot of the bed, and the other fell somewhere about the middle of the bed, almost right across it. In throwing water over the overhead joists before they burned to ashes, it charred them and left a black place. The skull of the defendant's wife was washed off and showed that it had been cracked in over the right eye. It seemed as if the skull was mashed in there. The lower limbs were burned to the knees. The biggest part of the clothing had been burned up.

According to the testimony of Ralph Graham, he examined the head of the defendant's wife, and there was a cracked place with five or six spangles running

out from the cracked place like you would crack an egg. Witness showed on his own head about where the hole or cracked place was, and said that it was about the size of a half-dollar.

Jerry McGraw was a witness for himself. According to his testimony, his house burned down about seven o'clock in the morning of the 25th day of March, 1931. His clothes and about $80 in money were burned up. He did not set fire to the house. He and his wife returned from a card party at a neighbor's house about two o'clock in the morning. He had been living with his wife thirteen years, and did not quarrel with her on the morning in question. He did not have any insurance on his wife's life nor upon his household goods which were burned up. His arm was burned while he was runing out of the house. He tried to get his wife out of the house but some burning paper fell on them, and his wife jerked loose from him and ran back in the front room. Witness had gotten up early in the morning and had built a fire in the heater in the front room, and had gone back to bed. The roof of the front room was falling in when he woke up again. He denied shooting in the wall close to his wife's head on an occasion about eighty days before the fire. On cross-examination, he was asked if he had not done this in the presence of Bertha Neely, and at the same time told his wife that he ought to kill her, and answered that he had not. On cross-examination, he admitted that he had killed the stepfather of his wife, and had been sentenced to eight years in the penitentiary for murder in the second degree on account of it. He denied having had any argument with his wife on the morning that the house was burned. He admitted that the front door was locked which was their usual custom at night, but denied that there was any lock on the door between the front room and the kitchen. His wife was asleep when he woke up and discovered the fire. After his wife jerked loose from him and ran back into the front room, he went out of the back door.

Another witness testified that he examined the defendant right after the fire, and saw where some of his hair had been burned off, and that he had a little scar on his neck.

Bertha Neely, in rebuttal, testified that just before Christmas preceding the burning of the house, she was at the home of the defendant and saw him shoot a hole through the wall of the house right by his wife's head, and that he said that he ought to shoot her brains out. She denied that she was intoxicated at the time, but said that the defendant and his wife were both intoxicated.

We have made a rather full abstract of the testimony because the conviction was had and a life sentence imposed upon circumstantial evidence; and counsel for the defendant earnestly insist that a verdict of murder in the first degree is not supported by the evidence.

To warrant a conviction of murder in the first degree, the jury must be satisfied beyond a reasonable doubt that the killing was willful, deliberate, malicious, and premeditated. *McAdams* v. *State,* 25 Ark. 405; and *Weldon* v. *State,* 168 Ark. 534, 270 S. W. 968.

The proof, however, need not be express or positive. It may be deduced from all the facts and circumstances attending the killing; and if the jury can reasonably infer from all the evidence the existence of the elements of murder in the first degree, as above set forth, it will be sufficient. *Miller* v. *State,* 94 Ark. 538, 128 S. W. 353; *Davidson* v. *State,* 108 Ark. 191, 158 S. W. 1103; *Owens* v. *State,* 120 Ark. 563, 179 S. W. 1014; *Tillman* v. *State,* 112 Ark. 236, 166 S. W. 582; and *Sneed* v. *State,* 159 Ark. 65, 255 S. W. 895.

The body of Jerry McGraw's wife was found lying across the foot of the bed in their home. The front room in which the body was found, had been practically destroyed by fire. The roof had fallen in and one of the joists had fallen across the middle of the bed, and one joist had just missed the foot of the bed. Neither of

them appeared to have touched the body of the deceased. Her feet and lower limbs had been burned off; and after her head was washed, it was found that her skull had been mashed in over the right eye. One of the witnesses said that it was cracked like an egg, and another said that it seemed like it was smashed in. There was a hole about the size of a half-dollar in her skull. The jury might have inferred from these circumstances that the skull of the wife of the defendant had been cracked by some blunt instrument in the hands of some one. The jury might have thought that if it had been done by the fallen joists, they would have remained on the body; or the jury might have thought that the fall of the joist would not have cracked in the skull in the manner described by the witnesses.

It is true that the defendant denied setting fire to his house or that he killed his wife. The jury, however, were justified in disbelieving his story. According to his own testimony, he tried to lead his wife out of the house after he discovered the fire. He led her in the kitchen, and when some burning paper from the roof fell on them, she jerked away and went back into the front room. He immediately went out at the kitchen door. Several of the witnesses saw him come out of the kitchen door, and all say that he did not make any outcry or give any warning that his wife was still in the house. It does not appear that his senses were paralyzed. Indeed, according to his own testimony, he was in the possession of all of his faculties. While he denied that the door leading from the front room into the kitchen was locked, other witnesses testified that it was locked. None of the witnesses heard the defendant's wife make any outcry. One of them lived in the house right across a vacant lot. Another lived only thirty yards away. One of the witnesses testified that she heard them arguing before day on the morning in question, and heard the wife say to her husband, "You did, you did, you know damn well you did." The jury might have

found from this that the parties were quarreling just a short time before the fire was discovered. According to the defendant's own testimony, after he built the fire in the living room in the heater, he went back to bed, and his wife got up to get breakfast. When he woke up again and discovered the fire, he said that his wife was in bed with him. In a short time after this, her body was found with the lower limbs all burned up and with her skull cracked in over the right eye. As above stated, the circumstances might have led the jury to believe that the skull of defendant's wife had been cracked in by some one, and that that person was the defendant. We are of the opinion that the facts and circumstances shown in evidence warranted the jury in finding the defendant guilty of murder in the first degree. It may be that from motives of mercy, because there was no positive proof, the jury fixed the punishment of the defendant at life imprisonment instead of death. See *Houston* v. *State,* 165 Ark. 294, 264 S. W. 869; and *Hannah* v. *State,* 183 Ark. 810, 38 S. W. (2d) 1090.

The next assignment of error is that the court erred in admitting the testimony of Bertha Neely to the effect that some time about Christmas during the preceding year, the defendant shot a hole in the wall near his wife's head, and said that he ought to shoot her brains out. This testimony was admissible for the purpose of throwing light upon the defendant's motive and also was a link in the chain of evidence along with the other facts and circumstances connecting the defendant with the commission of the crime. The threats made by him just about Christmas of the preceding year were made only about three months prior to the homicide and were not too remote to be admissible in evidence. *Phillips* v. *State,* 62 Ark. 119, 34 S. W. 539; *McElroy* v. *State,* 100 Ark. 301, 140 S. W. 8; *Lewis* v. *State,* 155 Ark. 205, 244 S. W. 458; *Combs* v. *State,* 163 Ark. 550, 260 S. W. 736; and *Crowe* v. *State,* 178 Ark. 1121, 13 S. W. (2d) 706.

The next assignment of error is that the court erred in permitting the prosecuting attorney to ask the defendant on cross-examination concerning his conviction for the killing of his wife's stepfather. There was no error in this. It is well settled that the defendant may be questioned, when he becomes a witness in his own behalf, as to specific acts to test his credibility. He admitted on cross-examination that he had been convicted of murder in the second degree, charged to have been committed by killing his wife's stepfather. The court told the jury that the evidence was admitted for the purpose of testing his credibility as a witness, and for no other purpose. *Turner* v. *State,* 153 Ark. 40, 239 S. W. 373; and *Bullen* v. *State,* 156 Ark. 154, 245 S. W. 493.

Finally it is insisted that the court erred in allowing the prosecuting attorney to tell the jury that in his opinion the defendant was guilty of murder in the first degree, and should suffer the death penalty. The record shows that the prosecuting attorney told the jury that this was his own opinion under the evidence adduced in the case, and was a mere expression of the attorney's opinion as to the guilt of the defendant, under the evidence, and was not improper. *Dixon* v. *State,* 162 Ark. 584, 258 S. W. 401; *Cunningham* v. *State,* 133 Ark. 154, 202 S. W. 27; and *McClaskey* v. *State,* 168 Ark. 339, 270 S. W. 498.

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

BEARD *v.* WILCOCKSON.

Opinion delivered October 12, 1931.

Jeff Bratton, for appellant.

Jason L. Light, for appellee.

SMITH, J. On June 25, 1929, the bookkeeper and agent of W. J. Beard made a return to the tax assessor of Greene County of the personal property owned by Beard. The usual blank was employed in making the assessment, and the various articles of property owned by Beard were set down and assessed, but Beard's agent wrote opposite each article assessed the present market value, and not 50 per cent. thereof, as is the custom and the law. The blank employed had a column headed "Assessed value as Fixed by Assessor" and another column headed "Equalized Assessed Value." No valuations were written in either of these columns, and Beard's assessment list, as filed with the county clerk and as extended upon the tax book by that officer, was made upon the basis of 100 per cent., and not upon the basis of 50 per cent. of the value as required by law.

Upon filing a complaint containing these allegations, Beard prayed that the assessment be reformed and reduced. The taxes assessed amounted to $713.22, and a tender of one-half of that amount was made, and it was prayed that the collector be enjoined from attempting to collect any sum in excess of the amount tendered. A demurrer to the complaint was filed and sustained, and this appeal is from that decree.

The right of the taxpayer to maintain this suit is predicated upon § 5786, Crawford & Moses' Digest, which provides that: "the chancellor may grant injunctions and restraining orders in all cases of illegal or unauthorized taxes and assessments by county, city or other local tribunals, boards or officers."

But the taxes here sought to be enjoined are neither illegal nor unauthorized. They may be excessive, but this fact alone does not authorize interference with the collection thereof by a court of equity. The excess results from a mistake made by the taxpayer's own agent,

but the result thereof would be the same had the error been made by the assessor himself, as the taxes are neither illegal nor unauthorized, but are only excessive.

It was said in the case of *Clay County* v. *Brown Lumber Co.*, 90 Ark. 413, 119 S. W. 251, that the property owner who thinks his valuations as assessed are excessive must pursue the remedy provided by law to obtain a reduction.

Appellant insists that the law has provided no remedy whereby he might have obtained relief, and that he is therefore entitled to invoke the aid of the chancery court. But in this he is mistaken. The assessment here attacked was made pursuant to act 172 of the Acts of 1929 (vol. 2 Acts 1929, p. 841). Section 10 of this act requires the assessor, upon the application of the property owner, to furnish an appropriate blank, which, after being filled out by the property owner, is returned to the assessor. Section 12 of act 172 provides that the valuations as returned by the property owner shall not be conclusive on the assessor, but that officer may make such assessment of the property as he may deem just and equitable, provided the assessor, if he raises the valuation, shall deliver to the property owner a duplicate copy of such adjusted assessment, or shall notify the property owner of his action by first-class mail.

Here the assessor made no change in values, but accepted those returned by the agent of the property owner.

Act 172 created an equalization board, and defined the duties of its members, and required the board to convene on the third Monday in August, after the members thereof had taken the required oath "That he will fearlessly, impartially and faithfully equalize the assessed value of all property assessed and subject to taxation." Paragraph 1 of § 27 of act 172 provides that the board of equalization "shall raise or lower the valuation of any property to such figure as in the opinion of the board will bring about a complete equalization."

Here the assessor accepted the valuation as returned by the property owner, as did also the board of equalization, and no request was made that either the assessor or the board change the valuation which the property owner had himself made.

The property owner therefore had a full and complete remedy at law to correct the mistake which he himself had made, and the chancery court therefore properly refused to interfere to enjoin the collection of the taxes complained of. The decree is correct, and is therefore affirmed.

VILAS *v.* VILAS.

Opinion delivered October 12, 1931.

Fred A. Isgrig, Leo P. McLaughlin and *Frank Pace*, for appellant.

Martin, Wootton & Martin, for appellee.

SMITH, J. On February 5, 1930, Mrs. Susan Wharton Vilas obtained, in the Garland Chancery Court, a divorce from her husband, L. A. Vilas. The court found in that case that the parties had agreed "as to the rights of the plaintiff in and to the property of the defendant," and that, pursuant to this agreement, the defendant had created a trust fund of $100,000 for the plaintiff's benefit.

The court was asked to award the custody of the children—three in number and all minors—to the plaintiff, but this was not done. Upon the subject of the custody of the children, the decree recites that "the care and custody of said minor children of plaintiff and defendant is left to the agreement of the parents, and, they failing at any time to agree upon the care and custody of said children, the same shall be subject to the future determination of this court by appropriate order," and that "the court doth retain jurisdiction of this cause for the purpose of making such other and further orders as may be necessary from time to time with reference to the custody, maintenance, support and education of the infant children of the plaintiff and defendant."

By the 29th of September, 1930, the defendant, Mr. Vilas, had obtained possession of all three children and was about to sail with them on a trip to Europe, when Mrs. Vilas filed a petition in the Garland Chancery Court praying that the permanent custody of the children be awarded to her, and that the defendant be restrained from carrying the children out of the jurisdiction of the court. This petition was heard before the court on oral testimony. The trial began on October 30, 1930, and was concluded November 8, 1930.

A decree was rendered in which the custody of all the children was awarded to the father, but it was provided that "the plaintiff be permitted to visit said children at all convenient times, wherever they may be at such times residing; and that said minor children be permitted, if they desire, to visit plaintiff at the expense of the defendant, for a period of thirty days during the summer vacation period, and during one-half of the

Christmas holiday vacation period, and if said minor children do not desire to visit the plaintiff during such periods, she, the plaintiff, be permitted to visit them at some suitable place, and that the defendant provide suitable quarters outside of his home for the plaintiff to visit said minor children during such periods, and that the defendant use all reasonable means to facilitate plaintiff's visiting said minor children."

The court was requested to modify these directions to require the father to send the children on the visits there provided for to their mother, whether the children wished to go or not, but the court declined to impose the requirement that the father compel the children, over their protest, to make these visits.

In an oral opinion delivered before the rendition of this decree the chancellor stated that his conclusion in regard to the custody of the children was largely controlled by the wishes of the children themselves. At the time of the trial in the court below, Ariel, the oldest child, a daughter, was 16 years old; Jack, the second child, a son, was 14 years old, and Susan, the youngest, a daughter, was 12 years of age.

These children were all examined and cross-examined at great length before the chancellor. The examination of these children appears to have required about three days, and a large part of the voluminous record before us covers their examination and cross-examination. The testimony of the youngest child covers 186 pages of the record, of which 157 are devoted to her cross-examination.

This testimony makes the fact perfectly clear that all the children have not only a decided partiality for their father, but have also acquired an antipathy for their mother. Mrs. Vilas says that Mr. Vilas is responsible for this unnatural feeling, and this is no doubt true. Indeed, we are convinced that each parent attempted to prejudice the children against the other parent, and that this has been the fixed purpose of each since the rendition of the divorce decree, which did not

award the custody of the children to either parent. Much of the examination and of the cross-examination of the children was devoted to the development of the activities of the parents in this respect.

The rupture between Ariel, the oldest child, and her mother appears to have occurred before there was an estrangement on the part of the other children. Mrs. Vilas testified that the attitude of Ariel was induced by her insistence that Ariel go to school and be obedient to the authority of herself and of Mr. Vilas. On the other hand, the maid, who was herself a grandmother and who had been employed in the Vilas home for the seven years immediately preceding the separation, testified that Mrs. Vilas had said before the divorce that she did not care what Ariel did so that she did not have a baby. The witness was asked on her cross-examination when and where this remark was made and in whose presence, and she answered that it was made to her by Mrs. Vilas in the kitchen of Mrs. Vilas' home and that the cook was present. The cook was not called as a witness.

Mrs. Vilas denied categorically that she had made any such statement, or that she entertained any such feeling towards her daughter. But, whether she made the remark or not, it is evident that Ariel has convinced herself that her mother is indifferent to her, and the breach between Ariel and her mother appears to be complete and irreconcilable.

Mrs. Vilas was asked what she would do with the children if their custody was awarded to her, and she answered that she very much desired the care and custody of Jack and Sue, but that Ariel was an uncertain quantity, and was unwilling to mind, and was very antagonistic, and we are impressed that, while she would accept the custody of Ariel, this would be done only as an inducement to have the custody of the other children awarded to her.

Ariel testified that she was 16 years old on the 15th of July, 1930, and she will therefore in July of next year, be 18 years of age, a woman of full age for all pur-

possess under the laws of this State. Section 4986, Crawford & Moses' Digest. Jack, the son, testified that he was 14 years old on September 26, 1930, and he is therefore now more than 15 years old. Sue, the youngest child, was 12 years old on August 11, 1930, and she is therefore now more than 13.

The examination and cross-examination of Jack, the son, does not disclose the same bitter feeling manifested by Ariel towards her mother, but he repeatedly stated, in effect, in answer to many questions, that he had but little affection for his mother and preferred to live with his father, and that "my legal custody I want to be with my father."

The testimony of Sue was substantially to the same effect.

All three of the children had been in the custody of Mr. Vilas for a few months immediately preceding the trial from which this appeal comes, and it is certain that in this interval he had been assiduous in his attentions to the children, and that it was a part of his purpose to estrange them from their mother. Indeed, it is the insistence of Mrs. Vilas that this estrangement has been accomplished by the persistent overindulgence of the children by Mr. Vilas, and that it was the attempt of Mr. Vilas to take the children to Europe which precipitated the present proceeding.

Much testimony was offered by Mrs. Vilas to the effect that Mr. Vilas had an ungovernable temper, and that he had afforded her ample grounds for divorce on that account. The most pronounced act of this kind consisted in shooting out some of the lights in his home, but this appears to have been done after the separation had become final, and this incident occurred on the last night which Mr. Vilas spent in the home where he had lived with his wife and children for a number of years preceding the final separation.

As to Mr. Vilas' conduct since the divorce, the court found the fact to be that "he (Vilas) has furnished a home for the children, and kept them together, and

seems to have been sober and industrious and loving and kind to them, and kept them all together." The court below did not find—nor do we find—that Mrs. Vilas is not a proper person to have the custody of her children. On the contrary, testimony was offered by a number of Mrs. Vilas' friends—persons of the highest social position—that her reputation was excellent.

But we have the duty of deciding, under the tragic facts disclosed by the record before us, which parent should have the custody of these children, and our duty in this respect has been defined by act 257 of the General Acts of 1921 (General Acts 1921, page 317). Section 3 of this act reads as follows: "Where the husband and wife are living apart, there may be an adjudication of the court as to their power, rights and duties with respect to the persons and property of their unmarried minor children. In such cases there shall be no preference between the husband and wife, but the welfare of the child must be considered first in determining the custody of such child, or the control of its property. Pending such adjudication the court may award the custody of the child and the control of its property to the father, or the mother as may be to the best interest of all concerned, regarding the interest of the child as of the first importance."

In the case of *Patterson* v. *Cooper,* 163 Ark. 364, 258 S. W. 988, there was involved a contest over the custody of a fourteen-year-old girl between the father and the mother of the child, and we there said: "At any rate, the wishes of the children were consulted, and, while their preference is not of controlling importance, it is a circumstance which cannot be ignored, and, as the younger child is now fourteen years old, she has reached an age which would entitle her to select her own guardian, if she had neither father nor mother, subject to the approval of the probate court. Section 4987, Crawford & Moses' Digest.

This § 4987 does not, of course, give the children here involved the right to choose a guardian, because they

have both a father and a mother, and the statute applies only where the child has neither father nor mother, but we recognized in the Patterson case, *supra,* that this statute declares the policy of the law to consult the wishes of children who have reached the age of discretion in deciding which parent shall have their custody.

It was said in the case of *Lipsey* v. *Battle,* 80 Ark. 287, 97 S. W. 49, in which case the opinion was rendered long prior to the passage of the act of 1921, above referred to, that "courts not only respect the rights and feelings of the parent, but also when the child is of sufficient age they give consideration to its wishes. The child in this case is nearly thirteen years of age. She expressed a decided preference to dwell with her mother. So far as this evidence shows, this mother and child are sincerely attached to each other, and this feeling should not be disregarded, nor the ties of affection sundered, unless the welfare of the child clearly demands that she be separated from her mother. We see nothing in the evidence that requires it." Other cases to the same effect are: *Jackson* v. *Clay,* 89 Ark. 501, 117 S. W. 546; *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41; *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47.

At § 745 of Schouler on Marriage, Divorce, Separation and Domestic Relations (6th ed.), it is said: "It is sometimes a question, in proceedings relative to the custody of minors, how far the child's own wishes should be consulted. Where the object is simply that of custody, the rule, though not arbitrary, rests manifestly upon a principle elsewhere often applied; namely, that after a child has attained to years of discretion he may have, in case of controversy, a voice in the selection of his own custodian. The practice is to give the child the right to elect where he will go, if he be of proper age, and the issue is a doubtful one. If he be not of that age, and want of discretion would only expose him to dangers, the court must make an order for placing him in custody of the suitable person; nor will the choice of the child in any case control the court's discretion, and

the affection of the child for others will not suffice to deprive the parents of custody if fit."

Here the daughter, Ariel, and the son, Jack, have both passed the age of fourteen. Indeed, Ariel will soon have attained the age when she will not be subject to the order of the court. Now, it is probably true, as Mrs. Vilas insists, that the children have been influenced in the conclusions they have reached, and in the choice they have expressed, by the conduct of their father, but this is the condition with which we must deal. There is no question about their preference for their father and their hostility to their mother, whatever the cause thereof may have been, and we cannot ignore this preference.

As to the youngest child we have much greater doubt. She is now only thirteen years old, and if her custody alone were involved we would award her custody to her mother, upon the theory and with the hope that if she were given to her mother the association would restore the child's affection for her mother. Ordinarily, a child of this age needs the mother's love and care more than the love and protection of the father. But the testimony of this child makes the fact very plain that she has been influenced in her choice, not only by her father, but by her sister and her brother as well. She referred to their choice and stated that she preferred to be with her brother and sister in their father's care.

To award the youngest child to the mother would mean her separation from her brother and her sister, and, in view of their hostile attitude towards the mother, the alienation of the affection of these children for each other would probably result from their separation. We have therefore concluded to affirm the decree of the chancellor to allow all the children to remain together and in the custody of their father. The right of visitation accorded the mother by the decree of the court below is, of course, unaffected by this decision.

The court assessed the costs of this proceeding against Mr. Vilas and allowed plaintiff an attorney's fee of $2,000, and we are asked to increase this fee to $10,000.

Mr. Vilas is shown to be a man of large means. His income prior to 1930 from his investments alone was, according to his own admissions, between twenty-five and thirty thousand dollars per annum, but this income has since been greatly reduced. The showing was made that the expenses of the litigation which had been paid by the attorneys have exceeded the fee allowed by the court, and the majority have concluded that an additional fee of a thousand dollars should be allowed, and that the costs of this appeal should also be assessed against the defendant.

It is the opinion of the writer and Justices KIRBY and MCHANEY that, inasmuch as a final decree of divorce was granted prior to the institution of the present proceeding, the court had no power to require Mr. Vilas to pay the fee of his wife's attorneys in this case, and they interpret the case of *Nelson* v. *Nelson,* 146 Ark. 362, 225 S. W. 619, as so holding.

The Nelson case was called to the attention of the chancellor, but he distinguished the instant case on the ground that the decree of divorce left the custody of the children an open issue, and that jurisdiction of the question of their custody had been specially retained, and this fact, as stated by him, "made it necessary for the court, in continuation of the original case, to decide at this time upon the custody of the children, and I look upon this case as being simply a completion of the former suit."

The majority of the court are of the opinion that the distinction made by the chancellor is a valid one, and that the present proceeding is, in effect and in fact, a mere continuation of the former suit, and that the court has now jurisdiction to fix a fee to compensate the services rendered by the attorneys since the rendition of the original decree. It is their opinion that this fee is authorized by § 3506, Crawford & Moses' Digest, which reads as follows: "During the pendency of an action for divorce or alimony, the court may allow the wife maintenance and a reasonable fee for her attorneys, and enforce the payment of the same by orders and executions and proceedings as in cases of contempt."

This view of the majority is supported by the opinion of the Supreme Court of Minnesota in the case of *Spratt* v. *Spratt*, 151 Minn. 458, 187 N. W. 227. The opinion in that case recognized the fact that there was a division in the authorities, a number of which were there cited, but the conclusion was there announced that the chancellor had the power to make an allowance to the wife for her counsel fees in a proceeding for a modification of the judgment respecting the custody of the children, although a decree for divorce had been previously granted.

Accepting this view, the majority are of the opinion that an additional fee of a thousand dollars should be allowed, in view of the labor and expense incurred in the prosecution of this proceeding, and the decree of the court below is therefore modified to increase the allowance of attorney's fees by a thousand dollars. In all other respects the decree is affirmed.

Justices HUMPHREYS and MEHAFFY are of the opinion that the entire decree should be reversed, and that the custody of all three of the children should be awarded to Mrs. Vilas.

The Chief Justice is of the opinion that the decree should be modified to award to Mrs. Vilas the custody of Sue, the youngest child, but not that of the two older children.

SCHAFFNER *v.* MCCULLOUGH.

Opinion delivered October 12, 1931.

Metcalf, Metcalf & Apperson and *C. M. Buck,* for appellant.

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

HUMPHREYS, J. Appellee sued Morris Block and appellant in the circuit court of Mississippi County, Osceola District, to recover damages for personal injuries received by him through their concurrent acts of negligence.

After the institution of the suit. Block paid appellee $5,000 under a covenant not to sue him; whereupon appellee dismissed his suit against Block and proceeded against appellant alone. The negligence alleged against appellant was that he negligently parked his truck and trailer diagonally across the concrete road leading from Manila to Blytheville after night without a tail light, causing an approaching car negligently driven by Morris Block to knock a truck in front thereof against appellee and break his leg and otherwise injure him.

Appellant filed an answer denying the negligence charged against him and pleading contributory negligence by appellee as an affirmative defense to the action.

The cause was submitted upon the pleadings, testimony, and instructions of the court, which resulted in a verdict and judgment against appellant, from which is this appeal.

Appellant, appellee, and J. T. Holcomb were drivers of trucks and trailers for different owners engaged in transporting lumber from Manila to Blytheville. During the afternoon of September 19, 1928, the truck being driven by appellant was injured in a wreck so that he could not proceed with his load of lumber to Blytheville. After J. T. Holcomb delivered his load, he came back and got appellant's load, and delivered it. He then returned to assist appellant in taking his disabled truck back to Manila. Appellee, in company with Joe Hornberger, came along and loaned appellant a log chain to fasten his truck on the trailer attached to the truck driven by J. T. Holcomb, so that Holcomb could pull appellant's truck and trailer into Manila. Appellant got in Holcomb's truck with him, and they started with the understanding that appellee would follow along to see that the back truck and trailer followed along as they

should. Hornberger discovered that appellant's truck had slipped down and was scraping the tires of the trailer to which it was attached. They drove along opposite to Holcomb and told him of the injury being done to the tires of the trailer. So he stopped after parking both trucks and trailers as he and appellant thought, off the pavement. The evidence is in dispute as to whether the back truck and trailer were parked on the shoulder of the road or diagonally across the slab or pavement without leaving room for traffic to pass. There was no light on the back end of the rear trailer. After passing appellant and Holcomb, appellee drove his truck and trailer around in front of them and parked. He and Joe Hornberger went back and Hornberger was directed by appellant to go to the rear and strike matches which were given him by appellee to warn approaching cars. Appellant then asked appellee if he had a heavy pole, and, being informed that he did, requested him to get it. Just as he turned to go after it, Block ran into the rear trailer and knocked the trucks and trailers forward. In the movement forward, the front truck struck and injured appellee. The injury occurred about 7:30 P. M. Appellee testified that when he walked back he noticed that both trucks and trailers were parked one-half on the pavement and one-half off, and he knew they should be parked off the pavement, but that he did not tell appellant or advise him to move them off the slab. He also testified that he gave Joe Hornberger some matches and told him to go to the rear and strike them to warn approaching vehicles.

Appellee's action and recovery was based upon the negligent manner in which appellant's truck and trailer were parked on the pavement and his failure to light the rear end thereof in accordance with the requirements of the traffic statute. Even though appellant was negligent in these respects, yet the undisputed testimony reveals that appellee knew the conditions and undertook to render a service with his eyes open to the danger of performing same.

Appellant requested a peremptory instruction to which he was entitled under the doctrine of contributory negligence.

The judgment is therefore reversed, and the cause is dismissed.

BROWN *v.* VAUGHAN.

Opinion delivered October 12, 1931.

W. A. Leach, for appellant.

S. Brundidge, for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Prairie County adjudging an execution sale of certain personal property belonging to appellee to be void on the ground that the levy on part of the property was illegal since same was sold in bulk.

On November 15, 1929, appellant obtained a judgment in said court against appellee for $17,818.08, and a decree of foreclosure of lands described in a mortgage executed by appellee to him to secure the indebtedness. In addition to the order of sale of the lands, the court also ordered the sheriff that in levying a general execution which appellant had caused to be issued on said judgment with directions to levy same upon certain personal property of the appellee, including his law library,

to constitute said appellee the custodian thereof and to sell said library in his office. The sheriff proceeded to the law office of appellee, seized certain property belonging to appellee, listed same, and left it in his custody pursuant to the order of the court. The return of the execution was to the effect that he sold the property described in the list attached to the execution to appellant at the place designated for the sum of $750.

Appellee filed a motion to vacate the sale on the ground, among others, that the sheriff included in the sale in bulk more property than he levied upon and left in the custody of appellee

Appellant filed a response denying that more property was sold than was levied upon and also controverting the other grounds set up in the motion.

The court heard testimony adduced by the parties responsive to the issues joined with the result stated above.

The undisputed facts in the record revealed that the sheriff proceeded with the execution to the office of appellee and listed certain property upon which he levied and left same in the custody of appellee; that, after returning to his own office, his attention was called by appellant's attorney to the fact that he had failed to include in the list one set of American Law Reports, Crawford & Moses' Digest, and one set of Words & Phrases complete, which appellee owned; whereupon, he added the books mentioned to the list without going back and seeing them and later advertised and sold all the books upon the list in bulk to appellant for $750.

It is contended by appellant that this is a collateral attack upon the execution sale, and that the written return of the sheriff upon the execution to the effect that he levied upon all the property listed is conclusive and cannot be questioned by oral testimony showing how the levy and list was made. Learned counsel for appellant is in error as to the character of this attack. It is a direct attack upon the levy of the execution issued on the judgment rendered in the cause and the sale of the

property thereunder. This being true, the manner and character of the levy was susceptible of proof by oral testimony.

According to the oral testimony, undisputed, the property specifically mentioned above was not seized by the sheriff. He never reduced the particular books mentioned to possession. He failed to assume dominion over them at the time he made the first list of books when in appellee's office. It was necessary to do this in order to make a legal levy. 23 C. J. Executions, § 224.

According to the undisputed oral evidence, the whole property, that legally levied upon and that illegally levied upon, was sold in bulk, so that it is impossible to determine how much the property legally levied upon sold for. The procedure necessarily rendered the sale void. *Vaughan* v. *Screeton*, 183 Ark. 816, 39 S. W. (2d) 299.

No error appearing, the decree is affirmed.

BURKE *v.* GULLEGE.

Opinion delivered October 12, 1931.

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[redacted]

Moore, Daggett & Burke, for appellant.

Jo M. Walker, for appellees.

KIRBY, J., (after stating the facts). The contention that this court is without jurisdiction to review the judgment appealed from, because the county treasurer against whom the original mandamus was sought and finally

ordered did not appeal, is without merit. The county treasurer responded to the petition alleging that she was only a nominal party, and asked that the county judge and the county be made parties in order that the interests of the taxpayers and the county could be protected, and an order was made making them parties for the purpose of defending the suit upon their appearing and asking that it be done. The suit then proceeded as though the county judge and county were the only parties defendant and without regard to whether the judgment pronounced was against them as such, or an order directing the treasurer to pay the warrant, it was but a judgment in fact against the county and from which the county judge could appeal as was done. Section 2293, Crawford & Moses' Digest; *Ouachita County* v. *Rolland,* 60 Ark. 516, 31 S. W. 144.

It was the duty of the judge of the county court to defend, since the interest of the taxpayers was affected by the litigation, the treasurer having refused to defend against it, and he could either have done so for the treasurer in his name or by becoming a party thereto as was done herein.

The undisputed testimony shows that the warrants issued were in excess of the county revenues of the year in which they were issued and upon a fund which was composed of revenues of the county derived from various sources, as well as from the turnback from the State Highway Fund. Such being the case the warrants were void within the prohibition of the Constitutional Amendment No. 13, as has been repeatedly held by this court. *Nelson* v. *Walker,* 170 Ark. 170, 279 S. W. 11; *McGregor* v. *Miller,* 173 Ark. 459, 293 S. W. 30; *Luter* v. *Pulaski County Hospital Assn.,* 182 Ark. 1099, 34 S. W. (2d) 770. In the last cited case many cases on this question were reviewed, and the court there held that the amendment should be construed as it reads—literally.

In *Anderson* v. *American State Bank,* 178 Ark. 652, 11 S. W. (2d) 444, it was held, however, that a warrant could be issued under a contract to be paid out of the

Highway Fund derived from the State revenues if it required all of such funds on hand to make the first payment with the deferred payments to be made in the following years out of such fund, the creditor taking a chance of getting the money due him out of the fund after it came into the county treasury. These warrants having been issued to be paid out of the "Special County Road Fund," which was composed largely of county revenues, were void, and the court erred in not so holding. Since, however, under the law the county was entitled to certain income from the State Highway Fund to be returned to it under said act of the Legislature (act 63 of 1931), the county court was authorized to make the contract for the payment of these supplies out of such fund, as it did in fact do herein, and the creditor or holder of warrants held void as issued against the revenues of the county contrary to the provisions of the said amendment No. 13 to the Constitution was entitled to payment of his said claim out of such fund when returned to the county treasury, and the right to such payment is not affected by the holding of the warrants, wrongfully issued as already indicated, invalid.

The warrants being void as issued for an amount in excess of the revenues of the county for the fiscal year, the court erred in holding otherwise, and in directing a mandamus to compel their payment. The judgment is reversed accordingly, and the cause dismissed.

NORTHERN OHIO COMPANY *v.* WILLIAMS.

Opinion delivered October 12, 1931.

Walter N. Killough, for appellant.

J. G. Waskom, for appellee.

KIRBY, J. Appellant prosecutes this appeal from a judgment against it for professional services of a physician to the sharecroppers on its farm.

Appellee, a physician, stated he attended the tenants on the farm of appellant at the direction of the farm superintendent or foreman and charged the account for his services directly against appellant company, the owner of the farm. That the calls came over the superintendent's 'phone, from him or his wife; and during high water the superintendent furnished a motorboat, when there was necessity for its use, to enable him to attend the sick persons, and also a saddle horse was furnished him so he could ride to the houses of the patients on the back of the farm.

The superintendent or manager of the farm admitted this to be true, but said he had the only 'phone on the plantation and rendered the service for the benefit of the sick sharecroppers on the place and not because of any authority to employ a physician for the company, which he said he did not have. He admitted, however, that he had been furnished two or three accounts of the charges against the company for professional services to the sharecroppers on the place, and thought he had sent one of the accounts to each of two of the officers of the appellant company, one to its president which they denied receiving. He also stated that, after the bill was received, he talked with an officer of the company Mr. Cothern, about medical attention to the sharecroppers, and the officer inquired what physician they wanted, and, being told, said he supposed that they would have to furnish the services. He also stated that he inquired what should be done about the accounts of Dr. Williams for services rendered, and the officer replied: "We will have to O. K. it."

The court instructed the jury which returned a verdict for about one-half the amount sued for.

It is insisted that the agent was without authority to make the contract for professional services of appellee and bind the corporation to the payment thereof, and that the evidence is insufficient to show ratification of the act.

The court properly instructed the jury as to the apparent and implied authority of the agent, and the testimony was sufficient to warrant the verdict, upon either the ground of apparent or implied authority of the agent or superintendent of the farm, who was in charge of the commissary furnishing supplies to the tenants to make the contract, or ratification of his conduct in procuring the services of a physician after such service was performed. *Standard Pipe Line Co.* v. *Haynie Construction Co.*, 174 Ark. 332, 295 S. W. 49.

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

SIMMONS *v.* STATE.

Opinion delivered October 12, 1931.

Walter A. Isgrig and *Elmer Schoggen,* for appellant.

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

MEHAFFY, J. Appellant and one J. R. Graham were jointly indicted for murder in the first degree. They were charged with killing one Elgin Jordan. Graham pleaded guilty, and appellant was tried in the Pulaski Circuit Court and convicted of murder in the first degree, and his punishment fixed at life imprisonment in the penitentiary. Appellant prosecutes this appeal to reverse the judgment of the circuit court.

The appellant, who was twenty-four years old, lived in North Little Rock, was married, and his occupation was electrical helper. According to appellant's testimony, he had never been in trouble before this except on two whiskey charges.

There had been a robbery of the Engleberger Cafe, but the evidence is in conflict as to whether appellant participated in this robbery. Appellant had known Graham, according to his testimony, four or five months. On the morning that Jordan was killed, appellant had gone near Moore's houseboat, he said, to meet a woman. He saw Graham at that time, and he testified that Graham

asked him to carry him somewhere, as he had several times before.

He returned to where Graham was, Graham asked him to wait a minute, and then Graham went into a little tool shack, and came out pulling down his pocket. Jordon was there, and he and Graham came up to the car. Graham got in the front seat and Jordan in the rear. Graham told appellant to drive out the 19th Street Pike, and while they were driving, they talked about money matters, and Graham said it was not right if Westerman owed Jordan part of the money, and that he ought to pay him, and that when he got out there he'd see that Westerman gave Jordan his part. According to appellant's testimony, they turned off the pike and drove a short distance and Graham told appellant to wait, that they would be back in a few minutes. When Graham told appellant they had reached the place, appellant stopped the car, and Graham and Jordan walked off together.

Graham came back to the car alone, and he and appellant came back to the city. Several days after this Jordan's body was discovered, and the examination showed two gun shot wounds that had caused his death. One bullet entered behind the left ear, ranged downward through the neck, coming out below the right ear. The other bullet entered below the left shoulder blade and passed through the body. Other evidence will be referred to in the opinion.

Appellant first contends that the evidence is insufficient to warrant a conviction of murder in the first degree. The evidence shows that appellant and Graham were associates, frequently together both before and after the killing of Jordan. A short time before the killing of Jordan, Graham and others had robbed the Engleberger Cafe in North Little Rock. Graham testified that the appellant was involved in this robbery. Graham also testified that he and Westerman divided the money.

On the day of the killing of Jordan, appellant and Graham got in the front seat of the automobile and

Jordan got in the back seat. They drove several miles out the Hot Springs Pike and left the pike and drove some distance and were gone a short time and Graham and appellant returned to the city in the car without Jordan. A few days thereafter Jordan's body was found, and two gun shots were in the body, either one of which would have killed him. The physician testified that the wound in the head killed him, but that if he had not been shot in the head, the other one would have killed him. Appellant and Graham were constantly together thereafter until Graham was arrested.

Graham testified that he did not know who killed Jordan. The appellant testified that Jordan and Graham left the car and went a few yards away, out of sight of the car, and that he heard two shots, and that Graham came back to the car and said that he had killed Jordan. This testimony of appellant is contradicted by Graham. If it occurred like appellant said it did, then Graham did know who killed Jordan. The statement of Graham that he did not know who killed Jordan could only mean that he and appellant both shot him, and that he did not know which one killed him. It cannot mean anything else, because, if Graham went out with Jordan alone, and fired both shots, he of course knew who killed Jordan.

The jury had a right to believe that Graham's statement was true, and that both Graham and appellant shot Jordan and that he did not know which one killed him. The jury may have believed that appellant and Graham thought Jordan knew too much about the cafe robbery and that they together took Jordan to the place where he was killed and that both of them shot him.

The undisputed proof shows that Jordan was claiming some of the money, and Graham, according to the evidence, was going to make Westerman pay Jordan some of the money. The circumstances and evidence very strongly indicate that both Graham and appellant drove Jordan out into the woods and killed him. There was ample evidence to justify the jury in believing that both of them took part in the killing.

Another assignment of error relied on is the court's refusal to grant a peremptory instruction. This request for a peremptory instruction was of course based on the theory that the evidence was insufficient to support the verdict, and is the same as his first assignment of error. What we have just said answers this contention.

It is next contended that the court erred in refusing to furnish a full and complete panel of twenty-four jurors. The record shows that the appellant announced ready for trial, and waived arraignment and formal drawing of a jury, and entered a plea of not guilty. The record also shows that, during the examination of the regular panel for the purpose of selecting jurors to try the case, the name of Mrs. N. M. Harrison was called for examination, and the clerk announced that Mrs. Harrison had been excused, whereupon the following occurred: Mr. Isgrig: "How many jurors are on the panel?" Mr. Gladden (clerk): "There are twenty-one." Mr. Isgrig: "I want a full panel of 24 jurors and I won't proceed until it is completed, I am entitled to a panel, and I won't proceed further until I get it." Court: "The request is denied." Mr. Isgrig: "I except."

"The statute provides that by consent of the parties, the drawing of the jury may be waived, in which case the whole panel may be sworn, examined, and disposed of as provided in the preceding section." Crawford & Moses' Digest, § 3146.

The preceding section referred to provides that when the panel is exhausted, bystanders may be summoned. We think these two sections clearly show that when the drawing of the jury has been waived the defendant is not entitled to a full panel of 24 jurors.

Section 3144 of Crawford & Moses' Digest provides for the method of selection in felony cases. In construing these §§, 3144 and 3146, of Crawford & Moses' Digest, this court said: "Our construction is that it is only necessary to have 24 names in the box when a drawn jury is not waived. In this case appellant waived a drawn jury. The waiver was tantamount to saying to the court that there

was no necessity for filling up the panel until the qualification of each of the 12 jurors in the box was passed upon and until the State and appellant should exercise such number of their peremptory challenges as each might desire." *Bohannon* v. *State,* 160 Ark. 431, 254 S. W. 683.

This court also recently said: "When the case was finally called for trial, appellant announced ready and proceeded with the impaneling of the jury without asking for a drawn jury until a portion of the jury had been selected and accepted. The question was raised that there had been no formal arraignment, and, appellant then refusing to plead, the court entered on the docket a waiver of arraignment and a plea of not guilty. It was then that appellant's counsel asked for a drawn jury. It was too late then to make the request, for appellant had, by proceeding with the selection of the jury without a formal arraignment, waived both the arraignment and the right to have a drawn jury." *Herring* v. *State,* 170 Ark. 352, 280 S. W. 353.

The record in the instant case shows that the appellant waived arraignment and formal drawing of a jury and entered his plea of not guilty. His request for a full panel therefore came too late.

Appellant's next contention is that the court erred in permitting the introduction of immaterial and irrelevant photographs and enlargements thereof. The objection to the photographs was that they were immaterial and do not shed any light on the case as to defendant's guilt or innocence and that they were introduced for the purpose of inflaming the minds of the jury. The photographs introduced in this case were shown to have been accurately taken and to correctly represent what they were intended to show. This court stated the rule with reference to the introduction of photographs as follows: "As a general rule photographs are admissible in evidence when they are shown to have been taken accurately and to be correct representations of the subject in controversy and are of such nature as to throw light upon it." *Sellers* v. *State,* 91 Ark. 175, 120 S. W. 840;

Washington v. *State,* 181 Ark. 1011, 28 S. W. (2d) 1055; *Nicholas* v. *State,* 182 Ark. 309, 31 S. W. (2d) 527.

The appellant objected to the introduction of the confession or statement that he had made after being arrested. He contends that the court erred in permitting this to be introduced in evidence. The confession was substantially the same as appellant's testimony at the trial, and therefore the appellant was not prejudiced by the introduction of the statement. The appellant testified that the statement was voluntarily made, and that no promises of any kind were made to him and no threats were made, and appellant does not contend that the confession is not true.

The appellant contends that the court erred in permitting a continued reopening of the case. The record does not show any reopening of the case, but there was a recall of witnesses and evidence introduced, but all this was done before the appellant introduced any evidence, and the case had not been closed. But the reopening of the case, either for the re-examination of a witness or the taking of further testimony after the testimony on both sides has been concluded, is a matter within the sound discretion of the court.

The statute reads as follows: "A witness once examined cannot be re-examined as to the same matter without leave of the court. But he may be re-examined as to any new matter upon which he has been examined by the adverse party. After the examination on both sides is concluded, the witness cannot be recalled without leave of the court." Crawford & Moses' Digest, § 4190; *Whittaker* v. *State,* 173 Ark. 1172, 294 S. W. 397; *Teel* v. *State,* 129 Ark. 180, 195 S. W. 32; *Smith* v. *State,* 162 Ark. 458, 258 S. W. 349.

Appellant contends that the court erred in refusing to instruct the jury on the different degrees of manslaughter. The court properly refused the request of appellant to instruct the jury on the different degrees of manslaughter because under the evidence the appellant was either guilty of murder in the first degree or

innocent. There is no evidence in the record to justify an instruction on the other degrees of homicide.

This court recently said, in discussing the refusal of the lower court to instruct on the lesser degrees of homicide: "We do not think that this assignment of error is well taken. There was no evidence to establish a lesser degree of homicide than murder in the first degree. The evidence shows that the defendant, if guilty at all, was guilty of murder in the first degree; and it was not error for the court to refuse to give instructions authorizing the jury to return a verdict of guilty of one of the lesser degrees of homicide when there was no evidence upon which to base such instructions." *Washington* v. *State,* 181 Ark. 1011, 29 S. W. (2d) 1055; *Clark* v. *State,* 169 Ark. 717, 276 S. W. 849; *Harris* v. *State,* 170 Ark. 1073, 282 S. W. 680.

Appellant contends that the court erred in its refusal to instruct the jury on the question of appellant's being an accessory. As we have already said, the evidence in this case shows that the appellant was either guilty of murder in the first degree or innocent. This court said: "One present, aiding and abetting in the commission of a felony, formerly a principal in the second degree is under the statute responsible for the result of the act done as though he had done it himself, a principal offender, and must be indicted and punished as such; and in charging appellant with having stabbed the deceased with a knife, his act was stated according to its legal effect." *Parker* v. *State,* 169 Ark. 421, 275 S. W. 758; Crawford & Moses' Dig., 2308-2309.

Appellant contends that the court erred in giving an argumentative instruction. In the instruction objected to the court simply told the jury that it was not necessary to prove motive in order to warrant conviction.

The court continued in its instruction as follows: "It may happen that there are no external conditions capable of proof of express malice, but the prosecution does not necessarily fail for that reason." The part quoted is the part objected to by appellant. There was

no error in giving this instruction. *Floyd* v. *State,* 181 Ark. 185, 25 S. W. (2d) 766.

The other instructions objected to by defendant were instructions defining murder and malice given in all cases where the charge is murder in the first degree, and have been many times approved by this court.

It is finally contended by the appellant that W. A. Howell, one of the jurors, was not a fair and impartial juror. The affidavit of one D. M. Phillips was introduced to the effect that Howell had stated that Charley Simmons was a crook and a law violator. The statements in this affidavit were contradicted by Howell. The finding of the trial court on this conflicting evidence will not be disturbed by this court. *Cabe* v. *State,* 182 Ark. 49, 30 S. W. (2d) 855.

The trial court did not abuse its discretion. *Pendergrass* v. *State,* 157 Ark. 364, 248 S. W. 914. We find no error, and the judgment is affirmed.

[redacted]

LITTLE ROCK *v.* HOLLAND.

Opinion delivered October 12, 1931.

[redacted]

Linwood L. Brickhouse, for appellant.

Geo. A. McConnell and *Graham R. Hall,* for appellee.

McHANEY, J. The only question presented by this appeal is whether the city of Little Rock, in the operation

and maintenance of an electric light plant and distributing system, including necessary poles and wires, for the sole purpose of lighting its streets, alleys, public buildings and grounds, acts in a proprietary, corporate capacity, to which liability for negligence attaches; or whether it acts in its governmental capacity, on which no liability for negligence of its agents or servants may be predicated.

Appellee, an electric lineman in the employ of the city was sent out alone by his superior to remove a pole in the city's electric line. He climbed the pole, after an inspection, to remove the wires therefrom, and, when he had reached the top, it broke because of a rotted condition beneath the surface of the ground, causing him to fall and receive painful and permanent injuries. Negligence was alleged by reason of the failure of his superior to inspect the pole or to warn him of its dangerous condition, in failing to furnish him a safe place to work, and in not sending another to assist him. A demurrer to the complaint was interposed and overruled. A trial resulted in a verdict and a judgment for appellee for $1,000. Is the city liable for the negligence of its agent or officer as alleged in this respect?

It is conceded that the city owns and operates its light plant and distributing system for the sole purpose of lighting its streets, alleys, public buildings, parks and grounds, and that it sells no current to private consumers or otherwise.

At the outset we desire to commend the diligence of counsel for both parties in the preparation of the excellent briefs submitted to us. An exhaustive review of our own decisions touching on the question, as well as a great collection from other jurisdictions, has been made. We find it unnecessary, however, to go beyond our own cases to determine the question involved, as we feel the principle has been well settled by many decisions of this court. We will not undertake to review them all, but only enough of them to show that the principle has been decided.

As early as *Granger* v. *Pulaski County,* 26 Ark. 37, it was held that counties are *quasi* corporations, and that they possess no power and incur no obligations, except conferred or imposed by statute, and that they are not liable, in a private action by the party injured, for the negligence of their officers, unless authorized by statute. At the conclusion of the opinion the court pointed out a distinction between counties and municipalities and rather indicated that had the action been against a municipality, instead of a county, that the municipality would be answerable, and held to a performance of its corporate duties. Granger and wife sought damages for injuries received by reason of a defect in a public highway, a defective bridge. It was denied.

Whatever distinction between liability of counties and cities the court pointed out in the Granger case, *supra,* has been lost sight of by this court in its later decisions. For instance, in *Arkadelphia* v. *Windham,* 49 Ark. 139, 4 S. W. 450, 4 Am. St. Rep. 32, it was held that a municipality is not liable for nonfeasance in failing to put the streets in repair, or in failing to keep them in repair, *Ft. Smith* v. *York,* 52 Ark. 84, 12 S. W. 157, in the absence of a statute imposing such liability. But in the earlier case of *Mayor of Helena* v. *Thompson,* 29 Ark. 569, it was held that the city was liable for the misfeasance of its officers caused by raising the grade of a street, thereby changing the natural channel of a stream, and in failing to provide other means of sufficient capacity to carry off the water so diverted, which flooded Thompson's land. This court, in *Collier* v. *Ft. Smith,* 73 Ark. 447, 84 S. W. 480, 68 L. R. A. 237, pointed out the distinction between the two lines of cases in this language: "There is no necessary conflict between the earlier case (29 Ark.) holding the city liable for misfeasance of its officers and servants and the two later cases (49 Ark. and 52 Ark.) holding that cities and towns are not liable for nonfeasance. This distinction is not without reason, for, in the absence of a statute expressly imposing liability to individuals for nonperformance of a duty to the public, none will be im-

plied, though liability might be implied from the commission of a positive wrong whereby an individual might suffer injury. Nor is this distinction without high authority to support it." Citing cases. In the Collier case damages were sought for injuries sustained because of an obstruction placed in one of the public streets of the city and permitted so to remain overnight without displaying a red light or other danger signal, and by reason of which plaintiff was thrown from his horse and injured. A recovery was denied. In that case the court recognized the distinction "between act and duties of a municipal corporation which are strictly public and governmental in their nature and those of a private or *quasi* private nature." It has been generally held that in the former there is no liability, whereas in the latter there is, and it was held that the management and control of highways by cities was of the former class.

In *Brown* v. *Bentonville,* 94 Ark. 80, 126 S. W. 93, it was held that the maintenance and operation of waterworks by the city are governmental functions, and that the discretion of the city council is not subject to control by mandatory injunction. In *Board of Imp. Sewer Dist. No. 2* v. *Moreland,* 94 Ark. 380, 127 S. W. 469, 21 Ann. Cas. 957, it was held that a sewer district is a *quasi* public corporation: "In other words, they are agents of the State to which certain powers and duties of a public nature have been delegated, but which can only exercise the corporate functions which the statute has expressly conferred upon them. Public *quasi* corporations are created with limited statutory powers, and the general rules, as respects the question of liability to individuals for the negligence of their officers or agents, is that no such liability attaches unless expressly provided by statute." Citing cases.

From the foregoing cases we may deduce the following principles as being well settled:

1. That a municipality is not liable for the nonfeasance of its officers and agents.

2. That a municipality is not liable for the negligence of its officers and agents in the performance of a governmental function.

We think unquestionably the city of Little Rock, in lighting its streets, public buildings and grounds, is engaged in the performance of a necessary governmental function, necessary for the convenience and safety of the public, not only of its own citizens, but of all others who may be visitors therein, for the prevention of crime, for the apprehension of criminals and for other purposes. If the maintenance and operation of waterworks, the maintenance and operation of sewers, and building and repair of streets are necessary governmental functions, for which municipalities are not liable for the negligence of its officers and agents, it is difficult to perceive why the same rule should not apply to the facts in this case. We hold that it does. Appellee bases his action upon the failure of his superior to perform a duty, a mere act of nonfeasance, for which the city is not liable, and for negligence in the performance of a governmental function for which the city is not liable.

The court therefore erred in overruling the demurrer and in submitting the case to the jury. The judgment will be reversed, and the case dismissed.

ROSS, GRAHAM AND LOGAN *v.* STATE.

Opinion delivered October 12, 1931.

[redacted]

Evans & Evans, for appellants.

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

McHaney, J. The prosecuting attorney filed with the clerk of the circuit court, on June 19, 1931, three separate petitions, one against each appellant, to abate as a nuisance the business of each appellant. It was alleged that they were operating "snooker" halls or parlors in Booneville, in violation of the laws of the State; that gambling was permitted; that children under the age of 18 were permitted to play and loiter therein; that "snooker" parlors are in fact pool rooms operated under that name as a shield from its reality; that the reputation of such places is bad, and that they are kept open late at night, all to the detriment of public morals and welfare of the citizenship of Logan County and the State of Arkansas. Further "that they are truly a public nuisance." An order was prayed abating each of them as a nuisance. A demurrer was interposed by each appellant challenging the sufficiency of the petition and the jurisdiction of the court to abate their places of business as a nuisance on the said petition, which was overruled by the court. Motions were thereupon made to transfer to equity and overruled. Separate responses were filed denying all the allegations of the petition, and request was made for trial by a jury, which the court also denied. The cases were consolidated, tried before the court, and a finding made against appellants that they were operating places of business which were public nuisances and should be abated. An order was made and entered directing the sheriff to close each place until the further order of the court, "and that the gambling devices, the pool tables, balls and cues be held by him until the regular August, 1931, term of this court."

This appeal challenges the validity of this order.

The evidence taken on the trial, brought into the record by bill of exceptions, is not in conflict. It shows that "snooker" is a game very much like pool, played on a pool table with balls and cues, but with more balls, twenty, instead of fifteen, as in pool, and is a more scientific game. The charge made by the house is 5 cents per cue per game, and, by an arrangement between or among the players, the loser pays for the game, with the knowledge and consent or acquiescence of the house. A few minors have been seen to play, but no drinking, vulgar or profane language is permitted, nor is gambling on the games allowed, except as it may be so in permitting the loser to pay for the game. Each appellant has been paying a small license charge to the city. This is the substance of all the evidence.

It appears to us that, in effect, this is a suit in the circuit court by the prosecuting attorney in the name of the State, to enjoin appellants in the further conduct of their places of business as it is alleged they were conducted. Did the circuit court have jurisdiction?

By act 469 of 1921, p. 993 of said acts, it is made unlawful "to operate for hire any billiard hall or pool room within three miles of any church or school in Logan and Craighead Counties." A violation of this act is made a misdemeanor, punishable by fine of from $50 to $200, and each day's operation is made a separate offense. It was found by the court that the game called "snooker" is a form of pool, and that the places so operated are pool rooms, and are in violation of said act above mentioned. Said act does not declare pool rooms to be public nuisances, nor does it attempt to confer jurisdiction on the circuit court to abate them. A violation of the act is made a misdemeanor, subjecting the misdemeanant to severe penalties, after a prosecution and conviction. This act, therefore, does not sustain the action of the court in this case.

It appears, however, that the circuit court relied somewhat on the decision of this court in *Marvel* v. *State*

ex rel. Morrow, 127 Ark. 595, 193 S. W. 259, 5 A. L. R. 1458. But we fail to find there any support for the learned trial court's action. The question there was the constitutionality of act 109, p. 408, Acts 1915, making the business of selling intoxicating liquors illegally in any building structure or place within this State a public nuisance, and enjoining upon the circuit and chancery courts of the State the duty of abating them. The act was held valid, by a divided court, on the ground that no additional jurisdiction was conferred on chancery courts by the act, but that a new condition had been prescribed upon which its ancient jurisdiction might be exercised. The court said: "The act is remedial in its nature, and, while the Legislature cannot enlarge or restrict the jurisdiction of chancery courts, it is entirely within the province of the Legislature to prescribe the procedure for the exercise of this jurisdiction, and to prescribe new conditions under which that jurisdiction may be exercised. The Legislature has not conferred the jurisdiction upon the chancery court to abate public nuisances. This jurisdiction they have always had." The court in that case distinguished its previous holdings in *Hester* v. *Bourland,* 80 Ark. 145, 95 S. W. 992; and other cases including *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C, 980, from its then holding as above stated. In *State* v. *Vaughan,* 81 Ark. 117, 98 S. W. 685, it was held that, quoting syllabus, "Injunction will not lie at the instance of the State to restrain an indictable public nuisance, unless the nuisance is one touching civil property rights or privileges of the public, or the public health is affected thereby, or some other ground of equity jurisdiction exists calling for the injunction." This doctrine was reaffirmed in *Lyric Theater* v. *State,* 98 Ark. 437, 136 S. W. 174, 33 L. R. A. (N. S.) 325.

Whether the "snooker" parlors operated by appellants are in reality pool rooms, as the court found, cannot affect the matter, except that, if they are pool rooms, they may be prosecuted under the act above mentioned. It appears, however, that they may be also

operating a gambling device, under the decision of this court in *State* v. *Sanders,* 86 Ark. 353, 111 S. W. 454, 19 L. R. A. (N. S.) 913.

We conclude therefore that the circuit court was without jurisdiction in the premises, and the case will be reversed, and the proceedings dismissed.

KRONE *v.* MAESTRI.

Opinion delivered October 12, 1931.

Hill, Fitzhugh & Brizzolara, for appellant.

G. L. Grant, for appellees.

SMITH, J. This suit was brought by the trustees named in a deed of trust to foreclose that instrument. The testimony discloses the following facts: Leo Maestri operated a grocery business in a building owned by himself in the city of Ft. Smith, on which there was a mortgage not involved in this suit. To secure a number of creditors to whom he was indebted, Maestri executed the deed of trust here sought to be foreclosed. This instrument named the creditors and stated the amounts due them respectively, and Maestri did not deny the existence

of this indebtedness. The deed of trust covered not only the stock of goods, but the trade fixtures, including a Frigidaire and a cash register, but a foreclosure is prayed only as to the trade fixtures and the Frigidaire and cash register. Buell and his wife, who were made defendants, bought an interest in the business, and later bought the entire interest of Maestri, and thereafter conducted the business in their own names.

The original purchase price of the Frigidaire was $595, and upon this Maestri owed a balance of $253.66. The original purchase price of the cash register was $495, and upon which Maestri owed a balance of $100.

The Frigidiare and the cash register had been sold under conditional sales contracts whereby the title was reserved until the purchase price had been paid. Buell paid the balance of purchase money due on both the Frigidaire and cash register and claims that he thereby became the owner of both.

The complaint filed to foreclose the deed of trust made the Buells, as well as Maestri, parties defendant, and it was alleged that a partnership composed of Maestri and the Buells had assumed the payment of the indebtedness secured by the deed of trust and had converted the goods which it described.

The complaint alleged that the trustees, on behalf of the creditors, had agreed to release a lien of the deed of trust on the stock of goods in consideration of the agreement of the Buells to assume and pay the debts secured by the deed of trust.

The Buells denied in their answer that they had agreed to assume the payment of the existing indebtedness, but alleged that they took possession under an agreement with the trustees, referred to as Exhibit A, of which the following is a copy:

"Ft. Smith, Ark., Sept. 25, 1929.

"For the sum of two hundred sixty and no/100 dollars paid by John Buell we will release the stock of goods which was placed in the building by Leo Maestri and

which was mortgaged to the creditors together with all fixtures in the building by Maestri.

"We, the undersigned trustees for the creditors, release the stock only.

"Gus Krone, Trustee,
"J. A. Sipe, Trustee."

As we understand the testimony and find the facts to be, Buell now denies any liability under the instrument designated as Exhibit A, set out above, for the reason that it was never delivered and never became effective, although it is set out in the answer as the instrument and means under which he entered into possession of the property. It was also denied that the Buells have detained or claimed ownership of any of the fixtures except the Frigidaire and cash register, which Buell claims to have purchased from the original vendors by paying the balance of the purchase money due thereon. It was also alleged that they had requested the trustees to remove all the other trade fixtures from the building.

Certain cross-pleadings were filed by the Buells and Maestri against each other, which we need not consider, as they are not involved on this appeal. The complaint was dismissed as being without equity, and this appeal is from that decree.

We think the instrument referred to as Exhibit A must be given effect, in so far as it obligated Buell to pay $260 for the release of the stock of goods from the mortgage, because the parties have acted under it, although the $260 therein referred to was never paid in the manner contemplated. But a sum in excess of this amount was paid by Buell when he paid the balance due on the Frigidaire and the cash register. This payment of the balance of the purchase price of the Frigidaire and cash register inured to the benefit of the partnership, because the contract evidenced by Exhibit A, under which, as we have said, the parties have acted, contemplated that the deed of trust given by Maestri which covered the Frigidaire and cash register, should

subsist and continue in effect except as to the stock of goods.

The Buells appear to have refused to assume the payment of the indebtedness secured by the deed of trust beyond the $260, and they cannot be held liable therefor, but such interest as they acquired in the Frigidaire and cash register was, for the reasons here stated, acquired subject to the deed of trust.

There were transactions between Maestri and the Buells which we need not recite, but it is not claimed that Maestri has paid his creditors the indebtedness which the deed of trust secured, and, as he does not deny this indebtedness, judgment will be rendered against him for the amount thereof.

ROGERS *v.* WOODS.

Opinion delivered October 12, 1931.

Buzbee, Pugh & Harrison, for appellant.

Robert Bailey and *Chas. Mehaffy,* for appellee.

BUTLER, J. This is an appeal from a judgment of $10,000 in favor of the appellee for injuries sustained on January 16, 1929, in a collision between a car driven by appellee and a truck driven by the defendant near Conway, Arkansas.

The sufficiency of the evidence is not questioned. The giving of instruction No. 6 at the request of plaintiff is the single assignment of error presented and argued by appellant, which instruction is as follows:

"You are instructed that, if you find from the preponderance of the evidence in this case that the defendant or his employee was driving his truck at a speed in excess of thirty-five miles an hour, that this is *prima facie* evidence of negligence and casts the burden upon the defendant to prove that he was exercising ordinary care notwithstanding the violation of this law. If you further find from the preponderance of the evidence in this case that the defendant has failed to prove he was exercising ordinary care notwithstanding the violation of the law, and that said violation of the law was the proximate cause of the collision and the resulting injuries, if any, and that plaintiff was exercising ordinary care under the circumstances, then you must find for the plaintiff."

By § 4 of act 223 of the Acts of 1927, subdivision (a), the rule of conduct for persons driving vehicles on the highway is prescribed, *i. e.,* that he "shall drive the same (vehicle) at a careful and prudent speed not greater than is reasonable and proper having due regard to the traffic, surface and width of the highway, and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such speed as to endanger the life, limb, or property of any person."

By subdivision (b) of the same section it is provided that in all cases where the speed at which a vehicle is driven shall not exceed the speed limits specified in the act, the driver's conduct shall be *prima facie* lawful.

By subdivision 8 it is provided that it shall be *prima facie* unlawful to exceed the speed limits, thirty-five miles per hour being the extreme limit.

Upon the foregoing statute is based the instruction of which complaint was made. As stated by the appellant, it creates no civil liability, but imposes a penalty for its violation. Yet an injured party, in seeking redress by common-law action, may base such action on the evidence found in its violation; and, as such action is based not on the statute but on the evidence found in its violation, a literal adherence to its language is not essential, though perhaps to be desired.

According to the statement made in Huddy's Enc. on Automobile Law, vol. 3-4, page 61, the great weight of authority is to the effect that a violation of the statute such as the above is negligence *per se,* but in this State the rule is that it is not negligence *per se,* but is evidence of negligence (*Mays* v. *Ritchie Gro. Co.,* 177 Ark. 35-37, 5 S. W. (2d) 728), which casts upon the defendant the burden of proof to establish a compliance with the rule of conduct fixed by the statute, and which would be ordinary care within its meaning. *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. (2d) 676.

In criticism of the instruction, counsel say: first, that it departs from the language of the statute in that it substitutes the words "*prima facie* unlawful," for "*prima facie* evidence of negligence"; second, that it assumes that defendant violated the law; third, that it assumes that driving in excess of thirty-five miles per hour was negligence. Counsel suggest the language in which the instruction should have been couched.

Under the statute, *supra,* the *prima facie* violation is driving in excess of thirty-five miles an hour. Unless, therefore, the driver establishes ordinary care on his part, driving in excess of thirty-five miles per

hour violates the law and is evidence of negligence. When one introduces evidence rebutting the *prima facie* case of unlawful conduct, of course the fact that he was driving in excess of thirty-five miles per hour loses its probative value. The same proof which raises the presumption of an unlawful act creates the evidence of negligence, and the same proof which rebuts that presumption destroys the evidence created by it. So, it seems to us that the use of the words "*prima facie* evidence of negligence" was unnecessary, for, if they had been wholly omitted, the legal effect would have been unchanged, and stripped of its unnecessary words and arranged in proper order, an interpretation might be placed on the instruction considered as a whole that it did not assume a violation of the law or of defendant's negligence and that the excess speed, if proved, without proof of the exercise of ordinary care on defendant's part, established a violation of the law which was an evidence of negligence sufficient to fix liability, if the rate of speed was the proximate cause of the collision and injuries provided plaintiff himself was not negligent. This seems to us to be the meaning of the instruction.

We have frequently held that where an instruction is imperfectly worded so as to be obscure or ambiguous, if the appellant is of the opinion that it might mislead the jury, he should by specific objection point out what he conceives the assumption of fact to be and the inaccuracies in the language of the instruction. *St. L. S. W. Ry. Co.* v. *McLaughlin,* 129 Ark. 377, 196 S. W. 460; *St. L. Sw. Ry. Co.* v. *Wyman,* 119 Ark. 530, 178 S. W. 423; *St. L. I. M. & S. R. Co.* v. *Hutchinson,* 101 Ark. 424, 142 S. W. 527.

Had the appellant interposed his specific objections, the court could, and doubtless would, have converted the instruction into a concise and clear statement of the law by the use of a few qualifying and explanatory words; or, the appellant, if he so desired, might have had the instruction put in a more accurate form by presenting a correct prayer for instructions on the issues

involved, thus removing any anticipated doubts from the mind of the jury. As the instruction was not necessarily erroneous and prejudicial, a general objection was not sufficient.

Case affirmed.

Mr. Justice MEHAFFY disqualified and not participating.

FIRST NATIONAL BANK OF WYNNE *v.* COFFIN.

Opinion delivered October 12, 1931.

Ogan & Shaver, for appellant.

A. F. Clements and *S. H. Mann,* for appellee.

BUTLER, J. This was a suit by the plaintiff in which he prayed for a cancellation of a contract entered into by and between plaintiff and defendant, that the defendant be required to accept reconveyance of property conveyed under said contract, for judgment against the defendant for all sums paid out by plaintiff on account of his purchase of said lands, and that certain outstanding notes for the remainder of the purchase price and the deed of trust securing same be canceled. The ground alleged for cancellation of the contract and deed

thereunder was mutual mistake of the parties as to the quantity of land conveyed. Defendant filed answer and cross-complaint asking for a foreclosure of its mortgage. From a decree in favor of plaintiff the defendant prosecutes this appeal.

From the evidence it appears that it was the understanding of the plaintiff that the defendant was the owner and in possession of a certain tract of land commonly known as the Austell place in or adjacent to the town of Wynne, Arkansas. Learning that the place was for sale, plaintiff interviewed Mr. Horner, the cashier of the defendant bank, regarding its purchase. The result of this interview was the execution of a contract by which it was agreed that certain described real estate be conveyed to plaintiff upon certain terms, and on December 12, 1927, a deed was executed conveying the land according to the description in the contract, being lots Nos. 301-450, both inclusive, of the Bedford Addition to the town of Wynne, Cross County, Arkansas, and the southwest quarter of the northwest quarter (SW¼ NW¼) of section 22, township 7 north, range 3 east, containing forty acres, more or less, in said county. The agreed purchase price was $4,750 of which the sum of $1,750 was paid in cash and the balance evidenced by certain promissory notes secured by deed of trust by which plaintiff conveyed to a trustee for the defendant bank the property described in the deed and also an additional forty acres. One of the notes for $500 was paid and interest payments on the others made in the sum of $431.61. Plaintiff paid the taxes for the years 1927, '28 and '29, in the sum of $178.27; for repairing buildings on the premises he expended $275; for surveying the tract and for attorney's fees the sum of $61.50, making a total expenditure of $2,959.66.

The Austell property was marked by well defined boundaries and inclosed by a fence, all said property being included in one field and cultivated as farm lands. Austell, the former owner, had so occupied and used the land for a period of twenty years when the defendant

bank acquired it under foreclosure proceedings. Plaintiff was familiar with the property, having known it for a number of years. He did not obtain immediate possession after his purchase because one Williams, a tenant of the defendant bank, was in possession of the dwelling house on the property, and it was not until about January 1, 1928, that the tenant of defendant moved out and plaintiff, by a tenant, moved in. A short time after plaintiff had entered into possession of the property, one J. C. Bell laid claim to some of the property near the northern boundary and attempted to take possession of same. Another person by the name of Burke also made claim to a portion of the property. Plaintiff attempted to, and did, compromise with Burke and Bell, buying them off for a small sum of money. This was called to the attention of the defendant bank and plaintiff and Mr. Killough, the attorney for the bank, with plaintiff's attorney, went out and looked over the land and discussed the situation. After this the town council of Wynne addressed a letter to plaintiff notifying him that the council had ordered the removal of all the obstructions and encroachments from certain named streets which appeared to be located in Bedford's Addition and in the field known as the Austell place of which plaintiff was in possession under his purchase from the bank. This, too, was called to the attention of the defendant bank, which undertook to remedy the situation by procuring an act of the Legislature for the reduction of additions and parts of same in cities and incorporated towns into acreage. The act as passed provided for proceedings in the county court on any question for the reduction of additions into acreage under the provisions of the act.

The plaintiff was notified of the passage of the act, and defendant undertook by proceedings in the county court, to obtain the benefits of such act. It appears from the order of the county court, however, that not all of the lots within the inclosure of the Austell place were included in the reduction to acreage, but only those

named in the deed from the defendant bank to plaintiff, and lots Nos. 301-450, both inclusive, were not included in the order.

Plaintiff (appellee) had a survey made of the property, and from this it was discovered that the lots described in the deed covered only a part of the property, and that about seven acres was not within the description, this part being included in lots 300-350, both inclusive. Further negotiations were had between the parties regarding an adjustment of the matter, but no one appeared to know just how to proceed, and finally in the spring of 1930, the board of directors of the defendant bank, acting through its president, notified the plaintiff that it would do nothing further toward perfecting the title. The plaintiff thereupon brought this suit.

The defendant bank contended, first, that there was no mutual mistake regarding the amount of land conveyed or its description; second, that it had not made any representations to plaintiff or shown him the land to be conveyed; and third, that plaintiff acted solely on his own opinion and judgment, and, if there was a mistake at all, it was not mutual, but the mistake of plaintiff only. The finding of the chancellor was against the defendant, and we are of the opinion that a consideration of all the circumstances and proof justified the conclusion reached. From a fair analysis of the testimony there can be no question that the defendant bank thought it owned and had title to the Austell place, and that it was attempting to convey all the land within the inclosure, and that plaintiff also thought that he was buying the land within the inclosure. While Horner, the cashier of the defendant bank, had only resided in Wynne for about two years, it is not shown that he and the officers of the bank were unacquainted with the boundaries of the Austell place, and it makes but little difference whether Horner actually pointed out the boundaries or not. For situated on land not included in lots Nos. 301-450, both inclusive, the land actually conveyed, was the dwelling

house and other improvements, which land was shown to be much more valuable than the southern part of the tract. This dwelling was considered to be on and a part of the property conveyed, for the tenant who farmed the property occupied such house as a tenant of the bank for the year 1927 and possession could not be, and was not, given under the deed from defendant to plaintiff until the expiration of the tenancy of Williams. When Williams moved out, the plaintiff, by his tenant, moved in about January 1, 1928.

The facts as found by the chancellor bring this case within the rule announced by the authorities cited in appellant's brief. *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52; *Augusta Cooperage Co.* v. *Bloch,* 153 Ark. 133, 239 S. W. 760. Although the description used in the deed was admittedly the same as that in the contract, and the appellant did convey all the land in the written contract, as we have seen, the evidence justified the conclusion that the description as used was mistakenly thought to cover the land actually intended to be conveyed, and, since it did not, under the authorities cited, the deed might be canceled for mutual mistake between the parties to the transaction unless the appellant is correct in his third and fourth contentions, *i. e.,* that any right plaintiff had to cancel the deed for mutual mistake was waived by his agreement, and that he is estopped by his conduct and delay in demanding a cancellation of the conveyance. This presents the greatest difficulty in the case and one on which the testimony is somewhat conflicting.

The appellant says that it has done everything within reason and within its power to satisfy appellee, and that an agreement was made between the parties under which the appellant agreed to procure the passage of an act through the Legislature by which the platted portion actually conveyed to plaintiff might be turned back into acreage; that, in consideration of this promise, appellee agreed that he would be perfectly satisfied with his purchase and continue his payments according to the

original agreement. In this connection Mr. Horner, the cashier of appellant, stated that an agreement was made between him as the representative of the bank and the appellee; that appellee feared the city would compel him to open up the streets and lots Nos. 301-450, inclusive, and that, if he knew that the city would not do this, he would still carry out his contract; that an agreement was made to procure an act authorizing the abandonment of the addition converting the lots to acreage; that the passage of this act was procured and an order of the court made under the authority of said act putting the lots back into acreage, and that when this was done appellee paid a $500 note which was past due and which he had before refused to pay on account of the condition of the title. This payment was made about the first of July, 1929, which only paid the principal and did not take care of the past-due interest; that appellee's attention was called to this by letter of July 12, 1929, and that at a later date he and the appellant adjusted the interest by waiver of the bank and in addition paying one-half of the purchase price that appellee had paid to Burke, one of the parties claiming an interest in the property. The amount paid by the bank on the Burke matter was $5.72. Horner was asked: "After having waived the interest and having agreed with Mr. Coffin to pay Mr. Burke one-half of the purchase price of the lot in question, did Mr. Coffin state whether or not if you would do that he would be perfectly satisfied and continue with and make the balance of the payments due for the land?" The answer was, "He did." Continuing, Mr. Horner testified that thereafter the appellee made no objection until March 21, 1930, when witness was notified by letter from appellee's attorney that he was demanding that the bank refund him all the money appellee had paid on purchase price of the land.

The appellee testified that he had purchased the property for a particular purpose; that in about three weeks after taking possession, when he discovered that others were claiming some part of the property, he was

much disturbed and immediately notified the bank, which seems to have done nothing but look the situation over and advise appellee that his title was good because of the length of time the property had been adversely held by the bank and its predecessors in title. According to appellee's testimony, which is undisputed, the appellant bank afforded him no assistance in dealing with those who were claiming title, although appellee was trying to clear same. On cross-examination of the appellee, the intimation is made that the appellant bank, when first notified that the description in the deed did not cover all of the property sought to be conveyed, offered to cancel the trade and to reimburse the appellee the money he had paid on the purchase price, and that appellee refused to reconvey the land. But he answered those questions containing the above intimation in the negative, stating that he had bought the land for a definite purpose, and had no intention of ever going back on the deal as long as he thought the bank would give him a title to it, but that he had no recollection of the offer made or of his refusal. There was no testimony introduced to contradict this. Appellee further testified that some time later on the town council gave appellee notice to open the streets through the land and to remove the fences, and to meet this defendant procured the passage of an act by which additions that had been platted into lots and blocks might be reduced to acreage. For some reason, however, probably still believing that the lots as described in the deed occupied the entire area of the land conveyed, the order was procured for only the reduction to acreage of the lots in the deed, whereas it developed that these lots were not the ones on which the dwelling house was located and which were being claimed adversely by other parties. Before the procuring of that order, the appellee had failed and refused to pay a $500 note due, and after the order of the county court he paid the same. He stated that he did this in order to comply with his part of the contract according to the understanding he had had with Horner, the cashier

of the bank; that when Mr. Killough, his attorney, was satisfied as to the title he would abide by the latter's decision, but that Mr. Killough had never been satisfied. The question was asked appellee: "Is it not true that both Mr. Killough and myself (the interrogator) advised you that the only method by which the title to this seven acres not conveyed by the bank could be straightened out would be by a suit brought by us to quiet the title," and he answered, "No, sir; I didn't think it was my place to claim that land because I bought it from the bank, and it was up to them. I don't see why I should be out any more expense—I have bought it once."

Appellee further testified that after the order of the county court, in the spring of 1930, he had two meetings with the bank officials endeavoring to get the matter straightened out, and they were trying to adjust it; that he had no intention of handing the land back to the bank because he wanted it and believed they were sincere in trying to fix it, and the first knowledge he had that the bank had no intention of quieting the title was when he attended a meeting of the board of directors in the spring of 1930, and the president of the bank so stated. Appellee also testified that he had a conversation with Mr. Horner who told him that he had sold him everything under fence and would take the matter up with his attorney and see what could be done about it; that, from the information appellee gathered from his dealings with Horner and because the bank was a reputable institution, he believed it would do the right thing, and it was only when the president of the bank, acting for the bank, refused to take further steps to adjust the title that he concluded that the bank would not do this, and in a short time thereafter he brought this suit.

Horner, the cashier, and the appellee, were the only persons testifying as to these transactions, and, while the evidence as disclosed by the record is not clear as to what the intention of the parties was with reference to claiming the title and what they were attempting to do and what was the attitude of the appellee, we can-

not say that the conclusion reached by the chancellor that the appellee had not waived any right he might have to call for a cancellation of the contract was against the preponderance of the testimony.

■ The fourth ground urged by the appellant for a reversal of the case is that the appellee is estopped by his conduct and delay in demanding a cancellation. The cases cited by appellant to support this contention, *Fitzhugh* v. *Davis,* 46 Ark. 348, and *McCormick* v. *Daggett,* 162 Ark. 16, 257 S. W. 358, correctly state the rule that one who desires to rescind upon the ground of mistake or fraud must, upon the discovery of the facts, at once announce his purpose and adhere to it; if he be silent and continue to treat the property as his own, he will be held to have waived the objection and will be conclusively bound by the contract as if the mistake or fraud had not occurred, and must proceed with reasonable diligence to disaffirm the contract so that both parties may as nearly as possible be restored to their original positions. In the case at bar, however, we do not think that the facts, as found by the chancellor, bring the appellee within the rule for he immediately brought to the attention of the officers of the appellant bank the fact that others were adversely claiming the property and continued to urge them to perfect the title until shortly before the institution of the suit, and the delay was occasioned by his mistaken belief that the bank would do whatever was necessary to perfect the title.

■ This view disposes of the fifth and last contention of the appellant that it cannot now be placed in the same position it was when a discrepancy in the acreage was first discovered, for if that be true, this was occasioned through no fault of the appellee.

The decision of the trial court, not being against the preponderance of the evidence both as to the complaint and cross-complaint, will be affirmed.

SCHOOL DISTRICT No. 65 OF RANDOLPH COUNTY *v.* WRIGHT.

Opinion delivered October 19, 1931.

George M. Booth, for appellant.

A. J. Cole and *Jackson & Blackford,* for appellee.

HART, C. J., (after stating the facts). Counsel for appellant first insist that the contract is void and unenforceable because the record does not show that the electors of the common school district at the annual school meeting voted to keep the school open more than three months in a year, as required by § 8952, Crawford & Moses' Digest. Under our settled rules of practice, this assignment of error is not before us for review. The record shows that, at the time of, or after the parties had made their statements to the jury, the court ruled that the burden was on the defendant to establish its defenses to the contract, and that it would be given the opening and closing of the case in argument. Counsel for the defendant accepted the ruling of the court as correct. Therefore, whether the ruling was correct or not, it be-

came the law of the case and governs the parties on this appeal.

It is next insisted that the court erred in instructing the jury that the burden was on the defendant to show that the plaintiff might have obtained other employment of the same character for the remainder of the term. What we have said with regard to the first assignment of error will govern on this point.

Besides this, the burden of proof was on the defendant to show that the plaintiff found or could have found employment elsewhere of the same or similar character for the balance of the term. *Seaman Stores Co.* v. *Porter,* 180 Ark. 860, 23 S. W. (2d) 249; *Tate* v. *School District No. 11 of Gentry County,* 324 Mo. 477, 23 S. W. (2d) 1031, 70 A. L. R. 771; *Beissel* v. *Vermillion Farmers' Elevator Co.,* 102 Minn. 239, 113 N. W. 575; *Farrell* v. *School District No. 2 of Township of Rubicon,* 98 Mich. 43, 56 N. W. 1053; *Hamilton* v. *Love,* 152 Ind. 641, 53 N. E. 181, 71 Am. St. Rep. 384; *Court* v. *O'Connor,* 65 (Tex.) 834; *Howard* v. *Daly,* 61 N. Y. 362; and *Kring* v. *School District No. 3,* 105 Neb. 864, 182 N. W. 481. In the last case cited it was said that it seems to be practically the latest and universal rule that, where an employee brings an action against the employer for damages resulting from a violation of the contract of employment, the burden rests upon the defendant to plead and show that the employee might have, or could have, obtained employment in mitigation of damages.

The next assignment of error is that the contract is unenforceable because it was unlawful for the board of directors of the school district to employ a teacher unless there was money on hand with which to pay her. To sustain this assignment of error, reliance is placed on § 9030 of Crawford & Moses' Digest, which provides that it shall be unlawful for any board of directors in any school district to employ a teacher unless said district has money to its credit in the county treasury for such work. The section, however, contains a proviso that, if the amount of taxes to be paid in by the collector of any county shall

be sufficient to have a school taught in any district in which such taxes are to be paid, then the directors shall have the power to employ teachers to teach a school in such district. In the present case, the record shows that during the time for which appellee was employed to teach the school, there was deposited in the county treasury for the district the sum of $531.39, which was an amount more than sufficient to pay appellee under her contract. It did not make any difference that the contract was to be performed after the next annual school meeting. Under our statute, there are three directors of a common school district, and each one is elected annually for a term of three years. Hence the court has held that it is not unlawful for the school board to make a contract for a teacher for a term beginning after one of the members of the board goes out of office. *Gates* v. *School District,* 53 Ark. 468, 14 S. W. 656, 10 L. R. A. 186; and *School District No. 54* v. *Garrison,* 90 Ark. 335, 119 S. W. 275. It is believed that this is a safe and reasonable rule to enable the directors to perform with due care the important duty of selecting and hiring teachers.

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

KELLEY TRUST COMPANY *v.* PAVING DISTRICT NO. 46 OF FORT SMITH.

Opinion delivered October 19, 1931.

[redacted]

George F. Youmans, for appellants.

George W. Dodd, for appellee.

HART, C. J., (after stating the facts). The suit was brought within the time required by statute and therefore constitutes a direct attack upon the assessment of benefits. The question thus presented by the record is mainly one of fact.

At the outset, it may be stated that the special benefit conferred upon private property by public improvement is the foundation of the power to assess it to pay the cost of the improvement. This is the only theory upon which, under our Constitution, an assessment can be justified. An assessment cannot be levied if the amount of it is in excess of the benefits in the enhancement of the value of his property received by the owner from the improvement. *Kirst* v. *St. Imp. Dist. No. 120,* 86 Ark. 1, 109 S. W. 526; *Osborne* v. *Board of Improvement of Paving District No. 5 of Fort Smith,* 94 Ark. 563, 128 S. W. 357: *Mullins* v. *City of Little Rock,* 131 Ark. 59, 198 S. W. 262, L. R. A. 1918B, 461; and *Johnston* v. *Conway,* 151 Ark. 398, 237 S. W. 80.

Many other authorities in support of the general rule might be cited, but the principle is so firmly established in this State that a further citation of authorities is unnecessary.

The only difficulty is to apply the rule correctly under the facts of each particular case. The general test is whether the proposed improvement will enhance the actual value or worth of the property. The test is not whether, as now used by its present owner, any advantage is received, but whether its general value has been enhanced. While the mere fact of improvement or failure to improve is not the controlling question, yet the situation and conditions surrounding the property may be looked into to ascertain the weight to be given to the testimony of the witnesses with regard to their opinion as to whether or not the property will be enhanced in value by the amount of the assessment of benefits against it.

Two streets were to be paved in the present district, each of them being two blocks in length. The two streets proposed to be paved run east and west and are parallel to each other and are connected with paved streets on each end. It will be seen from our statement of facts that the witnesses differed widely in their judgment or opinion as to whether the proposed improvement would enhance the value of the property to the amount of the special assessment against it.

The assessors and witnesses for the improvement district testified that the property would be enhanced in value in the amount assessed against each lot in the district, but they in the main contented themselves with the general statement that they were familiar with real estate values in Fort Smith and believed this to be true. According to the testimony of Noe, one of the assessors, they began by getting an estimate of the cost of the paving from the engineer of the district, and thus obtained the amount necessary to be raised by means of the assessments. He said their purpose was to charge each lot in proportion to the entire amount, figuring five per cent. for the improvement. This is a proper matter for consideration in testing the credibility to be given this witness. Doubtless his judgment was at least unconsciously affected in the assessment by the knowledge that the as-

sessments of benefits must be high enough to cover the estimated cost of the improvement and leave a margin for unforeseen contingencies. The test is whether the general value of the property will be enhanced to the amount of the assessment.

The testimony for the witnesses for the property owners was directly contrary to that of the witnesses for the district. The witnesses for the property owners stated positively that the property of appellants is not worth the cost of the improvement or of the assessment of benefits against the property. They stated that no one would assume the burden of the cost of the assessment upon the property, for the property. They stated that under present conditions, which have existed for more than two years, no one would buy the property and improve it with the probability of having to pay the assessment of benefits levied against it. They stated that the property had no salable value for any reasonable amount, and that it would have to be greatly sacrificed in order to sell it at all. They stated further that if the property was sold for speculative purposes, it could not be given away to any one who would pay the assessment of benefits against it. While witnesses for the defendant contradict this testimony, they all admit that there has been no market for the property of this kind for the past year.

It does not make any difference whether the general depression and the financial condition of the country caused this or whether there are other extraneous causes for it. The test is whether the property will be enhanced in value to the amount of the special benefits assessed against it. As we have already seen, where lands are improved by legislative action for a public improvement, the cost of such improvement may only be imposed on the property to the extent of the special or peculiar advantages received by it. In this way it is not considered that the property of the individual or any part of it is taken from him for the public use, for the reason that he is compensated by the enhancement of the value of his property. In short, the principle is only applicable where

the assessed benefits is commensurate to the burden. If the sum is exacted of the property owner in excess of the enhanced value, then to that extent private property is taken for public use without just compensation to the owner.

A majority of the court is of the opinion that, when the situation of the property and the conditions existing at the time the assessment of benefits was made are considered, the assessors levied against the property of appellant an amount of benefits substantially in excess of any enhancement in the value of the property, and that the chancellor erred in not so holding. Therefore the decree will be reversed, and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion. It is so ordered.

Justices SMITH, KIRBY and MCHANEY dissent.

FEDERAL LAND BANK OF ST. LOUIS *v.* MILLER.

Opinion delivered October 19, 1931.

J. R. Crocker, for appellant.

Oliver & Oliver, for appellee.

SMITH, J. This suit was brought by the Federal Land Bank of St. Louis, hereinafter referred to as the Loan Company, to foreclose a deed of trust in its favor executed by James B. Miller and wife. Mrs. Malinda Miller, the mother of James B. Miller, filed an intervention, in which she alleged the truth of the following facts:

Prior to March 24, 1922, intervener and her husband, J. T. Miller, owned in fee the land described in the complaint, and on the date mentioned she and her husband conveyed said land to their son, James B. Miller, in consideration of an agreement on his part to suitably maintain them in accordance with the manner in which they had previously lived, and this agreement was recited as the consideration for their deed to their son; that their son had failed and refused to keep his agreement; that he is now insolvent and unable to prevent the foreclosure of the deed of trust. She further alleged that her husband was dead, and that she was dependent upon the land, which at the time of its conveyance to her son was the homestead of herself and her husband, for her support. She therefore prayed that the deed to her son be canceled, but, if that relief were denied, that a lien be declared in her favor for a sum sufficient, her expectancy of life being taken into account, to support her for the remainder of her life.

Testimony heard at the trial was to the following effect: Intervener and her husband owned a quarter section of land, and they deeded eighty acres to each of two sons, and the consideration recited in each of the deeds was "the sum of one dollar and maintenance to us paid." These deeds were duly acknowledged and recorded, and the two sons entered into the possession of the land conveyed to them respectively. At the time of the execution of these deeds a written contract was entered into, which was not placed of record, in which the agreement in regard to maintenance was amplified.

Mrs. Miller, the mother, lived first with one son and then with the other, but finally James B., through his dissipation, became unable to support her. James B. never at any time repudiated his obligation, but was unable to comply with it, although he continued to make small contributions to his mother's support.

It is contended that Mrs. Miller has estopped herself to attack the right of her son, James, to execute the deed of trust here sought to be foreclosed, for the reason that she permitted him to execute the deed of trust. She denied, however, that she had any knowledge of the execution of this instrument until after the loan had been consummated, and no attempt was made to show that she had said or done anything to induce the belief that she had waived any of the benefits reserved in the deed to her son. On the contrary, the loan company had no knowledge of the recital as to maintenance until long after the loan had been made, as the abstract of the title submitted for examination recited the consideration to be "the sum of one dollar to us paid," and contained no reference to any agreement for maintenance. But there was no attempt to charge Mrs. Miller with knowledge of or responsibility for this omission in the abstract, whether it was fraudulently done or not. The court found that Mrs. Miller had done nothing to waive the agreement for her maintenance, and we think the testimony fully supports that finding.

We think no importance is to be attached to the contemporaneous written agreement on the part of Mrs. Miller's children to support her and her husband, as that contract was not of record, and as to that writing the loan company is an innocent purchaser. But not so as to the deed itself. The deed was the instrument under which James B. Miller acquired title to the land which he mortgaged, and the loan company is, of course, affected with knowledge of its recitals, although they were not shown in the abstract of title. *Madden* v. *Suddarth,* 144 Ark. 79, 221 S. W. 457; *McLaughlin* v. *Morris,* 150 Ark. 347, 221 S. W. 457; *Star Lime & Zinc Co.* v. *Arkansas Nat. Bank,* 146 Ark. 246, 225 S. W. 322.

Many decisions of this court have upheld the validity of conveyances such as the one from Mrs. Miller and her husband to their son, and these cases have defined the rights of grantors in such instruments. One of the comparatively recent cases on this subject is that of *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286, where we said that this court is committed to the doctrine, which is supported by the great weight of authority, as announced in 4 R. C. L., p. 509, § 22, that "where a grantor conveys land, and the consideration is an agreement to support, maintain and care for the grantor during the remainder of her or his natural life, and the grantee neglects or refuses to comply with the contract, that the grantor may, in equity, have a decree rescinding the contract and setting aside the deed and reinvesting the grantor with the title to the real estate." (Citing cases.) It was there further said: "The rationale of the doctrine is that an intentional failure upon the part of the grantee to perform the contract to support, where that is the consideration for a deed, raises the presumption of such fraudulent intention from the inception of the contract, and therefore vitiates the deed based upon such consideration. Such contracts are in a class peculiar to themselves, and where the grantee intentionally fails to perform the contract, the remedy by cancellation, as for fraud, may be resorted to regard-

less of any remedy that the grantor may have had also at law." (Citing cases.)

We therefore hold that the intervener had an interest in the land which she had the right to assert.

It was shown that the loan company had paid certain taxes duly assessed against the land after default made, and the court held that these taxes constituted a first lien on the land, "which lien shall be prior to any claim of homestead or dower rights the said Malinda Miller may have in said property," and a decree for the foreclosure thereof was awarded.

The decree of the court below denied intervener's right to absolute rescission, and declared that the deed of trust was a valid lien on the land, subject to her right to maintenance, and she does not complain of that decree.

The court, in effect, found that all the rents will be required for intervener's maintenance, and that she is entitled to the possession of the rents and profits accruing from said property during her natural life, and that out of said rents and profits she shall be required to pay the taxes, with the provision that, if she failed to pay the taxes, the loan company may do so, and shall have a first lien on the land therefor, and that the land may be sold by the commissioner named for that purpose in the manner there stated. We think this decree accords with the equity of the case.

We make no review of the testimony tending to show that intervener knew her son intended to mortgage the land, although the preponderance of the testimony appears to support her statement that she was unaware of that fact, because it is not contended that she said or did anything to induce the loan company to make the loan, or that she had waived any right to her maintenance. Of course, her son acquired by the deed an interest in the land which he might convey with or without his mother's consent, subject, of course, to the right which she had reserved. The court recognized this right in its decree.

It is insisted that, although the plaintiff loan company is affected with notice of recitals contained in the

deed to their mortgagor, these recitals are too ambiguous and uncertain to put it upon notice that the consideration had not been fully paid. We do not think so. The deed recited as having been paid a dollar, a nominal consideration, and the recital of "maintenance to us paid" was certainly sufficient to put one on notice that there was some consideration other than the dollar, the receipt of which was acknowledged.

The reasonable construction of the language there employed was that the maintenance of the grantors was, in part at least, the consideration for the deed, and that this maintenance referred to an assumed obligation which remained to be performed. Certainly, it was not a recital which the loan company had the right to ignore, as the slightest investigation would have disclosed the facts.

In 38 C. J., page 338, chapter Maintenance, it is said that "maintenance" is a large term, the meaning of which depends on the surrounding circumstances and the connection in which it is applied, and citations are made to cases giving various definitions, among others "act of maintaining; keeping up, supporting; livelihood; means of sustenance, etc.," and, as applied to a person, to mean "supply of the necessaries of life; livelihood; the furnishing by one person to another, for his support, of the means of living, or food, or shelter, clothing, etc.; * * *."

We have said that the loan company had no actual knowledge of the recital in the deed, but we have also said that it was charged with this notice, as it appeared in the deed through which their grantor acquired his title, and the intervener did nothing to prevent this constructive notice from becoming actual.

The insistence that the intervener is barred by the statute of limitations from the assertion of her claim of maintenance may be disposed of by saying that her son and grantee never at any time repudiated the obligation which he assumed in consideration for the execution and delivery of the deed to him.

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

KIRBY, J., dissents.

[redacted]

SMITH *v.* LEECH.

Opinion delivered October 19, 1931.

[redacted]

McDaniel & Nall, for appellant.

W. H. Evans, for appellee.

SMITH, J. This litigation involves the title to a small strip of land lying between two larger tracts, one of which is owned by appellant, who was the plaintiff below, and the other by appellees, the defendants.

After proving his title to the tract of land which he claimed, appellant offered testimony to the effect that the disputed strip was a part of the tract to which he had title. Appellees questioned the accuracy of the survey, which showed the strip to be a part of appellant's land, and, in addition, they claimed title by adverse possession. This last defense was submitted under an instruction which reads as follows: "You are instructed that it makes no difference whether or not the survey recently made by the county surveyor is correct or not, provided you find from the evidence that a fence was erected on the east line of the tract of land in controversy, and that said fence or a fence has been continuously on said line for more than seven years, and you believe from the evidence that the strip of land in controversy is east of said fence, and that said J. A. Leech held said strip of land in open, continuous, notorious possession for more than seven years prior to his death, and that his open, con-

tinuous, notorious, peaceable and actual possession, together with the possession, continuously, and adversely and peaceably of the defendants has been for more than thirty years last past, you will find for the defendants."

The accuracy of this instruction as a correct declaration of the law is not questioned, and the verdict of the jury in defendants' favor thereon is conclusive of this case, as testimony was offered on behalf of appellees, that their ancestor had built a fence on what they claimed is the true line about thirty years ago, and that he and they have since continuously occupied the land to this fence as their boundary line. This being true, it is immaterial whether the fence was built on the true line or not, as the title to the land inclosed by the fence was acquired by the adverse possession.

There was testimony amply sufficient to warrant the submission of this issue to the jury and to support the verdict returned in defendants' favor, and the judgment pronounced thereon must be affirmed, and it is so ordered.

BUTLER *v.* ARKANSAS NATURAL GAS CORPORATION.

Opinion delivered October 19, 1931.

W. T. Saye and *J. N. Saye,* for appellant.

Jeff Davis, for appellee.

HUMPHREYS, J. Appellee brought suit in the chancery court of Ouachita County against appellant to recover $199.17 for fuel gas furnished to operate a certain oil leasehold and for $579.42 for fuel gas furnished to operate another certain leasehold, both belonging to ap-

pellant, and to enforce its lien against said oil properties for said amounts.

Appellant filed an answer denying liability on account of fuel gas thus furnished.

The cause was tried upon the pleadings and testimony, resulting in a decree in accordance with the prayer of the complaint, from which is this appeal.

The record reflects that fuel gas of the amounts and value alleged was furnished to and used by appellant in the operation of his leases in excess of 80 per cent. of the casinghead gas purchased and received from appellant by appellee under contract fixing the price and time of payment for the casinghead gas. In addition to the cash price appellant was to receive for the casinghead gas, appellee agreed to furnish fuel gas for the operation of the leases to appellant in accordance with paragraph 11 of the written contract between them, which is as follows:

"Buyer shall return, free of cost to sellers, residue or fuel gas to a mutually convenient point on said lease, such gas to have sufficient volume and pressure for the economical operation of said lease, for economical domestic use by seller's employees residing thereon, and for the fulfillment of any lease grant obligations, provided that the number of cubic feet of fuel gas so furnished each month shall not, in any event, exceed 80 per cent. of the total number of cubic feet of casinghead gas received by the buyer from the above described property."

The amount sued for was the price of the fuel gas used by appellant in excess of 80 per cent. of the amount of casinghead gas drawn from appellant's wells on said oil properties.

Appellant's contention for a reversal of the decree is that, although he used fuel gas in excess of 80 per cent. of the casinghead gas drawn from his wells, under paragraph 11 of the contract he was to have all the fuel gas he needed to operate his leases without additional cost. The language of the paragraph is unambiguous, and will not bear the construction placed upon it by appellant, for it states in language too clear to be misunderstood

that the number of cubic feet of fuel gas to be furnished each month shall not, in any event, exceed 80 per cent. of the total number of cubic feet of casinghead gas received by appellee from the properties of appellant.

Appellant contends, however, that he should be released from payment for the excess fuel gas furnished him because he notified appellee that he would not pay for fuel gas in excess of 80 per cent. of the amount of casinghead gas bought from him. The equipment and connections were so arranged that appellant could use any amount of fuel gas he needed. It passed through a gas meter open to his observation and inspection, the quantity used by him being under his control. The gas meter was installed for his benefit, and he should not have used fuel gas in excess of the maximum amount specified in the contract unless he expected to pay for it. When he used more, there was an implied contract that he would pay the market price for the excess amount which he could not satisfy or settle by a written notice that he would not pay for it. His acceptance and use of the excess rendered him liable therefor.

The decree is therefore affirmed.

BARTON-MANSFIELD COMPANY *v.* COLLINS.

Opinion delivered October 19, 1931.

A. H. Rowell, Jr., Rowell & Alexander and *H. Jordan Monk,* for appellant.

Reinberger & Reinberger and *Galbraith Gould,* for appellee.

HUMPHREYS, J. The only question involved in this appeal is whether the chancery court in confirming a foreclosure sale of land to satisfy a materialman's lien thereon had authority to grant a period of twelve months to appellee to redeem the property. Appellant furnished appellee building materials which were used in repairing buildings on lots 5 and 6 in block 3, Forest Park Addition to Pine Bluff, Arkansas, and, within the time allowed by law filed its materialman's lien on said property for $48.90. This suit was later instituted in the chancery court of Jefferson County to foreclose the lien, wherein a decree of foreclosure and order of sale of the property was obtained. The sale was made pursuant to the order of the court and reported to the court for confirmation. The sale was approved and the commissioner ordered to execute a deed to the purchaser subject to redemption within twelve months by appellee. Appellant has appealed from that part of the decree allowing a twelve months period for redemption.

The trial court was in error in granting appellee twelve months in which to redeem the property from the foreclosure sale. The materialman's lien law in this State contains no provision for redemption from the sale of the property to satisfy a lien for material furnished, and the record does not show that there was any agreement between the parties to that effect. The rule governing in equity foreclosures of such liens is well stated in 35 C. J., p. 67, in the following language:

"While, under the broad power to adjust the relief in such a way as to afford fair treatment of all parties, a court of equity may, and sometimes does, frame its decree so as to permit redemption to be made, at least before confirmation of the sale, the general rule in equity is that, where all the parties are before the court and a sale is made pursuant to its decree, and by an officer appointed by it for the purpose, the right of redemption will not be allowed except by command of the statute, or by contract between the parties. Except when given by a valid agreement between the parties themselves, the

right of redemption exists, if at all, by force of statute, and the right extends only to cases coming within the statute."

That part of the decree appealed from is reversed, and the cause is remanded with directions to strike the redemption privilege from the decree.

CITY OF NEW YORK INSURANCE COMPANY *v.* AMERICAN COMPANY OF ARKANSAS.

Opinion delivered October 19, 1931.

Verne McMillen, for appellant.

H. G. Wade, for appellee.

KIRBY, J. This appeal is prosecuted from a decree denying appellants the right to a citation against appellee for contempt for violation of the decree of the chancery court in attempting to issue an execution for collecting a circuit court judgment contrary to the provisions of said decree.

This is the third appeal of the case, a statement of which appears in the opinions in *American Co. of Ark.* v. *Wheeler,* 181 Ark. 444, 26 S. W. (2d) 115, and *American Co. of Ark.* v. *Wheeler,* 183 Ark. 550.

In reversing and remanding the cause on the first appeal, this court said: "The result of our views is, in so far as appellant is concerned, that the decree must be reversed and the cause remanded with directions to the chancery court to order the amount of its judgment and

interest paid out of the funds deposited in the registry of the court by the insurance companies." 181 Ark. 450.

The mandate recites: "* * * that this cause be remanded to said chancery court with directions to order the amount of the judgment of the appellant against Conine and interest thereon paid out of the funds deposited in the registry of the court by the insurance companies aforesaid, and to distribute the remainder of such fund in accordance with its former decree."

On the second appeal relative to the mandate issued by the clerk, the court said: "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 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 holdings on that appeal became the law of the case, and the issue could not longer be litigated by the parties."

These decisions became the law of the case, and the chancery court was without jurisdiction to restore the American Company to all its rights of said circuit court judgment as adjudged by the circuit court, and to decree that said company had not been divested of any right acquired under its judgment in the circuit court proceed-

ing, contrary to the direction of the Supreme Court. *Fidelity & Deposit Co.* v. *Fairfield,* 169 Ark. 997, 278 S. W. 658; *Henry* v. *Irby,* 175 Ark. 614, 1 S. W. (2d) 49.

The American Company could not issue any executions out of the circuit court on its judgment on garnishment against the appellee company, which had paid the proceeds from the insurance into the registry of the chancery court, this court having held that it should be paid out of the proceeds deposited in the registry of the chancery court, in effect "that the payment out of that fund satisfied the judgments obtained in the circuit court on the garnishment proceedings."

The fact that such fund was dissipated before appellee, the American Company, was paid the amount of its judgment, if such is a fact, could not restore its right to proceed to its collection under an execution issued upon the circuit court judgment, as the chancery court erroneously held it might do.

The decree is reversed, and the cause remanded with directions to issue the citations, and for any further necessary proceedings not inconsistent with the principals of equity and this opinion.

FORT SMITH, SUBIACO AND ROCK ISLAND RAILROAD COMPANY *v.* HUMPHREY.

Opinion delivered October 19, 1931.

James B. McDonough, for appellant.

Cochran & Arnett, for appellee.

KIRBY, J. This appeal is prosecuted by the railroad company from a judgment for damages against it for negligently permitting fire to spread from its right-of-way to the lands of appellee and destroy the trees, grass and fence post thereon.

The testimony on the part of appellant tends to show that its section crew was burning fireguard on the 13th of August, near the land of appellee, it being explained that a fireguard was the burning off of the grass on the right-of-way in order to prevent damage from fires extending to adjoining lands caused by the running of trains; that the fires were put out when the right-of-way was burned off; that they were burning fireguard on the particular day and quit in the afternoon when a rain came up and put out the fires.

Other testimony tended to show that a tree on the right-of-way began burning and was still burning that night. That after it had fallen, the fire was still burning on the stump, and that it spread and burned across the right-of-way to the lands of appellee and destroyed about 35 acres of pasture, some trees and some fence posts; some of the testimony showing that the land burned over was damaged at least $5 per acre.

There was some testimony indicating that the fire might have originated at a place off the right-of-way where some women were washing during the day.

The jury returned a verdict for appellee for $100 damages, and found against him on his complaint for personal injuries, resulting from fighting the fire, and the court also assessed an attorney's fee of $50.

The testimony warranted the jury in finding that the fire that caused the damage was set out by the servants of appellant and negligently allowed to spread to and burn over appellee's land, causing the damages thereto. Section 8569, Crawford & Moses' Digest; *K. C. S. Ry. Co.* v. *Cecil,* 171 Ark. 34, 283 S. W. 1; *K. C. S. Ry. Co.* v. *Wilson,* 119 Ark. 147, 171 S. W. 484.

The court correctly instructed the jury as to the measure of damages for the destruction of the trees, etc. *St. L. I. M. & S. Ry. Co.* v. *Ayre,* 57 Ark. 371, 55 S. W. 159; *K. C. S. Ry. Co.* v. *Wilson, supra.*

Neither was error committed in the allowance of the attorney's fee provided by the statute, which was not shown to be excessive, nor in the court's fixing the fee after a hearing on the motion upon testimony adduced without the intervention of a jury, none being asked. *K. C. S. Ry. Co.* v. *Cecil, supra.*

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

ROSE *v.* ROSE.

Opinion delivered October 19, 1931.

[redacted]

[redacted]

McKay & Smith, for appellant.

Henry Stevens, for appellee.

KIRBY, J., (after stating the facts). The principal question herein is one of fact, and a careful examination of the testimony does not disclose that the finding of the chancellor is contrary to the preponderance of the evidence. The complaint alleges that the mortgage and notes securing it were through a mistake of fact delivered to the appellee, the mortgagor and maker of the notes, and that they had not been paid; but no testimony was introduced attempting to explain how the notes and mortgage came into the possession of the mortgagor and maker, if they had not been paid, and the burden was upon appellant to prove his allegation of mistake, which he failed to discharge, and to overcome the presumption of payment attendant upon the possession of the past-due obligation in the hands of the maker. *Hollenberg* v. *Lane,* 47 Ark. 399, 1 S. W. 687; *Excelsior Mfg. Co.* v. *Owens,* 58 Ark. 556, 25 S. W. 868.

The notes and mortgage sued upon were not introduced in evidence, but others of different terms were introduced, the evidence tending to prove their execution, etc. The burden was on the plaintiff to show that the notes were not barred by the statute of limitations which was pleaded as a defense thereto. The notes were barred long since, according to their terms and date of execution, unless by partial payments the bar of the statute was removed, and the proof does not definitely show the fact of any partial payments on any of the particular notes or that such payments were credited thereon. The $600 that plaintiff paid at the bank and agreed to credit on the mortgage indebtedness when it was repaid by appellee, Mrs. Colvin, was not a charge against the lands mortgaged, and its payment could not constitute a partial payment on such mortgage indebtedness. *Alston* v. *State*

Bank, 9 Ark. 459; *Watkins* v. *Martin,* 69 Ark. 311, 65 S. W. 103; *Simpson* v. *Brown-Des Noyes Shoe Co.,* 70 Ark. 598, 70 S. W. 305; *Armstead* v. *Brook,* 18 Ark. 521; *State Bank* v. *Woody,* 10 Ark. 631; *Desha Bank & Trust Co.* v. *Quilling,* 118 Ark. 118, 176 S. W. 132, L. R. A. 1915E, 794.

It is insisted that H. A. Bryan was an incompetent witness, he being the husband of one of the defendants, a granddaughter of the plaintiff, and that the court erred in allowing the introduction of his testimony. This contention appears to be meritorious, but it is not necessary to pass upon the question, since we have already found from an examination of the whole testimony that the chancellor's finding is not contrary to the preponderance of the evidence.

The decree is accordingly affirmed.

[redacted]

FRASER *v.* NORMAN.

Opinion delivered October 19, 1931.

[redacted]

Buzbee, Pugh & Harrison, for appellant.
Evans & Evans, for appellee.

MEHAFFY, J. The appellee brought suit against the appellant to recover damages for injury received while in the employ of the appellant. He alleged that he was working under Judson Jeffus, general foreman, doing whatever Jeffus directed him to do; that Jeffus directed him to assist one George Baumis about some carpenter work and to follow Baumis' instructions in performing his work; that he was ordered by said Baumis to go upon a scaffold and nail some headers which he had been cutting for Baumis; that the scaffold had been negligently constructed by defendant's agent too close to the wall, so that while working overhead, nailing headers, the plaintiff was overbalanced, so that when he struck a nail in his awkward position the scaffold slipped, causing him to strike the nail a glancing lick, which caused the nail to ricochet out. The nail struck plaintiff in the eye, causing him to lose his eye. He prayed for damages in the sum of $5,000.

The answer of appellant denied all the material allegations of the complaint, and alleged that whatever damages he sustained were the result of his own negligence or of a risk assumed by him.

The appellee testified that he was 50 years old, a laborer, not a carpenter but a carpenter helper; that he was employed by the appellant and began work on the first day of July, and worked until the third of September, when he received his injury. Appellant, who was a contractor, was building a school house. He had worked for appellant before, beginning in 1927 and working off and on until he was injured. He was hired as a carpenter helper, or anything that was to be done on the job.

The morning before the injury, the foreman wanted some extra laborers, and appellee helped him to pick some, as he lived there, and the foreman then told him to go and help George Baumis, a carpenter. He asked Baumis what he wanted him to do, and Baumis told him to cut some headers and bring them up and lay them on the scaffold. Baumis then told appellee to get on the scaffold and nail some of the headers. Appellee asked,

"How is the scaffold?" and Baumis said, "It's all right, I've been on it."

Appellee got on the scaffold, and Baumis told him to go ahead and nail some of the headers, and he did. There was a 1 x 8 nailed to studding on the partition wall and a leg of the same kind of material, and another 1 x 8 nailed from the studding of the partition wall over to the window frame, and a 2 x 10 lying across these, and this constituted the scaffold.

The scaffold was about 4½ or 5 feet high and extended out from the partition wall about 3 feet. The arm was about three feet long, and the header extended out from the partition wall and the scaffold was very close to the wall, and, when he went to nail the headers he had to lean back, and when he leaned back his feet were on this 2 x 10 which was loose, and when he made the lick in the header the 2 x 10 he was standing on slipped and went back, which caused him to hit the nail a glancing lick, and it flew out of the timber and hit him in the eye. He did not fall but caught on to the overhead joist.

Baumis was doing the same thing, only he was above appellee. He had not nailed any of these headers before he was hurt; thinks that was the first one. When the nail hit him, he got pretty sick, told Mr. Fraser about it, and Fraser said he had better go to the doctor. He went to Dr. Hedrick, who told him his eye was out. Fraser came down, and Dr. Hedrick told him to take appellee to a specialist. He was taken to Dr. Moulton, a specialist, to treat him, who finally removed the eye-ball.

Appellee then told about his injury and suffering, but it is not necessary to set this testimony out because there is no dispute about the extent of his injury.

On cross-examination appellee testified that he had done carpenter work for a number of years and had worked on platforms before; that the ceiling was to be put on these headers. The particular work he was doing at the time was nailing these headers for the ceiling to be placed on. He had his own tools, a hammer and saw and

square. His hammer was in good condition, and the nails were ordinary six-penny nails.

At the time of his injury he was standing on the 2 x 10. He did not put it there, Mr. Baumis put it up that morning. The 2 x 10 was just laid on the cross-bars. They very seldom nail them down. The arm was nailed to a stud, and this 2 x 10 was just lying up there. It was about 12 feet long. This 2 x 10 plank was about 12 feet long and was lying across these arms, and could be moved when he got ready. He could move it around to other positions as he saw fit, according to how he wanted to stand. That was the plank he was standing on when he drove the nail and became overbalanced. He felt the plank move toward the wall. It was not against the wall. He could have put it where he wanted it. He thought it was at a convenient place until he went to drive the nail.

The platform extended 10 or 12 feet, and he could step about on it any place to drive the nail. When he reached back, the board went toward the wall. The arms and legs were there when he went there. The plank he was standing on was laid up solid on the arms.

Dr. Moulton testified as to appellee's injury, and Dr. Hedrick also testified as to the extent of the injury. The appellee was then recalled, and on cross-examination testified that he had been on this sort of platform many times before.

The jury returned a verdict for $2,500. Motion for new trial was filed and overruled, and the case is here on appeal.

It is contended by the appellant that there is no evidence to support the verdict, and that its request for a peremptory instruction should have been granted.

The only negligence alleged by appellee is that the scaffold, that is the 2 x 10 on which appellee was standing, was negligently constructed by defendant's agent too close to the wall, so that plaintiff, while working, was overbalanced when he struck said nail; that the scaffold slipped, causing him to strike the nail a glancing lick.

Baumis, who put the scaffold up, was a fellow-servant and was joined as a defendant in the suit. The court, however, instructed a verdict in favor of Baumis. There is no dispute about the facts.

According to appellee's own testimony, he had been on similar platforms many times and knew all about the arrangement, knew that they were not generally nailed, knew where the 2 x 10 on which he must stand was placed, and knew also that he had a right to place it wherever he thought proper.

It does not appear from the evidence that the master had anything to do with the scaffold except to furnish the material out of which it was made, and it is generally held that the obligation of an employer to furnish his employees with safe appliances and a safe place to work does not impose upon him the duty of supplying instrumentalities in a completed form.

Where the employees construct the scaffold, the employer's duty is discharged by furnishing suitable materials, and the employer is not liable for injury due to a defect in the construction or adjustment of the scaffold.

In this case the undisputed evidence shows that the appellee himself had a right, and it was his duty, to adjust it to suit his own convenience.

The general rule may be stated as follows: Where the employer does not undertake to furnish the scaffold, but instead merely supplies material for its construction, and where the employer has no supervision over the erection of the structure and gives no directions in regard to it other than to direct that it be constructed, he is not liable for an injury due to negligence in its construction. 18 R. C. L., 596-597.

If, however, the employer furnishes the scaffold, or, if it is constructed either by himself or under his direction, he must exercise ordinary care to furnish the employees with a safe place to work, and it is wholly immaterial whether the master undertakes to perform this duty himself or delegates it to another.

The undisputed evidence in this case, however, shows that the employees themselves constructed the scaffold, and there is no evidence that the master had anything to do with it.

A servant, in accepting and continuing in the employment, assumes all the ordinary and usual hazards incident thereto, and also all the risks which he knows to exist. *Graham* v. *Thrall,* 95 Ark. 560, 129 S. W. 532; *Choctaw, O. & G. Rd. Co.* v. *Thompson,* 82 Ark. 11, 100 S. W. 83; *Sw. Tel. Co.* v. *Woughter,* 56 Ark. 206, 19 S. W. 575; *Fordyce* v. *Stafford,* 57 Ark. 503, 22 S. W. 161; 3rd Labatt's Master & Servant, § 1168.

There is no contention in this case that there was any defect in the materials furnished or that the scaffold was improperly constructed, except it is claimed that the plank was too close to the wall. This is the only ground of negligence alleged.

The appellee, however, testifies that he had used scaffolds like this before; that he had a right to place a plank wherever he wished, and there was certainly nothing about the situation that was not open and obvious. The employee assumed whatever risk and hazard there was because of the plank's being too close to the wall.

The appellee cites and relies on the following cases: *Moline Timber Co.* v. *McClure,* 166 Ark. 364, 266 S. W. 301, but in that case the court said: "There is a sharp conflict in the testimony whether or not plaintiff was working under the immediate direction and supervision of the foreman, or whether he was merely working in conjunction with a fellow-servant."

In the instant case there is no conflict in the testimony, and no claim that appellee was working under immediate direction and supervision of the foreman. He testifies that the foreman told him to go up and help Baumis, but there is no evidence that the foreman gave him any directions other than to go up and help Baumis.

The next case relied on by appellee is *Brackett* v. *Queen,* 162 Ark. 525, 258 S. W. 635. The court said in that case: "The rule is well settled in this State that

when it appears to be clear that the servant has knowledge of and appreciates the danger incident to his work, or that the danger is so obvious or apparent that knowledge and appreciation thereof should be imputed to him, then the court should declare as matter of law that the servant is not entitled to recover."

The court further said in that case: "He was required to do the work which was usually done by two men. He was only 18 years of age, and was wholly uneducated. He had only been at work at the mill for about two weeks and had been operating the bull-wheel for a much less period of time. He was not warned about the dangers incident to his work."

The appellee in the instant case was fifty years old, familiar with this kind of work; had used platforms like this many times, and, besides that, had the right to arrange the plank to suit his own convenience.

The next case relied on by appellee is *Jewel Coal & Mining Co.* v. *Whitner*, 170 Ark. 393, 279 S. W. 1031. The court said in that case: "The plaintiff further testified that he was sitting in the middle of the front end of the front car where it was his duty to sit while driving, and that he had fixed his seat so that coal would not topple off and cause him to fall when he should look back. His testimony as to the rock protruding over the track, to a certain extent, was corroborated by the testimony of another witness. This evidence, if believed by the jury, was sufficient to warrant it in finding that the defendant was guilty of negligence."

The court in the same case said further: "It is true, as contended by counsel, where the danger is so obvious that knowledge of it and appreciation thereof should be imputed to the servant, the court should have declared as a matter of law that he is not entitled to recover against the master."

The next case relied on by appellee is *Bryant Lumber Co.* v. *Stastney*, 87 Ark. 321, 112 S. W. 740. In that case the appellee testified that the foreman told him to come with him and load the car, and he understood that

he was to go with the foreman, and he and his co-worker did so and followed the foreman onto the pile of lumber which fell and received no warning of the insecure position of the pile to which he was carried on his route nor notice from the foreman of the impending danger from the approaching engine. This testimony was contradicted by the foreman, and the court said: "This conflict as to the facts upon which the case hinges is irreconcilable and should go to the jury upon proper instructions for their determination. * * * No presumption of negligence arises from the mere happening of the accident which caused the injury in such actions as these between master and servant; but the master is required to exercise ordinary care in discovering defects and in repairing them and in discovering dangers and obviating them."

The next case is *Oakleaf Mill Co.* v. *Smith,* 98 Ark. 34, 135 S. W. 333. In that case the court said: "There is a sharp conflict in the testimony. Plaintiff and some of the witnesses testified that, though he was foreman, his duties were limited to those of superintending the work of the men on one of the floors of the mill; that he worked under the direction of the general manager, and that a millwright was employed whose duty it was to keep the machinery and working places in repair. There was abundant evidence tending to show that plaintiff was what the witnesses called a straw-boss with authority only to direct the working of men under him, and that he had nothing to do with keeping the machinery and mill plant in repair; that this was done by the millwright under the direction of the general manager."

Appellee also calls attention to the case of *St. Louis Stave & Lumber Co.* v. *Sawyer,* 90 Ark. 473, 119 S. W. 830, to sustain his contention that among the master's non-assignable duties are to use ordinary care to furnish a reasonably safe place in which to work and reasonably safe appliances, and to maintain them so. This rule is well settled by the decisions of this court, but the deci-

sions in these cases relied on by the appellee are none of them applicable to the facts in this case.

It is well settled that the master owes the duty to the servant to exercise ordinary care to provide a safe place to work, and that this duty is non-assignable; but it is equally well settled that where the master furnished the material and the employees themselves construct the platform or place to work, the master is not liable for negligence of the employees in the construction of the platform or place to work. This court has many times held that the master is not liable where the employee himself prepares the place to work.

In the instant case the appellee was not working under the immediate direction of the foreman; he had many times used platforms similar to the one used at the time of his injury; and, according to his own testimony, he had a right, and of course it was his duty, to place the plank where it would be most convenient and where it would be safe. The evidence, we think, does not show any negligence on the part of the master, but it does show that whatever risk there was was patent and obvious, and that the injured servant had a right to place the plank where there would be no danger.

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

STATE USE RANDOLPH COUNTY *v.* POCAHONTAS STATE BANK.

Opinion delivered October 19, 1931.

[redacted]

E. G. Schoonover, George M. Booth and *Chas. D. Frierson,* for appellants.

George M. Gibson, W. J. Schoonover and *Walter L. Pope,* for appellees.

BUTLER, J. The Pocahontas State Bank was named county depository of Randolph County for a two-year period, beginning with the first day of May, 1929, and on June 1, 1929, gave the bond required by order of the county court with Ben A. Brown and others as sureties thereon. The bond was duly approved, and the treasurer of the county from time to time during the year 1929 made deposits of funds in said bank, the property of Randolph County and various school and road districts in said county, withdrawing as occasion required part of said funds by proper warrants, so that on February 7, 1930, there remained in said bank to the credit of the treasurer of the county the sum of $19,070.22. On that date said bank and the Randolph County Bank, another banking corporation located in the town of Pocahontas, entered into an agreement by which the business of the two banks was merged, and to carry out this merger a new bank, called the Randolph State Bank, was duly incorporated. The assets of the two old banks were assigned to the new bank, which assumed the liabilities of the two old banks according to the stipulation of the merger agreement. Both the Pocahontas State Bank and the Randolph County Bank retained their corporate identity but agreed that they should receive no more deposits and

should cease to engage in the banking business except for purposes of liquidation.

On the 8th day of February, following, the account of the county treasurer with the Pocahontas State Bank was closed, and the amount due him on that date was entered to his credit on the books of the new bank, so that on that day the county treasurer had to his credit property of the county and school and road districts, the sum of $19,070.22. The Pocahontas State Bank included in the assets to the Randolph State Bank its banking house in which the new bank opened for business and in which it operated.

It is stated by counsel for appellants in the brief filed here that a number of the sureties on the bond heretofore mentioned continued to act as officials in the new bank, and we assume this to be a fact. For purposes of convenience, the stationery of the two old banks was used by the new bank in the transaction of its business, the old check books were continued to be used, and a depositor in the new bank would draw his check using the form of one of the old banks without changing the name and the check would be paid by the new bank; likewise, when a deposit was made, the old blanks for certificates of deposit were used without any change in the name at the head of these blanks.

The treasurer of Randolph County continued to make deposits in, and withdrawals from, the new bank up to November 15, 1930, when the new bank became insolvent and was taken over by the State Bank Commissioner for liquidation. During the time it operated the treasurer deposited with it, in addition to the money to his credit on February 8, 1930, other large sums of the county and school and road districts, and from time to time withdrew a sum far greater than the original deposit. As a result of the deposits and withdrawals there remained to his credit on November 15, 1930, the sum of $37,909.91.

This suit was instituted on December 26, 1930, against the Pocahontas State Bank, and the sureties on the aforesaid bond to recover from them said sum last mentioned. The case was submitted to the court on an agreed statement of facts which established, among other things, the foregoing statement. Other facts are not here recited as they are immaterial in view of the conclusion reached.

It is the contention of the appellants that upon the merger of the Pocahontas State Bank and the Randolph County Bank each continued as separate corporations, and that such merger did not change the liabilities of the Pocahontas State Bank as depository or of the sureties upon its bond. Appellants also contend that the sureties were officials and stockholders of the Pocahontas State Bank and are estopped to claim that they were released from liability upon the depository bond, and that there can be no apportionment of the loss with reference to dates of deposits or checks. It will be unnecessary for us to examine the questions presented in the second and third contentions of appellants as we are constrained to find against them on the first contention.

We agree with the contention of counsel for appellees that the Pocahontas State Bank paid to the Randolph State Bank on February 8, 1930, the amount of the deposit of the county treasurer, and that his subsequent actions amount to the acceptance of the fund so transferred, which was in due course withdrawn by him, and that this act terminated the relationship before existing between the Pocahontas State Bank and Randolph County, and relieved such bank and its sureties from any liability on the depository bond; or, as succinctly stated by counsel for appellees, "At the time the Pocahontas State Bank ceased to do a banking business, it was liable only for $19,070.22, and that amount has been paid."

The measure of liability of the Pocahontas State Bank and its sureties must be found in the terms and conditions of the bond executed. The condition of the bond

in this case is as follows: "Whereas, by an order of the Randolph County Court entered at its April term, 1929, the said Pocahontas State Bank was designated as the depository for all of the funds of Randolph County for the two-year period, beginning on the first day of the April term, 1929, of this court, and, whereas, under the order of this court, the said Pocahontas State Bank was to pay 3 per cent. per annum on the daily balances of the said funds carried in the said depository during the said period of time.

"Now, if the said Pocahontas State Bank shall duly and properly perform all the duties and obligations devolved by law upon said depository and shall promptly pay upon presentation all checks drawn upon said depository by the county treasurer of Randolph County, so long as said funds shall be in said depository to the credit of said county, and if all funds of the county shall be safely kept by the said depository and accounted for according to law, then this obligation is to be null and void; otherwise, to remain in full force and effect."

The obligation on the part of the Pocahontas State Bank and its sureties therefore was that it should pay on demand of the county treasurer all checks drawn upon it so long as any funds remained in the bank to the credit of the county. The appellee bank ceased to do a banking business on February 7, 1930, and the funds in its hands to the credit of the county were delivered to the Randolph State Bank, which bank undertook to pay them out on the order of the county treasurer. While the specific sum transferred to the credit of the treasurer on the books of the new bank was not paid at one time and in one amount, the legal effect of the subsequent transactions between the county treasurer and the new bank was as if this had been done; for, after the 8th of February, 1930, the county treasurer continued to deposit in the new bank and to withdraw therefrom the county funds so long as the bank continued in operation. This was tantamount to an acceptance on the part of the county

treasurer of the change of the account, and since he withdrew from the bank in excess of the amount transferred to it from the county depository, in the absence of an agreement to the contrary, the law presumes that the money first withdrawn was $19,070.22, the money first placed to the treasurer's credit in the Randolph State Bank.

It is the general rule that, where there is a running account and a payment is made, and neither the debtor nor the creditor directs to what item the payment should apply, the law applies such payment to the oldest item on the account. This rule is well established in this State and seems to be one of universal application, so much so that we deem the citation of authorities unnecessary.

It is also settled law that the relation between banker and depositor is that of debtor and creditor, and we can see no distinction in principle in an account between a bank and its depositor and any other running account. In the case of *City Nat. Bank* v. *Eastland County,* 12 S. W. (2d) p. 662-667, cited by appellee, the court of Civil Appeals of the State of Texas, in determining a case similar in many respects to the case at bar, said: "One of the defenses urged by the corporate sureties was that the county had received payment on all obligations for which they ever became liable. This contention is sustained. It is elementary that the liability of these sureties can, at most, be extended no further than for the payment to the county of all moneys deposited by the county in the City National Bank. As to any funds deposited with the Security State Bank, these sureties assumed no obligation, and cannot be held responsible, for their liability must be measured by the contract which they signed, and cannot be extended by implication to cover any other and different contract. The amount on deposit in the City National Bank on the day its assets were taken over by the Security State Bank was $262,436.55. Thereafter the county continued to make deposits with the Security Bank and to draw vouchers against said bank. The trial court found that by the 16th day of March,

1921, the county had withdrawn, in the regular course of business, sufficient funds to total the amount of such deposit. Thereafter the county continued to withdraw funds from the bank, until it closed for liquidation on August 2d. The total amount withdrawn by the county from said funds greatly exceeded the amount on deposit by the county at the time the City Bank turned over the account to the Security Bank.

"It is a well-established rule that, when payments are made upon a current account by a debtor to a creditor and no application is made by either, the law will apply the payments according to priority of time, liquidating the oldest items first. * * *

"No reason can be perceived why this rule should not apply between a bank and its depositor. The relation, as stated, is that of debtor and creditor. Each deposit made in a bank creates a new item of indebtedness due by the bank to the depositor, and each check or voucher cashed by the bank constitutes a payment by the debtor on its account, consisting of various items owing to the creditor. *Sunflower County* v. *Drew,* 136 Miss. 191, 101 So. 192; *Henry County* v. *Salmon,* 201 Mo. 136, 100 S. W. 21; *Freemont County* v. *Freemont Bank,* 138 Iowa 167, 115 N. W. 925; *Pittsburg* v. *Rhodes,* 230 Pa. 397, 79 A. 634; *Board of Commrs.* v. *Citizens' Bank,* 67 Minn. 236, 69 N. W. 912; *State* v. *U. S. F. & G. Co.,* 81 Kan. 660, 106 p. 1040, 26 L. R. A. (N. S.) 865." See also *First National Bank* v. *National Surety Co.,* 130 Fed. 401, 66 L. R. A. 781.

It is therefore immaterial whether the Pocahontas State Bank ceased to exist after the merger or whether it retained its corporate identity, and the citations from the text writers and the decisions to which we are referred by counsel for appellants have no application. Neither do we think that the facts in this case call for an application of the rule *strictissimi juris,* for as the condition of the bond was performed and the principal relieved of liability, the sureties were of course exonerated.

We have not overlooked the fact that the new bank continued to operate in the building formerly occupied by appellee bank and that the stationery of the appellee bank was continued to be used by the new bank, or the argument of counsel of appellant based thereon. There was no allegation of a fraudulent concealment on the part of the appellee bank of the merger and transfer of its assets to the Randolph State Bank, neither do we think the evidence justifies such conclusion.

It can scarcely be doubted but that, in a town the size of Pocahontas, such change in as important institutions as was effected between the banks there, would be known to every one, especially those, who, like the treasurer, had been doing business with the bank. These circumstances in some cases might be strong evidence of fraud, but, when the entire situation of this case is considered, they have no weight.

The judgment is therefore affirmed.

HOLCOMB *v.* AMERICAN SURETY COMPANY.

Opinion delivered October 19, 1931.

J. H. Johnson and *Jones & Wharton,* for appellants.

Frauenthal, Sherrill & Johnson, for appellees.

BUTLER, J. Fifty-three persons brought a joint action against the appellees to recover amounts due them for work and labor performed and material furnished one Clark, a contractor, who had the contract for making an improvement known as Drainage District No. 12 in Jackson County. Clark had executed a bond to the drainage district for its use and benefit as well as for the use and benefit of all persons who might furnish any labor or material for the principal under his contract, and it was upon this bond that the liability of the appellees was sought to be established. Suit was first instituted in the chancery court, and a demurrer filed to the complaint which was treated by the court as a motion to transfer to the law court, which was accordingly done over the objection and exception of the appellees. In the latter court a demurrer was filed to the complaint, setting up,

among other things, that there was a misjoinder of parties and a nonjoinder of necessary parties. A nonsuit was suffered by some of the plaintiffs, and the case proceeded to trial as to the others, which resulted in a judgment in favor of a certain number and against certain others, among them the Beattie Hardware Company, C. W. Butts, Reed & Deucker, Joe Koettel, J. W. McCartney, W. E. Stephens and Ed Hopper, who in apt time filed their motion for a new trial. This motion was overruled, and they thereupon prosecuted an appeal to this court.

I. It is insisted first by the appellees that the appellants have no standing in this court for the reason that the complaint failed to state a cause of action in that it failed to state the amounts due any of the plaintiffs or what particular work any one of them performed or what material was furnished, and did not state any facts upon which an action could be based as to each separate plaintiff. The pleadings under the Code are liberally construed, and every reasonable intendment is indulged in behalf of the pleader. Thus considering the complaint, we are of the opinion that the facts stated were sufficient to state a cause of action as to each of the plaintiffs, and that objections to the complaint should have been raised by motion to make more specific and certain rather than by demurrer, and the court committed no error in overruling the demurrer.

It is secondly insisted that there was a misjoinder of parties in that fifty-two separate claimants were joined in one cause of action, and that under our decisions in *Gage* v. *Road Imp. Dist. No. 3,* 153 Ark. 321, 240 S. W. 427, and *Tolbert Bros. & Co.* v. *Molinder,* 178 Ark. 888, 12 S. W. (2d) 780, each plaintiff had a separate and distinct cause of action and therefore could not maintain a joint action. The trial court correctly held that the complaint was not demurrable on that account.

Section 1081 of Crawford & Moses' Digest provides that "when causes of action of a like nature or relative to the same question are pending before any of the circuit or chancery courts of this State, the court may make

such orders and rules concerning the proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

The purpose of the act is stated therein and is to avoid unnecessary costs or delay in the administration of justice. This section is to be liberally construed so as to effect its purpose. In the case at bar the claims were of a like nature and all against the same defendant, and grew out of the same transaction, and, while each plaintiff had an independent cause of action, it is not to be doubted that, if each had filed his separate suit, the court would have consolidated them for the purposes of trial. Since the court might have done this, we can see no good reason why the plaintiffs might not have jointly proceeded in one suit as they did. If a proper defense could not have been made because plaintiffs were proceeding jointly and not independently, the court, in the exercise of its discretion, might have ordered a severance, but no such request was made, and it does not appear that any disadvantage was suffered. Therefore the action of the trial court in overruling the demurrer on this ground must also be upheld.

The third ground of appellees' demurrer was that there was a nonjoinder of necessary parties, in that the contractor was not made a party, and § 6919 of the Digest is invoked as authority for the position taken. This section provides that, in all cases where a lien shall be filed under the provisions of the act by any person other than a contractor, it shall be the duty of the contractor to defend the action at his own expense. The act referred to in § 6919 was one enacted for the benefit of laborers or other persons who should do work for private individuals or corporations, giving them a lien upon the building, erection or improvement, etc. This statute has no application to the instant case, as the construction in question was of a public nature, upon which there could be no liens, and the rights of the persons performing work

or furnishing material must be found in the bond given for their protection. This bond, which is hereafter set out, entitles the beneficiaries—the laborers and materialmen—to an action against the obligors. *Oliver Construction Co.* v. *Williams,* 152 Ark. 414, 238 S. W. 615. Clark was a proper, but not a necessary party. If it be true, as claimed by appellees, that Clark was frequently within the State and conferred during the pendency of the suit with their attorneys, they could have themselves made Clark a party if they deemed such action necessary for the preservation of their rights.

The fourth ground urged for an affirmance is that the suit was barred by the statute of limitations, and counsel suggest that, if the evidence was properly abstracted, it would show that the work of the plaintiffs for which they seek to recover was done during 1926 and 1927, and that the contract was forfeited by Clark during the latter part of 1927 and terminated in so far as he was concerned, which would bar plaintiffs' action under § 6914, *supra.* Appellees have not referred us to the page of the transcript where this evidence may be found, and we have examined the transcript and fail to find such evidence. We think that the case was properly in court, and none of the objections before mentioned made by the appellees are well taken.

It also is insisted by the appellees that the appeal should be dismissed for failure on the part of the appellants to comply with rule 9 of this court. The abstract is sufficient to give us an understanding of the issues involved, and is a substantial compliance with the rule.

II. We therefore proceed to an examination of the error assigned by the appellants, *i. e.,* that the court erred in holding that "none of the other plaintiffs (appellants here) are entitled to recovery against the defendants for the reason that their claims would not be covered by the surety bond in question, and judgment will be for the defendants on all other claims." There was no contention made in the court below, nor is any made here, that the claims of the appellants against Clark for work done

or material furnished were not true and correct. The evidence shows that at some time after the claims accrued the claimants met with Clark, some members of the district board, and an attorney for the appellees, at which time the claims were examined and discussed and their correctness agreed to.

Without setting out separately the nature of each claim, the evidence shows they were for cutting and hauling wood, used as fuel under the boilers for the creation of steam; clearing right-of-way, for lumber used in the construction of the dredge boat, for machinery installed for the operation of the boat, and for digging and removing dirt, and for hauling this equipment to the location necessary for the performance of the work.

The condition of the bond on which the appellees were sureties, among other things, provided for the payment by Clark of "all indebtedness for labor and material furnished or performed by any person on the work contemplated by said contract," and concluded with the following paragraph: "This bond is executed for the use and benefit of said drainage district as well as for the use and benefit of all persons, firms and corporations who may furnish any labor or materials for the principal of this bond under his contract with the district, and is for the purpose of saving the expense and trouble of making a separate bond for the use and benefit of the district and a separate bond for the use and benefit of persons furnishing materials and performing labor, and this bond shall be as valid and binding on the principal and sureties herein as if separate and distinct bonds had been made."

Since the improvement in this case was of a public nature, the statutes giving materialmen and laborers a lien for their work do not apply, and the only protection for the payment for labor performed or material furnished is to be found in terms of a bond. The appellees, sureties on the bond, were organized, among other purposes, to make surety bonds such as this, for which they were paid. Therefore the bond should be liberally con-

strued in favor of the laborers and materialmen for whose benefit the bond was given. *United States F. & G. Co.* v. *Bank of Batesville,* 87 Ark. 348, 112 S. W. 957; *American Bonding Co.* v. *Morrow,* 80 Ark. 49, 96 S. W. 613; *Title Guaranty & Surety Co.* v. *Bank of Fulton,* 89 Ark. 471, 117 S. W. 537; *Equitable Surety Co.* v. *Bank of Hazen,* 121 Ark. 422, 181 S. W. 279; *Union Indemnity Co.* v. *Forgey & Hanson,* 174 Ark. 1110, 298 S. W. 1032.

The condition of the bond under consideration in the case of *Leslie Lumber & Supply Co.* v. *Lawrence,* 178 Ark. 573-575, 11 S. W. (2d) 458, was "that if the said contractor shall pay all persons, firms or corporations who perform labor or furnish equipment, supplies and material for use in the work thereunder," etc., and in construing this condition the court said: "The last proposition necessary for consideration is whether the bond is liable only for material actually entering into the work —such items as might be the basis of the mechanics' lien. We answer this question in the negative, as does the bond itself. It protected all persons who furnished supplies and material for use in the work and not merely material actually entering into the work. Therefore all material and supplies furnished the contractor 'for use in the work' or reasonably necessary to accomplish the purpose of the work, and which were delivered to the contractor for such use and purpose, are covered by the bond."

In *Ætna Casualty & Surety Co.* v. *Big Rock, etc., Co.,* 180 Ark. 1, 20 S. W. (2d) 180, where the condition of the bond was that the contractor "shall pay off and discharge claims for labor and material of whatsoever kind used in the construction of said work," it was held that the language used was sufficiently broad and inclusive to make the surety liable on claims for material used in the construction of the building, and the payment would not be limited to only such claims for labor and material furnished as would constitute liens against the improvement.

So, in the instant case we are of the opinion that the language of the bond is broad enough to cover not only claims which constitute liens against the improvement, but for all labor or material which was necessary to accomplish the purpose of the work. It will be noted that the language is to the effect that the contractor should pay all indebtedness for labor and material furnished or performed by any person on the work contemplated by such contract and not that the contractor should be liable for labor and material which entered into the construction of the work; and in the concluding paragraph of the bond it is expressly provided that such bond was "for the use and benefit of all persons, firms and corporations who may furnish any labor or material *for the principal* of this bond under his contract."

In *Kotchtitzky* v. *Magnolia Petroleum Co.,* 161 Ark. 275-6, 257 S. W. 48, the court said: "The contract for the construction of the improvement by the appellant carries with it an obligation by necessary implication upon the part of the appellant to furnish the labor and material necessary to make the improvement which the appellant contracted to construct. How would it be possible for appellant to fulfill the obligations of his contract to construct the improvement unless he furnished the labor and material necessary to make the improvement?" In the case at bar the contractor was obligated under his bond to dig the ditch, and it would have been impossible to fulfill this obligation unless he obtained the labor and material necessary, and the surety expressly recognized the necessity of the case and undertook that the bond executed was for the use and benefit of all persons who might furnish any labor or material for the principal. We think the plain provisions in the bond bound the appellees for the labor done and material furnished by appellants, for there can be no question that this labor and material were reasonably necessary for the accomplishment of the work contemplated and were furnished for the principal, Clark.

The conclusion reached is not in conflict with the doctrine of *Pierce Oil Corp.* v. *Parker,* 168 Ark. 400, 271 S. W. 24; *Oliver Const. Co.* v. *Erbacher,* 150 Ark. 549, 234 S. W. 631; *Goode* v. *Ætna Cas. & Sur. Co.,* 178 Ark. 451, 13 S. W. (2d) 6, and *Heltzel Steel Form & Iron Co.* v. *Fidelity & Deposit Co.,* 168 Ark. 728, 271 S. W. 325, relied on by appellees, for those cases arose under different statutes to the one at bar, and the bonds considered were not as comprehensive and broad in terms as that considered here. It follows that the trial court erred in that part of the judgment which found against the appellants. Therefore the judgment will be reversed as to them, and the cause remanded with directions to enter a judgment against the appellees and in favor of the appellants in the amounts of their respective claims.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* THOMAS.

Opinion delivered October 26, 1931.

[redacted]

Thos. S. Buzbee and *George B. Pugh,* for appellant.

John L. McClellan and *Wm. H. Glover,* for appellee.

HART, C. J., (after stating the facts). Counsel for the defendant rely upon the principles of law decided in *Jemell* v. *St. Louis Southwestern Railway Company,* 178 Ark. 578, 11 S. W. (2d) 449, for a reversal of the judgment. They admit that there was a presumption of negligence when the plaintiffs proved that their injuries were received by the passenger motor coach of the defendant colliding with the automobile in which they were

riding at the public crossing over the defendant's railroad. They claim, however, that the facts in the present case bring it within the principles of law decided in the Jemell case, but we cannot agree with them in this contention. In the Jemell case the operative of the train saw the plaintiff drive upgrade to the edge of the tracks at the public crossing and then back down the grade. He supposed that the plaintiff would not again attempt to run up the grade until after the train had passed. The plaintiff admitted that he did not look for the approach of the passenger train and admitted that he could have seen it if he had looked. The railroad track was straight at that point. When the plaintiff admitted that he did not look and could have stopped his car in time to avoid the accident if he had looked, he could not recover because his own negligence directly contributed to the happening of the accident, and there was no negligence on the part of the defendant because the fireman who was keeping the watchout was justified under the circumstances in believing that the plaintiff, when he backed his car down the grade just before the accident, would not drive up the grade again in front of a rapidly approaching train. The train was running at the rate of thirty-five or forty miles per hour.

Here the jury might have found that the facts were essentially different. According to the testimony of the plaintiffs, they were keeping a watchout for a train on the tracks of the railroad company. They were prevented from seeing the approaching train because of some bushes growing along the side of the railroad. There was no upgrade at the crossing. It was practically level. The engineer of the defendant's passenger coach admits that he saw the automobile in which the plaintiffs were riding about 200 feet away, but supposed that it was going to stop. He did not look around again until just before the accident occurred. From this testimony, the jury might have inferred that the negligence of the railroad company was greater than that of the plaintiffs. It will be remembered that there was a presumption of negli-

gence from the fact that the plaintiffs were injured by the defendant's passenger motor car striking the car in which the plaintiffs were riding at a public crossing over the railroad. The jury might have found that the railroad operatives did not sound the whistle nor ring the bell for the approaching crossing as required by statute. The plaintiffs themselves testified that their eyesight and hearing were both good, and that they did not hear the bell ringing or the whistle sounding as the passenger coach approached the crossing. They were listening for these statutory signals and could have heard them if they had been given. There were no sounds or other disturbances to interfere with their hearing, and their testimony cannot be classed as negative. It was affirmative testimony under the circumstances, and was entitled to such weight as the jury saw fit to give it. *Fort Smith & Western Ry. Co.* v. *Messek,* 96 Ark. 242, 131 S. W. 686; *Slattery* v. *New York, N. H. & H. Rd. Co.,* 203 Mass. 453, 89 N. E. 622; *Brown* v. *Milwaukee Electric Ry. & Light Co.,* 148 Wis. 98, 133 N. W. 589; *Philadelphia, B. & W. Rd. Co.* v. *Gatta,* 4 Boyce Del. 38, 85 Atl. 721, 47 L. R. A. (N. S.) 932.

There was a conflict in the testimony in this case, and it cannot be said as a matter of law that plaintiff's contributory negligence was greater in degree than the negligence of the defendant. Hence there was no error in the court refusing to direct a verdict against the plaintiffs.

Under § 8575 of Crawford & Moses' Digest, commonly known as the comparative negligence statute, an injured party, guilty of contributory negligence, cannot recover damages for an injury unless his negligence is of a less degree than the negligence of the railroad company. As we have already seen, the facts and circumstances adduced in evidence in this case make it a jury question whether the negligence of the plaintiffs was of a less degree than that of the defendant. *Davis* v. *Hareford,* 156 Ark. 67, 245 S. W. 833; *C. R. I. & P Ry. Co.* v. *French,* 181 Ark. 777, 27 S. W. (2d) 1021; *St. L. S. F. Ry.*

Co. v. *Haynes,* 177 Ark. 104, 5 S. W. (2d) 737; *Mo. Pac. Rd. Co.* v. *Sandifur,* 183 Ark. 196, 32 S. W. (2d) 316.

No other assignments of error are urged for a reversal of the judgment, and it will therefore be affirmed.

NORTHCROSS *v.* MILLER.

Opinion delivered October 26, 1931.

G. B. Segraves, for appellee.

Chas. E. Sullenger, for appellant.

HART, C. J., (after stating the facts). The general rule is that money paid under a mistake of fact may be recovered. *C. R. I. & P. Ry. Co.* v. *Lena Lumber Co.,* 99 Ark. 105, 137 S. W. 562. In *Tancred* v. *First National Bank,* 130 Ark. 520, 197 S. W. 1178, the rule is stated where a person without mistake of fact, or fraud, duress, or coercion, pays money on a demand that is not enforceable against him, the payment is deemed voluntary and cannot be recovered. In *Blackburn* v. *Texarkana Gas & Electric Co.,* 102 Ark. 152, 143 S. W. 588, it is said that where one voluntarily makes a payment upon a claim with knowledge of the facts, or under such circumstances that he is affected with such knowledge, then he cannot recover such payment upon the ground that the asserted claim was unenforceable. The reason for the rule that money paid under a mistake of fact may be recovered proceeds upon the theory that the plaintiff has paid money which he was under no obligation to pay and which the party to whom it was paid had no right to receive or to retain. Hence the law raises an implied promise on his part to refund it, and an action will lie to recover it.

In the application of this rule to the present case, the verdict of the jury in favor of appellees upon the

complaint of appellant must be sustained. Each party had the land surveyed in 1928, and there was a conflict in the testimony as to whether there was any shortage in the leased land. The appellees withheld the rent for 43.7 acres of land in the fall of 1928 from the amount due for rent for that year because of this alleged shortage. The question was submitted to the jury, and the jury by its verdict found in favor of appellees. The testimony on the question of whether there was a shortage in the land for the year 1928 being in conflict, the verdict of the jury is binding upon this court upon appeal, and the judgment on that branch of the case must be affirmed.

On the cross-complaint, the facts are quite different. On that branch of the case, appellees sought to recover against appellant on their claim that they had overpaid the rent for 1927 by mistake. We do not think there was any evidence upon which to submit this question to the jury. Appellees did not claim a mistake as to the acreage. According to the testimony of appellant, there was no mistake as to the acreage. According to the testimony of Rogers, a member of the firm which rented the land for the year 1927, there was no mistake as to the acreage. He and McAdams, who worked for Williams, examined the tract where it is claimed the shortage exists and decided that there were 50 acres in it. Williams and Miller, as members of the partnership with Rogers, were bound by the latter's act. The ground of liability of one partner for the acts of the other is that of implied agency within the scope of the partnership. *Stephens* v. *Neely,* 161 Ark. 114, 255 S. W. 562; 45 A. L. R. 1236.

Besides the testimony above referred to, that of Williams himself, shows that when the rent was paid in the fall of 1927, they made the payment with knowledge of all the facts or under such circumstances that they were affected with such knowledge. Under the authorities above cited, they cannot recover the payment upon the ground that there was a mistake in the acreage.

In this connection, it may be stated that, where a person has sufficient information to put one of ordinary intelligence upon inquiry, he shall be deemed to know what the inquiry would disclose. *Jordan* v. *Bank of Morrilton,* 168 Ark. 117, 269 S. W. 53; *Richards* v. *Billingslea,* 170 Ark. 1100, 282 S. W. 985.

Williams was asked about a plat of the land exhibited in evidence which he caused to be made in October, 1928, and was asked what was the occasion of it being made. His answer was, "Well, there were two reasons: This was the first reason. Mr. Miller and I went down there often. Quite a number of times I told Mr. Miller I did not believe we had the acreage we were paying for. Then, after the canals were cut, we decided we would have the land surveyed. And we also wanted to see how much land the canals took up." Continuing, he said that the canals were dug in the latter part of 1927 or the early part of 1928. Further on in his testimony, Williams said that he first believed in 1927 that there was a shortage in the acreage. He said that he had made a good many trips on the land and made up his mind that they were paying for more land than they were getting. Williams was a planter of large experience and was, according to his own testimony, capable of estimating the quantity of land in cultivation upon a given tract. It is inferable from his own testimony that he believed there was a shortage in 1927. It is true he said that they did not have the survey made until after the canals were dug in the latter part of 1927 or the first part of 1928. He states, however, that he made frequent trips down there in 1927, and that was when he first believed that there was a shortage in the acreage. He had worked the lands in 1926, and it was his duty to have ascertained about the shortage before he paid the rent in the fall of 1927. Not having done so, he will be deemed to have knowledge of the shortage because he was put on inquiry as to the shortage by his knowledge and judgment of the land during the frequent trips he made there before he paid the rent. Therefore, according to his own testimony, he paid the rent with

full knowledge of the alleged shortage. Miller, his partner, was bound by his acts; and they were not entitled to recover on their cross-complaint because they made a voluntary payment of the rent with knowledge of the shortage and under such circumstances that they are affected with such knowledge.

Therefore there was no evidence upon which to submit the issue raised by the cross-complaint to the jury, and the court erred in so doing. No exceptions were necessary. A new trial was asked on the ground that the verdict was contrary to the law and the evidence under § 1311 of Crawford & Moses' Digest. The motion for a new trial was sufficient to raise the question as to whether the verdict was sustained by sufficient evidence. *Naylor* v. *McNair,* 92 Ark. 345, 122 S. W. 662. Inasmuch as the case seems to be fully developed on this point, the judgment in favor of appellees on the cross-complaint will be reversed, and their complaint will be dismissed here. The judgment in their favor upon the complaint of the appellant will be affirmed. It is so ordered.

ATWOOD *v.* STATE.

Opinion delivered October 26, 1931.

Floyd Terral, for appellant.

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

SMITH, J. Appellant was convicted of the offense of receiving stolen property, a Ford automobile. The automobile was stolen from the garage of B. M. Wilson at his home near Jacksonville, in Pulaski County, and was found at the home of appellant, who does not deny that the car was in his possession when found.

Appellant offered testimony to the effect that he sold a Ford car which he owned in April to one Keesey, and repossessed it about the second week in July, and during this interval Keesey, or some one else, made extensive repairs and practically consolidated this car with the stolen car, so that, when the stolen car was found at appellant's home, it had in it the motor and some other parts which had been in appellant's car, and that he did not know the car had been stolen.

It is insisted that, for this reason, there was a failure of proof, in that the car found in appellant's possession was not the car stolen from Mr. Wilson. We do not concur in this view. It is true, of course, that the motor is an essential part of an automobile, but an automobile was found at appellant's house which had been identified as the one stolen from Wilson, and it is no defense to show that the motor, or some other part, had been changed. The car found was the property of Wilson, and there is no variance between the indictment and the testimony.

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

This appears to be a substantial copy of the instruction set out in the opinion in the case of *Barron* v. *State,* 155 Ark. 80, 244 S. W. 231, but it was there said that the error in the instruction was such that a specific objection thereto was necessary to call the error to the attention of the court, and that, in the absence of such objection, it would not be held prejudicial. So here as there was no specific objection to the instruction, we must hold that giving it was not prejudicial error. It is true, of course, that an instruction on the possession of property recently stolen should not be given unless the possession of the property is so related to the larceny thereof in point of time so as to have some probative value on that account. But this is always a question of fact, and the value of such testimony diminishes as the time of possession becomes more remote from the larceny, but we are unable to say here that the possession of the stolen car was so remote in point of time that the possession thereof was without probative value.

It is very earnestly insisted that there was no proof of the venue in this case, and this is the most difficult question presented, as it must be admitted that the proof of venue is not as satisfying as it might easily have been made.

It is essential always to prove the venue in any criminal case, and this is true because § 10 of article 2 of the Constitution (which article bears the title, "Declaration of Rights") provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public

trial by an impartial jury of the county in which the crime shall have been committed; * * *." The failure to prove the venue has therefore always been held to be a fatal defect in the testimony and requires the reversal of a conviction where this proof was not made. *Ware* v. *State,* 77 Ark. 19, 90 S. W. 619.

This essential fact, that of the proof of the place of the commission of the crime—the venue—is ordinarily so easily proved that many prosecuting attorneys neglect to prove it expressly, and such is the case here, but convictions are not necessarily reversed on that account.

The venue of the crime is no part of it and therefore does not have to be proved beyond a reasonable doubt, as the essential elements of the crime itself must be. Venue relates to and determines the jurisdiction of the court under the provision of the Constitution above quoted, and may therefore be shown by a preponderance of the evidence. It is a fact which may be inferred from all the circumstances shown by the testimony, and the venue is said to be proved when the place of the commission of the crime appears, from all the testimony in the case, to have been within the county in which the indictment was returned. *Brock* v. *State,* 171 Ark. 282, 284 S. W. 10; *Stribling* v. *State,* 171 Ark. 184, 284 S. W. 38; *Chambers* v. *State,* 168 Ark. 248, 270 S. W. 528; *Spivey* v. *State,* 133 Ark. 314, 198 S. W. 101.

We have a special statute fixing the venue in prosecutions for receiving stolen property. It is § 2871, Crawford & Moses' Digest, and reads as follows: "When any person shall be liable to be prosecuted as the receiver of any personal property that may have been feloniously stolen, taken or embezzled, he may be indicted, tried and convicted in any county where he received or had such property, notwithstanding such larceny may have been committed in another county."

This statute was sustained and construed in the case of *Smith* v. *State,* 169 Ark. 913, 277 S. W. 530, where it was held that the receiver of stolen property may be tried in any county where he "had or received" the prop-

erty, and that the section quoted was intended to allow and did authorize the receiver of stolen property to be tried in any county where he either first received the property or at any time afterwards had it. See also *Satterfield* v. *State,* 174 Ark. 733, 296 S. W. 63.

Here a witness named Brown testified that he was a deputy sheriff, but did not state for what county. He did testify, however, that the stolen property was found at appellant's home, but he did not state that his home was in Pulaski County, in which the indictment was returned and the trial and conviction had. But another witness, W. W. Garner, a deputy sheriff of Saline County, testified as follows: "Yes, I was deputy sheriff in Saline County; I went out with Mr. Brown and made a search for the car at another place, how come me with them in Pulaski County." We think this testimony supports the inference and sustains the finding that Garner went with Brown to search for the car, and that it was found at appellant's home, which, as Garner testified, was the place in Pulaski County where he went with Brown to search for the car and where it was found.

We conclude therefore that the testimony sufficiently establishes the venue in Pulaski County.

We cannot refrain from taking this occasion to say that a little more care on the part of the prosecuting officer would remove such difficulties as this case presents.

On the whole case we think the venue was established in Pulaski County, and that no error appears in the record. The judgment must therefore be affirmed, and it is so ordered.

KORY *v.* LESS.

Opinion delivered October 26, 1931.

W. E. Beloate, Jr., W. E. Beloate and *Robt. C. Powell,* for appellant.

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

HUMPHREYS, J. On November 11, 1929, this court reversed a decree of the chancery court of Lawrence County for and in the eastern district thereof awarding damages against appellant for waste, and remanded the cause with directions to enter a decree in accordance with the opinion. The case is reported in the 180th Ark. at page 342 [22 S. W. (2d) 25], and, in order that the issues on this appeal may be better understood, reference is made to the statement of facts and opinion on the original appeal. On remand of the cause, the receiver filed a final report containing many items of debit and credit, and this appeal involves the correctness of the ruling of the trial court relative to four of the items contained in the report.

First, the court refused to allow appellant herein credit for $901.34 which the receiver expended out of the rents for repairs on the property.

Second, the court refused to credit appellant with the money expended by the receiver for making a survey of the lands.

Third and fourth, the court charged appellant with one-half of the amounts paid Mamie McKenzie for clerical work and W. M. Ponder for legal services in the preparation of the final report.

(1) It is first contended that the item of $901.34 was allowed to her by this court on the original appeal of the case. We find nothing in the opinion relating to the item and nothing bearing out the construction placed upon it by appellant. It is true the judgment against her

for waste was reversed, but in doing so this court did not award her a judgment for amounts which the receiver had expended in making repairs upon the plantation. The weight of the evidence sustains the chancellor in his finding to the effect that the repairs covered by the item in question were for the benefit of the life estate of appellant, and not for the benefit of the reversionary estate of the appellee. They were for reroofing houses and barns and clearing drainage ditches on the property, which, in their nature, were necessary for the preservation of the property and in keeping with good husbandry.

(2). The item of surveying, according to the weight of the evidence, was necessary in order to properly collect the rents, and appellant was not entitled to a credit for one-half of the amount thus expended.

(3 and 4). The receiver, according to the record, was a capable farmer, but not in any sense an accountant. The management of the plantation involved many items of expense as well as many items of collection. It is apparent from reading the record that the receiver needed some clerical help as well as the advice of an attorney in preparing his final report, and we think the allowances made to the receiver were proper expenses of receivership and very reasonable. He was allowed $107 for clerical help and $25 for attorney's fees, one-half of which was charged against appellant.

No error appearing, the decree is affirmed.

RIDENOUR *v.* STATE.

Opinion delivered October 26, 1931.

Rains & Spinks, for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried, and convicted in the circuit court of Crawford County for possessing a still, and was adjudged to serve a term of one year in the State penitentiary as a punishment therefor, from which is this appeal.

The first assignment of error urged for a reversal of the judgment is the want of evidence to support the verdict. The evidence introduced by the State was to the effect that the sheriff and deputy sheriff of Crawford County procured a search warrant and proceeded to appellant's home near Tip Top Tavern, close to the line

between Washington and Crawford counties, and found a keg and quart of whiskey in his house and a still in a southeasterly direction therefrom, about one-quarter of a mile distant. At the still they found a pint of whiskey, the color of that they found at the house and a barrel of mash. As they approached the house, and about the time the sheriff was entering the front door, the deputy started around to the back door, where he met appellant and ordered him to sit down. He refused to do it and followed the sheriff into the house where some words were passed between them. Appellant's wife seemed disconcerted and started into the room where the sheriff found the keg and quart of whiskey. Under the rule announced in the case of *Robinett* v. *State,* 180 Ark. 873, 23 S. W. (2d) 627, the evidence detailed above is sufficient to sustain the verdict of the jury finding that appellant possessed the still seized by the sheriff.

The next assignment of error urged for a reversal of the judgment is that the State failed to prove that the still was located in Crawford County. It is true that no witness said in so many words that it was located in Crawford County, but one of appellant's witnesses testified on cross-examination that he was shown where the still was seized, and that the place shown him was land in Crawford County that he was employed to look after by St. Louis & San Francisco Railroad Company; that in the performance of his duty, he had surveyed the land. He was the surveyor of Crawford County. This circumstance was sufficient to establish the venue under the rule announced frequently by this court that the venue in criminal cases might be proved by circumstantial evidence. *Wilder* v. *State,* 29 Ark. 293; *King* v. *State,* 110 Ark. 595, 162 S. W. 1087; *Spivey* v. *State,* 133 Ark. 314, 198 S. W. 101.

The next assignment of error urged for a reversal of the judgment is that the court allowed the sheriff to act as prosecuting attorney in the case. We are unable to find anything in the record indicating that the sheriff usurped the duties devolving upon the prosecuting at-

torney. The most that he did was to divulge information concerning the case to the prosecuting attorney.

The next assignment of error urged for a reversal of the judgment is that the court allowed the prosecuting attorney to ask Frank Price on cross-examination whether he drank liquor. This was an improper question, but, answered as it was, could not possibly have prejudiced appellant. The witness responded that he drank occasionally, but that he never obtained any liquor from appellant. An admission that he took an occasional drink in no wise affected his credibility as a witness, and the effect of his answer was to forestall any inference that appellant furnished him liquor to drink.

The next assignment of error for a reversal of the judgment is that the court allowed the State to prove that a keg and quart of liquor were found in appellant's house. This was admissible as a circumstance tending to show whether appellant was engaged in the liquor business and the owner of the still seized by the sheriff near his home. *Sexton* v. *State,* 155 Ark. 441, 244 S. W. 710; *Tuttle* v. *State,* 180 Ark. 285, 21 S. W. (2d) 188.

The next assignment of error urged for a reversal of the judgment is that the prosecuting attorney was permitted in the argument to misquote witness Huey's evidence relative to whether the trail leading to appellant's house from the still was plainer than trails leading to other homes in the neighborhood. Even if the prosecuting attorney had misquoted the evidence of said witness, there is no showing that his version of it influenced any juror. The jurors heard the several witnesses themselves, and, knowing that to which they testified, could not have been misled by incorrect rehearsals of their testimonies by the prosecuting attorney. If it had been definitely shown that the juror or any juror was misled by the argument in reaching an adverse finding to appellant, then it might reasonably be contended that appellant was prejudiced by the argument, otherwise not. No such showing was attempted in the record.

The next assignment of error urged for a reversal of the judgment is that the court did not instruct the jury that the failure of appellant to testify should not be considered as a circumstance against him. Appellant made no request to that effect. He should have requested a correct instruction on the point, and, not having done so, is in no position to complain on account of this omission. *Lowmack* v. *State,* 178 Ark. 928, 12 S. W. (2d) 909.

The next assignment of error urged for a reversal of the judgment was the trial court's refusal to give appellant's requested instructions Nos. 2 and 3. Both instructions were covered by instructions given by the court to the effect that appellant should be acquitted unless proved guilty beyond a reasonable doubt of possessing a still.

The next assignment of error for a reversal of the judgment is the court's refusal to give appellant's requested instructions 4, 5 and 6 on circumstantial evidence. This court has ruled that the refusal to give any instructions on circumstantial evidence where the case depends wholly upon such evidence is not error if he had already fully and correctly instructed the jury on the credibility of witnesses, the weight of evidence, the presumption of innocence, and reasonable doubt. *Barton* v. *State,* 175 Ark. 120, 298 S. W. 867; *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d) 946.

The next assignment of error urged for a reversal of the judgment is the refusal of the court to give appellant's requested instruction No. 7 to the effect that, unless there is other proof than the finding of a quantity of liquor in appellant's home tending to connect him with the still, such testimony should not be considered by them. This court has ruled in a number of cases that the finding of liquor in the home of one accused of violating liquor laws is admissible as a circumstance tending to show the commission of the crime. *Marsh* v. *State,* 146 Ark. 77, 255 S. W. 7; *Robertson* v. *State,* 148 Ark. 585, 231 S. W. 865; *Clark and Tuttle* v. *State,* 180 Ark. 285, 21 S. W. (2d) 188.

No error appearing, the judgment is affirmed.

Opinion delivered October 26, 1931.

[redacted]

Cole & Poindexter, for appellant.

Coleman & Reeder, for appellee.

KIRBY, J. Appellant and others on June 14, 1930, petitioned the Independence Circuit Court for a certiorari seeking to quash an order of the board of education of Independence County made on the 14th day of September, 1929, dissolving School Districts Nos. 4 and 88 and annexing the territory formerly embraced therein to School District No. 71 in Sharp County.

It was alleged as grounds that district No. 71 lies wholly in Sharp County and that the Independence County board of education was without jurisdiction to annex territory in Independence County to it.

School District No. 71 at the date of the order of annexation in fact contained certain sections of land situated in Independence County, which were annexed by act of the Legislature, and School Districts Nos. 4 and 88 in Independence County adjoin said territory in Independence County that has been annexed to the Sharp County district by the Legislature. The annexation of districts Nos. 4 and 88 in Independence County to School District No. 71 of Sharp County increased the area in Independence County so materially in excess of the area in Sharp County that the board of education of Sharp County, acting under the present law and instruction of the State Board of Education and the State Superintendent of Education, relinquished jurisdiction over said district and ceded it to the board of education of Independ-

ence County, which accepted the administration of its affairs, designating it finally as School District No. 2A of Independence County.

When the order of consolidation was made, members of the boards of both districts Nos. 4 and 88 recommended and acceded to it. An election was called for the purpose of voting on the question of borrowing money for the construction of school buildings, one voting precinct being located in Sharp County and another in Independence County, and in the latter district one director of School District No. 4 and one of No. 88 acted as judges, and of 50 votes cast in Independence County precinct all were in favor of the loan for building purposes; and, acting under the authority conferred by the electors, the directors borrowed money from the "Revolving Loan Fund" of the State, and had at the time of the filing of the petition for certiorari constructed a large and commodious building to accommodate the pupils of the entire district, and had purchased and put in operation school busses for transporting the pupils formerly residing in the territory embraced in the old districts Nos. 4 and 88 to and from the new school at Cave City, where additional teachers had been employed for conducting the school.

The court denied the petition for certiorari because it was not sooner applied for, and from this judgment the appeal is prosecuted.

Certiorari is not a writ of right but one of discretion, and will not be granted except to do substantial justice *Rural Special School Districts Nos. 17 and 95* v. *Ola Special School District*, 182 Ark. 197, 31 S. W. (2d) 129. In this case it was also said: "An effort to quash an order or judgment in a matter involving the public interest or of a public nature, such as the consolidation and creation of school districts, is not entertained as of right, but is a matter resting in the sound discretion of the court, which should not grant relief unless the remedy is sought within apt time or without an unreasonable delay in applying therefor."

It was held in the above case that there was no abuse of discretion in refusing the writ of certiorari as the proceeding for quashing the order of consolidation was not commenced for more than 5 months after the order made without excuse made for the delay.

In the instant case petitioners waited almost 10 months before starting the proceeding, giving no sufficient excuse for the delay, and we hold this case is controlled by the ruling in the case above cited.

The judgment is affirmed.

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

Opinion delivered October 26, 1931.

A. M. Hartung and *Warner & Warner,* for appellant.

D. H. Howell, for appellee.

MEHAFFY, J. The appellee brought suit in the Crawford Circuit Court for damages to a car of strawberries delivered to the appellant for shipment to Dallas, Texas. The complaint alleged that the appellant was negligent in failing to ice and re-ice said car and maintain proper refrigeration in the handling and transporting of said shipment of strawberries, and that by reason of the neg-

ligence alleged the strawberries, when they reached Dallas, Texas, were in a more or less overripe, soft, decaying, and otherwise deteriorated condition; that appellee was damaged by the negligence of appellant in the sum of $348.75.

Answer was filed by appellant specifically denying negligence and denying all the material allegations in the complaint.

The cause was tried by a jury and a verdict was rendered for $348.75. The case is here on appeal.

There was sufficient evidence to submit to the jury the questions of negligence and damages, but it would serve no useful purpose to set out the testimony here.

The first instruction given by the court at the request of the appellee was as follows: "You are instructed that it is the duty of the carrier to furnish proper shipping facilities for the kind and character of commodity which it undertakes to carry, and in this case it was the duty of the defendant to furnish a refrigerator car sufficiently iced to preserve the strawberries loaded therein and keep said car sufficiently iced for such purpose until the same was delivered at destination."

This instruction told the jury that it was the duty of the carrier to furnish proper facilities and to furnish a refrigerator car sufficiently iced to preserve the strawberries therein. This instruction was erroneous and should not have been given. The suit was based on negligence of the carrier and it was its duty to exercise ordinary care to properly ice and re-ice the car, thereby keeping the proper temperature.

Instead of telling the jury that it was its duty to do the things mentioned, the court should have told the jury that it was the appellant's duty to exercise ordinary care. The suit being based on negligence, the burden was upon appellee to show by the evidence that the appellant was guilty of negligence, causing the damages.

In the next place, the instruction tells the jury that it was the duty of appellant to furnish proper shipping facilities. There is no allegation in the complaint and

no evidence tending to show that proper equipment was not furnished; but, if this allegation had been made in the complaint and there had been evidence to support it, it would not have been proper to tell the jury that it was the duty of the carrier to furnish proper shipping facilities, but the suit, being based on negligence of the carrier, the jury should have been told that it was the carrier's duty to exercise ordinary care in furnishing shipping facilities.

In suit for damages due to negligence the shipper must prove the negligence in order to recover. *Mo. Pac. Rd. Co.* v. *Fine,* 183 Ark. 13; *St. L. S. F. R. Co.* v. *H. Rouw Co.,* 174 Ark. 1, 294 S. W. 414; *Amer. Ry. Exp. Co.* v. *H. Rouw,* 174 Ark. 6, 294 S. W. 416; *H. Rouw Co.* v. *St. L. S. F. R. Co.,* 172 Ark. 881, 290 S. W. 936; *C. R. I. & P. Ry. Co.* v. *Geo. E. Shelton Produce Co.,* 172 Ark. 1017, 291 S. W. 428; *H. Rouw Co.* v. *Amer. Ry. Exp. Co.,* 173 Ark. 84, 291 S. W. 1001; *C. R. I. & P. Ry. Co.* v. *Robinson & Co.,* 175 Ark. 35, 298 S. W. 873; *Amer. Ry. Exp.* v. *Cole,* 183 Ark. 557.

The appellee argues that the court, having correctly instructed the jury in other instructions, the cause should not be reversed on account of giving instruction No. 4. After giving instruction No. 4 the court gave instruction No. 5, telling the jury that it was the carrier's duty to use ordinary care in furnishing a properly refrigerated car, and to keep said car properly ventilated, and it is insisted by appellee that if there was error in giving instruction No. 4, that it was cured by the other instructions. The result, however, in giving the instructions referred to was to create an irreconcilable conflict in the instructions, leaving the jury without any proper or consistent guide. *Am. Ry. Exp. Co.* v. *Cole,* 183 Ark. 557; *Mo. Pac. R. Co.* v. *Fine,* 183 Ark. 13.

We have carefully examined the instructions given in this case and find no other error.

For the error in giving instruction No. 4, the judgment is reversed, and the cause remanded for a new trial.

AMERICAN RAILWAY EXPRESS COMPANY *v.* COLE.

Opinion delivered October 26, 1931.

A. M. Hartung and *Warner & Warner*, for appellant.

D. H. Howell, for appellee.

MEHAFFY, J. This suit was brought by appellee to recover damages in the sum of $454.86, alleged to have been caused by the negligence of appellant.

Appellee, on the 12th day of May, 1929, delivered to appellant 448 crates of strawberries which were received and accepted for transportation. The berries were to have been transported to St. Louis, Mo., but on the 13th day of May, 1929, appellant was instructed to divert said car of strawberries to Cleveland, Ohio. The shipment arrived at Cleveland on May 14, 1929, too late for the market of that date.

It was alleged that the appellant was negligent in transporting the shipment in that it did not transport it within a reasonable time, and in not furnishing appellee a properly constructed and equipped refrigerator car,

and that it was also negligent in not icing and keeping properly re-iced the car in which the berries were transported.

It also alleged that appellant negligently and carelessly allowed the ice to melt away in the bunkers and allowed and permitted the temperature of said berries to rise to a high degree; and that, when the shipment of berries arrived at Cleveland, they were found to be soft, rotten, wet, mouldy, overripe, leaky, and otherwise deteriorated, and were thereby greatly depreciated in value.

John Steward, who bought the berries in the car on May 11th and inspected them, testified that the berries were dry, clean, mostly firm, in good condition, grade A, which is equivalent to No. 1. The car was set May 11th at 6:30 P. M.; loading completed May 12th, and delivered to appellant at 2:30 A. M. This witness had had about 12 years' experience. The berries were not diseased to such extent that could be determined at that time.

On cross-examination witness said he had no independent recollection of these cars, but his record respecting the berries was accurate. A few berries were small, but they were mostly medium to large. Ten per cent. of the berries did not have color. Witness found nothing wrong with the car; was satisfied with the car and accepted it.

Another witness, Donald P. Pocock, testified that he acted as broker in the sale of this car of berries; that the car arrived at Cleveland at 4:45 A. M. May 14th, and was placed for delivery between 4:45 and 6:00 A. M. same day. The berries were refused by the purchaser on account of the weak condition. This witness inspected the berries May 14th and found them in poor condition; top two layers of berries soft, and some leaking. The berries had been sold for $3 a crate. After the purchaser refused to take the berries on account of their damaged condition, witness resold them for a smaller sum, but for the full market value of berries in damaged condition. This witness had had 18 years' experience, and in his opinion the

damages to the berries was due either to faulty equipment or improper refrigeration. Witness stated that, if the car had been properly transported, the condition of the berries would have been the same when they arrived at Cleveland that they were when shipped.

The appellee testified about the shipment of the berries and the sale f. o. b. Morrilton for $3 a crate; that in his opinion if the berries had received ordinary care in shipment they would not have been damaged, and that the damage, he thought was due to improper refrigeration; that, if given ordinary care in transportation, the berries would hold up six to eight days.

S. L. Robinson, who had been a shipper of produce and fruit for 15 years, testified that the berries would hold up and be delivered in merchantable condition for 6 or 8 days.

Another witness, H. Rouw, who had handled strawberries 12 or 15 years, testified that No. 1 quality of berries, when the condition was good, the berries dry, clean and mostly firm, under proper handling would hold up 6 to 8 days.

W. Getes, a mechanical engineer for the appellant, testified about the construction of the car, when it was built, and how the air circulates; and H. A. Simms, a mechanical supervisor of cars for the appellant, testified that the car is handled in passenger train service, and cars are inspected each time they are put in a train; knows nothing personally about this car during the particular trip, but said if it was not all right he would have heard of it.

Earl Sanders, another witness for the appellant, testified that he cleaned and iced the car in question in Van Buren on May 10th; that it was iced to capacity, and the condition of the car after inspection was good. He does not know how many blocks of ice or how many pounds of ice were put in; no record was kept of the amount of ice put in the car, but it was iced to capacity.

A. L. Drilling, testified that he supervised the loading of the car at Morrilton and supervised the inspec-

tion; when loading started the temperature was 42 degrees inside the car; that the condition of the berries was fair quality, sandy and overripe; that several different lots were affected with small spots and bruises; 25 per cent. in that condition; temperature of the car was 66 degrees after loading was completed. Car moved on first train at 4:40 A. M. Ice was 11 inches down at 2:30 A. M. There were 14 crates of berries loaded into the car in which the quarts were about half full; that he had had 6 years' experience in inspecting berries. U. S. No. 1 berries are not defective in any way; not spotted or overripe, and medium to large in size; does not know what defects are allowed in U. S. No. 1 berries, but knows a good car of berries; does not remember anything personally about the car except what was in the record. This witness also testified that Tom Nation, working for Mr. Cole, loaded some of the cups which were not full. There were some good lots of berries in the car, but about 25 per cent. were bad. Car was iced before it left Van Buren. The ice was down about 11 inches five hours after loading began, does not know what caused the yellow spots in the berries, but were so large you could see them with your eyes; does not know the grade; 25 per cent. of the berries were defective. It was dry the day they were loaded, but it had rained the day before.

C. J. Treadway, inspector for the appellant at North Little Rock, testified that his record showed that the car was placed at the icing platform at 8:05 A. M. May 12th, and icing completed at 8:20 A. M.; put in approximately 4,200 pounds, which filled bunkers to capacity. Temperature was 76 degrees outside. Ice would have to be down about 28 or 30 inches to get 4,200 pounds in the bunkers.

A. H. Hyderman, general foreman for Railway Express Agency, St. Louis, Mo., testified that the car arrived at 8:02 P. M. May 12th; estimated the amount of ice put in at 1,500 pounds.

Mr. H. E. Cunningham, general foreman for express company at St. Louis, testified that in May, 1929, there

were 2,400 pounds of ice put in the car at 1:15 P. M. on the 13th. This witness testified from his record and has no personal recollection other than shown by the record.

H. D. Marks, general foreman of the express company at Cleveland, Ohio, testified about the arrival of the car, and that the consignee was notified and that he came the following morning at 4:30 to take the car.

W. F. Wheeler, general foreman of the express agency at Cleveland, testified that he re-iced the car and found it in first-class condition; bunkers were filled to capacity with 2,350 pounds.

E. N. Watson, supervisor of express company in Cleveland testified about the number of express cars set for unloading on the morning of the 14th, and it was agreed that H. F. Kellam, if present, would testify that he inspected the car at 8:00 A. M., May 14th; that the ice was 5 inches down; outside temperature was 51 degrees; temperature of berries, 43 at top and 39 at bottom; berries full ripe and mature; 2 to 4 per cent. scars and blemishes; 6 per cent. decay.

K. S. Branch, market specialist for U. S. Department of Agriculture, testified that he had had 13 years' experience in inspecting fruits and vegetables and has been connected with the U. S. Government 7 years. He testified as to the temperature; that the temperature was 57 degrees and raining, and that that was bad condition for strawberries; market was down; supply liberal; that there are very few cars of berries that do not show some decay; temperature at bottom of load, 39 degrees, and at the top, 43 degrees, indicates very good refrigeration.

John Steward was recalled in rebuttal, and testified that it was not true that 14 crates of berries went into the car that were not inspected by him, and that the quarts were about half full; there would not be 14 crates put in without his knowing it; knows nothing about any yellow spots.

The appellant contends that the plaintiff wholly failed to establish negligence, and for that reason he was not entitled to recover.

Appellee's witnesses testified that the berries were in good condition when delivered to the appellant, and a number of witnesses testified that berries in the condition these were at the time of shipment would stand up from 6 to 8 days if the car was in good condition and kept properly iced. In fact, there is no dispute about this in the evidence.

There is some conflict in the evidence as to the condition at the time they were delivered to the appellant, but this was a question of fact properly submitted to the jury, and there was ample evidence to sustain the finding by the jury that the berries were in good condition when loaded and would stand up from 6 to 8 days if the car was properly iced.

The appellee alleged that the appellant was negligent in not furnishing a properly constructed and equipped refrigerator car, and was negligent in not icing and keeping properly re-iced the car furnished for the loading and transportation of the berries; that appellant negligently and carelessly allowed the ice to melt away in the bunkers of said car; allowed and permitted the temperature of said berries to rise to a high degree. These were the acts of negligence alleged in the complaint, and there was sufficient evidence of failure to keep the car properly iced to submit this question to the jury.

The evidence set out above tends to show that the ice was permitted to get low, and the undisputed evidence shows that they arrived at Cleveland in a damaged condition. There is no conflict in the testimony as to the length of time the berries would stand up if the car was properly iced. It was only three days from the time the berries were loaded until they reached their destination, Cleveland, Ohio, at which time all the evidence shows they were in a damaged condition.

Several witnesses testified that the condition of the berries was caused by failure to properly ice the car, and one witness testified that damage was caused either by faulty equipment or improper refrigeration. The jury

may have believed and found from the evidence that the berries were in good condition when delivered to the carrier, and in damaged condition when they arrived at Cleveland, and that this was caused by improper refrigeration.

The appellee, having alleged specific acts of negligence and alleged that these acts of negligence caused the damage, the burden was on him to prove the negligence and resulting damage.

Appellant first calls attention to and relies on *American Railway Express Co.* v. *Cole,* 183 Ark. 557, 37 S. W. (2d) 699. In that case, however, the judgment was not reversed because of the insufficiency of the evidence. The court said: "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."

The judgment was reversed because the circuit court gave erroneous instructions. Instructions were given making the express company liable as an insurer. Other instructions were given on the question of negligence, and the court said that the result of giving the instructions was to create an irreconcilable conflict in the instructions and leave the jury without any proper or consistent guide. In the instant case no such instructions were given.

In the case of *Mo. Pac. Ry. Co.* v. *Fine,* 183 Ark. 15, 34 S. W. (2d) 755, the suit was based on negligence, and there was also an instruction given to the effect that the carrier was responsible as an insurer. These cases hold that where a suit is based on negligence, as this case is, the shipper must prove the negligence in order to recover.

Appellant calls attention to numerous other cases, but the rule announced in these cases is not applicable here because the jury were told in this case that it was the duty of the carrier to use ordinary care.

The appellant objects, however, to the instruction because it mentioned proper shipping facilities. The in-

struction objected to reads as follows: "You are instructed that it is the duty of the carrier to use ordinary care to furnish proper shipping facilities for the kind and character of commodity which it undertakes to carry, and in this case it was the duty of the defendant to use ordinary care to furnish a properly constructed refrigerator car, to use ordinary care to sufficiently ice to preserve the strawberries loaded therein, and to use ordinary care to keep said car sufficiently iced for such purpose until the same was delivered at its destination."

The complaint alleged that the appellant was negligent in not furnishing appellee a properly constructed and equipped refrigerator car, and the evidence of some of the witnesses tends to prove that the damaged condition of the berries was caused either by faulty equipment or improper refrigeration.

The next case referred to and relied on by appellant is *St. L. & S. F. R. Co.* v. *Vaughan,* 84 Ark. 311, 105 S. W. 573. The judgment in that case was reversed because of erroneous instructions. The court said: "The complaint contained no allegations of negligence on the part of appellant's servants in inducing the plaintiff to load his cattle in expectation of a train at an early hour to take them away, or at any particular time. No such issue was brought into the case by pleadings, and it was error to permit proof to be introduced upon it, over the objection of defendant, or to submit it to the jury. Nor was there any proof which warranted the submission of question of negligent failure on the part of appellant to furnish facilities for transportation of cattle."

The principle announced in that case has no application here because both the pleadings and the proof justified the giving of the instruction in this case. This court has many times held that it is error to give an instruction on an issue not raised in the pleadings, but the issues in this case on which the instruction was given were raised in the pleadings, and there was some evidence tending to support the allegation in the complaint. In the last case cited there was no allegation in the complaint

upon which to base the instruction complained of there, and the evidence, when offered, was objected to by the appellant. If the evidence had been introduced without objection, the complaint would have been considered amended to conform to the proof, and the instruction would have been proper.

The jury were not instructed that it was the duty of the carrier to sufficiently ice the car to preserve the berries, but they were told that it was its duty to use ordinary care for this purpose.

Appellant next contends that the court erred in its instruction on the measure of damages. This instruction told the jury that, if they found for the plaintiff, they would assess his damages, if any, between the original sale price, if they found there was such a sale, and the net amount received for said berries in their damaged condition. In view of the proof in this case, we do not think the instruction given to the jury on the measure of damages was in any way misleading and would not justify a reversal of the judgment. The evidence showed that the berries were sold for the highest price, or rather for their full market value, in their deteriorated condition, and the jury could not have been misled by the giving of said instructions.

There was ample evidence to sustain the verdict of the jury, and there was no error in the instructions.

The judgment is affirmed.

CRONIN *v.* UNIONAID LIFE INSURANCE COMPANY.

Opinion delivered October 26, 1931.

Streeter Speakman and *John D. Arbuckle,* for appellant.

Duty & Duty, for appellee.

McHaney, J. This is a suit upon a foreign judgment, obtained by appellant against appellee in the district court of Creek County, Oklahoma, on February 4, 1928. The only question presented is the validity of the judgment of the Oklahoma court, and this is dependent upon the validity of the service there had. The judgment roll itself recites that "the defendant [appellee here] has been duly served with summons in all respects as provided by the laws of the State of Oklahoma."

The facts are that in 1915 the Mutual Aid Union, a mutual assessment insurance company of Arkansas, issued a policy upon the life of Frances Cronin of Depew, Oklahoma, in which appellant was named as beneficiary. In December, 1926, appellee was organized as a stipulated premium company under the laws of this State, and shortly thereafter entered into a re-insurance contract with the Mutual Aid Union by which it re-insured its membership, agreed to collect the assessments and carry out the contracts re-insured. The Mutual Aid Union was dissolved in January, 1927, and ceased to do any business or to exist as a corporation. Frances Cronin died on December 1, 1927, and on December 28, 1927, this suit against appellee was filed and service attempted to be had by serving the Secretary of State of Oklahoma, under authority of § 5442, Oklahoma Stat. Ann. 1921. This statute provides that if any foreign corporation does business in that State and has failed to appoint an agent for service, or has failed to file a duly authenticated

copy of its articles of incorporation or charter with the Secretary of State, or has failed to pay the license fee required, then it may be sued by service on the Secretary of State. Appellee had no knowledge that a suit had been filed until after judgment. The circuit court of Benton County made a finding for appellee and rendered judgment accordingly.

Appellant relies upon the above statute and the decision of the Oklahoma Supreme Court in *Title Guaranty & Surety Co.* v. *Slinker,* 42 Okla. 811, 143 Pac. 41, sustaining similar service on a foreign corporation under authority of said statute. The facts in that case are very materially different from this case. There the court said: "The record shows that the surety is a Pennsylvania corporation, and had been duly authorized to do business in the Indian Territory prior to statehood, and did, in pursuance of such authority, engage in business in that territory, and prior to statehood executed the bond in suit; that upon the advent of statehood the surety withdrew all of its agents from the State, except the one located at Muskogee, and that this agent was retained for the purpose of collecting premiums on bonds that had been executed prior to statehood, and did not have authority to execute any new bonds; that no attempt was made by the surety to have the bonds canceled that had been executed, but that the same were continued in force and the annual premiums collected thereon; that it did not solicit or execute any new bonds in Oklahoma after statehood."

Under that state of facts the court held that the corporation was doing business in the State. In this case, however, the undisputed proof is that appellee has done no business in Oklahoma except to collect premiums by mail. It has no agent or office there. It solicits no contracts there and has never done so. The Mutual Aid Union may have done business in Oklahoma in violation of its laws, but appellee has no agent located therein to collect premiums on the old policies, and maintains no office therein. It collects at Rogers, Arkansas, by use of the United States mails. We are therefore of the opinion

that appellee was not "doing business in the State of Oklahoma," within the meaning of said § 5442, and that service upon the Secretary of State in this action conferred no jurisdiction on the Oklahoma court of the person of appellee. *Provident Savings Life Assurance Society* v. *Commonwealth of Kentucky,* 229 U. S. 103, 36 S. Ct. 34. In that case Mr. Justice HUGHES, speaking for the court, said: "But the continuance of the contracts of insurance already written by the company was not dependent on the consent of the State. It is true that acts might be done within the State in connection with such policies (as, for example, in maintaining an office or agents, although new insurance was not written or solicited) which could be considered to amount to the continuance of local business. In such cases it would be the actual transaction of business that would furnish the ground of the license exaction and in the manner of existence of the obligations under policies previously written. These policies are contracts already made; the State cannot destroy them or make their mere continuance independent of acts within its limits a privilege to be granted or withheld. Neither the continuance of the obligation in itself nor acts done elsewhere on account of it can be regarded as being within the State's control." Some of our own late decisions on the subject are *Linograph Co.* v. *Logan,* 175 Ark. 194, 299 S. W. 609; *Equitable Credit Co.* v. *Rogers,* 175 Ark. 205, 299 S. W. 747; *Stubbs* v. *Wright,* 176 Ark. 469, 2 S. W. (2d) 1087; *Chicago Title & Trust Co.* v. *Hagler Special School Dist.,* 178 Ark. 443, 12 S. W. (2d) 881; *Security Trust Co.* v. *Martin,* 178 Ark. 518, 12 S. W. (2d) 870. So in this case, appellee acquired the Oklahoma contracts from the Mutual Aid Union, and it had the right to continue them by acts done in this State, and such acts cannot be regarded as doing business in that State.

This holding does not violate the good faith and credit clause of the Constitution of the United States. As said in the recent case of *Lewis* v. *United Order of Good Samaritans,* 182 Ark. 914, 33 S. W. (2d) 53: "The

general rule is that the full faith and credit clause of the Constitution and the laws enacted thereunder apply only where the court rendering the judgment had jurisdiction." It was further held in that case that a recital of service in the foreign judgment was not conclusive, and that it could be impeached for want of jurisdiction by showing that no service was had and that there was no entry of appearance. Such a judgment is conclusive on collateral attack except for fraud or want of jurisdiction.

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

CONNELLY *v.* HOFFMAN.

Opinion delivered October 26, 1931.

E. R. Parham, for appellant.

Robert Bailey and *John G. Rye,* for appellees.

McHaney, J. On March 31, 1922, appellees, Huggler and wife, executed and delivered to appellant two promissory notes for $500 each, one due April 1, 1923, and one due April 1, 1924, with interest at 8 per cent. per annum until paid, payable annually, and if not paid when due, to become a part of the principal and bear interest at the same rate. On the same date they also executed and delivered to appellant their mortgage on certain real estate in the city of Russellville, constituting their homestead, to secure the payment of said notes, in which dower and homestead rights of the wife were released. This mortgage recited that it was subject to a prior mortgage not here involved. No part of this indebtedness has ever been paid. Thereafter, on July 15, 1927, before the statute bar attached on either of said notes, Huggler and wife, being indebted to R. B. and Mary H. Wilson, executed and delivered to them their note secured by mortgage on the same property for $1,750, at 10 per cent., due one year after date, which mortgage recited that it was subject to the same mortgage mentioned in that of appellant, but made no mention of appellant's mortgage in any way. This mortgage was thereafter assigned to appellee, Hoffman, and, it being in default, Hoffman brought this suit to foreclose on February 28, 1930, making appellant, and Huggler and wife, defendants. He alleged that appellant's mortgage was barred by the five-year statute of limitations, and that his lien was subject only to that mentioned in his mortgage. Appellant filed an answer and cross-complaint in which he alleged that Huggler, although having made him no payments, had acknowledged in writing his indebtedness, and had agreed to pay same within five years. He prayed for judgment against

the Hugglers, for a foreclosure and sale of the property. Hugglers separately answered, pleaded the statute as a bar to appellant's action, and denied they had agreed in writing to pay the debt within five years.

The court granted the prayer of appellee Hoffman's complaint and dismissed appellant's cross-complaint for want of equity.

The first question for determination is the priority of mortgages as between appellant and Hoffman. It will be seen from the foregoing statement of facts that appellant's mortgage was prior in point of time and was a valid, subsisting lien at the time Hoffman's mortgage was executed. Both mortgages were promptly recorded after execution and delivery, that of appellant on April 5, 1922, and that of Hoffman on July 26, 1927. On April 1, 1929, five years after the due date of the second note held by appellant, his mortgage was, so far as the record disclosed, barred by the statute of limitations, as no indorsement appeared on the margin of the record showing any payment on the indebtedness, as required by § 7408, Crawford & Moses' Digest, or any agreement for the extension of the date of maturity, as required by § 7382, Crawford & Moses' Digest, prior to the filing of this suit in February, 1930. The former section has no application to the facts in this case, as it is conceded that no payment was ever made on appellant's mortgage debt. The latter section provides: "No agreement for the extension of the date of maturity of the whole or any part of any debt or note secured by mortgage, deed of trust, or vendor's lien, or for the renewal thereof, whether made in writing or otherwise, and no written or oral acknowledgment of indebtedness thereon shall, so far as the same affects the rights of third parties, operate to revive said debts or extend the operation of the statute of limitations with reference thereto unless a memorandum showing such extension or renewal is indorsed on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk."

On August 26, 1930, about six months after this suit was filed, appellant caused the following indorsement to be placed on the margin of the record: "The time for payment of the notes secured by this mortgage was extended to the month of November, and the acknowledgment of the indebtedness made in a written request of Peter Huggler, Jr., dated June 10, 1927, and the indebtedness was acknowledged in writing and promise of payment made by Peter Huggler, Jr., on the 30th day of October, 1929. P. F. Connelly, by E. R. Parham, Attorney." The facts stated in the above indorsement are based on the following: Appellant's attorney made written demand on Peter Huggler for the payment of said debt on June 4, 1927, to which Huggler replied on June 10, 1927. "In regard to these notes that I owe Mr. P. F. Connelly. This comes just at a time when I am about to recover from financial reverses and at a time when I had a large tax to meet. If this foreclosure could be held off until fall, I will make all efforts to pay the interest in about sixty days; and the notes by November. Trusting this will meet Mr. Connelly's approval. Yours truly, Peter Huggler."

The attorney replied under date of June 18, 1927, agreeing to the extension until fall if the interest was paid in sixty days, but insisted that one-half the interest be paid in thirty days. Again on August 11, 1927, Huggler wrote said attorney, in answer to his letter of the 9th, that he had been unable to meet his promise, offered some shares of stock as collateral, and some steel forms for concrete, and begging additional time. We think the necessary effect of these letters was an acknowledgment of the debt and a promise to pay same, and that there was an agreement to extend the time of payment to the fall of 1927. But the agreement to extend was not indorsed on the margin of the record before the statutory bar as required by said § 7382, and as to third persons on April 1, 1929, it became in effect an unrecorded mortgage.

In *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278, construing § 5399 of Kirby's Digest, now § 7408, Craw-

ford & Moses' Digest, including the amendment by act May 10, 1911, providing that payments made on mortgage indebtedness must be indorsed on the margin of the record before the bar of the statute, else the rights of third parties will not be affected, it was said: "The effect of that statute, as to strangers to the transaction, is that when the debt secured by a mortgage is apparently barred by limitation, and no payments which would stay the limitation are indorsed on the margin of the record of the mortgage, it becomes as to third parties an unrecorded mortgage; and, like an unrecorded mortgage, it constitutes no lien upon the mortgaged property, as against such third party, notwithstanding he has actual knowledge of the execution of such mortgage." Citing a number of cases. This case was cited in *Wells* v. *Farmers' Bank & Trust Co.*, 181 Ark. 950, 28 S. W. (2d) 1059, and it was there inadvertently stated that the court construed § 7382 in *Morgan* v. *Kendrick*. It was what is now § 7408, Crawford & Moses' Digest, that was there construed, as § 7382 was not enacted until March 24, 1917. The same rule, however, was applied in the Wells case. There the intervener's mortgage (Wells) was barred when the bank took its mortgage, whereas, in this case appellant's mortgage was not barred when the Hoffman mortgage was taken. Does this fact make any difference? Appellant contends that it does—that Hoffman and Wilson had at least constructive notice of his mortgage, and that, having taken a mortgage at a time his was a valid, subsisting lien and after the mortgagor, Huggler, had acknowledged the debt in writing, and an agreement had been made for extension, it continued thereafter to be a valid lien, prior and paramount to the lien of Hoffman's mortgage, without regard to § 7382 of the Digest. We cannot agree. An acknowledgment of the past-due debt and agreement to pay by the mortgagor, either before or after the statutory bar, constitutes a new point from which the statute begins to run as between the parties, just as a payment made upon the debt does, but unless the agreement for extension or the payment is indorsed

on the margin of the record it cannot affect third parties who have not in some manner recognized the validity of the prior mortgage. We have many cases holding that the subsequent mortgagee is estopped by the recitals of his mortgage to plead the statute or question the validity of the prior mortgage, an extreme case, by a divided court, being *McFaddin* v. *Bell,* 168 Ark. 826, 272 S. W. 62. See also cases there cited. Or estoppel may arise by agreement between the mortgagees as in *Merchants' & Planters' Bank* v. *Citizens' Bank of Grady,* 175 Ark. 417, 299 S. W. 753, where the court made the same incorrect reference to the statute construed in *Morgan* v. *Kendrick, supra.* There is and can be no estoppel by merely taking a mortgage at a time when there is a valid mortgage of record ahead of it, nor does a positive recital in such mortgage that it is made "subject to incumbrances against the property" estop such mortgagee from pleading the statute. *McFaddin* v. *Bell, supra.* It was there said that "nothing short of a certain and definite reference to the particular incumbrance will evidence an intention to recognize it." The decision of this court in *Wadley* v. *Ward,* 99 Ark. 212, 137 S. W. 808, cited by appellant, is not contrary to the principles announced in this and other later cases. Hoffman was therefore a third party, within the meaning of the statute, and was not estopped to plead the statute in bar of the action as against his mortgage.

We are of the opinion, however, that the court erred in dismissing the cross-complaint as against Huggler. The above letters constituted an express acknowledgment of the debt and a new promise to pay prior to the statutory bar, creating a new point from which the statute began to run. The debt as to him was not barred, and is not now, nor is the mortgage securing it. It is true that Mrs. Huggler did not ask for a renewal of the indebtedness, nor is a personal judgment asked against her. She signed her husband's mortgage releasing her dower and homestead rights, and this release continues under

his valid and subsisting mortgage, securing a valid, subsisting debt.

The decree will therefore be affirmed as to appellee, Hoffman. As to appellees, Huggler and wife, it will be reversed and remanded with directions to enter judgment against appellee, Peter Huggler, for the amount of the notes and interest according to their terms, and to decree a foreclosure of appellant's mortgage on his cross-complaint, making it subject to the first mortgage mentioned therein, and also subject to Hoffman's mortgage, as above stated. It is so ordered.

CLEBURNE COUNTY BANK *v.* BUTLER GIN COMPANY.

Opinion delivered October 26, 1931.

Brundidge & Neelly, for appellant.

Miller & Yingling and *Cockrill & Armistead,* for appellees.

BUTLER, J., (after stating the facts). The first question for our determination is the validity of the mortgage of the Butler Gin Company executed July 11, 1927, by O. B. Henderson, its president, and J. Q. Adams, its secretary. It is the contention of the appellee corporation and G. R. Butler that this mortgage was void for the reason that it was not authorized at any meeting of the board of directors, and was made without the knowledge and consent of the stockholders, and that this

unauthorized action on the part of the president and secretary had not been ratified by the corporation. There is but little conflict in the evidence on this question. It will be remembered that at the time of the execution of the mortgage there were four directors, Henderson, Adams, Butler and Ghent, Ray having ceased to be a director. Butler and Ghent testified that they never at any time attended a directors' meeting where the execution of the note and mortgage in question was authorized or discussed, and that they had never received notice of any directors' meeting called for that purpose. Henderson and Adams admitted that Butler was not present in person at the directors' meeting, but they did not say whether Ghent was present or not. One of the officers of the bank who looked after this matter of business testified that when the question of the giving of the mortgage and the execution of the note by Butler was discussed witness advised Henderson and Adams that it would be necessary to call a directors' meeting to authorize the execution of same, and that under his supervision a notice was prepared to be sent to the remaining directors. Adams, the secretary, testified that this notice was prepared, and Henderson testified that it was duly mailed.

Ray testified that he was not a member of the Butler Gin Company when the mortgage was executed, as he had sold the one share of stock he owned to Henderson in 1926.

When the foregoing testimony is analyzed, it is apparent that, whether Butler and Ghent were notified of the directors' meeting or not, neither attended such meeting. Henderson himself states that Butler was not present, and neither he nor Adams contradicted the statement of Ghent that he was not present. Therefore the meeting was held only by Henderson and Adams, and as these did not constitute a majority of the board of directors under § 1713 of Crawford & Moses' Digest, and § 28 of act No. 250 of the Acts of 1927, a quorum was not present, and there was no legal meeting of the board of directors for the transaction of business, for the articles

of agreement of the Butler Gin Company provided that the business of the corporation should be conducted by a board of five members, all of whom should be stockholders.

It is well settled, as a general proposition, that the president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper unless such authority is expressly conferred by the charter or by the board of directors. *City Elec. St. Ry. Co.* v. *First Nat. Bank,* 62 Ark. 33, 34 S. W. 89, 31 L. R. A. 535, 54 Am. St. Rep. 282, and authorities there cited. See also *Anderson-Tully Co.* v. *Gillett Lbr. Co.,* 155 Ark. 224, 244 S. W. 26. This rule, however, is subject to important qualifications, one of which is that where the act is performed by the officers through whom the corporation usually functions and results in benefit to the corporation, it will be bound where the transaction was had under circumstances by which knowledge might be imputed to it. Where the unauthorized act of officers is clearly beneficial to the corporation, slight circumstances will be sufficient to impute knowledge and will effect a ratification of that act. *City Elec. St. Ry. Co.* v. *First Nat. Bank, supra; Anderson-Tully Co.* v. *Gillett Lbr. Co., supra; Love* v. *Metro. Church Assn.,* 181 Ill. App. 102; *Washington Savings Bank* v. *B. & D. Bank,* 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405; *Knowles* v. *N. T. T. Co.,* (Tex.) 121 S. W. 232. Especially is this true where the other party to the transaction has acted in good faith, and a repudiation of the transaction will result in harm and disadvantage to him.

In the instant case the mortgage on the machinery executed by the People's Gin Company was of record and gave Butler constructive notice that the machinery installed at Armstrong was bound for a debt to the appellant bank, and he was not deceived or misled to his prejudice in any just or reasonable sense, nor was the Butler Gin Company. The machinery was the security for the debt due the appellant bank, and the change in the mortgage did not alter the substance of the security, but only

changed its evidence. It seems to us that common honesty and fair dealing required the application of the exception to the general rule, and that all the surrounding circumstances impute to the Butler Gin Company such knowledge as would estop it from disavowing the act of Henderson and Adams, and, as the Products Corporation has succeeded to the rights of the Butler Gin Company, this estoppel must extend to it also. Thompson on Corp., (3 ed.), vol. 3, § 2077.

Unquestionably the Butler Gin Company benefited by this transaction, and, since to accomplish this, the appellant bank relinquished a valid mortgage on the identical machinery, it would be inequitable for the appellee corporation to take advantage of an unauthorized act of the president and secretary executing it which was intended to, and did, result in its benefit. The mortgage is therefore valid, and the appellant bank is entitled to recover its debt, and the learned chancellor erred in holding otherwise.

■ This brings us to the question of the relative rights of Butler and the appellee Products Corporation. In the first place, it will be noted that the corporation has lost nothing by this transaction, nor is it placed in a more disadvantageous position than it before occupied. The debt due it by the People's Gin Company antedated the purchase by Butler of the physical assets of the Butler Gin Company, and it advanced no more money on the faith of that transaction. It is also unquestionable that the mortgage taken by the appellant bank from the Butler Gin Company was a part of a series of transactions which were put in motion at the instance of appellee Products Corporation, and consummated for its advantage. Williams, the agent in charge of the Dixie Oil Mill belonging to the Products Corporation, testified that he knew nothing of the transaction between the Butler Gin Company and the bank, but the circumstances weigh heavily against this statement. It was Williams who pressed for a mortgage on the Pangburn ginnery to secure debts which were before unsecured; he knew

of the financial condition of Henderson and of the People's Gin Company; he was acquainted with Butler; and the amount of the debt due by the People's Gin Company to the bank was a matter of public record. Therefore, he must have known that the consideration for the satisfaction by the bank of the Pangburn mortgage was the taking of a new mortgage on the machinery at its new site in Armstrong. Adams and Henderson both testified that he knew of all these transactions and that he was familiar with them. He therefore had grounds for believing that, when Butler bought the machinery and building, it was reasonable to expect a balance due to the appellant bank, and Henderson testified positively that, when he assigned the note, it was as collateral security for the debt already owing by the People's Gin Company; that he informed Williams of the balance due the bank, and that from the proceeds of the $3,000 note the bank would first be paid and its lien satisfied; that Williams took the note with that understanding and with full knowledge of Butler's equity. Williams denied all this and testified that he took the note in due course of business without any knowledge or information of the rights of the bank or Butler.

The conduct of Henderson indicates throughout these entire transactions that he was honestly attempting to deal justly as far as possible with all those to whom he was obligated, and the evidence clearly shows that, with the exception of the actual operation of the gins, he managed the business of the People's Gin Company at Pangburn and the Butler Gin Company at Armstrong, and his testimony in regard to the assignment of the Butler note to the Products Corporation accords with his general conduct and with what an honest man would do under the circumstances.

In the concluding statement of appellee's brief the statement is made that "the great weight of the testimony showed *and the chancellor found* that the appellee acquired the note of G. R. Butler from O. B. Henderson before maturity for value and without notice of any

such equities of Butler as are asserted by him." As we view the evidence and the decree rendered by the chancellor, neither supports the contention of appellee. The decree appears to be predicated on the theory that the mortgage of the Butler Gin Company to appellant bank was void, for, although it was prior in point of time to the chattel mortgage given by Butler to Henderson, and was to secure a subsisting indebtedness, the chancellor decreed the latter the paramount lien and did not attempt to adjudicate the question of Butler's equities. It is clear that Butler ought not to have to pay the note twice, and that the evidence shows that it was not the intention of any one that he should, but that he was protected to the extent of the balance due the appellant bank.

It follows from what we have said that the decree of the chancellor must be reversed, and the cause will be remanded with directions to enter a decree according to the principles of equity herein announced. It is so ordered.

NORRIS *v.* DUNN.

Opinion delivered October 26, 1931.

John D. Arbuckle, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

BUTLER, J. This is an action by the appellant, Capt. Fred H. Norris, to recover custody of a minor child, Thomas Clark Dunn, from his grandmother, Mrs. Mary Dunn, and involves the validity of an adoption proceeding in the County of Cochise in the State of Arizona. Capt. Norris is the stepfather of the minor, who at the time of the adoption proceedings, was approximately 9½ years old. His mother died on or about the 17th day of October, 1929, and at her request Capt. Norris attempted to adopt the child. The child had no relatives in the State of Arizona, but its grandmother, the appellee, and two uncles were residents of the city of Fort Smith, in this State.

Capt. Norris instituted adoption proceedings in the Arizona court, and on November 7, 1929, an order of adoption was made by that court granting the prayer of the petition for adoption. Some months after, while the child was on its way to school in the town of Douglas,

in Cochise County, Arizona, he was abducted by an uncle and taken to the home of his grandmother in the city of Fort Smith, Arkansas, where he now lives, and was living at the time of the filing of this suit by Norris.

On the trial of the case before the chancellor an exemplification of the record of all the proceedings in the Arizona court relative to the disposition of the person and estate of the minor child after the death of his mother was filed and oral testimony taken. The statutes of Arizona relating to the adoption of minors is found at §§ 117-124 of the Revised Code of Arizona adopted in 1928. Section 117 provides that minor children may be adopted by an adult person at least ten years older than the person adopted with the consent of the child if over fourteen years of age, subject to the rules thereafter prescribed in the statute.

Section 118 provides that the petition shall be filed in the superior court of the county in which the child resides, and that where the petitioner has a husband or wife it is necessary for said husband or wife to consent and join in the petition, and that the attorney of the county in which the child resides, "upon application of the person seeking such adoption, shall draw the petition therefor and act as attorney for such petitioner in all adoption proceedings, without expense to the petitioner. No fees shall be charged in adoption proceedings by the clerk of any court, sheriff or other public officer."

Section 119 is as follows: "The parents of the child, or the survivor of them, shall, except as herein provided, consent in writing to such adoption. If neither parent is living, the guardian of the child, or, if there is no guardian, the next of kin in this State may consent; or if there is no next of kin, the court may appoint some suitable person to act in the proceedings as next friend of the child to give or withhold such consent."

Section 120 provides for proceedings where either parent is insane or imprisoned.

Section 121 is as follows: "Upon the filing of the petition, the court shall fix a day for the hearing thereof.

If the parent, guardian or next of kin does not consent to the adoption of a child, a copy of the petition and of the order fixing the day of hearing shall be served on him as a summons in a civil action, if found in the State, and if not, by publication once a week for three successive weeks in such newspaper in the county as the court may direct, the last publication to be at least four weeks before the time appointed for the hearing. Like notice shall also be published when a child has no parent living, and no guardian or next of kin in this State. The court may order such further notice as it deems proper."

The order for adoption made on November 7, 1929, is as follows: "This matter having come on regularly for hearing, and, it appearing that said minor, Thomas Clark Dunn, is now present, and the consent of James Logie that petitioner adopt said minor child having been signed and filed herein; that said James Logie is the guardian of the person and estate of said minor child; that the father of said minor child, Thomas A. Dunn, died on or about the 16th day of July, 1926, and that the mother of said minor child, Bernice Dunn Norris, died on or about the 17th day of October, 1929; that said minor child is of the age of approximately nine years and six months; that said petitioner has filed herein an agreement with said minor child and with each person whose consent has been filed herein, that said minor child shall be adopted by said petitioner and treated in all respects as his own lawful child should be treated, including the right of support, protection and inheritance, and it appearing that such adoption will be for the best interests of said minor child; that said petitioner and said minor child and all persons whose consent is necessary, have each appeared herein and were examined as provided by law; that said petitioner resides in this county and that said petitioner desires that the said Thomas Clark Dunn shall take his family name and be known hereafter as Thomas Clark Dunn Norris.

"It is therefore adjudged that the petitioner, Fred H. Norris, adopt said minor child, and from this day

forward said minor child shall be treated by him in all respects as his own lawful child should be treated, including the right of support, protection and inheritance; that said petitioner and said minor child shall bear toward each other the relation of parent and child and that said minor child shall take the family name of said petitioner and be hereafter known as Thomas Clark Dunn Norris."

The record of the Arizona court with reference to the appointment of James Logie as guardian discloses that James Logie filed his petition for guardianship of the person and estate of the minor in which he alleged that he was a citizen and resident of Douglas, Cochise County, Arizona; that he is not related in any way to the minor; that the minor had no lawful guardian and no relatives within the State of Arizona; that he was within the age of nine years and had an estate in Cochise and Pima counties, Arizona, which needed attention. This petition was duly sworn to, and an order made by the judge of the court on the 24th day of October appointing the 5th day of November, following, as the day for the hearing of the petition. The record shows that a notice was given by the clerk of the filing of the petition and of the date for the hearing by the court, which notice was dated October 24th, and on the 5th day of November, following, it is shown that the clerk made a certificate to the effect that he had published the notice on October 24th by posting copies thereof—one on the public bulletin board at the entrance of the county courthouse, one on the public bulletin board in the lobby of the United States postoffice in the city of Tombstone, and one on the public bulletin board at the entrance of the office of the clerk of the superior court, all in the aforesaid county and State. All of these preliminary proceedings appear to have been in strict conformity with the statutes of Arizona relating to the application and notice for letters of guardianship. On November 5th, the application came on for hearing, when the prayer of the petition was granted, and the court

ordered "that the said James Logie be, and is hereby appointed, guardian of the person and estate of the said minor, Thomas Clark Dunn, and that letters of guardianship of the person and estate of said minor be issued to him upon his giving bond to said minor in the penal sum of $1,000, and upon his taking and subscribing an oath according to law."

The next matter relating to the guardianship appearing in the exemplification of the record is the following:

"Bond

"Know All Men by These Presents:

"That we, James Logie, as principal, and the American Employers' Insurance Company, as surety are held and firmly bound unto Thomas Clark Dunn, in the sum of one thousand ($1,000) dollars, lawful money of the United States of America, to be paid to the said Thomas Clark Dunn, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

"Signed and dated this 7th day of November, A. D. 1929.

"The condition of the above obligation is such that whereas, by an order of the superior court of Cochise County, State of Arizona, duly given, made and entered on the 5th day of November, A. D. 1929, the above bounded James Logie was appointed guardian of the person and estate of Thomas Clark Dunn, a minor, and letters of guardianship were directed to be issued to him upon his executing a bond according to law, in said sum of one thousand ($1,000) dollars.

"Now therefore, if the said James Logie as such guardian shall faithfully execute the duties of the trust according to law, then this obligation shall be void; otherwise to remain in full force and effect.

"This bond is herewith substituted for a bond made and executed on the 7th day of November, A. D. 1929,

and erroneously made to run to the State of Arizona instead of Thomas Clark Dunn.

"James Logie,
"American Employers' Insurance Co.
"By Everett J. Jones, its Agent and Attorney in Fact.
"Arizona Southwest Bank, Agents,
"By Everett J. Jones, Manager.

"(Seal of American Employers' Insurance Co.)
"*Approved June 10, 1930.*
"Albert M. Sames, Judge of the Superior Court."

Following this, appear the letters of guardianship issued by the clerk on the 7th day of November, 1929, with the oath of James Logie appended thereto, made on the same date.

The statutes of Arizona relating to the appointment of guardians need not be set out here except that part of § 4110 of the Arizona Code relative to the bond of guardian, for it is conceded that the proceedings were in conformity with the statutes except in that particular. Section 4110, in so far as it relates to the bond of the guardian, and its necessity, is as follows: "Before the order appointing such person as guardian takes effect, and before letters issue, the court shall require of such person a bond to the minor, with sureties to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law. * * * Upon the filing and approval of the bond, letters of guardianship shall issue to the person appointed."

■ The evidence adduced at the hearing was to the effect that Capt. Norris married the mother of the minor, and that they lived together until her death about thirteen months after the marriage; that shortly before her death she requested that Mr. Logie, the proprietor of a newspaper in Douglas, Arizona, for whom she had worked, should be appointed guardian of her son, and that her husband, Capt. Norris, adopt the child as his own son; that the proceedings relating to the guardianship

and adoption were to carry into effect her wishes. If the order of adoption were valid, he is entitled to the custody of said child.

The rule is well settled that the adoptive father is entitled to all the rights and privileges of a natural one, among which is usually included the custody of his child. 1 C. J. p. 1395. Of course, it is to be understood that the right of custody is not an absolute and indefeasible right, but must yield on occasion to the paramount interest of the child.

It is insisted, however, that there was no legal adoption of the child by Capt. Norris in Arizona, but, as this is a collateral attack on the validity of the adoption, the order cannot be ignored because of the mere irregularities in its procurement, but to avoid its effect it must appear that the court had no jurisdiction to render it and the order is not voidable, but void. Is it void?

The jurisdiction of the court to make the order is wholly derived from the authority conferred upon it by the statutes, and, in the absence of decisions of the court of Arizona, we apply to the proceedings, the general principles of law, and the decisions of our own court construing similar statutes.

In *Morris* v. *Dooley,* 59 Ark. 483-486, 28 S. W. 30, 430, the court said: "The proceeding to adopt a child as an heir was unknown to the common law, and in this State exists only as a special statutory proceeding. * * * Mr. Black in his work on Judgments, says: 'It is well settled that a judgment in a summary proceeding must show upon its face everything that is necessary to sustain the jurisdiction of the court rendering it.' Section 280. The rule seems to be, especially in this State, as settled by this court in *Hindman* v. *O'Connor,* 54 Ark. 643, 16 S. W. 1052, that 'where the jurisdiction is conferred on a court by special statute, and which is to be exercised in a special, and often summary, manner, the judgment can only be supported by a record which shows jurisdiction, and no presumptions as to its jurisdiction will be indulged. (Citing cases).

"But it is contended that only those facts which the statute requires to be set out in the petition need to be made to appear in the record; but we hold, on the contrary, that in a proceeding of this kind, under a special statute, and not according to the course of the common law, the court in which the proceeding is had, *quoad hoc*, must be considered as an inferior court and that, unless all jurisdictional facts appear in the record itself, the judgment in the proceeding will be void upon collateral attack."

The rule announced in the above case has been adhered to and followed in all subsequent decisions of this court, and was restated in the recent case of *Minetree* v. *Minetree,* 181 Ark. 111, 26 S. W. (2d) 1011.

It was essential to the validity of the order of adoption that the person legally authorized by law appear and give consent to the granting of such order. *Willis* v. *Bell,* 86 Ark. 473-78, 111 S. W. 808; In re *Gallegos,* 21 Ariz. 250, 187 Pac. 573. The jurisdiction of the court where the proceeding is had under § 119 of the Code, as in this case, depends upon the consent of that person authorized by law or the court to represent the minor. *Willis* v. *Bell,* 86 Ark. 473, 111 S. W. 808, quoting from page 478: "The jurisdiction of the court depends upon the express consent of the parents of the child unless their residence be shown to be unknown." In this case both parents of the child were dead, and the consent to the proceedings was given by one who claimed authority as guardian. His right to so appear is challenged. The question then is: "Was he the legally appointed guardian with authority to consent for the child under the laws of the State of Arizona?" It will be observed that the Arizona statute relating to the appointment of guardian, like our own (§§ 5013 and 5015, Crawford & Moses' Digest) makes the giving of a bond a condition precedent to the issuance of letters of guardianship and authority to act as guardian. Section 4110, Arizona Code.

We have held that the condition of the statute is imperative, and that there can be no appointment of a

guardian and authority for him to act until the bond required has been given. *Guynn* v. *McCauley,* 32 Ark. 97; *Bank of Rector* v. *Parrish,* 131 Ark. 216, 198 S. W. 689. "Where the statute requires a guardian to give bond for the faithful performance of his duties as part of his qualification, he cannot qualify as guardian without giving such bond, nor can he act as guardian or take possession of, and control, the property of his ward unless he has complied with this condition precedent." 28 C. J. 1090.

The controlling question in this case then is: "Was the alleged guardian who assumed the right to consent to the adoption proceeding, legally constituted such with authority to enter consent?" As we have said, we look to the entire record in order to determine whether the bond was given before Logie assumed to act as guardian. The bond, which is shown in the exemplification of the record, was approved in June, 1930, long after the adoption proceedings, and, while it contains the recital that it is given in substitution of another bond filed November 7, 1929, the date of the adoption proceedings, that original bond is not accounted for either by an exemplification of it, or of any order of the court or judge in which reference to it is made. The recital in the bond approved June, 1930, to the effect that it was in substitution of a bond executed on November 7, 1929, and erroneously made to run to the State of Arizona instead of Thomas Clark Dunn, is inconsistent with the record as exemplified, for, as we have seen, the record is silent regarding the execution of a bond. As this was a special proceeding, having its authority only in the statute, that statute must be strictly followed, and this must affirmatively appear from the whole record. It is our conclusion that the record fails to disclose a guardian lawfully authorized to give consent, and, "until consent is obtained or personal or constructive service of the adoption proceeding is had or waived by personal appearance, the court is without power to make any order for the disposition of the child." In re *Gallegos, supra.*

We are of the opinion that the order of adoption under which Capt. Norris claims the custody of the child is void, and the court might award the custody of such child to that one who is best fitted to care for it. The record shows that Mrs. Mary Dunn is the child's grandmother, and while there is some suggestion by counsel that she is a woman of advanced age and in feeble health, that is a mere assumption, for the evidence wholly fails to disclose such state of facts. It does, however, show that she is a woman of splendid reputation and fitted by nature and experience to care for the child, and that she has ample means to rear and educate it. Capt. Norris, on the other hand, has no family or settled home; he is suffering from a disease which has caused his retirement from active service, and although a gentleman of high character, from the very nature of things he cannot give the child the same advantages and care that it would have in the home of its grandmother. It follows that the finding of the chancellor is correct, and the decree is therefore affirmed.

Justices SMITH, MEHAFFY and KIRBY dissent.

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

Opinion delivered November 2, 1931.

[redacted]

Chas. D. Frierson, for appellant.

Ogan & Shaver, S. H. Mann and *Walter N. Killough*, for appellee.

HART, C. J., (after stating the facts). The office of the writ of prohibition is to restrain the exercise of jurisdiction by an inferior court over a subject-matter where it has none or over parties where it can acquire none. *Order of Railway Conductors of America* v. *Bandy*, 177 Ark. 694, 8 S. W. (2d) 448, and cases cited.

This brings to our consideration the question whether the chancery court had jurisdiction to proceed further under the allegations of the complaint filed in the Cross Chancery Court by the landowners against Drainage District No. 7 of Poinsett County and the commissioners thereof. The whole question has been ably and exhaustively discussed by counsel on both sides in various forms and numerous authorities cited and reviewed with reference thereto. The conclusion which we have reached renders it unnecessary to consider and determine all the points raised by counsel; and in the determination of the question it will be our aim to confine our discussion to the issues necessarily raised by the plea to the jurisdiction of the Cross Chancery Court.

According to the allegations of the complaint, Drainage District No. 7 was created by the Legislature of 1917, and the lands within its boundaries were all situated in

Poinsett County. The dam, levees and other improvements, which it is alleged would divert the waters, were to be erected in Poinsett County, whereby the lands of the plaintiffs in Cross County would be flooded and permanently injured.

In a case note to *People* v. *Selby Smelting & Lead Co.,* 163 Cal. 84, 124 Pac. 692, Ann. Cas. 1913E, 1267, at 1272, it is stated that the holding in the reported cases to the effect that an action to abate a nuisance maintained wholly in one county may be brought in another county where injury therefrom is suffered, finds no support in the authorities. The general rule is stated that an action to abate a nuisance is local, and must be brought in the county where the nuisance exists. Several cases are cited in support of the text by the annotator.

We do not deem it necessary to review the authorities there cited or the numerous other authorities on the question cited by counsel in their respective briefs, for the reason that we believe that the question has been decided otherwise by this court in *Cox* v. *Railway Company,* 55 Ark. 454, 18 S. W. 630, decided February 13, 1892, where it was held that a suit to restrain defendants from removing earth from plaintiff's lands is an action "for an injury to real property," within the meaning of § 4994 of Mansfield's Digest, and must be brought within the county where the land lies. This was a suit by a landowner to enjoin the defendant railway company from removing earth from certain lands of the plaintiff situated in Prairie County over which the defendant's railroad passed. The plaintiffs alleged that the defendant had acquired no right-of-way over the land, but was carrying away from his land a large quantity of earth to be used in building its roadbed across Cache River bottom. The suit was brought in Pulaski County, where, it is alleged, the company had its principal office. Upon appeal, the court said that the objection of the defendant to the venue was well taken, and that the complaint was properly dismissed. It was the contention of the defendant that the action was local under our statute, and that

it therefore should be brought in Prairie County where the land was situated.

The statute involved in that case was § 4994 of Mansfield's Digest, which is § 1164 of Crawford & Moses' Digest. The section reads as follows:

"1164. Where the subject of action is situated. Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated;

"First. For the recovery of real property, or of an estate or interest therein.

"Second. For the partition of real property.

"Third. For the sale of real property under a mortgage, lien or other incumbrance or charge.

"Fourth. For an injury to real property."

It was claimed by counsel for the landowner that the fourth subdivision of the section applies only to actions for the recovery of damages for trespass and other like injuries. The court said that it observed no distinction between proceedings at law and proceedings in equity in the rule prescribed in determining the venue in actions. It was further stated that a cause of action is local under the Code, because the statute has made it so.

It was further argued that, as the remedy by injunction acts only upon the person of the defendant, the venue is transitory; but the court held otherwise. It was expressly stated that if the suit was "for an injury to real property," under the fourth subdivision of the section, then the statute imperatively required it to be brought in Prairie County where the land was situated. The court said:

"The term 'injury' is used in § 4994 in a technical sense, and as meaning every wrong which in legal contemplation is an injury to real property. This embraces, not only injuries committed directly and forcibly for which an action of trespass was the appropriate remedy under the former practice, but such also as nuisances, the

obstruction of light or air, diverting water courses and other similar wrongs for which the remedy at common law was an action on the case. Of the latter class was permissive waste, which, being a failure to repair, was a mere nonfeasance; and yet it was classed as an injury to real property, and the venue was local. 1 Chitty, pp. 144, 268. That an act which is only threatened may be an injury to real property is shown by the statutory provisions affording a remedy in many cases to prevent it. Thus an injunction is granted 'to restrain the commission or continuance of some act which could produce great or irreparable injury to the plaintiff. Mansf. Dig., § 3730'."

Continuing, the court quoted with approval from *Drinkhouse* v. *Spring Valley Water Company,* 80 Cal. 308, 22 Pac. 252, the following:

"The injury is the same, whether threatened or completed, and the privilege accorded to the plaintiff to prevent the injury by injunction ought not to be held to give him the right to have the trial in a county where the cause would not have been triable if he had waited the completion of the injury before seeking redress."

Counsel for the drainage district claim that this holding was inferentially at least modified by *Hogge* v. *Drainage District No. 7,* 181 Ark. 564, 26 S. W. (2d) 887; where an owner of land in Craighead County was allowed to maintain a suit for permanent injury to his land by the construction of the same drainage district in Poinsett County. It is argued that if the Poinsett Circuit Court had no jurisdiction because the action was local, then the case should have been decided upon that ground because the jurisdiction could not be waived. In the first place, the question of jurisdiction was not raised or discussed in that case at all. In the second place, if the question of jurisdiction had been raised, the court might have held that the courts of Craighead and Poinsett counties had concurrent jurisdiction.

The section of the Digest under consideration was an exact copy of a corresponding section of the Code of

Kentucky in force when our Code was adopted. *Jones, McDowell & Co.* v. *Fletcher,* 42 Ark. 422, which was decided at the November term, 1883, of this court.

In *Smith* v. *Southern Railway Co.,* 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (N. S.) 927, the Court of Appeals of Kentucky, in discussing the question, said:

"While at common law and by § 62, subsec. 4, Ky. Civ. Code Prac., an action for injury to real property is made local, and must therefore, as a general rule, be brought in the county in which the land is situated, and this rule is not to be arbitrarily enforced where the injury to the real estate results from a cause or act arising or occurring in a county or State other than the one in which it is situated, for in such a state of case the law seems to allow the owner of the real estate the right to elect whether he will sue in the county or State where the land lies, or in that in which the act causing the injury was committed.

It is true that this decision was rendered after we adopted the provisions of the Kentucky statute; and under the rule of adopted construction, the decision of the court of last resort of Kentucky would not be binding upon us, yet it would be persuasive as construing a similar statute. Such holding is in application of the rule, "when the matter in one county is depending upon the matter in another county, the plaintiff may choose in which county he shall bring his action." *Barden* v. *Crocker,* 10 Pick. (Mass.) 383. We cite these cases only as holding what might be consistently held by this court on a question of jurisdiction as to an injury sustained which results in one county from an act committed or cause originating in an adjoining county of the same state.

Again, it is insisted that the Cox case above cited is inferentially, at least, overruled or modified by *North Arkansas Highway Improvement District No. 2* v. *Home Telephone Co.,* 176 Ark. 553, 3 S. W. (2d) 307; and *Home Telephone Co.* v. *North Arkansas Highway Improvement*

District No. 2, 179 Ark. 875, 19 S. W. (2d) 1014. We do not think so. In these cases, it will be noted from the opinions that the action was treated as a transitory one and not as an action "for an injury to real property." The Highway Improvement District was created by the Legislature of 1917, and § 4 of the act expressly provided that the domicile of the corporation should be in Izard County, and that all suits against it should be by service on the commissioners in that county. Acts of 1917, vol. II, p. 1280. For this reason, it was held that the act itself required service to be had upon the corporation in Izard County; and under the provisions of the Code relating to transitory actions, they must be brought where the defendant resides or is found. Here, as we have already seen, the statute itself makes an action "for an injury to real property," a local action, which must be brought in the county where the land is situated.

We do not consider the case of *Road Improvement District No. 4* v. *Ball,* 170 Ark. 522, 281 S. W. 5, as authority one way or the other. There the court was dealing with a collateral attack on a decree of the Pulaski Chancery Court upon a road improvement district organized under the general statutes in Saline County, and the court merely held that while a suit against a domestic corporation must be brought in the county of its residence, in a transitory action a voluntary appearance in another county than that of its domicile constitutes a waiver and confers jurisdiction upon the court.

Hence it will be seen that, if the proposed acts of Drainage District No. 7 of Poinsett County were to be committed by a railroad corporation, by a private corporation, or by a private person, the venue of the action would be in Cross County where the land is situated and service would be had upon the defendant in Poinsett County, where the act sought to be enjoined was alleged to be committed. But it is insisted that this rule does not apply to a drainage district. We do not agree with counsel in this contention. It is true that drainage districts, levee districts, and road improvement districts

are created by statute, and have only such powers as are expressly or impliedly conferred upon them. They are *quasi* public corporations with power to sue and be sued with reference to the matters conferred upon them. *Altheimer* v. *Board of Directors of Plum Bayou Levee District,* 79 Ark. 229, 95 S. W. 140; *Board of Directors of St. Francis Levee District* v. *Fleming,* 93 Ark. 490, 125 S. W. 132; and *Board of Levee Inspectors of Chicot County* v. *Southwestern Land & Timber Co.,* 112 Ark. 467, 166 S. W. 589. According to these and numerous other decisions of this court, local improvement districts and their commissioners are governmental agencies created as *quasi* public corporations deriving their powers directly from the Legislature and exercising them as the agent of the property owners in the district whose interests are affected by the duties they perform. They exercise no governmental powers except those expressly or impliedly granted by the Legislature. They are not political or civil divisions of the State like counties and municipal corporations created to aid in the general administration of the government. They are not created for political purposes or for the administration of civil government. Hence no public policy would be violated by applying the same rules for the service of process upon them as are prescribed for private corporations and *quasi* public corporations, such as railroads, etc.

Section 2 of the original act of 1917, creating the district, expressly declares that a certain named board of directors and their successors shall constitute "a corporate body by the name of Drainage District No. 7 of Poinsett County, Arkansas, and by that name they may have a corporate seal, may perform all acts and have all powers and privileges to which a corporation is entitled under the provisions of this act and under the laws of the State of Arkansas and be subject to all liabilities provided for under the provisions of this act and under the laws of the State of Arkansas." Acts of 1917, vol. 1, page 1053.

Thus it will be seen that by the very terms of the act creating the district it is subject to all liabilities provided for under the laws of the State of Arkansas. Hence the venue of actions against it is not changed by the terms of the act creating the district. The act expressly provides that the domicile of the corporation shall be in Poinsett County, and, in addition, that the corporation shall be subject to the liabilities of other corporations under the laws of the State. This would make it amenable to service of process just like other corporations and would make it subject to the venue of actions just like other corporations.

It has been suggested that, being governmental agencies, public improvement districts could not be sued in a county other than that in which it has its domicile by law. The argument is based upon public policy; and the principle involved is that, like counties and cities, if their officers are subject to suits in other counties, such suits must inevitably hinder and delay the successful conduct of the functions laid upon them. If the Legislature had deemed this to be the best public policy, it could have effectually accomplished that purpose by declaring that the drainage district could only be sued in any action in the county of its domicile. That would have made all actions against the corporation local. Instead of this, as we have already seen, the act creating the corporation locates its domicile in Poinsett County, just as private corporations are located by statute in the county where they have their principal office; but, in addition, the statute expressly provides that the corporation shall be subject to all liabilities provided for under the laws of the State. This would include provisions for venue in actions against the district as well as for service of summons upon the district and the commissioners thereof.

This view is upheld by the rule in the case of *Road Improvement District No. 4* v. *Ball,* 170 Ark. 522, 281 S. W. 5, where the court treated the officers of a road improvement district as having power to enter their appear-

ance in another county than that in which the district was organized. If all actions against improvement districts and their officers are to be considered as local and only to be brought and tried in the county where the corporation has its domicile, it is evident that they could not enter their appearance in another county, and that the holding in the Ball case would have been different.

It follows from what we have said that, under the allegations of the complaint, the work proposed to be done under the changed plans and specifications of the drainage district will flood the lands of the plaintiffs in Cross County and permanently injure them. Therefore, under the fourth subdivision of § 1164 of the Digest, the venue is in Cross County, and service of process may be had upon the defendants in Poinsett County, and the application for the writ of prohibition must be denied.

KIRBY *v.* KIRBY.

Opinion delivered November 2, 1931.

Tom Kidd, for appellant.

Jas. S. McConnell, for appellee.

SMITH, J. Appellant and appellee were married August 11, 1929, and lived together as husband and wife

until June, 1930, at which time appellant left appellee's home and has not since lived with him. Both parties had been previously married, and Mr. Kirby, appellee, was the father of six children, one of whom resided with him. Mrs. Kirby, appellant, was the mother of two children, both boys, the elder named Gilbert being nine years old at the time of her marriage to Mr. Kirby.

Mr. Kirby is a very substantial farmer, the owner of a 400-acre farm, and has money in bank and out at interest, and owns a large quantity of livestock, yet he worked himself in his fields. One day while Mr. Kirby was plowing corn, he put the boy Gilbert to work chopping cotton, and when he discovered that the boy was cutting up too much of the cotton, he became angry and whipped the boy in anger. The whipping was unnecessarily severe, and blood was drawn, and bruises were left on the boy's body. Mrs. Kirby interfered, and Mr. Kirby said he would lay it on her, but he did not offer to strike her. He did tell her, however, that she could take her children and leave. Mr. Kirby had whipped the boy on three previous occasions, but not so severely, and Mrs. Kirby made no complaint of these whippings.

After the boy Gilbert was whipped the last time, Mrs. Kirby left her husband and returned to the homestead of her first husband, the father of her children. Mrs. Kirby was a widow at the time of her second marriage. Her first husband had children by a former marriage, and one of these children, a daughter, resided on his homestead, and Mrs. Kirby took up her residence with this daughter and now resides with her. Mrs. Kirby was pregnant at the time she left the home of her present husband, and in October, 1930, gave birth to a girl child.

Shortly before the birth of this child, Mrs. Kirby brought suit for divorce and alimony and for the custody of this child and for an allowance for its support. Pending the trial of this suit a consent decree was entered whereby Mrs. Kirby was given $200 in money settlement of her property rights in the estate of her husband, Mr.

Kirby, and an allowance of $20 per month was made for the support of their infant child.

Before the final submission of this cause, Mr. Kirby made an attempt to effect a reconciliation with his wife, and attempted to induce her to return to his home. He later filed a petition to modify the decree wherein the allowance of $20 per month had been made for the infant.

It was the opinion of the chancellor that it was Mrs. Kirby's duty to return to the home of her husband, and in the final decree from which this appeal comes, the prayer for a divorce was denied, and the former decree was modified to the extent that Mr. Kirby was excused from payments on account of the support of their infant child, and this appeal is from that decree.

We are of the opinion that the decree for divorce which Mrs. Kirby prayed was properly denied. Mr. Kirby had repented his anger with his wife and confessed that he whipped the child with unnecessary severity, and proposed in an effort to effect a reconciliation, to leave the future correction of Mrs. Kirby's two children by her first marriage to her. He also proposed that the decree awarding her $200 in settlement of her claim against his estate be set aside. The chancellor was evidently of the opinion that Mrs. Kirby should accept this proposition, and that she would have done so, but for the interference of Mrs. Kirby's stepdaughter, with whom she now resides, and the decree of the court was rendered upon the theory that Kirby should not be required to make contributions to the infant's support while he was in good faith offering to support the child and its mother and her other children at his home.

The testimony establishes the fact that Mrs. Kirby's stepdaughter was hostile to Mr. Kirby, and that at first he was not permitted to visit his child at her home, but she appears to have modified her attitude in this respect and does not now refuse him permission to see the child at her home.

We have concluded that Mrs. Kirby ought to forgive and forget the conduct of her husband which caused her

to leave his home, and should now accept the offer which he makes in good faith to effect a reconciliation, and for this reason the divorce which she prayed was properly denied.

But the fact remains that she had cause for leaving Kirby's home; indeed, she was invited to do so, and she appears to be unable to forgive and forget, and the court is without power to compel her to return to her husband's home.

Now, while this obstancy on the part of Mrs. Kirby justified the court in refusing her a divorce or an allowance for her separate support, the rights of the infant child are unaffected by the attitude of its parents towards each other. Their duty to it continues. This child, a girl, is only one year old, and its tender age is such that Mr. Kirby does not ask that its mother be deprived of its custody, and we think the father should be required to make contributions to its support. His duty to the child would not be affected, even though he had obtained a divorce.

It was said in the case of *Holt* v. *Holt,* 42 Ark. 495, that "the dissolution of the marriage tie and decreeing the custody of the children, either permanently or temporarily to the mother, do not relieve the father of his obligation to support them. If they are too young to earn their own livelihood, the father must continue to furnish them a maintenance out of his estate, regard being had to his means and condition in life." This rule has since been consistently followed and applied by this court, and was expressly reaffirmed in the case of *Shue* v. *Shue,* 162 Ark. 220, 258 S. W. 128; and *Daily* v. *Daily,* 175 Ark. 163, 298 S. W. 1012.

In the original consent decree an allowance of $20 per month was made for the support of the child, but in view of the circumstances of the parties this may be somewhat excessive, as the testimony of Mrs. Kirby herself shows that she did not require this sum to support the child. We have concluded, in view of the testimony as to Mr. Kirby's financial circumstances, that an allow-

ance on this account to Mrs. Kirby of $15 per month will not be excessive and is sufficient.

The decree of the court below is therefore modified to the extent of allowing Mrs. Kirby the sum of $15 per month for the support of the infant child; in all other respects the decree is affirmed.

The costs of this case, including those on the appeal, will be assessed against the appellee, the husband.

[redacted]

GASTER *v.* DERMOTT SCHOOL DISTRICT.

Opinion delivered November 2, 1931.

[redacted]

John Baxter, for appellant.

Wallace Townsend, for appellee.

SMITH, J. This suit was brought by appellant, a citizen and taxpayer in the Dermott Special School District, to enjoin the directors of that district from selling any additional bonds of the district.

The complaint contains the following allegations. The assessed valuation of all taxable property, both real and personal, within the district is $1,476,163, and on August 1, 1931, the indebtedness of the school district amounted to $194,410.54, consisting of the following items:

Floating indebtedness (including unpaid warrants) ..... $ 43,813.88

Bonds not matured	119,500.00
Contracts to be executed prior to July 1, 1932	18,924.01
Accounts payable	10,100.00
Other liabilities	1,150.95
Improvement taxes due	921.70
Total	$194,410.54

The floating indebtedness consists of the promissory notes of the district secured by unpaid warrants thereof, attached thereto, drawn by the district. These notes are twenty in number and bear various dates from 7-1-30 to 6-3-31.

On August 8, 1931, the directors of the school district filed with the Commissioner of Education of the State of Arkansas a petition for the authorization and approval of a proposed bond issue of $47,000, which petition conformed to the requirements of § 62 of act No. 169 of the Acts of the General Assembly for the year 1931, and the Commissioner of Education gave his approval to the proposed issue in writing, under the seal of the State Board of Education, authorizing the directors, on behalf of the district, to advertise and sell a bond issue of $47,000.

It was further alleged that the proposed bond issue, together with the bonds of the district now outstanding, will be very greatly in excess of seven per cent. of the assessed valuation of the property of the district, and that the proposed new issue of $47,000 in bonds will not be for the purpose of refunding the present existing bonded indebtedness, and for that reason the proposed issue is prohibited by § 60 of said act 169.

A demurrer was filed by the directors on behalf of the district, which was sustained by the court, and, as the plaintiff taxpayer refused to plead further, the complaint was dismissed as being without equity, and this appeal is from that decree.

The question presented by this appeal is that of the authority of the Dermott Special School District to

issue additional bonds under the authority of act 169 of the Acts of 1931 (Acts 1931, page 476). This is an act entitled "An act to provide for the organization and administration of the public common schools." The act consists of 198 sections, and is a complete revision of our school laws.

The provisions of this act which are decisive of this appeal are §§ 59 and 60, and they read as follows:

"Section 59. All school districts are authorized to borrow money and issue negotiable coupons for the repayment thereof from school funds, for the building and equipment of school buildings, making additions and repairs thereto, purchasing sites therefor, and for funding any indebtedness created for any purpose and outstanding at the time of the passage of this act, as provided in this act.

"Section 60. No bonds shall be issued at any time that would make the total of outstanding bonded indebtedness of the district at that time, exclusive of interest, exceed seven per cent. of the assessed valuation of the real and personal property in the district as shown by the last county assessment. This shall not prohibit bond issues refunding present bonded indebtedness that exceeds seven per cent."

Read by itself, the provisions of § 59 are very broad. This section authorizes all school districts to borrow money and issue negotiable bonds for building and equipping school buildings, making repairs and additions thereto, and purchasing sites therefor, "and for funding any indebtedness created for any purpose and outstanding at the time of the passage of this act, as provided in this act."

This section deals with the purposes for which bonds may be issued and authorizes their issuance, among other purposes, "for funding any indebtedness created for any purpose."

The following section, No. 60, imposes a limitation as to the amount of bonds which may be issued. Under this section bonds may not be issued that would make

the total of outstanding bonded indebtedness (exclusive of interest) exceed seven per cent. of the assessed value of the property in the district. But this limitation does not "prohibit bond issues refunding present bonded indebtedness that exceeds seven per cent."

In other words, school districts may refund their entire bonded indebtedness by issuing new bonds, although the indebtedness exceeds seven per cent. of the assessed valuation of the property in the district, but, except for this purpose, bonds may not be issued in excess of that per cent. of the assessed valuation.

It would appear, therefore, that the Dermott Special School District is without power to issue additional bonds which the plaintiff taxpayer seeks to enjoin, for the reason that the district has already issued bonds in excess of seven per cent. of the assessed value of the property in this district, and is therefore without power to issue new or additional bonds except to refund the present bonded indebtedness, and the complaint alleges that this is not the purpose to which the proceeds of the new bond issue will be devoted.

It is insisted, however, that the floating indebtedness of the district, for which the warrants of the district have been issued in payment of the notes of the district are included in the term "bonded indebtedness," appearing in § 60 of the said Act 169. The case of *Arkansas State Highway Commission* v. *Kerby,* 175 Ark. 652, 300 S. W. 377, is cited to sustain this contention; but we do not think it is sustained by that case.

In the case cited Kerby sought to compel the State Highway Department to take over and pay certain certificates of indebtedness issued by a road improvement district prior to the passage of act No. 11 of the Acts of 1927.

As appears from the opinion in that case, § 3 of act No. 11 provided that the Highway Commission should "ascertain the amount of the outstanding valid bonds issued by road improvement districts in this State, * * * 'and that, after obtaining this information, the High-

way Commission, beginning with the year 1927, should allot to each road district in the State now having outstanding bond issues an amount equal to its bonds maturing during the year.' "

Payment to Kerby was refused by the Highway Commission, because the indebtedness of the road improvement district in question was evidenced by certificates of indebtedness, and not by bonds. The opinion reviewed the history of this legislation and declared its purpose, and the fact was stated that the road district which had issued the certificates of indebtedness held by Kerby had been taken over by the Highway Department and made a part of the State highway system. It was there said: "The evident and avowed purpose of the act under consideration was to aid road districts, which had become overburdened with debt, in the construction of the improved roads, and we are of the opinion that the word 'bond' as used in the act was meant to include promissory notes and certificates of indebtedness issued by the district for the purpose of constructing the improved roads; and that the words 'bond,' 'note,' or 'certificate of indebtedness' are but convertible terms. In short, we are of the opinion that the expression, 'bond,' as used in the act under consideration, was intended to cover all written obligations for the payment of money legally issued by the commissioners for the purpose of constructing the improved roads under the original acts creating the road districts."

The judgment of the circuit court, directing the Highway Commission to pay the certificates held by Kerby, was therefore affirmed, but this order was affirmed because the Arkansas State Highway Commission had taken over the roads of the improvement district which had issued the certificates of indebtedness, and, having done this, it was held that, under the terms of the act under which the roads had been taken over and made a part of the State highway system, it became the duty of the Commisson to pay all of said certificates of indebtedness involved in that case. It was therefore

declared immaterial whether this indebtedness was evidenced by promissory notes, certificates of indebtedness, or negotiable bonds, and that these would be treated as convertible terms, inasmuch as the General Assembly had assumed the payment of the district's obligations.

Section 60 of act 169 consists of two complete sentences. In the first sentence it is provided that no bonds shall be issued at any time that would make the outstanding bonded indebtedness of the district (exclusive of interest) exceed seven per cent. of the assessed value of the property of the district. The second sentence of § 60 is in the nature of a proviso to the first sentence, that is, that this seven per cent. limitation shall not prohibit bond issues refunding present bonded indebtedness. This second sentence declares the purposes for which the seven per cent. limitation may be exceeded, that is, to pay, not the present indebtedness, but the present "bonded" indebtedness. We cannot read the word "bonded," here appearing, out of the statute or treat it as being without significance. Section 59 authorizes the issuance of bonds "for funding *any* indebtedness created for any purpose and outstanding at the time of the passage of this act," whereas, in § 60 the adjective "any," preceding the word "indebtedness," is displaced, and the adjective "bonded" is substituted. We cannot assume that the Legislature had no purpose in this substitution. On the contrary, the purpose of the Legislature, in the enactment of § 59, was to authorize the issuance of bonds to pay any indebtedness, subject to the limitations appearing in § 60, which are to the effect that bonds may not be issued in excess of seven per cent. of the assessed value of the property of the district except for the purpose of refunding the present bonded indebtedness of the district.

Here, under the allegations of the complaint, the school district has outstanding thousands of dollars of warrants, issued for teachers' salaries and other current expenses, attached to notes given for this borrowed money, and, while this is indebtedness of the district, it

is not bonded indebtedness, and there is therefore no authority to issue bonds to cover those debts, for the reason that the district has now outstanding bonds in excess of seven per cent. of the assessed value of the property of the district.

The decree of the court below will therefore be reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

MADISON SMITH CADILLAC COMPANY *v.* LLOYD.

Opinion delivered November 2, 1931.

Ira D. Oglesby, for appellant.

Partain & Agee, for appellees.

HUMPHREYS, J. Appellees sued appellants in the circuit court of Crawford County for damages on account of injuries each sustained in an automobile wreck alleged to have been caused by the negligence of Carlton Claridy in suddenly turning without warning a Hudson car which he was driving for Madison-Smith Cadillac Company across the highway out south of Fort Smith, thereby forcing them into the ditch paralleling the highway in order to avoid striking him.

Appellant filed an answer denying the alleged act of negligence on their part and pleading as an affirmative defense contributory negligence on the part of appellees.

The cause was submitted upon the pleadings, testimony, and instructions of the court, which resulted in verdicts and consequent judgments in favor of appellees, from which is this appeal.

When the testimony was concluded, the appellants requested an instructed verdict, which was refused over the objection and exception of appellants, and the cause was sent to the jury upon both issues of alleged negligence on the part of appellants and contributory negligence on the part of appellees.

The testimony was conflicting as to whether appellants gave the statutory signals when the Hudson car turned toward the left and it was therefore proper to submit to the jury the issue of negligence on the part of appellants.

The testimony responsive to the issue of contributory negligence was undisputed and is as follows:

Both cars were proceeding in a southerly direction on the right-hand side of the highway leading south out of Fort Smith. The Hudson was owned by the Madison-Smith Cadillac Company and was being delivered for it by Carlton Claridy to the Tankersly Junk Yard situated three and one-half miles south of Fort Smith on the east side of Highway 71. Appellees were on their way to Florida in a Chevrolet car driven by George Lloyd. As Claridy was nearing the junk yard, he reduced his speed to about 15 miles per hour in order to turn to the left into the road leading to the yard. When appellees were within 100 yards of him, he observed that he was slowing down, and they likewise slowed down to a speed of 25 or 30 miles per hour. When within thirty feet of him, they saw him turn to the left and blew their horn. He heard their signal and turned back to the right and stopped his car within a distance of four or five feet diagonally across the pavement. They then turned to the left to go around him, and in their effort to avoid striking him, ran into the

ditch, turned completely over onto the wheels again, and ran for fifty yards into a store building on the east side of the highway that obstructed and stopped them. After slowing down the first time, they made no further effort to slow down or stop. They proceeded at the same rate of speed, traveling 25 or 30 miles an hour until their car was wrecked, at which time they were injured. The undisputed testimony was to the effect that they could have stopped their car within ten to twenty-five feet at the speed they were going.

The law of the road is that the automobile in front has the superior right to the use of the highway for the purpose of leaving it on either side to enter intersecting roads and passageways, and the traveler behind must, in handling his car, do so in recognition of the superior right of the traveler in front. *Government Street Lumber Co.* v. *Ollinger*, 18 Ala. App. 518, 94 So. 177. According to the undisputed facts detailed above, it was appellee's duty in the exercise of ordinary care to stop their car so that appellants could turn to the left and go to the junk yard on the east side of the highway, and, failing to do so, were guilty of contributory negligence. Appellees argue, however, that they were not guilty of contributory negligence, because, when the Hudson car turned to the left thirty feet in front of them, they were required to act suddenly without opportunity for deliberation; hence, that they must be excused if they did not adopt the safest course or act with the best judgment or greatest prudence. They might be excused for failure to stop their car had they been confronted with an emergency, but they were not. The undisputed facts reflect that, as far back as 100 yards, the Hudson car slowed down to 15 miles per hour for some purpose, and that they observed it do so and reduced their own speed to 25 or 30 miles an hour. They had ample time to think in covering that distance and could have easily stopped their car until they ascertained what purpose the Hudson car had in slowing down. There was no necessity whatever for them to act hastily in order to avoid strik-

ing the Hudson car. They had control of their car, but rather than reduce their speed and stop if necessary, they deliberately chose to maintain their speed, and by doing so assumed the hazard of turning to the left and passing the Hudson car.

On account of the refusal of the court to peremptorily instruct for appellants, the judgments are reversed, and appellees' actions are dismissed.

Mr. Justice KIRBY dissents.

BAUGH *v.* TAYLOR.

Opinion delivered November 2, 1931.

Buzbee, Pugh & Harrison, for appellant.

C. W. Norton, for appellee.

HUMPHREYS, J. This suit was brought by appellant on December 28, 1929, in the chancery court of St. Francis County against appellees to redeem lot 10, block 15 and lot 2, block 50, in Forrest City, Arkansas, from a mortgage thereon executed by her brother, W. P. Brandon, on March 30, 1925, to secure an indebtedness of her brother and husband in the sum of $10,000, which was borrowed from appellee, Taylor, to pay off a like indebtedness and mortgage to the First National Bank of said city. Appellant based her contention for redemption of the property upon a deed therefor from her brother to herself of date March, 1915, or, in the

alternative, upon an option or repurchase contract between herself and Taylor of date February 10, 1927, in words and figures as follows:

"THIS WRITING WITNESSETH:

"That E. P. Taylor, the first party, and Mrs. Lucy L. Baugh, the second party, have agreed as follows to-wit:

"If at the commissioner's sale now advertised to be held on the 12th day of February, 1927, in the case of E. P. Taylor, plaintiff, against W. P. Brandon *et al.*, defendants, No. 4821, in the St. Francis Chancery Court, the said E. P. Taylor shall become the purchaser of the property to be sold, to-wit: "lot 10 of block 15 in the town of Forrest City, and lot 2 of block 50 in the town of Forrest City; and

"If the said second party thereupon and on the same day with the said sale shall pay to the said E. P. Taylor $2,000 as the consideration of this contract; and

"If the said second party shall regularly pay and discharge within the time provided by law for payment without penalty all general and special taxes and assessments now due or becoming due within the period of this contract, against the said property, and shall keep the buildings on the same well insured against loss or damage by fire and tornado in sums satisfactory to the first party and for his use and benefit and at the expense of the said second party; and shall at her own expense keep the buildings on said lots in good repairs; then

"Upon the conditions aforesaid, and the time shall be of the essence thereof, the said first party hereby gives and grants to the said second party the exclusive right and option to and including the 31st day of December, 1928, to purchase of and from the said first party the real estate above described at a price to be determined as follows:

"That is, the price shall be a sum equal to the decree rendered in favor of the said E. P. Taylor and against W. P. Brandon and others on the 15th day of January, 1927, in the St. Francis Chancery Court in the case above

referred to, with interest thereon at the rate named in the said decree to the day of the said exercise of the said option together with all court costs, attorney's fees, and other expenses incurred by the said E. P. Taylor on account of the said judgment together with any sums paid out by the said E. P. Taylor after the date of this contract for reasonable, necessary repairs and upkeep on the said property and any taxes, special assessments and insurance which he may have paid on the same; which sum shall be subject to credit by the sum of $2,000 plus such further sums as the said E. P. Taylor may receive after the date of this contract as rents or profits out of the said property, which credits shall bear interest at the rate of 8 per cent. per annum from the date of payment respectively; and the balance remaining after application of these payments shall be the purchase price of the said property, and the same shall be payable in cash upon execution and delivery by the first party of a good deed of special warranty conveying the said property free and clear of all liens and incumbrances arising by, through or under him but the first party does not undertake to make a good deed of general warranty.

"Provided, this contract is on condition that the commissioner's sale first above referred to shall be duly confirmed by the St. Francis County Chancery Court and a deed made to the first party, and if the said sale be not confirmed then the first party is to return to the second party the $2,000 paid for this option contract.

"Time shall be of the essence of this contract in all particulars.

"This 10th day of February, 1927.

(Signed) "Lucy L. Baugh,
"E. P. Taylor."

The defenses interposed to appellant's suit for redemption were that the conveyance of the property to her by her brother, although in form a deed, was in effect a will and that she obtained no present title or interest therein under the instrument, and that she failed to per-

form the conditions of the option contract within the time specified.

The cause was heard upon the pleadings and testimony, which resulted in a dismissal of the complaint of appellant, from which is this appeal.

There is little or no dispute in the testimony. The facts reflected by the evidence are, in substance, as follows:

The real estate in question had been owned for many years by appellant's blind brother, who resided with her and her husband. Her husband and brother were partners in business, and conducted a large mercantile establishment in the store building on the property. On March 15, 1915, appellant's brother executed and delivered a deed for said real estate to her. He said at the time of delivery that he wanted her to have the property, and in order to effect that purpose gave her some money and required her to hand it back to him in exchange for the deed. She put the deed with her other papers, where it remained until, upon the advice of an attorney, she recorded it on the second day of February, 1927. The possession of all the real estate was retained by her brother, the store building being occupied by her husband and her brother and the residence rented by her brother. He never accounted to her for rents and continued to keep the property in repair and pay taxes thereon. On the ..... day of ....., he executed a mortgage thereon to the First National Bank of Forrest City to secure an indebtedness of his brother-in-law and himself. Thereafter he mortgaged same to appellee, Taylor, for $10,000 to obtain money with which to pay the indebtedness to the bank. Later they failed in business and their estate was administered by receivers. The receivers occupied the store building and rented the house without accounting to appellant for rents until appellees took possession for the purpose of foreclosing the mortgage. The foreclosure proceeding was instituted on December 20, 1926. On the 15th day of January, 1927, a judgment was obtained by appellee

against appellant's brother and husband for $10,514.70, and the mortgage lien was foreclosed, and the property ordered sold to pay same. At this juncture in the proceedings, W. P. Brandon and J. D. Baugh, brother and husband of appellant, had several consultations with appellee Taylor relative to saving the property, which resulted in the execution of the option contract set out above. Pursuant to the terms thereof, appellee Taylor purchased the property for $8,000 at the commissioner's sale on February 12, 1927, at which time appellant paid him $2,000 in cash. Thereafter appellee Taylor collected rents on the store and allowed appellant to take possession of and collect the rents on the residences until March or April, 1929, some four months subsequent to the expiration of the option contract. Appellant paid appellee Taylor another $1,000 in February, 1928. At the time the option contract expired, appellant was ill and unable to attend to any business until early in 1929. As soon as she recovered sufficiently to attend to business, she requested an accounting and offered to redeem the property, but was informed that the time for redemption had expired.

We deem it unnecessary to consider or discuss appellant's contention that she is the owner of the property by virtue of the deed, which antedates appellee's mortgage, and entitled to redeem because she was not made a party to the foreclosure proceedings, for we are convinced that the option contract was in effect a new mortgage. It had practically all the characteristics of a mortgage. It carried the same indebtedness and bore the same rate of interest as the old indebtedness and costs of the foreclosure and appellee's attorney's fees. It also provided that if Taylor should pay out anything for taxes, insurance, or repairs, the amount should be added to the indebtedness. It also provided that rents collected by Taylor should be credited on the indebtedness. It also provided that appellant should pay the taxes, insurance and repairs on the property. It also provided that, if the debt were discharged within the time named, appellee

Taylor should deliver the property free of incumbrances under special warranty to appellant. The relationship of mortgagor and mortgagee between appellant and appellee Taylor concerning the property in question was created by the option contract, which necessarily let in the equity of redemption after default in payment. The principle announced in the case of *American Mortgage Co.* v. *Williams,* 103 Ark. 494, 145 S. W. 234, is applicable to and governs the instant case. The clause in the option contract making time of the essence thereof had the effect, perhaps, of waiving the right of redemption conferred by the statute, but did not dispose of the equity of redemption which antedates any statutory right of redemption. This equity can be disposed of only by foreclosure or a conveyance or by laches.

On account of the error indicated, the decree is reversed, and the cause is remanded with directions to ascertain the amount due on the mortgage and to allow appellant to redeem the property by the payment of same.

KIRBY, J., concurs.

SMITH and MCHANEY, JJ., dissent.

ROSE *v.* W. B. WORTHEN COMPANY.

Opinion delivered November 2, 1931.

Carmichael & Hendricks, for appellant.

E. G. Shoffner, for appellee.

KIRBY, J. This appeal challenges the validity of a mortgage by the guardian or curator of certain minors made to secure a loan with which to pay certain liens

on their real estate and for their maintenance and support.

Pearl Dooley, the widow of Geo. H. Dooley, now Pearl Dooley Rose, was first appointed administratrix of her husband's estate and later was discharged or resigned, and appellee company was duly appointed curator or guardian of the minors, who owned certain property, three pieces of real estate of west 12th Street in Little Rock, one piece of which had been mortgaged and upon which there were several liens for taxes, etc.

Appellee company filed a petition asking authority as curator to mortgage the lands of its wards, alleging that the widow's dower had never been assigned to her, and the two children were absolutely destitute and badly in need of food and clothes and must be taken out of school and put into a charitable institution unless they were afforded immediate relief as prayed.

The petition reads in part as follows: "Petitioners pray that, in order to care for the many liens, to keep the heirs in school and prevent them becoming subjects of charity, and to prevent the waste and loss of the balance of the estate, that petitioner, as guardian and curator, be authorized and directed to borrow from such source as may be available, the sum of $750, at the best possible rate of interest, and to mortgage or pledge such real estate as may be necessary to secure the payment of said loan, and petitioner further prays for such other relief as may be necessary to protect the interest of the minors."

The petition was dated April 21, 1930, filed April 22, and granted on the same day. The order recites:

"W. B. Worthen Company, curator of the estates of George Leon Dooley and Emma Loraine Dooley, is therefore by the court authorized, directed and ordered to borrow from such source as it may deem best the sum of $750 at the best possible rate of interest, and it shall pledge or mortgage to secure the repayment of said money lot 1, block 1, Worthen and Brown's Addition to the city of Little Rock the property of said minors.

Said sum shall be expended by said curator, under the orders of this court, to relieve the situation recited above in the finding of this court. The note or notes executed by the curator for said sum and the mortgage or deed of trust executed to secure the payment of such note or notes shall be a valid and binding obligation on the estates of the said minors and shall constitute a valid and subsisting lien against said lot 1, block 1, Worthen and Brown's addition to the city of Little Rock."

The curator reported the borrowing of the money to the court for the minors from the bank or its trust agent, and prayed an order authorizing the payment of certain claims, etc. The court confirmed the report of the curator reciting the amount borrowed, that it was not less than two-thirds of the value of the minors' interest in the lot mortgaged, which was not the homestead of the minors or their mother, and that the widow of George Dooley, having a right of dower therein, signed with the curator as principal, etc.

The complaint attacking the validity of the mortgage was demurred to, as also were the two amendments thereto, and the demurrer was finally sustained, and the complaint dismissed for want of equity.

Under our former statutes no authority was given executors, administrators or guardians to borrow money and mortgage real property of the estate to secure funds for maintenance and education of the minors. But act 195 of 1927 authorizes such executors, administrators and guardians to borrow money for certain purposes and secure the same by mortgage upon the real estate belonging to the estate represented by them. Section 120b, Castle's Supplement to Crawford and Moses' Digest, provides the procedure and reads as follows:

"When any administrator, executor or guardian presents to the probate court of the county in which any real property belonging to the estate represented by such administrator, executor or guardian is situated, his petition for permission and authority to mortgage the real

property, or any part thereof, belonging to said estate, in Arkansas, for the purpose of raising money to pay obligations secured by liens against any real property belonging to the estate represented by such administrator, executor or guardian, wherever situated, such probate court shall examine the same, and hear the evidence, and if satisfied that it would be to the best interest of such estate, then said court shall grant the petition and authorize such administrator, executor or guardian to borrow money and execute notes for the same, secured by a mortgage or trust deed to be executed by said administrator, executor or guardian on any part of the real estate belonging to such estate, situated in Arkansas. Provided, that the homestead shall not be encumbered by mortgage or trust deed except for the purpose of satisfying existing liens against said homestead." There is no authority granted by this statute to borrow money and secure the same by a mortgage or deed of trust except for the purposes specified in the act, and it contains no expression authorizing the borrowing of money for the maintenance and education of the minors. The probate court was without power to authorize the borrowing of money and execution of a mortgage by the guardian, etc., for any other purpose than as expressed in the statute, and its order authorizing it, as well as the mortgage executed in pursuance thereof for money to be used for any other purpose were void, and such mortgage constituted no lien against the lands and cannot be enforced against them for any money borrowed and expended for any purpose other than as specified in said statute.

We do not decide whether the dower interest of the widow of the decedent, the mother of the minor children, who joined in the execution of the mortgage and whose dower in the property mortgaged had not been assigned, bound such interest to the payment of any money furnished her, it not being necessary to the determination of the cause herein.

For the error designated the decree will be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion. It is so ordered.

[redacted]

MISSISSIPPI RIVER FUEL CORPORATION *v.* SENN.

Opinion delivered November 2, 1931.

[redacted]

J. G. Williamson, Lamar Williamson, and *Adrian Williamson,* for appellant.

W. F. Norrell and *R. W. Wilson,* for appellee.

MEHAFFY, J. This action was brought by the appellee against the appellant, Mississippi River Fuel Corporation, and R. R. Hudgins, to recover damages for a personal injury alleged to have been caused by the combined and concurring carelessness and negligence of the defendant, Mississippi River Fuel Corporation, and R. R. Hudgins.

The appellee and R. R. Hudgins were employees of the appellant, Mississippi River Fuel Corporation, and were moving and carrying by means of hand sticks a large and heavy meter from a truck to the place on the appellant's pipe line where it was to be installed.

It is alleged that R. R. Hudgins, an employee of appellant, carelessly and negligently, and without notice to appellee, caught hold of the end of the hand stick opposite where appellee was working, and suddenly and carelessly and negligently, and without warning, jerked and raised the opposite end of the hand stick to that held by appellee, and thereby threw practically all the weight of the heavy meter, and placed upon him the burden of lifting or holding up more than 1,000 pounds; that appellee was strained in his entire body, and otherwise injured as described in his complaint.

He alleges that the injuries were permanent, causing him great mental anguish and physical pain, and that he was compelled to undergo a major operation; that he was wholly incapacitated to perform any physical labor, and will be totally and permanently incapacitated to perform physical labor and earn a livelihood. He asked damages for his injuries in the sum of $15,500.

The appellant, without entering its appearance for any other purpose, filed motion to dismiss, alleging that the court had no jurisdiction. This motion was overruled by the court and a guardian was appointed for R. R. Hudgins, who was a minor, and answer was filed denying the material allegations in the complaint.

The appellant then filed a second motion to dismiss on the ground that the court had no jurisdiction. This motion was overruled, and appellant then filed a demurrer, alleging as grounds for demurrer, that the court had no jurisdiction over the person of the defendant, and that there is a defect of parties defendant, in that the defendant, R. R. Hudgins, is improperly joined as a party defendant. This demurrer was overruled by the court. The appellant saved proper exceptions to the overruling of each of its motions and the demurrer.

The appellant then filed answer specifically denying each material allegation in the complaint and alleging that if appellee was injured, the same was caused by physical infirmity or disease, for which appellant was not responsible. It alleged in its answer that, if appellee was injured as alleged in his complaint, said injury was caused by appellee's own negligence.

It also alleged that, if appellee was injured as stated in his complaint, his injury was caused by a risk necessarily incident to his employment and which was assumed by him.

The appellant owned a gas conduit pipe line extending from the gas fields of Louisiana across the State of Arkansas to St. Louis, Missouri. Its main line passed through Drew County, Arkansas. From a point six or

seven miles west of Monticello, a branch line was constructed to Monticello.

The appellee was 27 years of age and had been employed in this work for two or three weeks. The appellant, at the time of the injury complained of, was installing two gas meters near the western corporate limits of Monticello. The meters had been brought to the place by truck and placed on the ground about 30 feet from the point where they were to be installed.

The meters were to be put on a platform about 24 inches above the ground. In moving the meters from the place where they had been put on the ground to the platform, a crew of nine men, including the foreman, was engaged. The meter had a short extension of pipe four inches in diameter and about eight inches long sticking out of each end of the meter with a collar or flange where it would be connected with the gas line. Six men carried the meter to the platform by placing an iron crowbar under each of these pipes, one man lifting at each end of the crowbar, and one man lifting at the end of the extension pipe.

The appellee had hold of one end of the crowbar, and Virgil White had hold of the other end of the crowbar. The foreman, A. B. Willey, was on the platform, assisting in putting the meter on the platform.

When the crew undertook to put the meter on the platform, some of them called for help, and Ralph Hudgins, who is charged with the negligence complained of, took hold of the end of the crowbar held by White, and opposite to the end held by appellee. When Hudgins caught hold of the end of the crowbar, he lifted it something like three inches higher than the opposite end, which was held by the appellee. Appellee claims that when this was done practically the entire weight of the meter was thrown on him; that the walls of his stomach burst his appendix, and that he was ruptured. He estimates the weight of the meter at from 1,000 to 1,500 pounds.

None of the persons with appellee knew that he was injured in any way. The injury was alleged to have occurred on Thursday, and he worked Friday and Saturday; but he alleges that he turned hot, cold and blind, but he made no complaint at the time. He did not do anything for about 30 minutes; his work on Friday and Saturday was light. Prior to the injury he had complained from time to time of a pain in his lower right side and on Sunday afternoon he complained, and he did not work Monday. On Monday afternoon he became seriously ill, and the doctor said he had appendicitis, and he grew steadily worse until he was taken to Pine Bluff on Wednesday the 26th, where he was operated on for appendicitis, according to Dr. Clark's evidence. Dr. Simmons and Dr. Duckworth said he was operated on for hernia.

Appellee did not notify any of the officers, agents, or employees of appellant that he claimed to have been injured while working, but he testified that some days before he filed suit he wrote to some official of appellant, and on May 10th filed suit in the Drew Circuit Court.

While the appellee alleged concurrent negligence of Hudgins and appellant, the verdict and judgment is based on the alleged negligence of Hudgins, and the judgment against appellant is for the negligence of its servant, Hudgins alone. The jury returned a verdict in favor of Hudgins, and a verdict against the appellant for $10,500. The case is here on appeal by the Mississippi River Fuel Corporation.

Appellant's first contention is that the verdict in favor of R. R. Hudgins exonerates appellant, Mississippi River Fuel Corporation, from liability. It is its contention that a verdict in favor of the servant is inconsistent with a verdict against the master for the servant's negligence.

We agree with appellant that there is no negligence shown except the negligence of the servant, Hudgins. The verdict of the jury in favor of the servant, Hudgins, did not mean that Hudgins was not guilty of negligence.

Appellant cites numerous authorities to support its contention that a verdict in favor of the servant exonerates the master in cases where the master is sought to be held liable solely on the ground of the negligence of the servant.

In one of the cases relied on the court said: "Where a recovery is sought in an action against a principal and his agent based upon the act or omission of the agent which the principal did not direct and in which he did not participate and for which his responsibility is simply that cast upon him by law by reason of his relationship to the agent, a judgment in favor of and exonerating the agent generally *ex proprio vigore* relieves the principal of responsibility and may be availed of by the principal for that purpose." *Patterson* v. *Risher,* 143 Ark. 376, 221 S. W. 468.

In another case cited and relied on by the appellant, and which appellant says is one of the leading American cases on the subject, the court said: "The general rule undoubtedly is that, where one has received an actionable injury at the hands of two or more persons acting in concert, or acting independently of each other, if their acts unite in causing a single injury, all of the wrongdoers, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and he may enforce the liability in an action against them all jointly, or in any one of them severally, or against any number of them less than the whole. While the wrong committed is the joint wrong of the several parties participating therein, it is also, in contemplation of law, the several wrong of each of the participants. On this principle at common law, a jury in actions *ex delicto* against several persons, contrary to the rule in actions *ex contractu,* were permitted to find against one or more of the defendants and in favor of the others. The rule with regard to actions *ex delicto* remains the same under the Code, and the practice now permits the jury in an action for tort against several defendants to return a verdict against so many of them as the proofs show

are guilty of the wrong charged, and in favor of the others. As it is the peculiar province of the jury to determine the guilt or innocence of the several defendants, a verdict finding in favor of some and against others, even though there may be no very apparent reason for the distinction made, is not for that reason alone so far arbitrary or inconsistent as to require a reversal of the judgment entered thereon against those who have been found guilty." *Doremus* v. *Root,* 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649.

The above rule is the rule adopted by this court in all actions against joint tort feasors. But this court and all the courts, so far as we know, which hold that a verdict in favor of the servant exonerates the master, where the liability of the master is based wholly on the negligence of the servant put it on the ground that a verdict in favor of the servant is a finding by the jury that the servant is not guilty of negligence, and, since the master's liability is based solely on the negligence of the servant, finding in favor of the servant exonerates the master. We know of no decision that puts the right of the master to be exonerated on any other ground.

This court, in the case of *Patterson* v. *Risher, supra,* and in other cases has followed the above rule.

A holding that the master would be exonerated because of a verdict in favor of the servant on any other ground would be absurd. The finding in favor of the servant in the case at bar was not necessarily a finding that the servant was not guilty of negligence. The appellant, in its answer, pleaded the contributory negligence of the appellee, and requested, and the court gave, instructions on contributory negligence requested by appellant. It is now argued that the appellee was guilty of no contributory negligence, but that is immaterial. The appellant evidently thought there was evidence sufficient on which to base its instructions on contributory negligence, and the trial court evidently thought there was sufficient evidence to submit the question to the jury, and certainly the jury had a right to believe that the

court held there was sufficient evidence to submit the question of appellee's contributory negligence to it.

It cannot be said then that the finding in favor of the servant was a finding that he was not guilty of negligence. Under our law, any individual, as the servant in this case, who may be guilty of any negligent act resulting in injury to another, cannot be held liable if the injured party's negligence contributes in any degree to produce the injury, so that but for his contributory negligence the injury would not have happened; but this is not the law with reference to corporations.

Our statute provides that in actions against corporations for personal injuries, the fact that the injured employee might have been guilty of contributory negligence shall not bar a recovery. Section 7145, Crawford & Moses' Digest.

It will therefore be seen that it might be perfectly proper to find a verdict in favor of the employee charged with negligence and against the master, because appellee would be entitled to a verdict against the corporation, notwithstanding his contributory negligence, but would not be entitled to a verdict against the servant, no matter how guilty he may have been of negligence, if the injured party was guilty of any contributory negligence.

If a suit was prosecuted against a corporation, based solely on the negligence of a servant, and it was shown that the injured party was guilty of contributory negligence, to hold that the verdict in favor of the servant, because of the injured party's contributory negligence, exonerated the master would abrogate the comparative negligence statute.

None of the cases cited and relied on by appellant discussed the question here involved, and this question was not involved in any of the cases cited, but all of the cases relied on based their holding that a verdict in favor of the servant exonerates the master on the ground that the verdict is a finding that the servant was not guilty of negligence.

The rule is stated in C. J., as follows: "Under comparative negligence rule, where an action for negligence against a corporation and certain of its employees, there is a plea of contributory negligence on the part of the defendant and evidence tending to establish it, the jury may, if the evidence justifies it, under the comparative negligence rule, find in favor of such employees and against the corporation." 39 C. J. 1369. See also *Arnett* v. *Ill. Central Rd.*, 188 Iowa 540, 176 N. W. 322; *Gardner* v. *So. Ry. Co.*, 65 S. C. 341, 43 So. 816; *Davis* v. *Hareford*, 156 Ark. 67, 245 S. W. 833; *K. C. Sou. Ry. Co.* v. *Cockrell*, 169 Ark. 698, 277 S. W. 7.

If appellant's contention is correct, then in cases where the master and servant are sued for damages, based solely on the negligence of the servant, and where the servant may be relieved because of the contributory negligence of the injured party, and the master may be liable notwithstanding such contributory negligence, then it would be the duty of the court to direct the jury that they could not find against one without finding against both. If the injured party was guilty of contributory negligence and the master was liable because of the negligence of its servant, then the jury would be required either to find against the servant, when they knew that contributory negligence was a bar, and the verdict against him was unjust, or to find in favor of the corporation notwithstanding the negligence of its servant causing the injury, and notwithstanding he was entitled to recover, although guilty of contributory negligence. We do not think any court is committed to this doctrine.

We do not think it necessary to review the authorities cited by appellant extensively, because they are not applicable to the facts in this case, and there is no dispute about the rule announced by these authorities.

It is next contended by the appellant that the verdict is not supported by any evidence. The appellee testified that they had carried the meter along about 6 inches above the ground until they got to the platform; that the platform was about two feet high. When they got there,

Hudgins came and took hold of the bar on White's side, the side opposite to that of appellee; that Hudgins got hold of the bar and lifted it higher than the side appellee was on, throwing the meter on him, and he just had to stand there and hold it. When Hudgins came and took hold with White, they raised their end of the crowbar 3 or 4 inches higher, which caused the meter to slip over on appellee.

Appellee is corroborated by other witnesses, who testified that when Hudgins took hold he raised his end of the crowbar 2 or 3 inches higher. The witnesses corroborating him put it at from 1 to 3 inches. This testimony is undisputed.

It was a question for the jury to say whether, under the circumstances, taking hold of the crowbar with White and raising it up 3 or 4 inches when there was no one holding the other end of it except appellee, was negligence. The question was submitted to the jury under proper instructions, and we cannot say that there was no evidence to support their finding.

This court has many times held that when there is any substantial evidence to support the verdict of the jury, the verdict is conclusive here. It is true that the burden was upon appellee to show that his injury resulted from the negligence alleged in his complaint.

The master was not an insurer of his safety, but it is liable only for negligence, and the test as to whether it was guilty of negligence is whether Hudgins did what a person of ordinary prudence would have done under the circumstances.

The jury had a right to believe that Hudgins took hold of the bar with White, knowing that the other end of the bar was held by appellee alone, knowing that the meter was very heavy, and, without notice or warning of any kind, lifted the end of the crowbar from 1 to 4 inches, causing the injury to appellee. There is no presumption of the master's negligence, but we think there is substantial evidence to support the verdict of the jury that Hudgins was guilty of negligence.

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 should go to the jury, and it is the province of the jury to pass on 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. *Armour & Co.* v. *Rose,* 183 Ark. 413, 36 S. W. (2d) 70; *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; *Mo. Pac. Rd. Co.* v. *Juneau,* 178 Ark. 417, 10 S. W. (2d) 867; *S. W. Bell Tel. Co.* v. *McAdoo,* 178 Ark. 411, 10 S. W. (2d) 503; *Harris* v. *Ray,* 107 Ark. 281, 154 S. W. 499.

It is next contended that the court erred in permitting the introduction in evidence of the drawing of the meter prepared and introduced by witness Thompson. We do not think there was any error in permitting the introduction of the drawing, and no prejudice could possibly have resulted from its introduction. The evident intention was to give a representation of the meter which could not otherwise be as conveniently shown or described by the witness. *St. L. S. F. R. Co.* v. *Horn,* 168 Ark. 200, 269 S. W. 576; *Harrelson* v. *Eureka Springs Elec. Co.,* 121 Ark. 269, 181 S. W. 922; *Sellers* v. *State,* 91 Ark. 175, 120 S. W. 840.

It is next contended by appellant that the court erred in permitting witness Dr. W. H. Simmons to answer a hypothetical question. After the appellant had objected because it stated that the hypothetical question did not take into consideration some of the facts, the court held that there were other things proper to be stated, and those things were stated, and witness permitted to answer the question. The hypothetical question mentioned the material facts, and then asked the doctor, assuming those things to be true, what, in his opinion, caused the conditions as he found them. The doctor stated in answer to the question that, considering the man's position, when a strain is suddenly thrown on him, it might be very

slight and still cause hernia, such as was found in appellee; that it depended somewhat upon the position he was in. To say exactly this particular strain was enough ordinarily, he said he did not know but he said that if he had a history that had any kind of a strain and immediately felt pain and became nauseated and had cold sweat, he would say the injury was the cause of the trouble.

We do not think there was any error in permitting the hypothetical question and permitting the doctor to answer it. See *Taylor* v. *McClintock,* 87 Ark. 294, 112 S. W. 405; *Ince* v. *State,* 77 Ark. 429, 93 S. W. 65; *St. L. I. M. & S. Ry. Co.* v. *Hook,* 83 Ark. 589, 104 S. W. 217.

Appellant next contends that the court erred in giving appellee's instruction No. 6. Instruction No. 6 is as follows: "You are instructed that if you find from the evidence that the plaintiff, Oscar Senn, while working for the defendant in moving and carrying by means of hand sticks a large and heavy meter from a truck on a pipe line where it was to be installed, the defendant, Mississippi River Fuel Corporation, carelessly and negligently and without notice to the plaintiff, grabbed or suddenly took hold of the end of the hand stick opposite where plaintiff was working and suddenly and carelessly and negligently and without notice or warning to plaintiff, jerked up or raised the end of the hand stick opposite to that held by plaintiff and thereby caused the meter to roll and turn and threw the weight of the meter on the plaintiff and placed upon him the burden of holding same, if you find it was negligence to do so, and his injuries, if any, were caused solely by the acts of said R. R. Hudgins, then your verdict should be for the plaintiff and against the defendant."

The objection to this instruction was general, no specific objection being made, and the instruction was not inherently wrong. If appellant thought it was wrong for the reasons now urged, it was its duty to make specific objections to the instructions.

We have carefully examined all of the instructions, and, when considered as a whole, they furnished a correct guide to the jury.

It is next contended that the court was without jurisdiction to render judgment against the appellant. Suit was filed in Drew County, Arkansas, and summons directed to the sheriff of Pulaski County, Arkansas, and it was returned duly served. The summons was issued May 10, 1930, and returned served by the sheriff of Pulaski County on May 14, 1930. On September 8, summons was issued to the sheriff of Pulaski County and returned September 15, showing it had been served. But on September 8, a summons was issued against the appellant and R. R. Hudgins, to the sheriff of Drew County, returned September 9, 1930.

The appellant is a foreign corporation, and § 1152 of Crawford & Moses' Digest, provides that foreign or domestic corporations who maintain in any county of this State a branch office or other place of business, are subject to suits, etc.

Evidence was taken showing that appellant had a place of business at Wilmar, Drew County, and this place of business was in charge of J. C. Lemons. Evidence was taken by the court on this question, and this evidence shows that the appellant had purchased several acres of land, built a warehouse, kept supplies there, and that Lemons, on whom the service was had, was in charge of the warehouse and in charge of the maintenance.

Several witnesses testified and Lemon testified that he was foreman of Division No. 2, and, if it was necessary, he would have the freight bills in his warehouse at Wilmar; that he was in charge of the job, was in charge of the construction of the meter platform in a way, and in charge of everything being built in that division.

We think there was ample evidence to establish the fact that the appellant maintained a branch office and place of business at Wilmar, and that Lemon was in charge of it. This being true, the service on Lemon at

Wilmar was sufficient. *Ramey* v. *Baker,* 182 Ark. 1043, 34 S. W. (2d) 461; *Ark. P. & L. Co.* v. *Hoover,* 182 Ark. 1065, 34 S. W. (2d) 464.

It is next contended that the verdict of the jury was excessive. The verdict was for $10,500. The evidence shows that appellee was 27 years of age, made his living by farming mostly, was in good health before the injury, weighed 165 to 175 pounds, and according to his testimony was sound physically, and could do as much work as any other man of that size. He testified that there was nothing wrong with his abdomen before the injury. His expectancy was 37 years. He has been unable to work at anything that requires lifting or physical exertion. He is compelled to wear across his lower abdomen a piece of cloth, something like a truss.

The doctors examined him, operated on him, and Dr. Simmons testified they decided he had a rupture that was strangulated and had developed peritonitis from it. This doctor testified that the operation was to relieve that condition, and in his opinion he would have died if he had not been operated on.

There is no dispute in the evidence that he had to have an operation, and that since the injury he has not been able to do the kind of work he did before his injury.

If the injury to appellee was caused in the manner that he claims it was and is as severe as the evidence shows it to be, the amount found by the injury is not excessive.

We have very carefully examined all of the evidence and the instructions given by the court, and have reached the conclusion that there is no error in the record.

The judgment is therefore affirmed.

SMITH, J., (dissenting). The relevancy of the discussion of the right of an injured servant to recover against one or more of the joint tort-feasors who have injured him— under the undisputed testimony in this case —is not apparent. The master has been held liable in this case, not as a joint tort-feasor, but under the doc-

trine of "respondeat superior." Cooley on Torts, (3rd ed.) page 254.

It is necessary to strip this case of its superfluities in order to ascertain the applicable principles of the law of master and servant which should be applied in its solution and decision.

It is true, as stated, that the answer alleged that the injured servant—the plaintiff—was guilty of contributory negligence, and that his injury had resulted from a risk which he had assumed. These pleas are so usual in all ordinary personal injury cases that the lawyer who failed to allege them would himself be guilty of negligence. It is true also that instructions submitted these issues. Appellant having asked such instructions, it is settled law that no prejudicial error was committed in giving them, although they were abstract. One cannot complain that an abstract instruction was given at his request. But it is a wholly different proposition to say that either an allegation in a pleading or an abstract instruction can supply a total absence of evidence to prove an essential fact.

The majority say the jury may have found that the injured servant was guilty of contributory negligence and upon this finding applied the comparative negligence doctrine, and, in its application, excused Hudgins, the fellow-servant, against whom contributory negligence was an absolute defense, yet held the master liable, for the reason that contributory negligence was not an absolute defense in its favor and that, as against the master, the doctrine of comparative negligence applies.

But what are the undisputed facts? The plaintiff alleged no act of negligence against any one except Hudgins, and the majority say that "the judgment against appellant (the master) is for the negligence of its servant, Hudgins, alone." Although the master alleged plaintiff was guilty of contributory negligence, this fact was denied by the plaintiff, and not a scintilla of evidence was offered in support of it, and appellee's able

counsel solemnly asserts in his brief filed in this case and in the oral argument before us that plaintiff was not guilty of contributory negligence. I am unable to see why this statement should not, therefore, be accepted as an undisputed fact, and, if so accepted, the question of comparative negligence passes out of the case. Where only one person was negligent, there is no negligence to compare, and even an abstract instruction cannot supply a total absence of testimony. The discussion of the doctrine of comparative negligence, under the undisputed testimony in this case, is as much aside as is the discussion of the right to recover against one or more joint tort-feasors.

The majority opinion mentions the fact that the foreman was standing by while the meter was being put in place; but this fact adds no new issue. Even though the foreman had ordered Hudgins to assist in putting the meter in place, it is not contended that he gave any directions as to the manner in which this simple duty should be performed, and there is no allegation or issue that Hudgins was known to be a careless or incompetent servant. Certainly, there was no negligence in ordering Hudgins to assist. His assistance meant only the presence and participation of another servant in placing the heavy meter in the desired position. Had Hudgins, while standing by and available, not assisted, the contention might have been made that the employees were ordered to perform a duty without sufficient assistance. Ordering Hudgins to assist could only fix his status as an employee, and not a volunteer, and the case presents no such issue.

The quotation in the majority opinion from 39 C. J. page 1269, affords no support to the conclusions reached. I have placed in italics the portion of the quotation which destroys its application to the facts of this case. As thus italicized it reads: "Under comparative negligence rule, where, in an action for negligence against a corporation and certain of its employees, there is a plea

of contributory negligence on the part of defendant *and evidence tending to establish it,* the jury may, if the evidence justifies it under the comparative negligence rule, find in favor of such employees and against the corporation."

It thus appears that, to make the comparative negligence doctrine apply so that the master may be held liable for the negligence of his servant and the servant himself excused, there must, not only be a plea of contributory negligence, but "*evidence tending to establish it,*" and this necessity of testimony to present the issue cannot be supplied by abstract instructions. It would be a new doctrine, and one which I think the majority do not intend to announce, to say that an instruction which merely declares the law applicable to a particular state of facts can supply the necessity of proving those facts.

The case of *Patterson* v. *Risher,* 143 Ark. 376, 221 S. W. 468, was a well-considered case, and I do not understand that the majority intend to impair its authority. They have quoted the quotation appearing and approved in that case taken from the case of *Bradley* v. *Rosenthal,* 154 Cal. 420, but, in my opinion, they have not applied the rule there approved to the facts of this case.

The principle applied in the *Patterson* v. *Risher, supra,* case is that, while the master is responsible for the negligence of his servant, and must respond in damages for such negligence, yet, where the sole claim for damages against the master is that the servant's negligence inflicted the injury and caused the damage, a finding that the servant was not negligent necessarily discharges the master, because, if the servant was not negligent, then there is nothing for which the master should respond. Here we have not only an entire absence of testimony that the plaintiff was guilty of contributory negligence, but we have the contention of his able counsel made before us that he was not guilty of contributory negligence. There is therefore no negligence to com-

pare, and the doctrine of comparative negligence is unavailing.

There are certain exceptions to the rule announced in *Patterson* v. *Risher,* but they are more apparent than real. For instance, in the case of *Davis* v. *Hareford,* 156 Ark. 67, 245 S. W. 833. Without questioning the law as declared in *Patterson* v. *Risher,* we distinguished it from the case of *Davis* v. *Hareford,* and the distinction was just this: The Davis case was a suit for damages against both a railroad company and its engineer, whose negligence was alleged to have caused the plaintiff's injury. There was a verdict against the railroad company and in favor of the engineer, and we said the verdict was not inconsistent, because there was a statutory presumption of negligence against the railroad company, which the jury might have found was not overcome, whereas there was no such presumption against the engineer, and the finding may have been made in that case that the statutory presumption against the railroad company was not overcome, whereas, as against the engineer, the testimony might not have been sufficient unaided by that presumption, to establish negligence on the part of the engineer.

The majority say, in effect, that this principle may have been applied in the instant case, inasmuch, as against the master, the doctrine of comparative negligence applied, whereas, as against the servant Hudgins, contributory negligence was an absolute defense. In other words, the jury might have found that the plaintiff was guilty of some negligence contributing to his injury, and for this reason his right to recover was defeated as against Hudgins, whereas, as against the master, a corporation, the right to recover would not have been defeated unless the negligence of the plaintiff was equal to or greater than that of Hudgins.

But it may again be answered that this theory has no place in this case, for the reason that the plaintiff denied at the trial and now denies in his brief on this

appeal that he was guilty of any negligence whatsoever, and there is not a particle of testimony in the record that he was guilty of the slightest negligence. Certainly he should be bound, if not by his contention at the trial, then by his solemn admission before us.

The sole ground upon which liability has been asserted against the defendant corporation is that Hudgins was negligent, and that this negligence was the sole cause of the plaintiff's injury, and as the jury has found that Hudgins was not guilty of negligence, and as appellee insists that he, too, was not negligent, the doctrine of the Risher case applies, and in our opinion therefore the judgment against the defendant corporation should conform to the jury's finding, and if this is done the judgment against the master should be reversed and the case dismissed.

We therefore respectfully dissent from what we regard as the inconsistency of holding the corporation liable when Hudgins has been found by the verdict of the jury not to have been guilty of negligence.

I am authorized to say that Mr. Justice McHaney concurs in the views here expressed.

[redacted]

Irwin *v.* Alexander.

Opinion delivered November 2, 1931.

[redacted]

M. E. Vinson and *George W. Reed,* for appellant.

Wallace Townsend and *S. S. Jefferies,* for appellee.

Mehaffy, J. The appellants brought suit in the Cleburne Chancery Court asking for a review of the correctness of the judgment of the Cleburne County Court

to the effect that there is in existence indebtedness in the county in the sum of $35,000 which may be funded by the issuance of bonds, asking that the court find and decree that there is no indebtedness which may be funded, and praying that the court find and decree that the county court has no authority to issue or order to be issued any bonds of Cleburne County to fund any indebtedness under Amendment No. 8 to the Constitution of the State of Arkansas.

The only question for us to determine is whether Cleburne County had the legal right to issue bonds under Amendment No. 8 of the Constitution.

The county court on June 1, 1931, made an order that the court on that day ascertained and declared that, of the total indebtedness of the county at the time of the adoption of Amendment No. 8, there is an amount of $35,000 which had not been funded, which can now be funded by the issuance of bonds. The court had, on June 17, 1925, after the adoption of Amendment No. 8, found the indebtedness of the county existing at the time of the adoption of the amendment and at the time of the order to be $64,974.27, and it is contended that since the county did not issue all the bonds that it might have issued at that time, it now has the right to issue the difference between the existing indebtedness and the bond issue of 1925.

The court entered a decree dismissing the complaint of plaintiffs for want of equity, and the case is here on appeal.

It is true, as contended by appellee, that the finding of the county judge in 1925 as to the amount of indebtedness existing then and at the time of the adoption of the amendment to the Constitution became final after 30 days. The court, however, at that time issued an order calling in all outstanding warrants, except the courthouse warrants, for the purpose of re-issuing as provided in § 1994 of Crawford & Moses' Digest, and on July 21, 1925, the county court made an order in which it found that warrants of the county had been filed for re-issue in the total

sum of $26,381.50, and on the same day the court made an order finding that it was to the best interest of the county not to fund outstanding courthouse warrants. All warrants that were not filed for re-issue in compliance with the court's order were void. Under the order of the court at that time, the only bonds that could be issued would be bonds to take up the $26,381.50.

Section 1996 provides: "All persons who shall hold any warrants of said county, and neglect or refuse to present the same as required by the order of the court and the notice aforesaid, shall thereafter be forever debarred from deriving any benefits from their claims."

It seems therefore clear that there was no authority to issue any bonds except to pay the $26,381.50.

It is now contended by appellee that, since the $29,900 bonds for the payment of the courthouse indebtedness were not issued and sold, they can now be issued and sold, and that they represented indebtedness outstanding on the courthouse debt at the time former bonds were sold. There is no claim that any of the other indebtedness of Cleburne County now existing existed at the time or prior to the adoption of the amendment. Therefore there is no contention that any bonds can be issued by the county except to redeem the courthouse warrants.

The appellee contends that the judgment or order of the county court of 1925 became after 30 days *res judicata,* and that, we think, is correct. At that time, however, the court expressly found that it was to the best interest of the county not to refund outstanding courthouse warrants, and they were not refunded. Before making the order in controversy here, Amendment No. 17 to the Constitution of the State of Arkansas was adopted, and that amendment provides the procedure for taking up any indebtedness existing at the time of the adoption of said amendment in 1928.

We think it is wholly unimportant to decide whether the county court, after making the order finding that it was not best to refund the courthouse warrants, could refund courthouse indebtedness under Amendment No. 10

prior to the adoption of Amendment No. 17. After the adoption of that amendment the county court had no right to refund the courthouse indebtedness except by complying with the provisions of said amendment.

Section 1 of Amendment No. 17 is as follows: "The power and right is hereby vested in the qualified electors of each respective county in this State, by a majority of said electors voting on the question, to authorize the construction, reconstruction, or extension of any county courthouse or county jail and to authorize the levy of a tax not to exceed one-half of one per cent. on the dollar of the valuation of all properties in such county subject to taxation to defray the cost and expenses thereof or to take up any indebtedness existing at the time of the adoption hereof incurred in building, construction, or extending any county courthouse or jail."

It will be noticed that the power and right to authorize the construction of courthouses or jails or to take up existing indebtedness is vested in the qualified electors by Amendment No. 17. Therefore, the county court did not possess the power and right to issue bonds to pay the courthouse debt after the adoption of Amendment No. 17.

As we have already said, the only question involved is the right of the county to issue bonds for the courthouse indebtedness because there is no claim and no evidence that any other indebtedness now existing existed prior to the adoption of Amendment No. 10. The county can issue bonds to take up the warrants for the courthouse indebtedness only by complying with Amendment No. 17. *Boydston* v. *Condray,* 183 Ark. 336, 36 S. W. (2d) 64; *Carter* v. *Cain,* 179 Ark. 79, 14 S. W. (2d) 250.

The decree of the chancery court is reversed, and the cause remanded, with directions to enter a decree prohibiting the issue of bonds except by complying with the provision of Amendment No. 17.

GLICK *v.* DANIEL.

Opinion delivered November 2, 1931.

[redacted]

Coleman & Riddick, for appellant.

Henry Donham and *Martin K. Fulk,* for appellee.

McHANEY, J. Appellee sued appellant to recover a broker's commission of 5 per cent. of the sale price of certain laundry properties for procuring the signing and delivery of a contract between appellant and S. R. Morgan which contemplated a sale to a new corporation at a price of $222,500. The complaint alleged that appellant was the owner of all the capital stock of the Glick Cleaning & Laundry Company, with a plant in St. Louis and one in Fort Smith; that he contemplated the purchase of the Rose City Laundry in Little Rock; and that he desired to transfer all these properties to a new corporation; that about September 1, 1929, appellant employed him to execute a sale of the properties and to procure the execution of a contract to that end; that he brought Morgan and appellant together which resulted in the execution and delivery of the agreement between them hereinafter set out; that he was entitled to 5 per cent. of

the value of said properties as fixed in the contract as commission, in the sum of $11,075. Appellant answered denying all the allegations of the complaint, and by amendment pleaded failure to comply with the "Blue Sky" act in bar of the action. The written contract between appellant and Morgan follows:

"This instrument of writing witnesseth:

"An agreement between Joseph Glick, a resident of Fort Smith, Arkansas, and S. R. Morgan, a resident of Little Rock, Arkansas, to-wit:

"That said Joseph Glick is and or shortly will for himself and or with others, be or become the sole owner of all the assets of every kind and character of three certain laundries and cleaning plants, free and clear of any incumbrances or liabilities whatsoever, situated repectively in the cities of St. Louis, Missouri, Fort Smith, Arkansas, and Little Rock, Arkansas, which said three properties, said Joseph Glick undertakes and contracts to deliver to a corporation shortly to be caused to be brought out by the said S. R. Morgan for and in consideration of the sum of two hundred and twenty-two thousand and five hundred dollars, ($222,500) and other considerations below, to be more fully set out.

"By the payment of the sum of eighty-seven thousand and five hundred ($87,500) in cash to retire the present sundry incumbrances on the three properties, in the amounts of approximately thirty-six thousand dollars ($36,000), fourteen thousand dollars, ($14,000) and thirty-seven thousand five hundred dollars ($37,500) and the further sum of twenty-five thousand dollars ($25,000) in cash to be paid over to the said Joseph Glick, or a grand total of one hundred and twelve thousand and five hundred dollars ($112,500); and the further consideration of eleven hundred (1,100) shares, par value one hundred dollars ($100) per share, seven per cent. (7%) quarterly dividend preferred stock of the said new corporation to be caused to be brought out by the said S. R. Morgan, total consideration two hundred and twenty-two thousand and five hundred dollars ($222,500).

"It is contemplated and hereby agreed that said S. R. Morgan will attempt to discharge the liens and payments above referred to by use in substitution or otherwise of the notes, debentures or bonds of the new corporation to be brought out for the securities of the existing companies. This is a burden assumed by S. R. Morgan, and, in the event of his inability to arrange said indebtedness as above contemplated, then in that event he contracts and agrees herein to make the said loans himself, or cause them to be made by other banks or bankers.

"It is further agreed that the new corporation to be brought out will have an authorized issue of ten thousand (10,000) shares of no par common stock; fifty per cent. (50%) of the said common shares of stock are to go to the said Joseph Glick as additional consideration to the two hundred and twenty-two thousand and five hundred dollars ($222,500) above enumerated, and the remaining fifty per cent. (50%) of common stock is to be paid to said S. R. Morgan in consideration of his services in arranging the financing above set out, and for such further financial service as he may and will render to the said new corporation; it being the intention herein that said Joseph Glick and said S. R. Morgan will move on a fifty-fifty basis (50-50) basis in equity of the property.

"It is understood that some ten or fifteen days will be required to arrange the mechanics and the machinery for the authority of the new corporation to function in the States of Missouri and Arkansas, and the said S. R. Morgan agrees to go about expeditiously to the bringing out of the said corporation. In the meantime, it is desirable to the two parties that the sum of $..... be at this time paid over to acquire a Little Rock unit of the properties, and the said S. R. Morgan agrees to at this time furnish the $.....to discharge the final payment due on the Little Rock unit under the agreement that should, through the possibility of uncertainties, anything arise to prevent the carrying out of this agreement in full; then he will cause the Little Rock property

to be conveyed to the nominee of the said Joseph Glick upon the return of the amount furnished by him, plus the expenses incident thereto, at any time upon the order of the said Joseph Glick prior to October 1, 1929.

"It is agreed that said S. R. Morgan is moving up to this time upon the representations, appraisals and valuations of the said Joseph Glick on the Fort Smith, Arkansas, and the St. Louis, Missouri, units of the property, and it is agreed that he is to have and is hereby allowed fifteen days from date hereof to approve or disapprove of said properties at the figure of one hundred and eighty thousand dollars ($180,000) such approval or disapproval to be in writing, by registered mail, addressed to the said Joseph Glick, Fort Smith, Arkansas, on or before midnight, September 14, 1929, such acceptance or rejection without assignment of reason or cause on the part of the said S. R. Morgan to be absolute.

"Witness our hands and seals this, the 31st day of August, 1929.

(Signed) "S. R. Morgan,
"Joe Glick."

A jury trial resulted in a verdict and judgment in appellee's favor for $1,775.

For a reversal of the judgment it is first argued that appellee's contract with appellant "is void because prohibited by the laws of Arkansas," first, by act 148 of 1929, p. 742, providing for the licensing of real estate dealers and brokers, and, second, by §§ 750 to 771, Crawford & Moses' Digest, commonly known as the "Blue Sky" act. Appellant did not plead act 148 of 1929 in bar of the action, but we think it has no application to the facts in this case. So far as shown by the evidence, no real estate was involved in the deal. Nor does the "Blue Sky" act apply, as appellee was not selling stocks, bonds or other corporate securities, nor otherwise violating that act. He brought appellant and Morgan together, who entered into the above contract, which did provide for and contemplate a sale of certain laundry plants to a corporation which Morgan would cause "to be brought out."

It is next argued that, conceding appellee was employed by appellant, he cannot recover because he failed to perform his contract. In this connection, it is said the complaint alleges he was employed to "execute" the sale of certain properties and to procure the "execution" of a certain contract; that the contract between appellant and Morgan was conditional and could not have been executed until the conditions were performed; and that this was never done and the contract never performed. We think the obvious meaning of the word "execute" as used in the complaint was to sign and make a contract for the sale of the properties. In other words, appellee was employed to procure the making and signing of a contract for the sale of the properties satisfactory to both parties, which he did. He did not make nor sign the contract himself. He was not a party to it in any way except to bring the parties together. He did not prepare it, but, on the contrary, it was prepared by Morgan's attorney, to the apparent satisfaction of appellant, who was present representing himself, and signed the contract. We do not think it necessary to determine whether the contract was valid and binding after the lapse of the time which was given him to inspect the properties and to organize a new corporation. The fact is it was performed in part by the payment by Morgan of $36,000 to complete the purchase of the Little Rock property and some $2,000 additional was advanced for other purposes, all of which was returned by appellant to Morgan in June, 1930, and the agreement canceled apparently by consent. Appellant said he considered he had a valid and binding contract, and that Morgan breached it. He said Morgan advanced only $38,000, yet he voluntarily paid back to Morgan $42,500 which is the sum Morgan claims to have advanced. Under this state of facts and in view of the testimony of appellee that his commission was due when the contract was made, we cannot say there is no evidence to support the jury's finding that he did perform his contract.

Appellant next contends the case should be reversed for errors in the instructions and the admission of testimony. The testimony of Mr. Garner that the usual commission for services of the kind claimed by appellee is from 5 per cent. to 15 per cent. of the money obtained under the contract was admitted over appellant's objections. It is claimed that this constituted a variance and was further emphasized by the giving of appellee's instruction No. 5 to the effect that, even though the jury might find there was no contract between them for an agreed compensation, yet, if appellee performed services for appellant of such a nature as to induce the belief that the parties understood compensation was to be had, then a recovery might be had on *quantum meruit*. We think it was not error to admit the testimony and to give the instruction, but if so it was harmless. The verdict of the jury was for $1,775, which is 5 per cent. of $35,500, approximately the amount Morgan paid appellant for the balance of the purchase price of the Little Rock plant and was a finding on disputed facts that there was a contract between them for 5 per cent. of the purchase price. We cannot say that the jury's verdict was based on a *quantum meruit,* and therefore no prejudice could have or did result to appellant.

What we have already said makes it unnecessary to discuss instructions 3 and 11 requested by appellant and refused by the court and assigned as error. It appears to us that the court fully and fairly instructed the jury; that the verdict is supported by substantial testimony; and that the case must be affirmed. It is so ordered.

CONSOLIDATED INDEMNITY AND INSURANCE COMPANY *v.* STATE USE CRAIGHEAD COUNTY.

Opinion delivered November 2, 1931.

Baker & Gautney, for appellant.

Chas. D. Frierson, Jr., and *Chas. D. Frierson,* for appellee.

McHaney, J. Prior to February 21, 1930, the American Trust Company of Jonesboro, hereinafter called the bank, was designated by proper orders of the county court a depository of the public funds of Craighead County, conditioned upon its giving bond. On said date the bank as principal and appellant as surety, executed a bond to the county treasurer and the State in the sum of $50,000, referred to as the penalty, and conditioned that the bank should, during the term thereof beginning that date and ending December 31, 1930, "promptly pay over on proper legal order such cash and cash items as shall have been actually and regularly deposited with it during the terms of this bond in an account subject to check, together with the balance of cash or cash items to the credit of the obligee at the beginning of said term, as well as the amount of interest which the bank has contracted to pay thereon, then this obligation shall be null and void; otherwise to remain in full force and

effect." On November 1, 1930, the bank became, or was insolvent, and was placed in the hands of the Bank Commissioner for liquidation with George A. Knox, special deputy in charge. On that date the county treasurer had on deposit in the bank subject to check $86,459.70. Thereafter demand was made on appellant to pay the amount of its bond, $50,000, which it declined to do, and this suit followed, making the bank, the Bank Commissioner, the special deputy, Knox, and appellant defendants. Appearance was entered by all defendants except appellant. It thereafter filed a petition and bond for removal of the cause to the Federal District Court for the Eastern District or Arkansas on the ground of diversity of citizenship, it being a foreign corporation. It was alleged in the petition that, as between it and appellees, there was a controversy that could be wholly determined without affecting the interest of its co-defendants; that the bank was insolvent and in the hands of the Bank Commissioner; that the appellees' claim had been filed and allowed, there being no dispute about the amount of it, and that further litigation could not under the law gain for the treasurer any additional right or remedy in the collection thereof; that, on account of the nature of the action involving public funds affecting the interests of taxpayers and public of the county, it could not get justice in the State court, by reason of prejudice and local influence; and that the cause was separable; that the other parties defendant are not necessary parties and were joined for the wrongful purpose of preventing a removal. The court heard and denied the petition to remove on the ground that the requisite diversity of citizenship between the parties did not exist, and that there was no separable controversy between citizens of different States, it being a suit against principal and surety, the former being a citizen of this State and the latter of a different State, and that all defendants were properly joined. Appellant answered under protest, denying its full liability under said bond, and pleaded certain provisions thereof hereafter set out as reducing the

amount of its liability thereunder. The bank, the Bank Commissioner and the special deputy answered admitting liability of the bank, but that such liability must be liquidated under the State banking laws.

The case was submitted to the court sitting as a jury and judgment was rendered against appellant for the full amount of the penalty of its bond, with interest, and against the bank and Bank Commissioner for the full amount of the deposit without execution on the bank, but to be paid in the regular course of liquidation. Appellant only brings the case here for review on appeal.

It is first said the court erred in refusing to remove the cause to the Federal court. No error was committed in this regard as there was no separable controversy, such as entitles appellant to remove. This is a suit against the principal, the bank, and the surety, appellant. The obligation is joint and several. Both the bank and appellant agree in the obligation that they are held and firmly bound to the obligee "in the full and just sum of fifty thousand and no/100 dollars ($50,000) * * * for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, *jointly and severally,* firmly by these presents." So it is denominated in the bond that the obligation is joint and several. As said in 21 R. C. L., § 123, p. 1081: "As a surety is one who enters into a contract with another as principal, either jointly or jointly and severally, he may in all cases be sued jointly with the principal. But, if the obligation is joint and several, the creditor has the undoubted right to proceed against the surety alone, or, if he chooses, he may sue the principal and at the same time bring an action also against the surety, and prosecute both suits concurrently until he obtains satisfaction from one of them." Appellees therefor had the undoubted right to sue both the bank and appellant jointly as has been done in this action, and it can make no difference that the claim has been presented to and allowed by the Bank Commissioner and his liquidation agent, nor that the bank acknowledges the indebtedness and admits the amount

thereof to be justly due. There might be and probably are a number of reasons why appellees desire to secure this judgment against the bank, the principal in the bond. Whatever these reasons may be, and although the bank is admittedly insolvent, appellees had the right to join these parties as defendants at their option under the statutes of Arkansas and the decisions of this court. By § 1099, Crawford & Moses' Digest it is provided: "Persons severally liable upon the same contract, including * * * sureties on the same or separate instruments, may all, or any of them, * * * be included in the same action at the plaintiff's option," and § 1100 provides: "Where two or more persons are jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option." See also § 1076, Crawford & Moses' Digest. Appellees having the absolute right to join appellant with the other defendants, there is no separable controversy and no right to remove as such. The other allegations of the petition for removal do not amount to a charge of fraudulent joinder. Moreover, it appears that the charge of local prejudice among the taxpayers and because of the subject of litigation being public funds passes out of the case as a jury was waived, and trial was had before the court, against whom no charge of prejudice was made.

Passing now to the arguments made on the merits, appellant concedes that it is liable in some amount, but that the full penalty of the bond should be reduced by reason of three certain terms and conditions of the bond. It is also conceded that the facts are undisputed, which is true. The bond contained the following three express conditions, which are made precedent to the right of recovery:

"(1). If any time during the term of this bond the obligees, to the amount of $25,000, which, to that the moneys deposited with the bank, such security shall not be released without notice to, and the written consent of the surety.

"(2). In case the moneys on deposit with the bank to the credit of the obligee shall, at the time any loss is sustained on this bond, exceed the penalty of the bond, and obligee shall not hold additional security equal to the amount of such excess deposits, the liability of the surety hereon shall be limited to such proportion of the penalty of this bond as the said penalty shall bear to the total sum of money on deposit at the time of the loss.

"(3). The surety shall be liable hereunder only for such proportion of the total loss sustained as the penalty of this bond shall bear to the aggregate amount of all bonds and securities, whether collectible or not, furnished to the obligee and in no event shall the surety be liable hereunder in any sum in excess of the penalty of this bond."

It appears that at the time appellant executed the bond in question, there had been for some time certain United States Government 4¼ per cent. bonds and certain improvement district bonds of the par and actual value of $25,000 held in a safety deposit box of the bank under the joint control of the bank and the county treasurer, as collateral security for the county funds, and that a personal bond, called by appellant a "blanket bond", had been executed and delivered by certain persons, officers and directors in the bank, to the county treasurer, guaranteeing the payment by the bank of all the county's funds on demand. This latter bond was executed in April, 1929, and had never been released. The county treasurer was advised by the Attorney General that it was not lawful for collateral to be held in escrow to secure public funds, but that a surety company bond was required. Whether this advice was correct or not, the collateral held under joint control was taken down when appellant executed this and two other like bonds—one to the collector for $50,000, later reduced by agreement to $5,000, and the liability thereon of about $800 paid, and one to Drainage District No. 7 for $32,000, and the liability thereon for $31,000 paid

or conceded. And, at the same time, the collateral above mentioned in the sum of $25,000 and an additional sum of $25,000 of like collateral were delivered to appellant as indemnity to it against liability on the three bonds. No part of the $50,000, collateral, consisting of $30,000 government bonds, was demanded or returned to the bank when the liability on the collector's bond was reduced by $45,000, but it still holds same at this time.

Back now to the three conditions of the bond above quoted:

No. 1. As to No. 1, the security held by the county in the form of collateral was released to the bank and deposited by it with appellant with notice to and its written consent in the form of a receipt therefor to the bank. This disposes of condition No. 1.

No. 2. As to No. 2, it is undisputed that at the time the loss was sustained on the bond, the obligees had moneys on deposit to their credit with the bank in a sum in excess of the penalty of the bond by $36,459.70, and it is also undisputed that the obligees had additional security equal to the amount of such excess deposits over the penalty of the bond. Therefore condition No. 2 has no application, as it applies only in case obligees "shall not hold additional security equal to the amount of such excess deposits." The so-called blanket bond is the additional security. Whether it is good or otherwise we are not called upon to say, but it had not been released or canceled.

No. 3. Under this condition appellant argues that since its bond was for $50,000 and the "blanket bond" was for the whole deposit of $86,549.70, it should be held liable only for such proportion of the total loss sustained as the penalty of its bond bears to the aggregate of both bonds, $136,459.70, or approximately 5/13 of $86,459.70. We cannot agree with this contention. The prior personal bond or "blanket bond" was executed nearly a year prior to the bond of appellant by the officers and directors, or some of them, of the bank. These same parties caused the bank to deposit collateral in a safe

deposit box, under the joint control of the bank and the obligees, to the amount of $25,000, which, to that extent, reduced their personal responsibility. Later the bond in suit was executed, and this same collateral was by the bank, with the knowledge and consent of its officers and directors, together with $25,000 additional, turned over to appellant to indemnify it against loss, and still it insists that the two bonds should share the loss in such proportion. They are not on a parity. One is a paid surety and the other is not. The manifest intention was, just as the learned trial judge held, to indemnify the county to the extent of $50,000 against loss in the bank. It exacted and took from the bank bonds of the par value of $50,000 but of an actual value in excess of that amount. It being a paid surety, the terms of the bond, like an insurance contract, will be construed most strictly against it. *K. C. S. R. R. Co.* v. *U. S. F. & G. Co.,* 174 Ark. 318, 295 S. W. 705. Under the facts and circumstances in this case, we are of the opinion that this holding accords, with the intention of the parties, and is not in conflict with a fair construction of the provisions of the bond.

Judgment affirmed.

FORT SMITH *v.* UNITED STATES RUBBER COMPANY.

Opinion delivered November 2, 1931.

George W. Dodd, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

McHaney, J. The appellee, Eureka Fire Hose Manufacturing Company, operates as a department of the United States Rubber Company and both will hereafter be referred to as appellees. The city of Fort Smith operates under a commission form of government with a mayor, and two commissioners known and designated as commissioner No. 1 and commissioner No. 2, the mayor being in charge of the Department of Public Affairs and being the chief executive officer of the city, and commissioner No. 1 being in charge of the Department of Accounts and Finances and the Department of Health and Safety, the Fire Department being a part of the Department of Public Safety. These will hereafter be referred to as appellants. Appellants were in need of 6,000 feet of fire hose and advertised for bids to be submitted December 22, 1924, for said quantity with the right to take a lesser amount. Appellees submitted the lowest bid, $1.40 per foot, and on that date the parties entered into a written contract for the purchase and sale of 2,000 feet of two and one quarter inch, Paragon Brand, fire hose of certain specifications for a consideration of $2,800, payable one-half July, 1925, and one-half July, 1926. On December 29, 1924, appellant, through commissioner No. 1, ordered an additional 1,000 feet of the same kind of hose and on the same terms as that of December 22, the written order reciting that, at a meeting of the city commission, he was instructed so to do. Again, on March 8, 1925, on account of a disastrous fire in Ft. Smith, which

showed the necessity for additional hose, commissioner No. 1 ordered by telephone an additional 3,000 feet of the same kind of hose and on the same terms as the first order above mentioned, and on March 14, 1925, confirmed this order by letter, and, in addition to the telephone request, ordered 1,500 feet of one and one-half inch hose. In this letter it was stated that "This order is to be handled in the same manner as under date of December 22, 1924." This completed the total amount of hose for which bids were asked as of December 22, and 1,500 feet of smaller hose in addition. All these orders were promptly accepted and shipped by appellees to appellants who found the hose up to specifications and who accepted same, put it into immediate use, and is still using same, being practically all the hose appellants have. When pay day came, appellants neglected to pay, and appellees have been sending statements regularly ever since, requesting and demanding payment, but no part of the debt has been paid. The total amount is $9,900, being $8,400 for the larger, and $1,500 for the smaller hose. This suit followed, being filed February 10, 1931. It was tried by consent before the court without a jury, and judgment was rendered against the city for the full amount sued for.

No contention is made by appellants as to the validity of the contract as to form of the first order for 2,000 feet of hose, dated December 22, nor is much contention made as to the second order of date December 29, although irregularly done, as it is conceded that the city may be estopped to question the validity thereof, so far as the formality required by law is concerned, as was held by this court in *Natural Gas & Fuel Corporation* v. *Norphlet Gas & Water Co.*, 173 Ark. 174, 294 S. W. 52. The commission form of government act, act 13 of 1913, as amended, provides in § 10 that the mayor shall be the chief executive officer of the city and, *inter alia*, shall "sign all bonds, contracts, conveyances and other written obligations of the city." It is contended that the third order confirmed under date of March 14, 1925, is void and unenforcible, because the city commission took

no action thereon, made no minute of it, and the order or contract was not signed by the mayor, was an oral contract and barred by the three year statute of limitations, to be hereafter discussed. We think the third contract not invalid on account of the informalities in its execution, and that the city is estopped in the same manner as on contract No. 2. *Natural Gas & Fuel Corp.* v. *Norphlet Gas & Water Co., supra.* The city also ratified the unauthorized act of its agents, if unauthorized, by accepting, keeping and using the fire hose, and it would do violence to one's sense of common honesty and fair dealing to hold that collection could not be enforced because of mere irregularities in making the contract or that the agent exceeded his authority in doing so. As said by this court in *International Harvester Co.* v. *Searcy County,* 136 Ark. 209, 206 S. W. 312: "The county could not retain the property which it might then legally purchase, continue to use it and defeat a recovery for the price thereof. This follows from the principles decided in *Howard County* v. *Lambright,* 72 Ark. 330, 80 S. W. 148, and *Forrest City* v. *Orgill,* 87 Ark. 389, 112 S. W. 891. In the latter case the city of Forrest City purchased machinery for water works, and the contract was void because not executed as required by § 5473 of Kirby's Digest. The city, however, kept the machinery and continued to use it. The court held that, inasmuch as the contract was one within the power of the municipality to make, although it was made without authority, it could not retain the machinery, use it, and at the same time defeat a lien for the price thereof." See also *Ark. Valley Bank* v. *Kelley,* 176 Ark. 387, 3 S. W. (2d) 53; *Scott County* v. *Advance Rumley Thresher Co.,* 288 Fed. 739; *Texarkana* v. *Friedell,* 82 Ark. 531, 102 S. W. 374. "The theory of these cases," says Judge Kenyon in the Scott County case, *supra,* "is that a corporation, such as a county or city, should not be permitted to stultify itself by accepting property for necessary use, use it for years until it is worn out, and then refuse to pay on the ground of a lack of authority to make the contract.

A municipal corporation, which has enjoyed the fruits of a contract, fairly made, cannot, when called to account, deny the corporate power to make it."

It is next sought to avoid payment on account of the provisions of what has been referred to in many of our decisions as Amendment Number 11 to our Constitution, but what in fact is Amendment Number 10. This amendment became effective December 7, 1924, 15 days prior to the execution of the first contract in this case. *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22. The pertinent parts of said amendment are as follows: "The fiscal affairs of counties, cities and incorporated towns shall be conducted on a sound financial basis * * *; nor shall any city council, board of aldermen, board of public affairs or commissioners of any city of the first or second class, * * * enter into any contract or make any allowance for any purpose whatsoever, or authorize the issuance of any contract or warrants, scrip or other evidence of indebtedness in excess of the revenue for such city or town for the current fiscal year; nor shall any mayor, city clerk, or recorder, or any other officer or officers, however designated, of any city of the first or second class * * * sign or issue any scrip, warrant or other certificate of indebtedness, in excess of the revenue from all sources for the current fiscal year." Then follows the bond issuing provision for debts existing at the time of the adoption of the amendment. As was said in *Polk County* v. *Mena Star Co.,* 175 Ark. 76, 298 S. W. 1002, with reference to counties (and the same applies to cities), this amendment was drawn and adopted with two purposes in view: "(1) to prevent them from incurring any indebtedness in any fiscal year in excess of the revenue from all sources for such year; and (2) to provide a way to pay indebtedness existing at the time of the adoption of the amendment." The prohibition therein is against the making of contracts and allowances in any fiscal year in excess of the revenue from all sources for that year. Just what the fiscal year of the city of Fort Smith

was in 1924 is not shown, but the enabling act of 1925 made it the same as the calendar year. Act No. 210 of 1925, p. 611, § 7. The amendment does not prohibit the city from going in debt, but from going in debt in excess of the revenue from all sources for the fiscal year. It was prospective in operation and had no effect on indebtedness existing prior to its effective date. *Shroll* v. *Newton County,* 173 Ark. 1121, 295 S. W. 1, but did prohibit the incurring of indebtedness thereafter in excess of the revenue for the fiscal year. Since the city had no fiscal year at the time of the adoption of this amendment, December 7, 1924, we think it reasonable to establish it from that date to December 7, 1925, and, if so, we find the revenue largely in excess of $200,000, whereas this debt was only $9,900. Or if we say the fiscal year was the calendar year, the same thing is true for the year 1925. Or if we say it comes under the 1924 fiscal year from January 1 to December 31 inclusive, it is not shown that the debts contracted during that year were of themselves in excess of the revenue of that year. True, taking into consideration the old debts, contracted prior to 1924, and the payments made thereon from revenue during that year, there was a deficit in the revenue; but that is not what the amendment prohibits. There has not been a year since this debt was incurred, no matter on what basis the fiscal year is fixed, that the revenue was not in excess of this debt. As said in *Miller* v. *Woodruff County,* 176 Ark. 889, 1 S. W. (2d) 998, with reference to the construction of this amendment as applied to counties: "A county, whether it issues bonds or not, cannot increase the amount of its existing indebtedness; but it is not an increase of indebtedness if a county, which cannot redeem all of its outstanding warrants, issues others which cannot be redeemed through the lack of funds, but which, when issued, are not in excess of the indebtedness outstanding at the end of the prior fiscal year. To illustrate: If a county has an outstanding indebtedness of $19,441, as Woodruff County had at the beginning of the fiscal year,

it may, during that year, issue warrants which, while they cannot be redeemed, do not exceed the indebtedness existing at the beginning of that year. The amendment does not prohibit this. The prohibition of the amendment is against increasing the amount of the indebtedness." So here the contracts of the city for 1924 did not exceed the revenues of that year. This debt was to be paid one-half in 1925 and the balance in 1926, and was for the accommodation of the city. Being valid when contracted, the indebtedness may be paid out of the revenues of subsequent years. *Polk County* v. *Mena Star Co., supra; Miller* v. *Woodruff County, supra.*

Finally, it is argued that the order for hose in March, 1925, was an oral contract, made by telephone, and is barred by the three-year statute of limitations. We cannot agree with appellants in this contention. It is true the order was given over the telephone, but later it was confirmed in writing, was accepted by appellees in writing by shipping the hose and rendering invoice. This was a written contract. Moreover the record discloses several letters from appellants to appellees acknowledging the debt and tolling the statute.

We find no error, and the judgment is affirmed.

HILL *v.* ZANONE.

Opinion delivered November 2, 1931.

R. E. Wiley, for appellant.

L. C. Auten and *Carl E. Bailey,* for appellee.

BUTLER, J. The question in this case involves the right of the executor to commissions for the administration of the estate of R. B. Oliver, and comes to this court on exceptions to the claim of the executor for credit on his final settlement for commissions, which exceptions were sustained by the trial court and the credit asked was denied.

The clause of the will upon which the trial court based its finding is as follows: "I * * * do hereby appoint as my executors to serve without bond and without pay my son-in-law, Dr. Joe Zanone, my partners, D. B. Hill and J. H. Oliver." The persons named offered the will for probate and applied for letters testamentary. The will was admitted to probate and letters testamentary ordered issued, requiring however, (the desire of the testator notwithstanding) that the applicants for letters be required to give bond in the sum of $50,000 for the performance of their duties. From the statement made in appellant's brief it appears that the probate court discovered that Dr. Zanone was a nonresident and eliminated his name from the petition by marking it out with a pen. Contemporaneously with the order appointing the executors, J. H. Oliver, one of the executors, filed his written resignation as such, and the court made an order accepting the same. D. B. Hill was the only one of those named in the will as executors and appointed by the court who qualified and proceeded with

the administration of the estate, satisfactorily accounting for a sum slightly in excess of $190,000.

At common law executors and administrators were not entitled to compensation for their personal trouble and loss of time in the discharge of their duties, and it is only by the direction of the testator or where the will is silent, that compensation is allowed by virtue of the statute. In some States, where no provision for compensation is made by statute or in the will, the courts allow reasonable compensation, and in one jurisdiction (Maryland) it has been held that, since the statute allows commissions for the administration of an estate, the will cannot deprive the executor of that right; but in Woerner's American Law of Administration (3d ed.), it is said: "The current of authorities, however, is that, if the testator has given a legacy in lieu of commissions or imposed upon his executors the condition that they should not have commissions, the court cannot defeat the provision of the will." Volume 3, p. 1827-28. That rule has been adopted in this State.

"While there is some conflict in the authorities, the great weight of authority sustains the proposition that a testator can fix the compensation of his executor. * * * If the executor named in the will is not willing to serve for the compensation fixed by the will, he is not required to serve, but may decline to do so." *Gordon* v. *Greening,* 121 Ark. 617, 182 S. W. 272.

"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." *James* v. *Echols,* 183 Ark. 826-830, 39 S. W. (2d) 290.

It is the opinion of the majority that, although the court required bond against the express wish of the testator, and one of the executors named was disqualified and another resigned, Hill by undertaking to administer the estate brought himself within that clause of the

will requiring him to serve without compensation and therefore the rule announced in the above authorities applies to him, and the order denying him compensation was correctly made and must be upheld; that this is true notwithstanding the fact that the executor might have been advised that he would be entitled to compensation or that his consent to act was induced by the solicitation of the beneficiaries under the will. Hill offered testimony to establish this state of facts, which testimony was refused by the trial court; but, as this evidence was immaterial, the court committed no error in refusing to permit its introduction.

It is the view of the CHIEF JUSTICE and of Mr. Justice KIRBY, in which the writer concurs, that, because of conditions which arose not contemplated by the testator, and which are reflected by the record itself, the administration by Hill was equivalent to that of administrator with the will annexed; that the rule heretofore announced does not apply, and that the executor is entitled to a reasonable commission not exceeding that fixed by the statute.

The appellant suggests that the character of the transactions as reflected by the account and settlement shows that the executor is bound to have incurred expenses in the administration of the estate, and that, if we should conclude that he is not entitled to commissions, he asks that he be given an opportunity to show the amount of the expenses incurred and for such to be allowed and paid to him out of the estate. Appellee replies that this question was not raised in either the probate or circuit court. This is true, but it does not follow that the executor would not be entitled to his legitimate expenses in the administration of the estate, and may not yet file his claim therefor. *Hilton* v. *Hilton* (Ky.) 109 S. W. 905; *Adamson* v. *Parker*, 74 Ark. 168-172, 85 S. W. 239. In *James* v. *Echols, supra,* it is said: "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 trans-

acting the business of the estate, but he must prove the particular items of expense and cannot claim the amount 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 court 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; *Scroggins* v. *Osborn Co.,* 181 Ark. 424, 26 S. W. (2d) 95. Therefore the executor may present his claim to the probate court for expenses incurred in the administration of the estate of the character and in the manner prescribed in *James* v. *Echols, supra.*

Affirmed.

STREET IMPROVEMENT DISTRICTS NOS. 481 AND 485 *v.* HADFIELD.

Opinion delivered November 9, 1931.

Lawrence C. Auten, for appellant.

Linwood Brickhouse, for appellee.

HART, C. J. This is an appeal from a judgment of a circuit court denying certain street improvement districts in the city of Little Rock a writ of mandamus to compel the treasurer of the city of Little Rock to set aside to them certain road taxes collected by him on property within the limits of the city under the provisions of act 66 of the

Legislature of 1931. The act was approved February 26, 1931, and is an act to grant to cities of the first class in counties having a population of 125,000 or more, fifty per cent. of the taxes collected on property in such cities and to aid improvement districts wholly within such cities. Acts of 1931, p. 186.

Section 1 of the act reads as follows: "The tax collector and county treasurer of each county now or hereafter having 125,000 or more inhabitants, according to the most recent federal census, shall, on or before October 1st in each year, pay to the city treasurer of each city of the first class in the county, 50 per cent., or the percentage now being paid if it exceeds 50 per cent., of all road taxes and delinquent road taxes collected by them respectively on property within the corporate limits of the city. The term 'road taxes' shall embrace all road taxes, including the three-mill road tax, the $4 per capita tax, and every other road tax levied in the county, the expenditure of which the Legislature is authorized to direct, and which have not already been allotted by law to particular street improvement districts."

Section 2 provides that the city treasurer of each city affected by § 1 of the act, having outstanding valid bond issues, shall at quarterly periods set aside in a special fund to be known as the "Street Improvement Bond Redemption Fund," one-half of all road tax funds received from the county collector and county treasurer, and one-half of all funds derived from city automobile, truck, or other vehicle license taxes, to be used in paying the bonds, with interest thereon, of such improvement districts.

Section 3 provides that the city clerk shall annually ascertain the dates of issuance and of maturities of all outstanding bonds issued by each improvement district affected by the terms of the act.

Section 4 provides that on October 1st the city clerk shall certify to the board of commissioners of each improvement district the amount of the fund apportioned to the district for the ensuing year.

Section 5 provides that improvement districts that are not wholly within city limits and those whose bonds were issued prior to February 4, 1927, shall not come under the provisions of the act.

Section 6 provides that compliance with the act may be enforced by mandamus.

The complaint of the improvement districts for the writ of mandamus was denied by the court, and the complaints were dismissed on the ground that the act was unconstitutional as being in violation of amendment No. 14 to our Constitution, initiated by the people in 1926 and adopted at the general election held in that year, which provides that the General Assembly shall not pass any local or special act.

The general rule is that classification is properly based on population when reasonably adapted to the subject of the statute. Otherwise the classification by population is special legislation. Other circumstances than population may be made the basis of classification when reasonably germane and pertinent to the subject-matter. 36 Cyc., pp. 1004-1006, and cases cited; 25 R. C. L., § 66, p. 817, and cases cited.

The authorities generally hold that classification of cities and towns by population can not be arbitrarily adopted as a ground for granting some of them powers denied to others if, although there be a difference in population, there is no difference in situation or circumstances of the municipalities placed in the different classes, and the difference in population has no reasonable relation to the purposes and object to be attained by the statute. *L'Hote* v. *Village of Milford,* 212 Ill. 418, 72 N. E. 399, 103 Am. St. Rep. 234. In that case the court quoted with approval from one of its former opinions the following:

"The rule is that a classification cannot be adopted arbitrarily upon a ground which has no foundation in difference of situation or circumstances of the municipalities placed in the different classes. There must be some reasonable relation between the situation of munici-

palities classified and the purposes and objects to be attained. There must be something in the nature of things, which in some reasonable degree accounts for the division into classes."

The court again held that an arbitrary classification upon a ground which had no foundation in difference of situation or circumstances could not be adopted.

Sometimes it is difficult to make a proper application of the rule to the facts of a given case, but the rule itself is so well established in this State that we need only cite a few of our cases in support of it. *Little Rock* v. *North Little Rock,* 72 Ark. 195, 79 S. W. 785; *Ark-Ash Lumber Co.* v. *Pride & Fairley,* 162 Ark. 235, 258 S. W. 335; *McLaughlin* v. *Ford,* 168 Ark. 1108, 273 S. W. 407; *LeMaire* v. *Henderson,* 174 Ark. 936, 298 S. W. 327; *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617; and *Simpson* v. *Matthews, ante* p. 213.

In the case first cited, the court had under consideration a statute allowing municipal corporations to be annexed and made part of other municipal corporations located within one mile of the municipal corporation to which the same was to be annexed upon compliance with the provisions of the act. It was contended that this was a special act and violated the provisions of the Constitution which prohibits the Legislature from creating municipal corporations and conferring corporate powers by special act. The court held that the classification made by the statute was not arbitrary and unreasonable. It was pointed out that there were at present at least two different localities in the State which came within the statute, and that towns which were situated within a mile of each other might be conveniently annexed while municipalities separated by greater distances could not be conveniently consolidated or annexed to each other. Consequently, the court said that the positions of the towns and cities embraced in the act in relation to each other distinguished them from other municipalities not so situated, and that situation under the circumstances was a reasonable basis for classification. In this connection,

it may be said that laws properly classifying cities and towns for organization and for the purposes of civil government are general in their nature. The reason is that in such cases population is a reasonable basis for classification because the density of population in cities makes it necessary to give them additional powers in the administration of the affairs of such cities. In such cases the law operates equally upon all cities wherever situated in the State which fall within the class, and the population of the county does not enter into such classification.

In *Harwood* v. *Wentworth,* 162 U. S. 547, 16 S. Ct. 890, the Supreme Court of the United States sustained a salary act for the Territory of Arizona as being general in its operation. 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 classification.

In the present case, no substantial or appropriate reason is given or is apparent to us for the distinction in legislation of this kind between cities of the first class in counties having 125,000 inhabitants or more and those in counties of a less number of inhabitants. The subject-matter of the legislation was to give certain designated cities fifty per cent. of all road taxes collected on property within their limits and to set aside a special fund for one-half of these road taxes received from the county collector to be used in paying improvement district bonds. There is nothing in the terms of the act to distinguish the cities included from those excluded, and making the legislation fit and appropriate to those included and inappropriate to the conditions of those excluded so as to be of no benefit to them. By this act preferences and advantages are given to municipal corporations simply because they are in Pulaski County, which is the only county in the State with a population of 125,000 or more. There would be no good reason. in the nature of things, why cities of the first class situated in counties having a smaller population than 125,000 should not have one-half of the road fund derived from property within their limits in like

manner as the cities in Pulaski County. It is therefore an arbitrary and unnatural classification of municipalities coming under the same general class and not materially differing in needs and requirements and exercising the same general powers in other respects. *People* v. *Knopf,* 183 Ill. 410, 56 N. E. 155; Scowden's Appeal, 96 Pa. St. 422; *State* v. *City of Trenton,* 42 N. J. 486; *State* v. *Weakley,* 153 Ala. 648, 45 So. 175.

In the Illinois case just cited, the act provided that in counties having a population of over 125,000, the aggregate rate of taxation should not exceed 5 per cent. and the county school and municipal tax rate should be scaled *pro rata,* if necessary to bring the aggregate rate within that limit. The act was held void as special legislation because it made a class of cities, towns and school districts in such counties without any reasonable grounds therefor. In discussing the question, the court said:

"By this act restrictions are put upon cities, townships, school districts, and other municipal corporations simply because they are within Cook County, which is the only county in the State with a population of more than 125,000. There can be no reason, in the nature of things, why a city, village, school district, or other public or *quasi* public corporation in that county should be deprived of powers that a similar corporation situated in some other county is permitted to exercise. It is an arbitrary and unnatural classification of municipalities not different in population, needs, or requirements, and exercising the same general powers in other respects."

In the New Jersey case cited, it was held that a statute purporting to confer upon all cities having a population of not less than twenty-five thousand inhabitants the power of issuing bonds to fund their floating debt was a special law, and in violation of the constitutional amendment which forbids the passing of special laws to regulate the internal affairs of towns. In discussing the question, the court said:

"The basis of classification is a minimum of population. The powers to be conferred by the statute concern

the issue of bonds for the purpose of funding floating debts. Now, I am unable to see any natural connection between the number of people in a city and its right to fund its floating debt. It is true that there may be some propriety in denying this authority to very small municipalities and granting it to larger ones, but the same may be said of almost every power usually possessed by cities. And it is manifest that if the classification made by a statute is to be justified or not by considering whether it is proper to apply the peculiar provisions of the law to the particular individual or individuals designed to be affected, then laws will be upheld or overthrown, not as the court shall decide them to be general or special, but as they shall deem wise or unwise. No rule heretofore laid down in this State sanctions such a test of constitutionality, nor do I think that such a criterion should be adopted."

In the Alabama case just cited, the act under consideration provided for the establishment of police commissions "in cities of 35,000 population or more, in counties of 125,000 or more population, and to define their terms of office, duties and powers." The court said that a statute in part was applicable to but one city, and that it was unconstitutional as not being a *bona fide* classification of cities.

The court said:

"The act in question was in no sense a classification of counties, as its manifest object is to create a police board in cities, and pertains in no way to the regulation of counties. Nor is it a *bona fide* classification of cities, as it expressly excludes cities of the same class, unless located in a county of a certain size. While there are cities in Alabama other than Birmingham with the necessary population, Birmingham is the only one located in a county with a population of 125,000. The substance of the act is for the sole purpose of regulating conditions in Birmingham, although the act is disguised in the garb of a general law. While we do not wish to recede from our former decisions on this subject, and do not intend by this

opinion to give the backing signal, we do not think the subject and occasion appropriate for an application of judicial brakes, else § 110 of the Constitution will be absolutely emasculated. The act in question being local, although under the attempted guise of a general law, is repugnant to § 106 of the Constitution, for the reason that no notice was given of the intention to apply for the enactment of same."

In the case before us, the question whether the act has effect or not in any particular city of the first class is determined by the number of inhabitants of the county in which it is situated and by nothing else. As said in *Van Riper* v. *Parsons,* 40 N. J. Law (11 Vroom) 1, the object of this amendment of the Constitution is to exterminate root and branch special and local legislation, and to substitute general law in the place of it in every instance where such substitution can be effected. In this case the court also said:

"All legislation is based, of necessity, on a classification of its subjects, and when such classification is fairly made, and the legislation founded upon it is appropriate to such classification, such legislation is as legitimate now as it would have been prior to the recent amendments to the Constitution."

It is equally well settled that the doctrine of classification is not to be extended for the purpose of evading the requirements of the Constitution. The legislative classification in the act before us is not germane to the subject-matter. The object of the statute was to benefit cities of the first class in a certain locality by giving them 50 per cent. of the road taxes collected on property within their corporate limits and one-half of the fund to be derived from city motor vehicle license taxes, and to aid improvement districts in such cities in the payment of their bonds, where the bonds were issued since February 4, 1927. The subject-matter of the act did not relate to counties at all. The effect, limiting or restricting the benefits provided by the act to cities of the first class in counties having 125,000 or more population, is

to localize the legislation, for such classification is not founded on any real or apparent difference in the situation or condition of cities of the first class. The needs of cities of the first class for relief of this sort does not depend upon the population of the counties in which they are situated. The court will take judicial notice from the United States census reports that Pulaski County has a population of 137,727, and that it is the only county in the State having 125,000 or more inhabitants, or which will likely have at any reasonable time in the future. It has two cities of the first class, and their situation and condition as to the subject-matter of the legislation is not different from that of other cities of the first class in the State. The fact that they are situated in Pulaski County has no reasonable pertinency as to their needs or circumstances with reference to receiving road taxes or vehicle license taxes. It is no answer to say that such taxes are collected from property and vehicles within the city limits, for this would be the case in every city of the first class within the State.

Therefore we are of the opinion the classification does not bear any reasonable or just relation to the subject-matter of the act, and is arbitrary and unreasonable.

For these reasons, the circuit court correctly held that the act under consideration was a local act, and unconstitutional, as being prohibited by amendment No. 14 to the Constitution, and the judgment will be affirmed.

SMITH and KIRBY, JJ., dissent.

[redacted]

WILLIAMS BROTHERS, INC., *v.* WITT.

Opinion delivered November 9, 1931.

[redacted]

Buzbee, Pugh & Harrison, for appellant.
Miller & Yingling, for appellee.

HART, C. J. This was an action for personal injuries by a servant against his master; and from the judgment rendered, appellant, the master, prosecutes this appeal to reverse it on the ground that no negligence on its part was established.

Fred Witt, appellee, was the principal witness for himself. According to his testimony, he was forty-five years old, and had been engaged in farming and logging all of his life. In July, 1929, he was working for Williams Brothers, Inc., in Jackson County, doing general work of all kinds—"hauling, and anything they wanted him to do." He had two teams on the job and got $11 per day for the hire of himself and teams. He looked after his own team, but usually a driver was furnished him. He had worked for the corporation about two months before he was injured. The corporation was engaged in laying gas pipes along a right-of-way in the State of Arkansas. The pipe was steel forty-four feet long, twenty-two inches in diameter, and about one-fourth inch thick. Rubber gaskets, twenty-two inches in diameter, were used to keep the joints of the pipe from leaking. The pipe was first hauled along the right-of-way and distributed; and then the gaskets, which came in sacks with about one hundred in each sack, were hauled along the right-of-way and also distributed.

On the morning the appellee was injured, the right-of-way was blocked with logs and pipes. The foreman directed the plaintiff to distribute gaskets along the line. Appellee told the foreman that there was not any way to get through with a wagon. The foreman replied that there was a way, to go along the right-of-way and to haul the

gaskets and distribute them. The wagon in which the gaskets were hauled had a frame about three and one-half inches deep. The gaskets were piled up fifteen or eighteen inches above the bed, and it was the duty of appellee to sit in the wagon and keep these sacks of gaskets from rolling off. Another man drove the wagon. The right-of-way had been cleared where the pipe was distributed, but it was blocked. The driver of the wagon hit a log, and this threw appellee over against a tree, and his foot caught between the tree and the wagon frame. At the time of the injury, appellee was trying to hold the sacks of gaskets and keep them from rolling off the wagon. It was the custom of appellant to wind around through the woods and make a road. Sometimes the road would be used a week before a new one was made further along the right-of-way.

At the time of the injury appellee was sitting on the wagon with his legs dangling over the side, and the wagon hit something which threw it to one side, and this caused his leg to be caught between the frame of the wagon and a tree. Appellee could tell the wagon was slipping towards the tree, but did not know that it was so close because he was reaching over pulling at a sack of gaskets that was about to fall off. His leg was broken by the accident. Other witnesses corroborated the testimony of appellee.

The evidence for appellant tended to show that it was not negligent in the premises.

Viewing the evidence for appellee in the light most favorable to him, we do not think that any negligence on the part of appellant was shown.

According to the settled law of this State, it was the duty of the master to exercise ordinary care to provide his servants with a reasonably safe place in which to work and reasonably safe appliances with which to work. The burden of proof was upon the injured servant to show negligence on the part of the master or of a fellow-servant which proximately caused his injury. *Fletcher* v. *Freeman-Smith Lumber Co.,* 98 Ark. 202, 135 S. W. 827; *Neimeyer Lumber Co.* v. *Watson,* 134 Ark. 491, 204

S. W. 310; and *Booth & Flynn Co.* v. *Pearsall,* 182 Ark. 854, 33 S. W. (2d) 404.

The right-of-way where appellee received his injury was his accustomed place of work, and was constructed in the usual and customary way. In the very nature of things, it was necessary to distribute the pipe which was to be laid and the gaskets which were to be used in joining the pipe along the right-of-way. Except where it crossed fields and roads, the right-of-way ran through the woods, and was necessarily somewhat rough and uneven. Appellee was a man forty-five years of age, and had been engaged in farming and logging all of his life. No other practical way could have been used in laying the pipe. While the accident to appellee was unfortunate, it was not due to the negligence of his master or of fellow-servants, but was an accident for which no one was to blame. It could not have been foreseen by any reasonable prudence on the part of the master, and was an unfortunate and unexpected occurrence. The right-of-way where appellee received his injury was his accustomed place of work. Its condition was open to his observation when he took the job. Appellee had been engaged in farming and logging all of his life, and the work he was performing was no different from hauling wood on a farm or in hauling logs. An unavoidable accident is a complete defense against liability.

We are of the opinion that there was no negligence shown on the part of appellant, and the accident resulted from a danger incident to the work which was being done. Therefore the judgment will be reversed; and, inasmuch as the cause of action has been fully developed, it will be dismissed here.

ROSS *v.* STATE HIGHWAY COMMISSION.

Opinion delivered November 9, 1931.

[redacted]

McMillan & McMillan, for appellant.

Hal L. Norwood, Attorney General, and *Claude Duty,* Assistant, for appellee.

SMITH, J. Although this appeal comes to us from a judgment sustaining a demurrer to appellant's complaint, the parties differ as to the effect and purport of the allegations of the complaint. We have accepted the appellant's interpretation of its allegations, inasmuch as he may make its allegations more specific upon the remand which must be ordered; and if the complaint does not allege what he contends it does, an amendment to the complaint will clarify the issues which he discusses in his brief on this appeal.

As thus interpreted, the complaint contains the following allegations: Without any order of court authorizing the State Highway Commission to enter upon and appropriate and damage plaintiff's lands or assessing the damages thus occasioned, the State Highway Commission entered upon and damaged plaintiff's lands. This was done by constructing a road bed and by digging a ditch connecting with a creek, which caused the water from the creek, in flood periods, to flow back upon plaintiff's lands. The road bed thus constructed was a part of the State's highway system. The road bed and ditch caused damage to the lands and to the crop growing thereon.

Thereafter, the road bed having been found insufficient for its intended purposes, an order of condemna-

tion was obtained in the county court condemning the necessary right-of-way. These allegations state a cause of action against both the State Highway Commission and the county, although suit was brought against the State Highway Commission only.

It may be first said that the county had power and authority to condemn and pay for the right-of-way at its own expense, even though the road to be improved was a part of the State's highway system. It was so expressly decided in the case of *England* v. *State Highway Commission,* 177 Ark. 157, 6 S. W. (2d) 23. See also other cases there cited. In such a proceeding the county would be liable for any damage then or thereafter accruing through the exercise of this right of eminent domain. *Independence County* v. *Lester,* 173 Ark. 796, 293 S. W. 743.

But the complaint alleges an entry upon and damage to the lands by the State Highway Commission before the exercise of this right of eminent domain by the county, and for any damage thus occasioned the commission is liable.

It was pointed out in the England case, *supra,* that the highway commission might exercise the right of entry and condemnation on its own account and at its own cost and expense, and, where it does so, it must pay the damages thus occasioned. In other words, the highway commission or the county may condemn land for State highway purposes, and the agency which does so must pay the damages resulting from its action.

Now the complaint does not allege that the highway commission instituted any proceeding authorizing it to enter upon plaintiff's lands, but that is immaterial. The commission cannot escape liability by proceeding without first obtaining an order and judgment of court authorizing it to proceed.

The facts in the case of *Campbell* v. *Arkansas State Highway Commission,* 183 Ark. 780, 38 S. W. (2d) 753, were that the commission, without instituting any proceeding against the complaining property owner, had damaged his land by the construction of a bridge and

the approaches thereto. Indeed, the contention was made by the commission that it had not taken or damaged the land of the complaining property owner.

We there said: "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 provide no adequate remedy, it may be enforced by an action for damages. (Citing authorities.)"

We conclude therefore that the highway commission, through its entry upon the plaintiff's lands prior to the order of condemnation in the county court, was responsible for any and all damages resulting from its entry prior to the order of condemnation, and the demurrer to the complaint should therefore be overruled, and the judgment of the court below is reversed, and the cause remanded with directions to overrule the demurrer.

HOXIE LUMBER COMPANY *v.* CHIDISTER.

Opinion delivered November 9, 1931.

Richardson & Richardson, for appellant.

W. P. Smith and *O. C. Blackford,* for appellee.

SMITH, J. Appellant, Hoxie Lumber Company, filed a complaint in which it alleged that it had sold to W. H. Chidister certain material to be used by the latter in construction work which he had contracted to perform for the Clover Bend School District of Lawrence County.

Chidister made default in paying for the material, and this suit was brought to enforce payment, and a writ of garnishment was served upon the school district.

In response to the interrogatories propounded to it, the school district filed a response and answer, in which the execution of the contract with Chidister was admitted, but it was stated that while Chidister commenced the work, he never completed it, but abandoned his contract, and that the work done was without value to the school district. The necessary effect of the answer of the school district was to deny that it was indebted to Chidister in any sum, and it did expressly deny that the work had been completed.

No response to this answer was filed, and no testimony was offered when the motion to quash the garnishment was submitted to and heard by the court.

The decree of the court recites that the cause was submitted and heard upon the pleadings, and it was ordered that the garnishment be quashed, and this appeal is from that decree.

The decree of the court was correct. It was held in the case of *Plummer* v. *School District No. 1 of Marianna,* 90 Ark. 236, 118 S. W. 1011, 134 Am. St. Rep. 28, 17 Ann. Cas. 508, that where a school building had been completed the creditors of the contractor doing the work may sue him in equity and impound any balance due him by the school district after the building contract had been completed, but not before. In so holding the court quoted from the case of *Boone County* v. *Keck,* 31 Ark. 387, as follows: "Public policy, indeed public necessity, requires that the means of public corporations, which are created for public purposes with powers to be exercised for the public good, which can contract alone for the public, and whose only means of payment of the debts contracted is drawn from the corporators by a special levy for that purpose, should not be diverted from the purposes for which it was collected, to satisfy the demands of others than the parties contracted with."

Here we have an answer of the garnishee school district to the effect that the work was never completed but was abandoned by the contractor, and that the work done was without value to the school district and, consequently, nothing was due for it.

This answer, whether true or false, was not denied as required by § 4912, Crawford & Moses' Digest, where the creditor wishes to make an issue as to the truth of the answer to the interrogatories which the garnishee has filed.

The practice in such cases was defined by Mr. Justice FRAUENTHAL in the case of *Beasley* v. *Haney*, 96 Ark. 568, 132 S. W. 646, where it was said: "After the garnishee has filed his answer, the plaintiff must either except to or deny the allegations thereof. The answer of the garnishee is taken as *prima facie* true of the allegations it contains; and if it is not contradicted, or if issue is not taken thereon, it will be presumed to be absolutely true. (Citing authorities.)"

Here, there being no denial of the truth of the garnishee's answer, the garnishment was properly dismissed. The decree of the court below is therefore correct, and must be affirmed.

KIRBY, J., dissents.

ARKANSAS POWER & LIGHT COMPANY *v.* ADCOCK.

Opinion delivered November 9, 1931.

Robinson, House & Moses and *Frank Bird,* for appellant.

John E. Miller and *C. E. Yingling,* for appellee.

HUMPHREYS, J. Appellee, as father and as administrator of the estate of his deceased minor son, brought this suit against appellant in the circuit court of White County to recover damages in the sum of $7,500 for the loss of his son's services and $15,000 on behalf of the estate for the pain and suffering endured by the deceased, who was killed by electricity received from a transmission line owned by appellant, who had negligently permitted it to sag near the ground across the cotton field of George Anders, about one and one quarter miles west of Pangburn.

Defendant filed an answer, denying the material allegations of the complaint, and also pleaded contributory negligence on the part of deceased as an affirmative defense to the alleged cause of action.

The case was submitted to the jury upon the pleadings, testimony adduced by the parties, and instructions of the court, resulting in a judgment for $2,500 in favor of appellee for the loss of his son's services and for $7,500 as administrator for his son's estate on account of the pain and suffering endured by deceased, from which is this appeal.

Appellant's first contention for a reversal of the judgment is that the testimony fails to show any negligence by appellant causing the death of appellee's son. The proper interpretation of the testimony, viewed in its most favorable light for appellee, reflects that appellant failed to repair its transmission line within a reasonable time after being dislodged from its support by the force of an electric storm, so that it hung within four or five feet from the ground across a cotton field owned by Anders in the vicinity of Pangburn. Appellee's son was engaged in picking cotton in the field across which the transmission line was suspended at the time he was killed by electricity escaping from the line. On Thursday night, September 23, 1930, an electric storm visited the town of Pangburn, and appellant's transmission line running across the cotton field was struck by lightning, demolishing one post and badly splintering three others. The injury to the posts and cross-arms caused one of the lines to sag within four or five feet of the ground for a considerable distance, where it remained unrepaired and unguarded until about nine o'clock A. M. Saturday, or for a period of about forty-eight hours. The line was carrying about 13,000 volts of electricity. At a time when deceased, who was picking cotton in the field, approached and was in near proximity to the wire, the electricity suddenly arcked to his body and produced the injury which resulted in his death. Appellant's manager at Pangburn knew of the storm Thursday night when it occurred. The lightning that struck the line put out the lights in Pangburn for awhile. Friday morning he sold some fuse plugs to persons to replace some which the lightning had burned out during the electrical storm. The substation near Searcy was equipped with kick-out switches and also a voltmeter for the purpose of registering disturbances along the line. When the employees came to the substation Friday morning, they discovered that the switch had been kicked out, and that the voltmeter had registered a disturbance on the line. The line had cleared, and there was nothing to indicate the character of the dis-

turbance. All that the warning devices indicated was that there had been a disturbance of some kind on the line caused by lightning. We think this information, coupled with the manager's knowledge that there had been a severe electrical storm, was sufficient to warrant the submission to the jury of the issue of appellant's alleged negligence in failing to patrol and inspect the line after the storm. It is clearly the duty of an electrical company to use due diligence to discover and repair defects in its system. 9 R. C. L., sec. 25, p. 17. It follows that diligence would require an immediate patrol and inspection of lines where the warning devices had indicated disturbances caused by lightning during a severe electrical storm.

Appellant's next contention for a reversal of the judgment is that the undisputed testimony reflects that deceased negligently caused his own death by walking up to the wire and starting to take hold of it for the purpose of showing his companions that there was no danger in touching a single wire, although warned not to do so. If this were the only reasonable deduction that could be drawn from the evidence, then deceased would have been guilty of contributory negligence, and appellee could not recover. There was testimony, however, tending to show that deceased turned to the right into another cotton row where the wire was higher than in his row, and said to one of his companions, "Look," and as he raised either his right or left hand, some amount of electricity arcked from the wire into his body, knocking him to the ground, which injury resulted in his death. It is argued by appellant that the only purpose he could have had in raising his hand was to touch the wire, because he had remarked to his companion that there was no danger in a single wire. It may be that he raised his hand inadvertently, for he did not tell any one that he intended to touch the wire. Had it been his purpose to touch the wire, he could have done so where he was standing before he turned to the right. Two of his companions had stooped down to walk under the wire, and it may be that

he intended to follow their example and had turned to the right where the wire was higher and easier for him to do so. As to why he raised his hand is entirely problematical, and the conclusive inference cannot be indulged that he intended to touch the wire because he raised his hand. The burden rested upon appellant to show by undisputed evidence that he raised his hand for the purpose of touching the wire before the court could declare as a matter of law that deceased was guilty of contributory negligence. Appellant has not met this burden, and, in view of the conflict in the evidence, it was proper for the court to submit the issue of contributory negligence to the jury for determination.

Appellant's next contention for a reversal of the judgment is that the court erred in giving instruction No. 6 at the request of appellee, which is as follows:

"You are instructed that contributory negligence is doing of something that a person of ordinary prudence would not do, or the failure to do something that a person of ordinary prudence would do under the circumstances; and in this case, in determining whether deceased was guilty of contributory negligence, you should consider the facts in the light of the circumstances as they existed at the time, and the age and experience and knowledge of the deceased, of the experience and knowledge that a person of the age of deceased should have had."

We think this declaration of law clearly announces the test of contributory negligence on the part of minors. This court ruled that the standard for determining whether a minor is guilty of contributory negligence is what one of his age, intelligence, and discretion would do under the same circumstances, in the case of *Kansas City Railway Company* v. *Teater,* 124 Ark. 1, 186 S. W. 294.

Appellant next contends for a reversal of the judgment on the ground that the instructions requested by appellee and given by the court impose upon appellant the "high degree of care" standard, instead of "ordinary degree of care" standard. We have carefully read

the instructions, and none of them told the jury that appellant owed appellee any other duty than that of reasonable care. The rule of law is that, in handling explosives and other very dangerous agencies, under certain circumstances in the exercise of reasonable care, the one so handling them must do so with a high degree of care. *Pine Bluff Company* v. *Bobbitt,* 168 Ark. 1019, 273 S. W. 1; *Arkansas Power & Light Co.* v. *Cates,* 180 Ark. 1003, 24 S. W. (2d) 846. This idea or principle ran through the instructions, but the effect thereof was not to tell the jury that appellant owed appellee a high degree of care as they were told in the case of *Morgan* v. *Cockrill,* 173 Ark. 910, 294 S. W. 44, cited by appellant in support of its argument that the instructions given by the court were erroneous.

Appellant's next contention for a reversal of the judgment in favor of the estate is that the undisputed evidence shows that the deceased was instantly killed and therefore suffered no pain. There is evidence in the record, that as he was falling, he exclaimed, "Oh, me," as many as two times, and that after falling, he tried to get up on his hands and knees. After his efforts to arise, he only moved his legs and arms, and, to all appearances, was unconscious. He did not breathe his last until he was carried about seventy yards to the wagon for removal. After the attempt to rise, deceased was mute and did not groan or emit any sound evidencing pain or suffering. In view of the fact that he was conscious only for a few moments, the court is of the opinion that the verdict for pain and suffering was excessive, and should be, and is, reduced to $3,000.

Appellant's next contention for a reversal of the judgment in favor of appellee on his own behalf is that it was excessive. Deceased was 17½ years of age at the time of his death and resided with his father on a 51-acre farm, and assisted his father in cultivating same. They raised about thirty acres of cotton in addition to the cereals they raised. He was very industrious and helped with all the work around the place and saved the neces-

sity of hiring a helper. He attended school about seven months out of the year, and at such times as he was not going to school or working on the farm he obtained other employment and earned enough to pay for his clothing. Appellee testified that the services of his son were worth at least $1,000 net a year. The jury allowed $2,500 to appellee for the loss of his son's services. We do not think that any boy can earn as much as $1,000 a year net on a farm of 51 acres, working during crop seasons and choring around the place. We think the estimate of appellee, and it was necessarily an estimate, is an over-estimate, and that the jury's allowance for the loss of services of $2,500 was excessive and should be, and is, reduced to $2,000.

With these modifications, the judgment is affirmed.

Mr. Justice KIRBY dissents.

[redacted]

MEYERS BROTHERS *v.* FIRST NATIONAL BANK OF RECTOR.

Opinion delivered November 9, 1931.

[redacted]

Reid, Evrard & Henderson, for appellant.

Wm. F. Kirsch, for appellee.

HUMPHREYS, J. Appellants sued appellee in the chancery court of Clay County, Eastern District, for having cashed and collected from Meyers Brothers, one of the appellants, sixteen checks in the total sum of $1,520.92, alleged to have been forgeries.

Appellee denied that the checks were forged.

The issue joined was submitted to the court upon the testimony adduced, from which the chancellor specifi-

cally found that the evidence failed to show that the checks were issued to fictitious payees, or that payments were made on forged indorsements and, based upon the findings, dismissed appellant's complaint, from which is this appeal.

The facts reflected by the record are as follows:

Meyers Brothers lived at Blytheville, Arkansas, and operated a gin at Rector, Arkansas. They did little commercial ginning, their plan being to buy seed and lint cotton and gin the seed cotton for themselves. They employed S. P. Wood to manage the gin and buy the cotton. They employed Claude S. Outlaw to keep books and issue checks on appellee bank in payment of the cotton bought from the farmers, and took an indemnity bond from the Union Indemnity Company, the other appellant, to protect them against any loss on account of the dishonesty of Claude S. Outlaw. They carried no deposit with appellee bank, but made an arrangement whereby it would cash the checks drawn on it in payment of cotton thus purchased, and at the end of each day to draw on them for the aggregate amount with checks attached to the draft. Claude S. Outlaw was also authorized by them to sell their cotton seed and to remit the proceeds by cashier's checks to them. On account of an irregularity on his part in connection with the sale of the cotton seed, they became suspicious of his other transactions and, upon investigation, came to the conclusion that he had drawn checks to fictitious persons to pay for purchases of cotton and had forged the indorsements of these persons on sixteen checks, aggregating $1,520.92, and collected same in person from appellee bank through its negligence, and who in turn wrongfully charged and collected same from them. They presented a claim to the Union Indemnity Company for the alleged peculations of Claude S. Outlaw in the sum of $1,520.92, which it paid without question. The cotton bought by S. P. Wood was brought into Rector by farmers who resided in the country round about.

The only witness introduced by appellants in an effort to show that the names of the payees in the sixteen checks in question were fictitious or that the indorsements thereon were forgeries was Adolph Meyers, a member of the firm of Meyers Brothers, who testified that he investigated at and near Rector and made inquiry in an effort to learn whether or not there were persons living at or near that place of the names appearing on the checks; that he was not able to find anybody at or near Rector, in the investigation, who knew any person by any of the names appearing on the checks offered in evidence; that he inquired of people who were well acquainted at Rector and who had an acquaintance among the farmers living near Rector; and that among others he inquired of the county weigher or his deputy at Rector, who stated that he did not know any of these persons.

This statement cannot be regarded as sufficient substantial evidence to show that the checks were forged. The most it shows is that the persons of whom Adolph Meyers inquired concerning the several payees of the checks were not acquainted with any of them.

No error appearing, the decree is affirmed.

WILLIAMS *v.* STATE.

Opinion delivered November 9, 1931.

[redacted]

Geo. Ellis and *Isgrig & Morrow,* for appellant.

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

KIRBY, J. This appeal is from a judgment of conviction of murder in the second degree against appellant for the killing of one Pinkey Lee with a sentence of five years' imprisonment.

It appears from the testimony that appellant, with his wife and a girl visiting them, went on the evening of the killing to the house of Sam Tappin, where they were having music, dancing and refreshments. They had first gone to Caldwell's house, but could not get anything to drink there.

The testimony on the part of the State tends to show that appellant walked into the room, which was crowded, and, observing Pinkey Lee sitting on a divanette with two or three others, walked over in front of him, caught him by the hand or shoulder and shot him to death.

According to the proof adduced for the defense, he walked into the room after having been told on the porch that Pinkey Lee had been making threats against him. Observing Lee getting up and attempting to draw a knife, appellant said: "Drop that knife," and began shooting. Appellant stated he picked up the knife after he shot Lee and carried it away with him, and that the knife produced at the trial was the one deceased drew on him.

Other witnesses, the ones sitting on the divanette with Lee at the time, stated that they did not see him draw any knife or attempt to do so, that they saw no knife at all, but would have seen it, had Lee have drawn a knife.

The evidence also tended to show that Lee was shot while attempting to get up.

It is claimed that the court erred in refusing to allow the impeachment of witness, Mary Lee Owens, by showing a contradictory statement made by her relative to the description of the knife said to have been drawn by Pinkey Lee; and also by the refusal to give instructions requested by appellant.

The witness, Mary Lee Owens, was called for the defendant, and testified that the deceased had a green handle knife on the night of the killing, and that the knife had a "forkedy end." Defendant's attorney claimed that he was surprised at the testimony of this witness describing the knife, and that she had made previous statements leading him to believe that the knife she saw in the possession of the deceased was the same as that introduced in evidence at the trial. The court refused to permit him to impeach his own witness, and there was no error in the ruling.

Appellant's attorney stated for the record that he had talked with this witness before the trial when she described the knife, which he identified from the description as the one produced at the trial. The witness stated to him, however, before she was called to the stand that she was not going to testify that she saw any knife at all, but that she had told him what kind of knife it was when he saw her at her home. The attorney could not well have been surprised, as the witness told him before she was called to the stand that she was not going to swear that she saw a knife at all on that night; much less that the knife that the deceased had on the night of the killing fitted the description of the knife produced at the trial. He could not, of course, be allowed to call a witness in order to obtain testimony for which he might be impeached. "It is not in every case that one's own witnesses may be contradicted by proof of his prior statements. * * * And it is not enough that he disappoints the expectations of such party by failure to give beneficial testimony. * * * In order to bring himself within the exception to the

general rule against the impeachment of one's own witness, it must appear that the party calling the witness was entrapped by his previous statements into putting him on the stand and was surprised by his testimony." 28 R. C. L., p. 645. The witness testified to no fact prejudicial to the defendant, but only failed to testify that the knife that the deceased had in his possession on the night of the killing fitted the description of the one produced at the trial. *Doran* v. *State,* 141 Ark. 442, 217 S. W. 485.

No error was committed in the refusal to give instruction No. 1A to the effect that the indictment was not evidence of defendant's guilt, the court having fully charged on the subject of presumption of innocence of the defendant. *Deshazo* v. *State,* 120 Ark. 494, 179 S. W. 1012.

It is sufficient answer to the contention in the other assignments that the court erred in its refusal to give certain instructions requested by appellant to say that the law was fully and correctly declared by the court upon all points complained about, and that no error was committed in the refusal to give his correct instructions requested, since they were already fully covered by the court's charge, and certainly none in its refusal to give others not correct declarations of the law.

The testimony is amply sufficient to support the verdict, and would have warranted the jury in finding appellant guilty of a higher degree of offense.

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

MECHANICS' INSURANCE COMPANY *v.* INTER-SOUTHERN LIFE INSURANCE COMPANY.

Opinion delivered November 9, 1931.

M. P. Watkins and *Verne McMillen,* for appellants.

Arthur L. Adams, for appellee.

KIRBY, J., (after stating the facts). Appellant contends that the contract of lease between the life insurance company and Simmons constituted them partners in the production of the rice, and that, because of the alleged conduct of Simmons in making the proof of loss, etc., the life insurance company is barred of all right to recover its losses under the policies issued to it and Simmons jointly. This contention, however, is unwarranted, since under said lease or contract Simmons was

but a share cropper, the whole of the crop produced belonging to the landlord until payment of Simmons' debts for supplies, etc., out of the part that would otherwise have come to him; and the undisputed testimony shows that there was nothing due Simmons out of the crop at the time it was stored in the house and insured. *Gardenshire* v. *Smith,* 39 Ark. 280; *Hammock* v. *Creekmore,* 48 Ark. 264, 3 S. W. 180; *Hardiman* v. *Arthurs,* 144 Ark. 289, 222 S. W. 20; *Fenton* v. *Price,* 145 Ark. 116, 223 S. W. 364; *Barnhardt* v. *State,* 169 Ark. 567, 275 S. W. 909; *Harnwell* v. *Rice Growers' Assn.,* 169 Ark. 622, 276 S. W. 371.

Rogers, the agent issuing the policies, also knew of the relationship existing between the landlord insurance company and Simmons at the time the policies were issued, and this knowledge is imputed to the insurance companies. *Nat. Life Ins. Co.* v. *Jackson,* 161 Ark. 597, 256 S. W. 378; *Nat. Union Fire Ins. Co.* v. *Crabtree,* 151 Ark. 561, 237 S. W. 97; *Same* v. *Wright,* 163 Ark. 43, 257 S. W. 753; *Firemen's Ins. Co.* v. *Rye,* 160 Ark. 212, 254 S. W. 465.

It is not necessary, in the absence of specific inquiry, for insured to state the exact nature of his interest, which was not necessary to be described in the policy. Cooley's Briefs on Insurance, 2 Ed. pgs. 2123, 2164; 14 R. C. L., p. 1051.

There may even be a shifting of interest of parties jointly insured without affecting the rights under the policy. 38 A. L. R. 325; see also 45 A. L. R. 856 and notes, p. 863; *Fire Ins. Co.* v. *Larey,* 125 Ark. 93, 188 S. W. 7, L. R. A. 1917A, 29, Ann. Cas. 1918B, 1225.

There was no attempt to show nor any showing made that appellee life insurance company was in any way connected with or had any knowledge that Simmons, the agent, had made any fraudulent or false statement in the proof of loss or that his conduct in so doing was known to such insurance company, and its right to recover would not be affected by such conduct on Simmons' part if it had been proved. 14 R. C. L., § 403, p. 1223 and

cases cited; 26 C. J., p. 348; *Beavers* v. *Security Mutual Ins. Co.,* 76 Ark. 595, 90 S. W. 13, 6 Ann. Cas. 585. Cooley's Briefs on Ins., (2 ed.), pp. 1253, 4941.

The terms and conditions of insurance policies are always to be construed most strongly against the insurer, and this principle is recognized and fixed by our statute. Section 6148, Crawford & Moses' Digest.

The insurer denied liability under the policies, dispensing with the necessity for making proof of loss, but such proof and supplemental proofs were afterwards demanded by the insurers and furnished by appellee, and any question on that account passes out of the case. *Commercial Union Fire Ins. Co.* v. *King,* 108 Ark. 130, 133, 156 S. W. 445; *Woodmen of the World* v. *Hall,* 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517; *Dodge* v. *Thompson,* 94 Ark. 21, 125 S. W. 648.

The undisputed testimony also shows that the adjusters representing all the companies met after the loss and investigated the fire with a view to settlement, there being an extended investigation for the purpose as shown by Martin for trying to settle with the appellee insurance company, designated by him as an innocent victim.

The jury's finding of the amount of rice destroyed by the fire is a sufficient answer to any contention about an unintentional overstatement of the loss which could work no forfeiture. 20 A. L. R. 1164; *Fidelity-Phoenix Fire Ins. Co.* v. *Freedman,* 117 Ark. 71, 174 S. W. 215.

It was also manifest, reading the clause of the policies, that the record warranty clause had no application to the property stored in this old dwelling house, which was in no sense a warehouse. *Camden Fire Ins. Assn.* v. *Meloy,* 174 Ark. 84, 294 S. W. 378; *Queen of Ark. Ins. Co.* v. *Dillard,* 96 Ark. 378, 131 S. W. 946.

Acceptance of the payment of premiums after the loss occurred would in any event have operated as a waiver of the failure of insured to keep the record as required in the record warranty clause. *National Liberty Ins. Co.* v. *Spharler,* 172 Ark. 715, 290 S. W. 594.

We do not find it necessary to discuss any of the other assignments, and, finding no prejudicial error in the record, the judgment must be affirmed. It is so ordered.

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

Opinion delivered November 9, 1931.

Carter, Jones & Turney and *Lamb & Adams,* for appellant.

Pace & Davis, for appellee.

MCHANEY, J. Appellee's intestate, A. E. Simpson, was, at the time of his death, 56 years old, and had been in the employ of appellant thirty years as an engineer. On August 2, 1930, he was directed by appellant to run engine 775, known as Extra 775, a freight train, from the Pine Bluff, Arkansas, shops to the Texarkana, Arkansas, yards. Before leaving Pine Bluff the conductor and engineer were each given order No. 104, the material part of which is as follows: "Eng. 775 run extra Pine Bluff shops to Texarkana yards, has right over No. 18 Eng. unknown Pine Bluff shops to cross over McNeil." This

being an extra train, it did not operate by any schedule in the time tables, but was operated under telegraphic orders addressed to the train which bore the number of the engine. Under the above order, with which the engineer, fireman, conductor and three brakemen were familiar, they proceeded to the crossover at McNeil where they passed from the main line to the side track. At McNeil the engineer and conductor were given order No. 132 reading as follows: "Train order No. 132, August 2, 1930, McNeil. To Extra 775 south. Second 18 Eng. 778 meet Extra 775 south at Stamps." The fireman and head brakeman were on the engine with the engineer and presumably all of them read this order. Evidently they all misinterpreted it, no doubt believing it referred to train No. 18 mentioned in the order first above quoted, and that they could continue safely to Stamps, some few miles further south. Engineer Simpson did not bring his train to a stop but slowly proceeded through the station on the siding, and headed out on the main line towards Stamps. When the swing brakeman Craig, who was in the cupola of the caboose saw the train was not going to stop, he hollowed out to conductor DeMaine, "No. 18 is not here yet. If you have not got anything more on No. 18, you had better stop. DeMaine said: 'We have a meet with Second 18 at Stamps.' I says, 'If you haven't got something on No. 18, you haven't got it, pull the air'." Craig then testified that the conductor told him to hand him the train orders that they had received out of Pine Bluff and out on the line, and that he rushed up into the cupola, got the orders where they kept them on a clip board, and handed them to the conductor who took them and held them in his hand looking at them until they had a head-on collision with train No. 18 about a mile south of the station at McNeil. Rear brakeman Dorman on Extra 775 south testified to substantially the same facts as did Craig, and in addition said that he thought that the train was going to stop, and that he intended to cut the crossing at the public highway, but saw the station agent at McNeil, Key, standing there with an

order in his hoop which Key took out and handed to him. About that time the caboose took a lunge like they were leaving. He opened the order, read it and handed it to Conductor DeMaine which is the same order above mentioned as No. 132. DeMaine told him to "high-ball the switch" which meant to go ahead, and that he looked out to see that the negro attending the switch properly threw it. He then went into the caboose and asked DeMaine where they were going for No. 18, and that DeMaine said "Let's see what we got out of Pine Bluff on 18." He then said to the conductor, "What did you get here on No. 18?" And the conductor replied: "All we got here was an order to meet Second No. 18 at Stamps." Dorman then said, "Is that all you got here?" DeMaine said, "Yes." Dorman said, "Pull the air, as you haven't got anything on No. 18 then, stop this train." To which the conductor replied: "I will pull the air." He said that swing brakeman Craig was standing there, and the conductor told him to go up and get the orders, and that he told the conductor to "pull the air and then look at the orders." He said that he started to pull the air himself, but that the conductor told him not to, and that, while the conductor was standing looking at the orders, their train collided with No. 18. He further said that when he asked the conductor about the orders, told him to pull the air, started to pull it himself and was directed not to do so, they were seven to ten car lengths out on the main line. It was shown that there were three appliances on the caboose for pulling the air. Pulling the air means to open a valve which causes the air brakes to set on the wheels of the car and stop the train. It was shown that if the air was pulled gradually that the train could have been stopped in 12 to 14 car lengths.

As a result of this unfortunate collision five persons lost their lives and another seriously injured—the engineer, fireman and head brakeman on Extra 775 were killed, the engineer and fireman on train 18 were killed and the head brakeman thereon seriously injured.

Appellee brought this action under the Federal Employers' Liability Act against appellant, which is engaged in interstate commerce, to recover damages for her intestate's injuries and death. The complaint alleged three grounds of negligence, but before the trial all allegations of negligence were withdrawn except the following: "On account of the conduct of DeMaine, conductor on said train, who carelessly, negligently and recklessly, after discovering the peril of the deceased, A. E. Simpson, failed to apply the air brakes from the rear end and stop said train, thereby causing the train upon which deceased was riding to collide with another train operated by the agents and servants of the defendant upon said main line, causing the deceased to receive injuries from which he thereafter died." The answer admitted that appellant was engaged in interstate commerce, denied that it was guilty of any negligence, and alleged that Simpson's injuries and death were caused solely by his own negligence resulting "not only in his injuries and death but in the death of several others of his co-employees and in the destruction of property of this defendant of the value of more than $100,000"; that Simpson's negligence consisted in running and operating his train in violation of orders which he at the time well knew.

A trial to a jury resulted in a verdict and judgment in appellee's favor for $28,000.

As we understand the respective contentions of the parties, the sole question presented for our decision is whether the evidence is sufficient to sustain the verdict and judgment against appellant. Appellant's request for a peremptory instruction was denied. It is true that in the brief of counsel for appellant, complaint is made of the instructions given at the request of appellee and of the refusal of the court to give certain instructions requested by appellant; but this complaint is based on the ground that appellee was not entitled to recover at all, and therefore, not entitled to any instructions, and that the instructions requested by it were, in effect, peremp-

tory, which, as is contended, was demanded by the law and the evidence.

It is conceded by both parties that liability if any is governed by the Federal Employers' Liability Act, and only one ground of negligence was submitted to the jury as shown by instruction No. 9, given at appellee's request, to-wit: "The court instructs the jury that the plaintiff relies alone upon the doctrine of discovered peril for a recovery in this case, and you will not consider any other allegation of negligence." It is contended, however, by able counsel for appellant that the doctrine of discovered peril or the "last clear chance doctrine" is not applicable to this case; that it is a case of concurrent negligence only, appellee's intestate and conductor DeMaine both being guilty of negligently operating the train in violation of express orders, and is subject to the comparative negligence rule in the Federal Employers' Liability Act as construed in *Davis* v. *Kennedy,* 266 U. S. 147, 45 S. Ct. 33; *Frese* v. *C. B. & Q. R. Co.,* 263 U. S. 1, 44 S. Ct. 1; *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, 49 S. Ct. 91; *Unadilla Valley Ry. Co.* v. *Dibble,* 31 Fed. (2d) 239; *Bradley* v. *N. W. Pac. R. Co.,* 44 Fed. (2d) 683; *Yadkin R. Co.* v. *Sigman,* 186 N. C. 519, 120 S. E. 56, reversed by memorandum opinion in 267 U. S. 577, on the authority of *Davis* v. *Kennedy, supra,* and *Frese* v. *C. B. & Q. R. Co., supra.*

Appellee contends that because the conductor, DeMaine, failed and refused to stop the train by pulling the air at a time when it was moving out from the side track on to the main line, after he had been told by two brakemen that the order he received at McNeil did not relate to train No. 18, but to Second 18, and after he had refused to permit one of the brakemen to pull the air and thereby prevent a collision, he discovered the perilous situation of them all, especially engineer Simpson, and was therefore guilty of negligence, independent of the negligence of Simpson in moving his train contrary to order 104. Whereas appellant contends "that the failure of DeMaine to act does not enter into the case, and that

from a legal standpoint the conduct of Simpson constitutes the sole, proximate cause of his injury and death." Therefore appellant says that the cases as above cited are decisive of this case against appellee and that no recovery can be had.

The discovered peril doctrine, or the doctrine of the "last clear chance," as it is sometimes called, constitutes an exception to the rule that the contributory negligence of the plaintiff is a bar to his action. Under this doctrine, where one discovers the perilous situation of another in time, by the exercise of ordinary care, to prevent injury to him, it is his duty to do so, and he is guilty of negligence if he fails to do so, which is regarded in law as the proximate cause of the injury, and this too regardless of the contributory negligence of the injured person. Such a person is regarded in law as having the last clear chance to prevent injury or death to another, and it is his duty to do so. It is sometimes referred to as the doctrine of *Davies* v. *Mann,* 10 M. & W. 546, and the principle is now generally recognized by the courts of both England and America. It has been announced in numerous decisions by this court, by the Supreme Court of the United States and by text writers. It has also been held to apply in cases brought under the Federal Employers' Liability Act. *Mo. Pac. Ry. Co.* v. *Skipper,* 174 Ark. 1083, 298 S. W. 849. Petition for certiorari to this court was denied by the Supreme Court of the United States. *Mo. Pac. Ry. Co.* v. *Skipper,* 276 U. S. 629, 18 S. Ct. 322. It is true that the facts in this case present an unusual situation in which to apply the rule of discovered peril, but we are unable to perceive why it should not apply. The usual situation for the application of the rule is for the operatives of the train to discover the perilous situation of another on its tracks in time to avoid injuring him, and generally arises under our lookout statute. (Crawford & Moses' Dig., § 8568). As said in 20 R. C. L., p. 141, § 115: "It is not, however, limited to any particular class of cases. It is proper to allow a recovery where the driver of a motor car sees a pedes-

trian in time to avoid injury by stopping and fails to reduce his speed or bring his car to a stop. And it has been held that when a bathhouse keeper is notified of a bather's disappearance so soon thereafter as to justify a reasonable inference that an immediate search in the water would result in rescue before death, and has no one present to attempt the rescue, and fails to make an immediate search in the water for the missing bather, it is error, in an action to recover damages on account of the death, to direct the jury to return a verdict for the defendant." It has also been said by the Supreme Court of the United States in *Grand Trunk R. Co.* v. *Ives,* 144 U. S. 408, 12 S. Ct. 679, that: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years, * * * that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." See also *L. & N. R. Co.* v. *Hurt,* 13 So. (Ala.) 130.

In this case we think it fair to assume that Engineer Simpson, the fireman, the head brakeman and the conductor misunderstood or misinterpreted order 132 received at McNeil directing them to meet Second 18 at Stamps. They evidently made a mistake in thinking that said order referred to train No. 18 over which they were given right-of-way to McNeil, and not to Second 18, about which they had no information so far as this record discloses, and was itself an extra train going north and following closely train No. 18. Having misunderstood the order Engineer Simpson moved his train out from the side track on to the main line evidently believing that he had orders to meet train No. 18 at Stamps. We cannot believe that he intended to commit suicide, or to endanger his own life and that of so many others. But the rear

brakeman and the swing brakeman, Dorman and Craig, did not misunderstand order No. 132, and, realizing the danger to themselves and to everybody concerned, urged conductor DeMaine to stop the train and prevent possible injury and death. He prevented Dorman from stopping the train and told him he would do it himself, but, instead of stopping the train and then reading his orders, he permitted the train to go on to destruction while reading his orders. We are therefore of the opinion that the negligence of conductor DeMaine in failing and refusing to stop the train, and of Dorman and Craig in failing to stop it, was the sole and proximate cause of the injury, because they knew and realized the perilous situation into which the negligence of engineer Simpson, in failing to understand his orders, had taken them, but did not use the means at their command to avert the tragedy. We think the rule announced in the cases above cited and relied upon by learned counsel for appellant have no application to the facts in this case. Although they were all brought and prosecuted under the Federal Employers' Liability Act, they were brought and prosecuted on the theory of comparative negligence as defined in the act and not under the doctrine of discovered peril or "last clear chance." We are furthermore of the opinion that none of the said cases presents a state of facts showing a supervening act of negligence, arising subsequent to and independent of the contributory negligence of Simpson, such as is the fact in this case. The fact that DeMaine, Dorman and Craig knew the perilous situation, and, with three different instrumentalities near at hand, the operation of any one of which would have taken but an instant, failed to exercise ordinary care to use them to avert the injury, is such a supervening act of negligence as to invoke the discovered peril doctrine and constitutes the sole and proximate cause of the injury, regardless of Simpson's contributory negligence in failing to understand his orders.

It necessarily follows from what we have said that the judgment must be affirmed. It is so ordered.

WEST *v.* BAIN.

Opinion delivered November 9, 1931.

Murphy & Wood, for appellant.

O. A. Featherston, for appellee.

McHANEY, J. In November, 1930, appellee H. H. Bain was the owner of a certain lot fronting 33.3 feet on South Border Street in the city of Hot Springs, Arkansas, with a depth of 120 feet, on which there was a five-room frame cottage. Appellee Lula Schardt, Bain's sister, together with her husband, appellee George P. Schardt, occupied said property rent free as his tenant at will. Margaret Duren was the owner of the adjoining lot to the east of the Bain lot with a frontage of 28.4 feet on the same street, on which was a five-room cottage, which she occupied with her husband, J. A. Duren, as their home. These houses were too close together for a driveway between to the rear of the property, which the Schardts especially desired. The Bain house was out of plumb 7 inches and was leaning toward the Duren house. It required repairs to make it safe, and while making the repairs the Schardts thought it would be a good idea to move their cottage to the west two feet which would make room for a driveway between the two cottages by using a portion of both lots. Schardt and Duren entered into a verbal agreement to this effect by which each was to do certain things in constructing the driveway. The Bain cottage was thereafter moved west two feet, but nothing was done about constructing the driveway thereafter except Schardt dumped three loads of rock therein.

Appellant owned the lot directly east of the Duren lot and adjoining it and she desired a driveway between her lot and the Duren lot, the space between the two

being insufficient, so on February 26, 1931, she purchased the Duren lot without any knowledge of the contract between Schardt and Duren for that driveway and received a deed from Margaret Duren and husband with the usual covenants of warranty. She thereafter began preparations to move the cottage which she had purchased from Duren west toward the property line so as to make room between her house and that she had purchased from Duren for a driveway. The appellees thereupon filed this suit against appellant for specific performance of the alleged contract between Schardt and Duren and to enjoin her from moving the cottage which she had recently purchased west towards the west line of her property. On March 4, 1931, the date the suit was filed and seven days after the Durens had sold and conveyed their property to appellant, the Schardts and Durens entered into a written contract embodying the agreement which had theretofore been verbal. On a trial of the case the chancery court found the issues of the case in favor of appellees and entered a decree perpetually enjoining appellant from moving the Duren cottage west toward the property line and from interfering with appellants in their prospective use of the proposed driveway. The case is here on appeal.

The undisputed evidence discloses that appellant knew nothing about the verbal agreement between the Schardts and the Durens for the establishment of the driveway between their property. She knew that the Schardts had improved their property and had moved the house two feet west, but when she was discussing the purchase of the property from Mrs. Duren she asked if there was a contract or any agreement regarding the driveway, and was told that there was not. There was no agreement of record, no conveyance in the form of an easement or otherwise from Mrs. Duren to Bain or the Schardts, giving them the right to the use of a portion of her lot. At the time appellant purchased, the agreement had not been reduced to writing. Since she had no notice, either actual or constructive, of the alleged agree-

ment at the time she purchased, and, having purchased with the distinct understanding that there was no such agreement, it is difficult to perceive on what theory she may be deprived of a portion of her property for private use and against her will without any compensation. Indeed, private property may not be taken for public use without compensation. It is true that there was some testimony on behalf of appellees that appellant should have known of the agreement because it was general talk in the neighborhood, but no witness testified that she did have actual knowledge thereof. The proposed driveway was never constructed, was never used as a driveway, and, since she had no knowledge of the agreement made by her grantors, she is not bound thereby, and the court erred in holding otherwise.

The decree of the chancery court will therefore be reversed, and the cause dismissed.

ROWELL *v.* ROWELL.

Opinion delivered November 9, 1931.

J. F. O'Melia and *Cravens & Cravens,* for appellant.

Hardin & Barton, for appellee.

BUTLER, J. The case now here began in this way. Ernest Rowell, the appellant, and Hazel Rowell, the ap-

pellee, were married in June, 1929, and separated about the first of the year 1930. The appellant brought suit a short time after the separation to annul the marriage on the ground of fraud practiced by the appellee in its procurement. The appellee answered denying the allegations of fraud, and, cross-complaining, prayed for divorce on the ground of cruel and inhuman treatment, and for alimony. A reply was filed to the cross-complaint denying its allegations, and upon the issues thus joined evidence was taken, and upon final hearing a decree was entered dismissing the complaint for want of equity and granting the prayer of the cross-complaint decreeing divorce and adjudging alimony. On appeal from that decree, its correctness is challenged for four reasons.

■ It is contended that the court erred in refusing to permit appellant to take a nonsuit on the cause of action for annulment. On this question, the record discloses that the appellee was the first to offer testimony which tended to support the allegations of her cross-complaint, and at the close of this testimony the appellant moved to take a nonsuit, which motion was overruled, to which he duly excepted. Appellant contends here that he had the right to control his case until final submission by virtue of the statute (Crawford & Moses' Digest, § 1261) and that this right is not to be denied. Ordinarily this is true, but not always.

In equity proceedings, the complainant cannot as a matter of right dismiss his complaint after a cross-complaint has been filed alleging grounds for, and praying, affirmative relief. *Allen* v. *Allen,* 14 Ark. 666; *Pickett* v. *Ferguson,* 45 Ark. 177, 55 Am. Rep. 545. "Plaintiff may dismiss any claim where such dismissal will not prejudicially affect the interest of defendant, but he will not be permitted to dismiss, to discontinue, or to take a nonsuit, when by so doing defendant's rights will be prejudiced or he will be deprived of any just defense." 18 C. J. § 31, p. 1158. "Where an answer or a plea has been filed showing defendant to be entitled to, and praying

for, affirmative relief, plaintiff will be precluded from dismissing his action on his own motion. The consent of the adverse party is necessary in such case." *Id.* § 32.

It will be seen in the discussion of the second assignment of error that the facts alleged as the basis for appellant's complaint are pertinent to the issue raised by the cross-complaint and the reply thereto. Its dismissal might therefore prejudice the rights of the cross-complainant. Then, too, the original plaintiff was attempting to accomplish, though by a different proceeding, the same result as that sought by the cross-complainant, namely, the dissolution of the marriage bond. It was within the sound discretion of the chancellor at this stage of the proceedings to grant or refuse the motion, and his action will not be reviewed, unless that discretion was abused. This is not shown to be the case.

It is next insisted that upon the merits of the case the preponderance of the evidence tended to establish the allegations of appellant's complaint, and that the court erred in dismissing the same for want of equity. The alleged fraudulent conduct and misrepresentation of the appellee upon which the appellant grounded his cause of action and to which he testified, was that the appellee induced him to believe by statements made by her to him in May, 1929, that she was with child by him as the result of an act of sexual intercourse on January 8th preceding, when in fact she knew her condition was caused by an act of like nature with another man; that he relied on the false statements. That appellee gave birth to a normally developed child on December 6th, following, which was light in color and had red kinky hair, and that appellant's color was "not so light." In addition to his own testimony he offered several of his female relations who testified to statements they said the appellee made on different occasions to the effect that she had had before marriage, sexual intercourse with appellant but once, and that the date of that occurrence was January 8th. And a physician told of a statement of appellee to him, in his professional capacity,

that she had had menstrual periods as late as March 7th. It was appellant's contention that the child born December 6th was not his. As considerably more than 40 weeks had elapsed between January 8th and December 6th, appellant could not have been the father of the child, if it is true, as he says, he did not have carnal knowledge of appellee after January 8th, until their marriage. But appellant's testimony and that of his witnesses was contradicted by appellee.

She was a young colored school teacher, and had a school at Bentonville, and it is uncontradicted that he visited her there, driving a Ford sedan, and was in her company from time to time throughout the spring of 1929. She said, and the chancellor believed, that not only in January but on every occasion thereafter when she and her lover met they "did give to dalliance too much rein." If her testimony is true, and the trial judge found it so, then appellant might well have been the father of the child.

We find it unnecessary to detail the testimony relative to a specific act of incontinence said by appellee to have been enacted by her and appellant at Bentonville in March, or to discuss the circumstances which might tend to show its probability or improbability. It is sufficient to say that the chancellor, who had all the witnesses before him, was in a better position to judge of their credibility than are we, and, when all the circumstances are considered, we are unable to say that his decision was contrary to the preponderance of the testimony.

■ It is next insisted by the appellant that the court erred in adjudging alimony against him in the absence of any testimony on the question. We have examined the record, and fail to find any testimony to establish upon what basis the court fixed the sum of $35 per month as alimony, and are of the opinion that the appellant is correct in this contention. "Before a decree is passed or order for alimony is made, the court should be in possession, either by the admission of the parties or by testimony, of all the facts necessary to form a just de-

cision. The court is not bound by the technical rule applicable to controversies between litigants generally, but the decree or order for alimony cannot rest upon mere presumption or conjecture. All the facts upon which the decree or order is founded must be proved either by affidavits of the applicant and of other persons or by depositions taken upon notice to the other party, or by the oral testimony of the applicant unless, of course, the statute otherwise provides." 19 C. J., § 641, "Evidence," p. 290; *Shirey* v. *Shirey,* 87 Ark. 175, 112 S. W. 369.

Lastly, the contention is made that the court erred in ordering a writ of sequestration. This writ is warranted by § 3509 of Crawford & Moses' Digest, as follows: "The court may enforce the performance of any decree or order for alimony and maintenance by sequestration of the defendant's property, or that of his securities, or by such other lawful ways and means as are according to the rules and practice of the court." However, the order for sequestration ought not to be made without a showing of the nature and amount of the property and without proof of circumstances which would tend to show the intention of the defendant to make such disposition of it as might tend to hinder or delay the enforcement of the order of allowance for alimony.

Upon the consideration of the whole case, we are of the opinion that that part of the decree of the chancellor dismissing appellant's complaint for want of equity and granting appellee a divorce and allowing her alimony is warranted by the testimony, and is affirmed. But the order fixing the amount of the alimony and ordering the sequestration of the defendant's property was arbitrary as having been made without any evidence upon which the orders might be based, and in this respect the decree ought to be reversed and the cause remanded for further proceedings in conformity with the principles of equity and not inconsistent with this opinion. But, as there might have been some sound reason for the order of sequestration, that order is not to be considered as annulled, and shall continue in full force until the

appellee may have an opportunity to offer evidence warranting the same and until it is modified or vacated on a retrial of that issue.

Reversed as to amount of alimony and sequestration, and remanded for further proceedings.

INTER-OCEAN CASUALTY COMPANY *v.* COPELAND.

Opinion delivered November 9, 1931.

[redacted]

Alfred Featherston, for appellant.

Feazel & Steel, for appellee.

BUTLER, J. In April, 1930, Charles E. Holcomb made application for and received the appellant company's insurance policy, by the terms of which he was to be indemnified for death by accidental means in the sum of $500 and against sickness in the sum of $50 per month when by reason of such sickness he was totally disabled and necessarily and continuously confined in the home receiving treatment therein from a physician at least once each seven days, and in one-half of the aforesaid sum where the sickness totally disabled but did not continuously confine him in the home but receiving regular treatments from a physician at an office at least once each seven days.

On the 21st of December, 1930, the said Charles E. Holcomb was accidentally killed, and liability was denied by the appellant. Thereupon the appellee, Mrs. Copeland, the beneficiary named in the policy, brought this suit to recover the amount of the indemnity. From a verdict and judgment in the court below in favor of the appellee, the appellant has prosecuted this appeal.

The appellant complains first that the court erred in denying its prayer for continuance. The action was filed on the 25th day of February, 1931, and the indorsements upon the complaint made by the clerk of the court are as follows: "Summons issued February 25, 1931." "Summons served February 26, 1931." "Filed March 2, 1931." On the 16th day of March, 1931, the Hon. A. P. Steele, the regular presiding judge, announced his disqualification, and an election was held by the practicing attorneys, and the Hon. Tom Kidd was elected special judge to try the case. On the 20th of March, 1931, which was the day apparently set for trial, on petition of defendant, it was given until the 23d to answer, and on that day answer was filed. On the 25th, various motions were filed including the motion for continuance, which motion

alleged as grounds for the same that the defendant's attorney had not had time to obtain the information necessary for the preparation of the defense as he had not been employed until March 12, 1931, and did not know the terms and conditions of the policy, as the same had not been filed with the complaint, and as a further ground alleged that certain named persons were material witnesses for the defendant, officers of the defendant company and all of them nonresidents of the State; that defendant had used due diligence to obtain the presence of these witnesses, but had not had time to have them in attendance or to take their depositions, and that they were not absent by consent, connivance, etc., of the defendant. The plaintiff admitted that the witnesses named if present, would testify to the statement contained in the application for continuance, and the court thereupon overruled the motion. In this action the court did not err.

The statute prescribed that the case will stand for trial at the term following twenty days' service of summons upon the defendant (Crawford & Moses' Digest, § 1286), and it will therefore be presumed that this is sufficient time in which to prepare for trial. *Clark Lbr. Co.* v. *Northcutt,* 95 Ark. 291, 129 S. W. 88. The fact that the attorney had not seen the policy was no reason for a continuance, for the defendant itself had in its possession all the information which the policy disclosed and could have communicated this to its attorney. If, under the circumstances, the defendant was entitled to the attendance of the witnesses named, there was no error in overruling the motion on account of their absence, for § 1270 of the Digest prescribes: "if the adverse party will admit that on trial the absent witness, if present, would testify to the statement contained in the application for a continuance, then the trial shall not be postponed for that cause." The plaintiff made this admission, and the record discloses that the said statements were read to the jury on trial of the case as the testimony of said witnesses.

The deposition of Dr. Henby was taken at Delight and filed with the clerk of the court on March 19th. On March 26th the cause came on for trial, and the plaintiff offered his deposition. The attorney for appellant interposed an objection, and the following colloquy took place:

"Mr. Steel: We desire to read the deposition of Dr. Henby. Mr. Featherston: We just filed a motion to quash the deposition. Mr. Steel: We move to strike it from the record. The jury is selected, the opening statements made, and the trial begun. Court: It comes too late. The court cannot continue to hear motions one after the other on the same subject. Mr. Steel: We wish the court would make a statement in the record that the trial is begun. Court: The motion was filed after the impaneling of the jury, and statements of attorneys for both plaintiff and defendant were made. Mr. Featherston: It was filed before the statements, and after the impaneling of the jury. Court: The motion will be overruled and stricken from the files."

As grounds for the motion it was alleged that the deposition of Dr. Henby was taken without proper notice, that the defendant had no opportunity to be present, and that the deposition was prejudicial to the rights of the defendant. The exception came too late, and the court properly overruled the motion. "No exception other than to the competency of the witness or to the relevancy or competency of the testimony shall be regarded, unless filed and noted on the record before the commencement of the trial." Section 4249, Crawford & Moses' Digest. As will be seen, there was a difference of opinion between the judge and the attorney as to when the motion to strike was filed. The judge stated that it was filed after the impaneling of the jury and statements of attorneys for both plaintiff and defendant, while the attorney insisted that it was filed before the statements and after the impaneling of the jury. It matters not which was correct. Exceptions must be taken "before the

commencement of the trial" and the trial began with the impaneling of the jury. 1 Hyatt on Trials, p. 39, § 36.

At the conclusion of the reading of the deposition objections to the competency of certain questions and answers contained in the deposition were interposed and overruled. The questions and answers objected to are as follows:

"Q. Are you familiar with the policy of insurance that Carl E. Holcomb carried with the Inter-Ocean Casualty Company—policy No. 60605? A. I am. Q. Do you know whether or not the Inter-Ocean Casualty Company was due the insured anything for sick benefits prior to November, 1930? A. It was. Q. How much? A. I do not know exactly, but made reports of his illness to the Inter-Ocean Casualty Company, and they have these reports. I do not find copy of reports in my file. Mr. Holcomb was ill from some time about the first of July until some time the latter part of October or the first of November, or, near as I can tell, he was totally disabled about thirty days of this time and partially disabled about thirty days. The company paid him seventeen dollars and fifty cents ($17.50) leaving a balance due him as near as I can tell of $57.50. In other words, they were due him for one month disability and one month partial disability."

When these questions and answers are compared with the balance of the deposition and so considered, we are of the opinion that they were relevant and competent. It is apparent from the deposition that Henby was the physician who attended Holcomb during his illness, which began about July 3, 1930, and after a convalescence later recurred and continued through October and until about the first of November; that he was totally disabled for about thirty days; that, as attending physician, Dr. Henby made reports of Holcomb's illness to the appellant company, and that said company had these reports in its possession at the time he testified, and that he was unable to find copies of these reports in his files. In making these reports it is evident

that he familiarized himself with the policy, and that part of his testimony relative to the balance due by the company to Holcomb was not an expression of opinion but a statement of fact, to-wit, that Holcomb had been totally disabled for one month and partially disabled for another month, and for this disability he had received the sum of $17.50, and that part of his answer stating that there was a balance due of $57.50 was but the result of a mathematical calculation. The terms of the policy provided that the insured should have $50 per month for total disability while confined to the home with a physician in attendance, and $25 per month where the insured is unable to perform his usual work but can go to a doctor's office for treatment.

The appellant contends that "the most serious question for determination in this case is whether or not on December 21, 1930, the date of the death of Charles E. Holcomb, the policy which is the basis of this suit was in force." Appellant takes the position that the policy was not in force because the premiums of $3.50 each, due November 1st and December 1st, had not been paid, and that this avoided the policy by the express terms of the same.

It appears from a letter which was offered in evidence from the general agents of the appellant, that it had received claim for sick benefit, and that there had been some previous correspondence between it and Holcomb relative to the claim. This letter was dated October 13, 1930, and was for sickness beginning July 3d, but does not disclose when the sickness for which claim was made terminated. It does indicate, however, that a controversy had been going on regarding the amounts due, but it "decided to allow disability benefit for 21 days partial, amounting to $17.50, deducting therefrom September and October premiums in the amount of $7 and inclosing claim voucher for the difference, $10.50." This claim voucher was dated October 11, 1930, and recited that it was in full payment under the policy for the illness beginning on or about July 3, 1930. It is

argued that the acceptance of this voucher exonerated the appellant from liability because as it contends there was no proof of any further illness. We do not so understand the testimony. Mrs. Copeland, the mother, stated that Holcomb was sick and under the care of Dr. Henby in October and to November 1st, and in November was in a hospital. Dr. Henby testified positively that the periods of illness of which he made reports, amounted to thirty days' total and thirty days' partial disability, and that a part of this illness was as late as about November 1, 1930. The reasonable inference arises that a part of the disability of which report had been made was subsequent to that which was settled for by the voucher of October 11, 1930, and that for this illness no payment has been made. That being true, there were funds sufficient in the hands of the appellant due Holcomb to keep his policy in force for the months of November and December, and it was the duty of the appellant to apply the amounts due Holcomb to the payment of the advance monthly premiums and thus prevent a lapse of the policy. *Union Central Life Ins. Co.* v. *Caldwell,* 68 Ark. 505, 58 S. W. 355; *American Nat. Ins. Co.* v. *Mooney,* 111 Ark. 514, 164 S. W. 276; *Pfeifer* v. *Mo. State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600; *Continental Casualty Co.* v. *Bigger,* 181 Ark. 156, 15 S. W. (2d) 23.

There was no question raised as to whether or not Holcomb died as a result of the automobile accident and that his death came within the provisions of the policy is not controverted, the sole defense being that the policy was void for nonpayment of premiums. As both parties asked for a directed verdict, the judgment must be upheld, as there seems to be substantial evidence to support the same.

Another position taken by the appellant, which we were about to overlook, is that a demurrer which it filed to the complaint, and which was overruled, should have been sustained for the reason that the complaint was fatally defective in that it did not allege that the plain-

tiff or the deceased, Charles E. Holcomb, the insured, were residents of Pike County, and failed to allege that the accident which caused his death occurred in Pike County, and thus lay the venue under § 6151, Crawford & Moses' Digest. The question raised by the demurrer was that the complaint did not state facts to constitute a cause of action. Venue is no part of a cause of action, and it is not usual, nor does it seem necessary, to aver the facts showing it, but, if so, the defect could not be reached by general demurrer, but by special plea to the jurisdiction. *Hughes* v. *Martin,* 1 Ark. 455; *Pullen* v. *Chase,* 4 Ark. 210; *Stone* v. *Bennett, Id.* 71; *Swinney* v. *Burnside,* 17 Ark. 38.

Upon rendition of the judgment the court heard testimony of reputable attorneys relative to the amount to be assessed as attorney's fees, and, in view of the evidence and the nature of the case, we cannot say that the fee allowed was excessive.

The record is somewhat meager, but the reasonable inference may be drawn that demand upon the company for the amount of life indemnity was made, liability denied, and payment refused. It therefore was not necessary to make formal proof of loss, and the provision of the policy providing for sixty days for filing proof of loss has no effect. The suit was not prematurely brought, and the twelve per cent. penalty was properly affixed.

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

BERRY *v.* SALE.

Opinion delivered November 16, 1931.

W. J. Dungan, for appellant.

Elmo Carl-Lee, for appellee.

HART, C. J., (after stating the facts). The Legislature of 1931 passed an act to provide for the organization and administration of the public schools. Acts of 1931, p. 476. Section 59 of the act gives the school districts authority to borrow money for certain purposes, and reads as follows:

"All school districts are authorized to borrow money and issue negotiable coupon bonds for the repayment thereof from school funds for building and equipment of school buildings, making additional repairs thereto, purchasing sites therefor, and for funding any indebtedness created for any purpose and outstanding at the time of the passage of this act as provided in this act."

This court has uniformily held that, in the construction and interpretation of statutes, the intention of the Legislature is to be ascertained and given effect from the language of the act if that can be done. In doing this, each section is to be read in the light of every other section, and the object and purposes of the act are to be considered. *Miller* v. *Yell & Pope Bridge District,* 175 Ark. 314, 299 S. W. 15; and *Berry* v. *Cousart Bayou Drainage District,* 181 Ark. 974, 28 S. W. (2d) 1060. The reason is that statutes are written to be understood by the people to whom they apply, and their words and phrases are considered and used in their plain and ordinary, as distinguished from their technical, meaning, where the language is plain and unambiguous. In such cases it is said that, where the intention of the Legislature is clear from the words used, there is no room for construction, and no

excuse for adding to or changing the meaning of the language employed.

The section of the act under construction was a part of the act passed by the last Legislature for the organization and administration of common public schools. The act contains 198 sections with an emergency declared, and there is nothing in any other section of the act which tends to show that the language used in § 59 was intended to be given any other than its ordinary and normal meaning. Under the express terms of the act, power is given to the school district to borrow money and issue negotiable coupon bonds for funding any indebtedness created for any purpose and outstanding at the time of the passage of the act, March 25, 1931. According to the allegations of the complaint, which are admitted by the demurrer, the outstanding indebtedness of the district at that date was $58,500. It is also alleged in the complaint that since that time the school district has paid the sum of $11,093.89 of this indebtedness by certain sums of money received from the tax collector and advanced by him to the district from the school taxes of said district, payable in 1931. Payment is a satisfaction of a debt and extinguishes the indebtedness. The section of the statute under consideration authorizes school districts to borrow money and issue bonds for funding any indebtedness outstanding at the time of the passage of the act, but does not contain any mandatory requirement for the issue of bonds for such purposes.

In the present case, the district might have issued bonds in the sum of $58,500, which represented the outstanding indebtedness of the district at the time of the passage of the act; but the district did not choose to do so. It paid the sum of $11,093.89, and this had the effect of extinguishing that much of the outstanding indebtedness. Consequently, the district would only have power and authority under the act to issue bonds for the remaining indebtedness, which was outstanding as of March 25, 1931. If it had paid all of the indebtedness of the district out of the tax moneys due the district from the collection of tax money due the school district, it would not

have had any authority to issue bonds at all. Having paid only a part of the outstanding indebtedness of the date of March 25, 1931, it has the power and authority to issue bonds in the principal sum of $58,500, lessened by the sum of $11,093.89, which has been paid since that date.

It is contended, however, that such construction of the statute is contrary to the holding and reasoning of the court in *Hagler* v. *Arkansas County,* 176 Ark. 115, 2 S. W. (2d) 5, but we do not think so. In that case, the court had under consideration an act of the Legislature of 1927, which was enacted to provide for the relief of all of the counties in the State which had issued and sold bonds under the provisions of amendment No. 10 to the Constitution, and which had originally paid some of the indebtedness for which said bonds were sold out of the revenues of said counties. This act authorized each county to make an order allowing amounts which had been originally paid out of the general revenue fund as a charge against the bond issue. This was held to be a relief against a mistake of fact which had occurred because it was first thought by the people of the State that amendment No. 8 became effective October 7, 1924, when, according to the holding of this court, it became effective on December 7, 1924. Amendment No. 10 gave the counties authority to issue bonds for funding their indebtedness which existed at the time of the adoption of the amendment. Consequently, the court said that a mistake of law and fact both had been made when the counties issued bonds to cover the outstanding indebtedness of October 7, 1924, instead of December 7th of that year. The Legislature of 1927 passed an act for the relief of these counties, and it was held that the indebtedness accruing between October 7th and December 7, 1924, might have also been included in the amount of the outstanding indebtedness at the time of the adoption of the amendment. Having been omitted from the bond issue by mistake, it was held that a supplementary bond issue might be made for the omitted part, or, in cases where

payment had been out of the general revenue, such payment would be considered made under a mistake of fact and treated accordingly.

No such issue is presented in the present case. As we have already seen, § 59 authorizes school districts to issue bonds for funding any indebtedness outstanding at the time of the passage of the act. No mistake has been made as to the time of the passage of the act, and bonds could be issued only for an indebtedness of the district at that time. If the whole or any part of the indebtedness has been paid, this would extinguish the debt in whole or as to the part paid, and no bonds could be issued to fund an indebtedness which had already been paid and thereby had become extinguished.

It follows that the decree will be reversed, and the cause will be remanded with directions to overrule the demurrer, and for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

RAILWAY EXPRESS AGENCY, INC., *v.* S. L. ROBINSON & COMPANY.

Opinion delivered November 16, 1931.

A. M. Hartung and *Warner & Warner,* for appellant.
D. H. Howell, for appellee.

HART, C. J. Appellant, Railway Express Agency, Inc., prosecutes this appeal to reverse a judgment for $339.50, in favor of appellee, S. L. Robinson & Company, for damages sustained to an interstate shipment of strawberries.

In the original complaint, it is alleged that the negligence of the carrier consisted in failure to furnish the shipper with a properly constructed and equipped refrigerator car in which to ship the berries and the failure to properly ice it in transit. Counsel for appellees claim that they amended their complaint and relied solely on liability for loss by negligence of the carrier as at common law. Inasmuch as we have reached the conclusion that the carrier has overcome the *prima facie* case made by the shipper, we shall treat the complaint as amended as contended for by appellees.

On May 11, 1929, appellees delivered to appellant at Roland, Oklahoma, a station on its railroad twelve miles from Van Buren, Arkansas, 457 crates of strawberries, consigned to themselves at Kansas City, Missouri. Two hundred and forty-seven crates of the berries were loaded in the car on May 10th, and 210 crates were loaded in the car on May 11th. On the 15th day of May, 1929, the shipper diverted the car from Kansas City to A. H. Welch, Chicago, Illinois.

According to the testimony of A. H. Welch, he was notified of the arrival of the car and inspected it on May 16, 1929. He did not make any written report of the inspection, but his recollection is that he inspected it on the team track of the railroad and found the berries in poor condition. Many of them were bruised, but he could not state what caused this.

The amount of damage to the shipment of berries was also proved by appellees. This proof made a *prima facie* case in favor of the shipper against the carrier, and cast the burden upon it to show that damages did not result from any cause for which it was responsible by law or by contract.

The reason the burden of proof changes from the shipper to the carrier when the former has proved deliv-

ery in good condition to the carrier and failure to redeliver in good condition is, that during transit the goods are no longer subject to the shipper's supervision or observation and are solely in the care of the carrier. The carrier has the better means, and frequently the only means, of showing whether there was any negligence in its handling of the berries. The employees of the carrier are with the goods during the whole time they are under its charge, both by day and by night. The rule is well settled and requires no further discussion. *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Wallace,* 223 U. S. 481, 32 S. Ct. 205; *St. L. I. M. & So. Ry. Co.* v. *Cunningham Commission Co.,* 125 Ark. 577, 188 S. W. 1177; *Missouri Pac. Rd. Co.* v. *Bell,* 163 Ark. 284, 259 S. W. 745; *H. Rouw Co.* v. *St. L. S. F. Ry. Co.,* 172 Ark. 881, 290 S. W. 936; and *C. R. I. & P. Ry. Co.* v. *Robinson & Co.,* 175 Ark. 35, 298 S. W. 873.

We are of the opinion that the *prima facie* case so made by appellee, which raised a presumption of negligence against the carrier, was completely overcome by the evidence introduced by the latter. The evidence introduced by the carrier to overcome the *prima facie* case for negligence against it is very voluminous and cannot be set out in detail within the compass of this opinion. We have carefully considered it, however, and shall attempt to set out the substance of it.

The carrier did not content itself with introducing witnesses as to the general condition of the shipment of strawberries while in its hands, but introduced all persons employed by it who had part in the different transactions during transit. We do not mean that all the operatives of the train were introduced as witnesses, but we do mean that the carrier followed the shipment step by step from the place of shipment to the place of delivery. It was shown by competent evidence that a refrigerator car of the most approved type was furnished the shipper within which to carry the berries. The condition of the car and its material, both as to its equipment and construction, were detailed by the witnesses.

It was shown that the carrier had a sufficient number of stations along the route for re-icing the car and that the car was properly inspected and well iced at all these stations. The evidence shows that the car of strawberries was in good condition at all these points. The car was diverted by the shipper from Kansas City, Missouri, to Chicago, Illinois. As soon as it arrived at its destination, the consignee was notified. An examination of the berries was made when they arrived at their destination, and they were found to be full ripe and watery. None of the crates were broken or damaged.

One inspector testified that the berries contained brown rot which is a disease of berries known as botrytis. This exists from water-soaked berries, causing a dry and leathery rot. Botrytis in these berries originated from the berries getting water-soaked, forming a dry leathery rot. This resulted from the inherent nature and infirmities of the berries. Another inspector testified that brown rot, called botrytis, is an inherent field disease. The condition existed when the berries were loaded, although it might not then be visible. The berries could be infected with that disease and on inspection at the loading point be accepted as number one berries because the disease might not be sufficiently developed to be noticed. Leather rot is an advanced stage of the disease when the skin gets hard. It is an advanced stage of botrytis. The water-soaked condition of the berries indicated that they were handled shortly after a rain and encountered rain during the ripening period. This hastened maturity, but the berries could still be graded as number one at the loading point, since it would take time to show the effect of the disease. Too much water causes the calyx to get dark or black. Refrigeration in express cars would tend to retard ripening, but, if the berries are diseased, refrigeration will not stop the disease. If the berries are water-soaked, refrigeration will not remedy it. The inspectors expressed the opinion that the berries in question possessed the inherent disease at the time they were loaded in the car.

The testimony of the witnesses for the appellant was reasonable and consistent in itself, and we think entirely overcame the presumption of negligence in favor of the shipper caused by proof that the berries were received in good condition at the point of shipment, and were in a decayed condition at the time of reaching their destination. In this connection it may be stated that the undisputed proof shows that the berries were handled according to schedule time of the train, and there was no delay in their transit. It is true that A. H. Welch, a witness for the shipper, testified that the berries were bruised when inspected by him at the place of destination in Chicago. He said that he did not know, however, what caused this; but the explanation given by the witnesses for the carrier explains it. On account of their diseased condition they became soft and watery, and this, in the very nature of things, would cause them to become bruised. According to the train operatives, at no point along the route was there any rough handling of the car of berries.

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

THOMPSON *v.* TAYLOR.

Opinion delivered November 16, 1931.

[redacted]

Willard Pendergrass and *Evans & Evans,* for appellant.

W. B. Rhyne and *Partain & Agee,* for appellee.

SMITH, J. In 1925 R. M. Thompson and L. P. Strobel formed a mercantile partnership under the name of Strobel-Thompson Dry Goods Company. The partnership continued until March, 1929, at which time it was dissolved by the retirement of Thompson. Strobel had been in active charge of the business, and from time to time borrowed various sums of money from the American Bank & Trust Company, of Paris, Arkansas. The loans were evidenced by notes executed by Strobel in the name of the partnership. Strobel's authority to borrow this money and execute the notes is not questioned.

At the time of the dissolution of the partnership the bank held two notes of the firm. Strobel continued in business and continued to use the original partnership name. When the notes held by the bank at the time of the dissolution matured, they were not paid but were renewed by Strobel, who signed the renewal notes in the name of the partnership as the original notes had been signed. The renewal notes were signed November 14, 1929.

At the time of the execution of these renewal notes the bank was advised that Thompson was no longer a member of the partnership which had been dissolved, and it is an undisputed fact, and was well known to the bank that, while Strobel had continued to use the name under which the partnership business had been operated, he was the sole owner of the business. Shortly after the execution of the renewal notes Strobel became a bankrupt, and later the bank became insolvent and was taken over by the State Banking Department. Suit was brought by the bank commissioner on the renewal notes against Thompson, and from a judgment in the bank commissioner's favor is this appeal.

It was contended by Thompson at the trial below that the dissolution was discussed with the cashier of the bank, and that it was agreed on behalf of the bank that Strobel would take over the assets of the firm and assume its liabilities, and that Thompson should be discharged from any and all partnership liability, so far as the bank was interested. This agreement was denied by the cashier of the bank.

The court submitted Thompson's defense to the jury under an instruction which told the jury that, if the bank accepted the defendant Strobel's individual assumption of the firm's indebtedness to the bank, with knowledge of the dissolution of the firm, it thereby released defendant Thompson from liability for said indebtedness.

In other instructions the court charged the jury that the burden was upon Thompson to show his release, and we think this was error under the facts of this case.

It may be conceded that, if Thompson had not been released by the bank from his liability to it, he would still be liable for the original debt which the renewal notes evidenced. However, he was not sued upon the original debt but upon the renewal notes. It is an undisputed fact that the partnership had been dissolved, and that for a period of eight months thereafter Strobel was engaged, not in winding up and settling the partnership affairs, but in carrying on the business in which the partnership had been engaged as sole owner thereof. In the meantime Strobel continued to be a customer of and depositor with the bank, whose officers knew that, while Strobel had continued to use the firm name, he had become the sole owner of the business, and that the partnership had ceased to exist. The notes sued on were executed in the name under which the partnership had operated, but this was the name under which Strobel transacted all other business with the bank after the dissolution. It was the name under which Strobel carried his individual account with the bank. In this name Strobel had deposited and had checked out of the bank more than twenty thousand dollars.

Of course, Thompson's retirement from the partnership did not discharge his liability to the bank for the partnership debts due at the time of the dissolution, unless it was agreed by the bank that it would thereafter hold Strobel only liable. But this question of fact was submitted to the jury, and the verdict of the jury would be conclusive of the question of liability, but for the error in placing the burden of proof upon the defendant Thompson.

Prima facie Thompson appears to have been discharged by the execution of the individual note of Strobel and by the subsequent transactions between Strobel and the bank, and we think the burden was upon the bank to show that this was not true, and that the original liability of Thompson as a member of the dissolved firm subsisted and continued, and for the error indicated the judgment will be reversed, and the cause remanded.

Certain questions are raised on this appeal as to errors occurring at the trial, but, as they are not likely to recur on the retrial of the cause, we do not discuss them.

LITTLE ROCK GRANITE COMPANY *v.* ROSS.

Opinion delivered November 16, 1931.

J. S. Utley and *Wm. T. Hammock,* for appellant.

Henry C. Riegler, for appellee.

SMITH, J. Appellants brought this suit to recover damages to compensate a trespass alleged to have been committed by appellees in the removal of a small house and the digging up of a driveway on lot 58 of Stewart's Subdivision to the city of Little Rock. The house, a small building about twelve feet square, was torn down and the driveway was dug up for the purpose of clearing up a small lot which the defendants claim to own.

Plaintiffs' ownership of lot 58 is not denied, and the question in the case is one of fact whether the house and driveway were on lot 58.

Plaintiffs acquired title to lot 58 from J. M. Stewart, trustee, who had the subdivision bearing his name surveyed and platted and the map thereof recorded.

The portion of Stewart's land out of which lot 58 was carved has as its western boundary line the east boundary line of the north half of the northwest quarter of the southwest quarter of section 33, township 1 north, range 12 west. Adjacent to lot 58, and lying between it and the right-of-way of the Rock Island Railroad, is a small triangular lot 19 feet wide at its base and 57 feet in length and containing .22 of an acre. The plaintiffs do not claim to own this triangle. It is the property of the defendants, and the question in the case is the location of the line between lot 58 and this triangle. Defendants deny that the property damaged was on lot 58.

Two surveys of the line between lot 58 and the triangular lot were made, one being referred to as the Conway survey, the other as the Martin survey. In addition to the plats of these two surveys, the plat of the entire Stewart addition was offered in evidence, and the witnesses testified with reference to one or the other of these maps. The testimony is difficult to understand with the plats before us, and without them it would be almost impossible to make the testimony intelligible.

We shall not therefore set this testimony out, and it will suffice to say that, according to one survey, the property damaged was on lot 58, whereas it was not on that lot according to the other survey.

The cause was heard by the court sitting as a jury by consent, and certain findings of fact and declarations of law were made, upon which there was a judgment in favor of the defendants, and this appeal is therefrom.

It is practically conceded, and such is the fact, that the testimony is legally sufficient to support a finding either way upon the disputed question of fact. This being true, the finding of the court is as conclusive as the verdict of a jury would be, and we would not be required or permitted to pass upon the question of the preponderance of the testimony, and we do not do so.

It is insisted, however, that the judgment in favor of the defendants is contrary to and inconsistent with the special findings of fact made by the court as to the correct location of the dividing line between the two lots. If this be true, the judgment of the court must be reversed, for the statute which provides that, "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly" (§ 1304, Crawford & Moses' Digest), applies to a finding of fact made by the trial court as well as to the verdict of a jury. *Gebhart* v. *Merchant,* 84 Ark. 359, 105 S. W. 1034. But we do not concur in the view that the court's special finding is in conflict with the judgment.

The essence of the plaintiffs' case was presented in a finding numbered six, which the court refused to make. This finding was to the effect that the plaintiffs were the owners of all that part of lot 58 lying east of the west boundary line of the north half of the northeast quarter of the southwest quarter of § 33, and that the defendants, through their agents and servants, entered upon said lot and tore down the building and dug up the driveway. The plaintiffs' right to recover was dependent upon the establishment of the facts which the plaintiffs requested the court to find. The court was not asked by the defendants to make any special findings, but the refusal to make this special and essential finding necessarily

indicated a finding to the contrary, as the controlling point in the case was the establishment of these facts.

As the judgment of the court is based upon testimony legally sufficient to sustain it, we must affirm it, even though in our opinion the judgment was contrary to the preponderance of the testimony. The judgment must therefore be affirmed, and it is so ordered.

[redacted]

FORD *v.* FERGUSON & SON.

Opinion delivered November 16, 1931.

[redacted]

Sam Levine, for appellant.

Rowell & Alexander and *Hendrix Rowell,* for appellee.

HUMPHREYS, J. This is an appeal from a summary judgment rendered in the chancery court of Jefferson County on a bond executed by appellant as surety and John W. Gibson as principal to enjoin an execution sale of equities of the said John W. Gibson in certain lands in said county and growing crops thereon until November 1, 1930. The judgment under which the execution had been levied was obtained in the circuit court of said county by appellees, C. M. Ferguson & Son, against John W. Gibson on the 12th day of April, 1929, for $1,920.50. Its validity was not attacked in the suit to enjoin it. The chancery court prohibited the appellees herein from enforcing the judgment until November 1, 1930, on condition that John W. Gibson would execute a bond with good and sufficient security in conformity with the re-

quirements of § 5806 of Crawford & Moses' Digest, which is as follows:

"Where the injunction is to stay proceedings upon a judgment or final order, the bond will be to the effect that the party obtaining the injunction will satisfy the judgment or order, or so much of it as is enjoined, to the extent to which the injunction may be dissolved; and that he will also satisfy any modified judgment or order that may be rendered or made in lieu of it, or so much of it as exceeds the amount left unenjoined. In other cases, unless otherwise directed by the court or judge, the bond shall be to the effect that the party giving it will pay to the party enjoined such damages as he may sustain, if it is finally decided that the injunction ought not to have been granted."

In compliance with the order, Gibson and his surety, the appellant herein, executed the following bond:

"We undertake and are bound to the defendants herein that the plaintiff, John W. Gibson, will satisfy the judgment against him in favor of the said C. M. Ferguson & Son involved herein, or so much thereof as is enjoined by the court in this action, to the extent to which said injunction may be dissolved, and that the said John W. Gibson will also satisfy any modified judgment or order that may be rendered or made in lieu of said judgment, or so much of said judgment as exceeds the amount left unenjoined.

"John W. Gibson,
"Jim G. Ford."

On the 19th day of March, 1931, the court, upon motion of appellee, C. M. Ferguson & Son, entered the summary judgment appealed from against the principal and surety in the bond for the total sum of $2,141.43.

Appellant contends for a reversal of the decree on the ground that the court was without authority to render a summary judgment against the principal and surety in the bond until the injunction had been dissolved by order of court. Neither the language of the statute under which the bond was given nor the bond admits of such

construction without reading into one or the other or both the words "by the court" after the word "dissolved." The bond is in the nature of a stay bond for a money judgment. The court is of the opinion that the final order of injunction issued on May 14, 1930, was automatically dissolved by failure to pay the judgment on or before November 1, 1930, and that it was within the inherent power of the chancery court as well as within its statutory power (§ 5822 of Crawford & Moses' Digest) to render a summary judgment upon the bond.

No error appearing, the decree is affirmed.

[redacted]

BOEHMER *v.* SHORT.

Opinion delivered November 16, 1931.

[redacted]

Pryor & Pryor, for appellant.

Roy Gean, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $1,300 obtained by appellee against appellant in the circuit court of Sebastian County, Fort Smith District, for injuries to her automobile and herself, resulting from the negligence of an employee of appellant in driving their service car into appellee's car. The driver was a negro regularly employed by appellant to wash cars and drive a service car. The cars were moving in the same direction on the highway between Fort Smith and Van Buren, and, just before reaching the free bridge, the negro overtook and ran into the rear end of appellee's

car and injured both the car and appellee. The negro abandoned appellant's car and absconded before the officers arrived on the scene. There was a chain in the service car which was used to attach the service car to wrecked cars and haul them in. The appellee used this chain in attaching her car to the car of the two young men who pulled her home. A single barrel shotgun was in the back end of the service car. There was a negro in the service car who stated that the driver had picked him up to accompany him on a hunting trip. The collision occurred at about two-thirty o'clock P. M. Christmas day. The next morning, Gus Boehmer, who was the senior member of the firm, in response to a 'phone call from appellee, came to appellee's home to see her car. According to the testimony of appellee and her witnesses, he admitted that the negro was their regular employee and made no denial that he was working for them. After examining her car, he admitted that she was not at fault, and said that he could not understand how it happened as the negro was a careful, dependable employee, and, before leaving, offered to repair her car as he was personally interested. Boehmer denied making the statement, saying that the substance of what he said was that he would investigate the matter, and, if he became convinced that they were liable, he would repair the car. Subsequently, Boehmer refused to fix the car.

H. A. Slack, one of appellee's witnesses, who corroborated her statement as to what was said in the conversation, later testified that Boehmer said the negro was in the habit of carrying his car keys and driving it when he wanted to. C. M. Short, the father of appellee, testified that he talked to Boehmer afterwards, and Boehmer made the statement to him that the negro was their employee, and that they would pay the damage. Boehmer denied making such a statement.

Appellee also testified that she called appellant's garage the day after the accident and inquired for the negro driver; that she was answered by a son of Boeh-

mer, who stated that he was not there; that he had an accident Christmas day and had not been seen since.

Appellant and his witnesses testified that they left the service car the negro was driving in the garage when they closed their business Christmas eve; that the garage doors were locked and remained in that condition until they opened them the morning of the 26th for business; that there were no evidences of the garage having been broken into, and that they could not account for him having the car as none of them had given him permission to take it or directed him to go anywhere for them; that no one except Boehmer, his son, and the foreman, had keys to the garage.

Over the objection and exception of appellant, the cause was submitted to the jury upon the issue of whether the driver, at the time of the injury, was acting within the scope of his employment and in furtherance of appellant's business, notwithstanding appellant's request for a directed verdict.

The sole question therefore involved on this appeal is one of agency, and appellant contends that the undisputed testimony shows that the negro driver was not appellant's agent, but, on the contrary, had unlawfully obtained possession of the car without the consent or knowledge of appellant, and, at the time of the injury, was on a hunting trip with another negro. If the undisputed proof reflected that the negro had stolen the car out of the garage and was using it for his own purposes and was not in pursuit of his employer's business, appellant would have been entitled to an instructed verdict. Appellee, however, made a *prima facie* case of liability against appellant when she showed that she was negligently injured by a regular employee of appellant, who was driving a service car belonging to appellant, properly equipped to haul in wrecked cars. *Mullins* v. *Ritchie,* 183 Ark. 218, 35 S. W. (2d) 1010; *Casteel* v. *Yantis-Harper Tire Co.,* 183 Ark. 475, 36 S. W. (2d) 406. It was ruled in both cases, however, that the *prima facie* case established by such proof might be overcome by testimony to

the contrary, saying that, where the evidence on that point was contradictory, the question became one for the jury.

We think the testimony adduced by appellant to the effect that at the time of the injury the negro driver was not engaged in the service of appellant was contradicted by the statements made by Boehmer the next day, if believed by the jury, and also was contradicted by the unreasonable statement made by appellant that the negro got the car out of the garage without their knowledge and consent. The jury might have disbelieved their unreasonable explanation and reasonably concluded that they had sent him to haul in a wrecked car. There were no evidences that the negro had broken into the garage. He had no key, and the only way he could have obtained it was from one of the three who had keys.

The facts in the instant case bring it within the principles announced in the Mullins and Casteel cases, *supra.*

No error appearing, the judgment is affirmed.

TRI-COUNTY HIGHWAY IMPROVEMENT DISTRICT *v.* TAYLOR.

Opinion delivered November 16, 1931.

Horace Sloan, for appellant.

Lamb & Adams, for appellee.

MEHAFFY, J. The appellee filed in the chancery court of Craighead County the following complaint:

"Comes the above-named plaintiff and, complaining of the above-named defendant, for his cause of action states:

"(1) That plaintiff, Walter E. Taylor, is State Bank Commissioner of Arkansas, and as such is in charge of the liquidation of the American Trust Company, insolvent, said bank having been closed and turned over its assets to the State Bank Commissioner on November 1, 1930.

"(2) In the capacity aforesaid, the said plaintiff is the owner and is in possession of the following described lands located in the western district of Craighead County, Arkansas, to-wit:

"South half of the southwest quarter of section seventeen (17), southwest quarter of the northwest quarter section seventeen (17), southeast quarter of the northeast quarter of section eighteen (18), north half of the northeast quarter of section nineteen (19), except ten acres for railroad right-of-way.

"(3) The defendant, Tri-County Highway Improvement District, was created by act No. 186 of the year 1919, (Vol. 1, Road Acts, 1919, p. 510) which said act was amended by act 61, approved at the special session of the Legislature, February 5, 1920 and by act 680, 1921, p. 414, the said Tri-County Highway Improvement District was dissolved, subject to the liquidation of all its debts.

"(4) After considerable litigation, claims of creditors were established against the said district and taxes

were extended against the lands in said district. Suit was finally filed for delinquent taxes, and, on May 18, 1925, this court rendered decree foreclosing lien of said delinquent taxes, and ordering delinquent lands sold. That, among the lands located in the district and so ordered sold, are lands above described by an adequate description, the void description being as follows: 'Pt. NW NE (30a) 19-15-3.'

"The court designated a special commissioner for the purpose of making said sale, and said sale was had on May 21, 1927, at which sale all delinquent lands were struck off and sold to the defendant, and at the August, 1927, term of this court the commissioner made his report of sale, which was duly confirmed, and executed a commissioner's deed, purporting to convey title to the said lands to the defendant.

"(5) The Forty-seventh General Assembly of the State of Arkansas, by act No. 153, approved March 20, 1929 (Acts 1929, p. 785), provided that the said highway commission should ascertain as soon as possible the amount of valid outstanding indebtedness against any road district in this State and pay same, and, after considerable litigation in the courts, said act was sustained by the Supreme Court of Arkansas and all indebtedness of the Tri-County Highway Improvement District was paid and discharged in full. That it was the purpose and intent of said act of the Legislature to relieve the taxpayers and property owners in road improvement districts of this State, and, when all of the indebtedness of the Tri-County Highway Improvement District became paid in full, it was the purpose and intent and necessary effect of said act and payment thereunder that all claims of road improvement districts against the delinquent lands in said district should be terminated and at an end, and that the owner of said property should hold the same free from any claim on the part of said improvement district.

"(6) The Tri-County Highway Improvement District embraces lands in three counties, viz: Craighead,

Poinsett and Greene; that the number of delinquent tracts of land in said district from which a redemption has never been effected are as follows: Craighead County, approximately 800 tracts; Poinsett County, approximately 580 tracts; Greene County, approximately 300 tracts.

"That the lands situated in Craighead and Poinsett counties have been conveyed to the district. By far the majority in number of said tracts of land are wild and unimproved, and, in addition to having these delinquent Tri-County Highway Improvement District taxes thereon, there are delinquent drainage and State and county taxes. In the greater number of instances such wild lands are not worth the total of the delinquent general, highway and drainage taxes now due against the same. Large areas of said delinquent lands consist of wild, flat, post-oak lands underladen with hardpan and of slight fertility, and in most instances the wild lands have been cut over with the result that the timber growing thereon is at present of very slight value.

"The Tri-County Highway Improvement District taxes were originally payable in the years 1921 and 1922, and same have been paid on most lands which are actually being farmed and of real agricultural value. There is no possibility that any appreciable percentage of said delinquent taxes can ever be collected in view of the small value of the delinquent tracts affected as compared with the total tax burden thereon. That there are practically no sales whatever between private parties of wild unimproved lands. The Tri-County Highway Improvement District has no bonds outstanding, and the taxes above levied by it were imposed solely for the purpose of paying off and discharging the preliminary expenses of said district, the unpaid balance of which, as above set out, was paid by the State Highway Department in full.

"(7) By reason of the matters and things stated aforesaid, this plaintiff should be held to own the lands above described free from any claim by the said Tri-County Highway Improvement District, and therefore asks that his title to the lands be quieted and confirmed in him, and that commissioner's deed to the defendant

hereinabove described be set aside, canceled, and held for naught as a cloud upon this plaintiff's title, and for all other proper relief."

The appellant entered its appearance and filed a demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The court overruled the demurrer, and appellant stood upon its demurrer. The court rendered final decree setting aside the deed to the lands to the Tri-County Highway Improvement District as being a cloud upon the title. The appellant excepted, prayed an appeal to the Supreme Court, which was granted, and the case is here on appeal.

The Tri-County Highway Improvement District was created by an act of the Legislature of 1919. The land involved in this controversy was sold for delinquent assessments and purchased by the district.

The act creating the district and the act amending the act creating the district were both repealed. The repealing act in 1921 authorized and impowered the commissioners to wind up and liquidate all the affairs of said district. In 1927 the Legislature passed an act, the first section of which reads as follows: "It is hereby declared to be the policy of the State to take over, construct, repair, maintain and control all the public roads in the State comprising State highways as herein defined." Act 11 of the Acts of 1927.

The Legislature in 1929 passed act 153, reciting that there was an extensive amount of indebtedness against road improvement districts, and that no provision was made for the payment of these obligations by act 11 of 1927, and this act, No. 153, provided that the highway commissioner should ascertain the outstanding indebtedness of road districts organized prior to 1927 and pay such indebtedness.

It is the contention of the appellant that the donation made to pay the indebtedness of road districts was a donation to the district as such, and not merely to one class of property owners, namely, delinquent property owners.

The only thing, therefore, for us to determine is what was the intention of the Legislature in passing the act for the payment of the indebtedness of road districts.

Appellant states that there are three possible views to take of the effect of payment by the State. One is that when the indebtedness of the district was all paid, that the State became subrogated to the claims of creditors, and that the proceeds of collections, less the cost of collecting, should be paid to the State and credited to the highway fund. However, both the appellant and the appellee argue that this could not have been the intention, and that the State could not be subrogated to the claims of the creditors. That the State was a volunteer in the payment of these claims cannot be controverted.

It would therefore not be entitled to subrogation. *N. Y. Life Ins. Co.* v. *Nichol,* 170 Ark. 791, 281 S. W. 21; *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41. We think it therefore clear that it was not the intention of the Legislature that the land in controversy should belong to the State, or that the proceeds from the sale of the land should belong to the State.

It is contended, however, by the appellant, that the act was intended for the relief of all the landowners in the district, or the district as a whole, and that the payment of delinquent taxes should be enforced and the collections divided among all the property owners in the district, so that the payment would inure to the benefit of all owners alike.

Appellant argues that, as evidenced by the title of the act, the Legislature intended that the donation was for the benefit of all the landowners in the district, or of the district as a whole, the title of the act being "An act in aid of road districts in the State of Arkansas." However, the act does not provide for the refunding of any money to taxpayers who have already paid their taxes, but expressly provides for the payment of outstanding indebtedness.

It is a matter of common knowledge that many landowners in improvement districts all over the State of

Arkansas were unable to pay their assessments, and, unless aided by the State, would lose their land, and it was, we think, the intention of the Legislature in passing the act to pay the debts and relieve these persons who had been unable to pay.

It would be manifestly unjust to sell these lands, deprive the owners of them, and distribute the proceeds among all the taxpayers in the district, because the money with which these debts were paid was received from taxes collected from all the people in the State; therefore, if the land could be sold and the proceeds distributed at all, it should be distributed to all the taxpayers in the State, which would be impractical, and the cost of distributing the funds would exceed the amount for which the lands would sell. Evidently the Legislature did not intend this.

The act creating the improvement district has been repealed, the district abolished, and the road taken over by the State. We must presume that the Legislature, in passing the statute, acted with a full knowledge of all these facts, and we must also presume that the Legislature did not intend any absurd or impractical consequences.

The Legislature knew the conditions of the country, knew that much of the land in many improvement districts were being sold to pay the taxes, and knew that many landowners were unable to pay, and, unless they received aid from the State, they would lose their lands.

"Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object, it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one, and the statute should be given that construction which is best calculated to advance its object by suppressing the mischief and securing the benefits intended. For the purpose of determining the meaning, although not the validity, of a statute, recourse may be had to considerations of public policy and to the established policy

of the Legislature as disclosed by a general course of legislation." 36 Cyc. 1110.

We think when the statute is considered as a whole, taking into consideration the object intended to be accomplished, which was manifestly to relieve persons unable to pay their taxes, and delinquent landowners as well as debts of the district, it shows the intention of the Legislature to relieve the delinquent landowners.

The decree is affirmed.

MOORE *v.* STATE.

Opinion delivered November 16, 1931.

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

MEHAFFY, J. Appellant was convicted in the Sebastian Circuit Court of murder in the first degree and sentenced to life imprisonment in the penitentiary. The indictment charged that he killed J. A. Thompson. The killing was on the 28th day of October, 1930, and on the 31st day of October, 1930, the grand jury returned the indictment against him for murder. On the 3d of Novem-

ber the appellant was arraigned, and, being without money or means for procuring counsel, the court appointed Joseph W. Prather to represent him. The court then set the case for trial on November 17th.

On November 7th appellant filed motion for continuance, stating that he was unable to employ counsel, and that the counsel appointed by the court did not have sufficient time to prepare his defense, and that two weeks was an insufficient and unreasonable length of time; that he had a defense, and that there were witnesses he could produce if given time; that the sanity of the defendant would be an issue, and that the appellant, by reason of his condition of mind, was unable to properly assist his attorneys; that the witnesses could not be procured and appellant be ready for trial on the 17th; that there was great public excitement in the minds of the people, and there was great prejudice against appellant, and that he had reason to apprehend that, because of the condition of the public mind, a jury could not be had that would be free to render justice; that the public excitement was such as to influence the jury and prevent his getting a fair and impartial trial.

On November 17th, appellant filed another motion for a continuance, setting up substantially the same grounds. Both motions for continuance were by the court overruled, and exceptions saved.

Appellant then was required to go to trial on the 17th, and on the 18th the jury returned a verdict of guilty of murder in the first degree and fixed his punishment at life imprisonment.

On November 20th, the appellant was given five days in which to prepare and file a motion for new trial. Motion for new trial was filed on the 22d of November; said motion was overruled, exceptions saved, and 55 days given in which to file bill of exceptions. The case is here on appeal.

Several witnesses testified that the appellant shot and killed J. A. Thompson, and appellant himself testified that he fired three shots, and that he was neither

crazy nor drunk; that he was on his way to surrender to the sheriff when apprehended.

We deem it unnecessary to set out the testimony of the witnesses about the killing, there being no dispute about the fact that appellant shot and killed Thompson.

Thompson and his brother, Wayne Thompson, were both killed by appellant, and a number of witnesses testified that he was going to kill another brother. The appellant married the mother of the Thompsons about twenty years ago, and for a short time some of the boys lived with appellant and their mother.

Appellant testified that the Thompson boys had been trying to put him out of the home where he lived with their mother; that they were indebted to him, and would not pay him; that they finally succeeded in driving him from home, and he left the State and was gone about a year. When he returned, he testified that he attempted to get a settlement but failed. He said that on the day of the killing he went by Louis Thompson's store, and, finding him out, went by the store where Wayne and Aubrey Thompson worked; that, as he entered the store, he told them he had come for a settlement, and Aubrey said that he was going to call an officer and have him arrested; that he only fired three shots, and that Aubrey Thompson was shot during the scuffle for the possession of the gun. He said he did not think he had done any great wrong.

There was considerable evidence as to the sanity or insanity of appellant.

The first ground for appellant's motion for new trial was that the court erred in refusing to grant appellant's continuance on the grounds that two weeks was insufficient time for him to properly make his defense, and the second ground alleged in his motion for new trial was that the court erred in not granting his motion for continuance on the grounds of public excitement and prejudice.

The statute provides that the court, upon sufficient cause shown by either party, may direct the trial

to be postponed to another day in the same term or another term.

However, sufficient cause must be shown before the court would have a right to postpone the trial. The motions for continuance were verified, but no evidence was taken, and no showing made other than the statement in the motions themselves, either that two weeks was insufficient time or that there was any great excitement. The motion did not contain the names of any witnesses, nor did it contain a statement or statements what the witnesses would testify to.

This court has repeatedly held that the granting or refusing a motion for continuance is addressed to the sound discretion of the trial court. *Thompson* v. *State,* 26 Ark. 323; *Jackson* v. *State,* 54 Ark. 243, 15 S. W. 607; *Price* v. *State,* 57 Ark. 165, 20 S. W. 1091; *Sullivan* v. *State,* 109 Ark. 407; *Cox* v. *Jonesboro,* 112 Ark. 96; *Morris* v. *State,* 102 Ark. 513, 160 S. W. 239; *Franklin* v. *State,* 85 Ark. 534, 164 S. W. 767; *Rucker* v. *State,* 77 Ark. 23, 90 S. W. 151.

There is no abuse of discretion of the trial court shown. It was not shown that witnesses were wanted, whether they were present in court at the time, where they resided, or what they would testify to, and there was no abuse of discretion in overruling the motions. *Holmes* v. *State,* 144 Ark. 617, 224 S. W. 394; *Gooch* v. *State,* 150 Ark. 268, 234 S. W. 33; *Mason* v. *State,* 152 Ark. 36, 237 S. W. 435; *King* v. *State,* 177 Ark. 812, 7 S. W. (2d) 987.

There was no error committed by the court in overruling appellant's motions for continuance. The granting or refusing motions for continuance is not cause for reversal unless it appears that the trial court abused its discretion.

It is next contended that the court erred in refusing to allow counsel for defendant to read to Dr. Foltz the statement of the Supreme Court in the case of *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186, as to a paranoid condition, and to state whether said statement agreed with his opinion of a paranoid condition. Appellant also con-

tends that the court erred in refusing to permit him to read a treatise on paranoid from Wharton & Stille on Medical Jurisprudence.

In the first place, the record shows that counsel for appellant was permitted to read from the case of *Bell* v. *State,* but the counsel asked permission to prove by Dr. Foltz that, in his opinion, the statement was a correct statement of paranoiac condition. The court said that the doctor could state his opinion as an expert, based on the testimony in the case, and then appellant's counsel asked to introduce in evidence a statement from Wharton & Stille on Medical Jurisprudence, and the record is silent as to whether there was any objection to this evidence. Dr. Foltz was a witness for the appellant, and appellant was permitted by the court to ask any questions tending to show whether appellant was sane or insane.

The extracts from the medical and law books were not competent, and the court did not err in refusing to permit appellant to introduce them.

"It is very generally recognized that extracts from medical books are not admissible in evidence, and for the very sufficient reason that the author does not write under the sanctity of an oath and has not been subjected to a cross-examination, and the decisions of this State are to the effect that statements from these books may not be presented as such in the arguments of counsel or introduced by the means of questions put on cross-examination as by reading an opposing opinion from text books, and asking the witness if it is or is not true; for this would have the effect of putting the statement in evidence and thus accomplishing by indirection what is forbidden." *State* v. *Summers,* 92 S. E. 328.

The correct rule is that an attorney may use a medical book to aid him in framing questions to be asked of a physician testifying as an expert, but it is not permissible to read from such books to the jury. *Brown* v. *Springfield Traction Co.,* 141 Mo. App. 382, 125 S. W. 236; *State* v. *Brunette,* 28 N. D. 539, 150 N. W. 271; *State* v. *Blackburn,* 136 Iowa 743, 114 N. W. 531; Underhill's Criminal Evidence, § 191.

The witness, Dr. Foltz, put on the stand by the appellant, and was on direct examination. On cross-examination of an expert witness, where he bases his opinion on a text book, he may be cross-examined, and for the purpose of impeaching him, extracts from the authorities may be read; but it is never proper to introduce the books, or extracts from them, except on cross-examination.

The appellant objected generally to giving each of the instructions given by the court on behalf of the State. They were, however, the usual instructions, and we do not find any error in the court's charge.

Appellant, also, in his motion for a new trial, contends that the court erred in refusing to give each of 15 instructions requested by appellant. The record, however, does not show that the appellant requested the court to give any instructions.

The chief defense relied on by the appellant was insanity. Several witnesses testified, and their testimony was in conflict. As to whether appellant was or was not insane was a question of fact properly submitted to the jury, and the evidence is ample to sustain the verdict.

The judgment is affirmed.

LANGSTON *v.* STATE.

Opinion delivered November 16, 1931.

Jackson & Blackford, for appellant.

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

McHaney, J. Appellant was convicted upon a charge of the unlawful sale of intoxicating liquor and sentenced to one year in the penitentiary. To reverse the judgment of conviction against him, he prosecutes this appeal upon the single assignment of error that the prosecuting attorney made certain prejudicial remarks in his closing argument to the jury. Appellant did not testify in his own behalf, and he offered no evidence by any other witness. A witness for the State, Burley Tyler, testified that he and two others went to appellant's place of business, and that he and one of the others went into the store and purchased two pints of liquor. This evidence was not disputed in any way, and in his closing argument the prosecuting attorney said: "The fact that Burley Tyler bought the liquor from the defendant has not been denied, and his testimony stands unimpeached."

The above statement was objected to on the ground that it was a comment on the fact that appellant had not testified, and the court was asked to instruct the jury not to consider the statement and to reprimand the counsel for making same, which the court refused to do. Another statement made by the prosecuting attorney over appellant's objections and exceptions is the following: "Gentlemen of the jury, the cold facts in this case are that Burley Tyler went into this man's place of business, and that the defendant called him off into the kitchen and sold and delivered to him two pints of liquor, as charged in the indictment, for two dollars, and I want to call your attention to the further fact, gentlemen, that this testimony is undisputed, undenied and unimpeached."

At the conclusion of the argument the court gave the jury an instruction as follows: "Gentlemen of the jury, you are instructed that the remark made by the prosecuting attorney, during his argument of the case to the jury, that the testimony of Burley Tyler was undisputed, uncontradicted and undenied by any testimony, that is, as to his purchase of the liquor alleged to have been purchased, is not to be considered by you as a comment on

the fact that the defendant did not testify, and you are now further instructed that the fact that the defendant has not testified in this case should not be considered as a circumstance against him, or a circumstance of his guilt.

"In arriving at your verdict in this case, you will consider only the testimony as you have heard it from the witness stand, and the statements made by either party not borne out by the records should not be considered by you. You will base your verdict on the testimony given by the witnesses and the law as given by the court."

We think this case is ruled by the decisions of this court in *Markham* v. *State,* 147 Ark. 509, 233 S. W. 676; *Davis* v. *State,* 174 Ark. 892, 298 S. W. 359; *Ferrell* v. *State,* 177 Ark. 742, 9 S. W. (2d) 15, even though the court hadn't given the above-mentioned instruction. The giving of that instruction removed whatever prejudicial effect the remarks of counsel may have had, conceding that they were prejudicial. *Greathouse* v. *State,* 166 Ark. 206, 265 S. W. 950.

Affirmed.

AMERICAN BANK & TRUST COMPANY *v.* FIRST NATIONAL BANK OF PARIS.

Opinion delivered November 16, 1931.

Rhyne & Shaw and *Hays & Smallwood*, for appellant.

Evans & Evans, for appellee bank.

Leora Blair, pro se.

BUTLER, J. The appellee bank filed an action in the chancery court of Logan County for judgment against Thomas B. Harris on a note executed by Harris to the bank, and for foreclosure of a mortgage given to secure the same and executed and filed for record on December 24, 1926. Appellee bank alleged among other things that appellant bank and trust company was claiming some interest in the property secured by the mortgage, and asked that it be made a party to the action. The bank and trust company answered, alleging that Harris was indebted to it for a balance on a note of $9,644 to secure which he had executed a mortgage in favor of the bank and trust company, which mortgage included the property named in the mortgage from Harris to the appellee bank, as well as certain other property located in the town of Paris. This mortgage was executed and filed for record on February 9, 1925. The bank and trust company made its answer a cross-complaint against the appellee bank, and Harris, and asked for judgment for the balance claimed, and that its mortgage be declared prior and paramount to that of the appellee bank, and prayed for foreclosure.

Thereafter, the appellee, Leora Blair, having obtained permission of the court, filed an intervention by

which she claimed that on December 4, 1925, Harris and wife were indebted to T. C. Blair, the debt being evidenced by a note and mortgage executed to the said Blair by which it conveyed certain town lots in the city of Paris included in the mortgage executed on March 9, 1925, to appellant bank and trust company. She alleged that this note and mortgage had been assigned to her, and asked that her rights be adjudicated, alleging further, as also did the appellee bank in its reply to the cross-complaint of the appellant bank and trust company, that the note given by Harris to said bank and trust company had been paid, and that the cross-complaint should be dismissed.

After having heard the evidence on the issues raised by the above pleadings, the chancellor found in favor of the appellees, and that the indebtedness secured by the mortgage set up in the cross-complaint of the bank and trust company had been paid, and that the lien of said mortgage had been satisfied. The court dismissed the cross-complaint as to its asserted rights under the mortgage for want of equity.

It was established by the evidence that in 1923 Harris borrowed $2,500 from the appellee bank and gave his note to evidence the transaction with Lewis C. Sadler as security thereon, executing to Sadler a mortgage on a small farm near Paris to secure Sadler from loss and to protect and save him on any renewals of the note, provided that, if Harris should pay the money borrowed when due, the mortgage should be void, etc. This note was extended from time to time in consideration of payments of interest made and indorsed thereon; the due date of the original note being January 2, 1924. This note and mortgage remaining unpaid, the note sued on by appellee bank was given in renewal on the 24th of December, 1926, and a new mortgage including the same property was executed by Harris to the appellee bank direct, but the original note and mortgage given to Sadler were not canceled or satisfied.

In the beginning of the year 1925, Thomas B. Harris, a brother-in-law, W. M. Quaile, and Guy O'Kelly pur-

chased a mercantile business located in the city of Paris, and Harris applied to appellant for a loan of $9,000 with which to pay for his third interest in the business purchased. This loan was approved, the interest to the amount of $600 was included in the note which was executed on March 9, 1925, for the sum of $9,600, to secure which Harris executed the mortgage set out in the appellant's cross-complaint. At that time the mortgage from Harris to Sadler and the debt secured thereby were still subsisting, of which fact the cashier of the appellant bank who handled the transaction had actual notice. The mortgage required by appellant included the mercantile business for which the money was borrowed, several town lots in the city of Paris, and also the small farm which had been mortgaged to Sadler as aforesaid.

Leora Blair, the appellee, loaned Harris, through her brother, T. C. Blair, $1,600; to secure which the note and the mortgage on some town lots was given as set up in her intervention.

A number of questions are presented by counsel in their respective briefs which will be unnecessary to consider, for in our view of the case a decision of only two questions is necessary to a determination of the issues.

It was shown by the evidence that Harris, prior to the date of purchase of the third interest in the mercantile business, was indebted to appellant bank on a note for which he was surety in the sum of $1,053.33, and two other smaller notes amounting to about $126. From February 9, 1925, down to, and including, August 16, 1926, he made a number of small notes, discounting others which he owned and which, not being paid, were charged back to his account. All these amounted to about $4,500. At and during the time of the purchase by Harris of the one-third interest in the mercantile business, he seems also to have been engaged in the insurance business, but in the year 1925 his health became bad, and he had to go to a hospital on several occasions and so concluded to sell his interest in the mercantile business. He induced his father-in-law, Mr. Quaile, to buy it, who, on March

9, 1926, in payment of the same, executed a note payable to appellant bank in the sum of $9,789.74, which note he afterwards paid.

It is the contention of the appellees that the transaction last referred to was a payment of the $9,600 note made by Harris to appellant and secured by mortgage. Appellant contends first that the $9,600 note was not paid, but that when Quaile executed his note for $9,789.74, there was no direction given as to what debt the proceeds should be applied, and therefore appellant had the right, and did, make application first to the payment of the small notes, crediting the residue on the $9,600, leaving a substantial amount of that note unpaid. Second, appellant contends that, even though the $9,600 note was paid, the mortgage given by Harris on February 9, 1925, was security not only for that note but also for all indebtedness incurred by Harris from its date to the time due, and that therefore its mortgage still subsisted, and it was entitled to have its mortgage declared paramount to the mortgages of the appellee, and to foreclosure in satisfaction of that indebtedness.

Reed, the cashier, testified in positive terms that Harris not only did not direct that the $9,600 note was to be paid, but expressly agreed that the payment made by Quaile was to be applied, first, to the "small notes and get them out of the way, and apply the balance to that covered by this mortgage"; that the understanding was that he was to take up "all of his little stuff and leave one note—get that all out of the way and apply the balance to the one big note which was covered by the mortgage." This testimony was contradicted by the testimony of Harris and of Mr. Quaile and by the attendant circumstances. Harris repeatedly stated during the nine times he was examined and cross-examined by the attorneys that he never at any time had any specific agreement or made any specific direction as to what should be done with the proceeds of Mr. Quaile's note, but that it was understood "between me, Mr. Quaile, Mr. O'Kelly and Mr. Reed that Mr. Quaile was taking up my interest in the business. So far as to Mr. Reed applying it, where he

applied it, I don't know. I didn't give him authority to apply it anywhere else. I didn't specify him to apply it anywhere."

Quaile testified that, after he had agreed to buy Tom Harris' interest in the store, he told Mr. Reed that he wanted to pay Tom Harris' note; that Reed figured up the amount of the note with the accrued interest and accepted the note of Quaile for that amount (which note Quaile afterward paid); that "he (Reed) figured it up, and I gave my note, and I said, 'You take my note and relieve Tom.' He said: 'All right, I will do that'," and the circumstance that the note taken from Quaile was for the exact amount of Harris' $9,600 note strongly corroborates the contention of Harris and Quaile, especially as Reed admitted that when he made the loan to Harris it was for the purpose of enabling him to buy in the business; and that he knew what the money was first borrowed for and knew what Mr. Quaile was paying the money for —"to take up that indebtedness."

The chancellor resolved the conflict in favor of the appellees, which finding we are not inclined to disturb, for, as we view the testimony, there was in fact a general understanding between Reed, Harris and Quaile that the proceeds of the latter's note were to be used only for one purpose, namely, to pay the $9,600 note, and no specific direction was required.

Reed testified that it was the understanding that the indebtedness incurred by Harris after February, 1925, and after the execution of the mortgage to appellant was to be included in the mortgage security, and stated that he advanced those amounts to Harris on account of the mortgage, and that he would not have advanced the same if he had not had the mortgage. This testimony was given in answer to questions propounded by his attorney which were suggestive of the answers, but other parts of his testimony indicated that he did not consider any of the small notes included within the mortgage, for, in speaking of the application he made of the money from Quaile, he said that he took up the little

notes and applied the balance "on the one big note covered by the mortgage"; and later on in his testimony he uses practically the same expression, and before that, in testifying as to the alleged agreement made with Harris as to the application, he stated that they would take up the small notes and apply the balance on the note "covered by the mortgage." At the time of the execution of the mortgage Harris was already indebted on one note in excess of 1,000 and two smaller notes, and it is likely that, had it been the intention to include any other amounts than the $9,600 note in the mortgage security, these notes would have been included.

It is argued that the intention is shown because Harris did not specifically deny the statement made by Reed. Throughout his entire testimony it is apparent Harris thought the only note secured was the $9,600. So, as between the parties, it is doubtful whether there was any such intention as claimed by Reed, but whatever might have been the intention, this could not affect third parties to the transaction for as to them the intention must have been shown by the plain terms of the mortgage itself.

One may execute a valid mortgage to secure a debt to be contracted in the future (*Jarrett* v. *McDaniel,* 32 Ark. 598; *Fort* v. *Black,* 50 Ark. 256, 7 S. W. 131) but, in order to do so, there must be an unequivocal agreement in the instrument itself that it is given for debts to be incurred in the future. *Martin* v. *Holbrooks,* 55 Ark. 569, 18 S. W. 1046; *Greeson* v. *German Nat. Bank,* 78 Ark. 141, 95 S. W. 439.

"The effect of our cases is that a mortgage to secure future advances * * * is valid, but, if such purpose is intended to be accomplished, that fact must clearly appear from the instrument, and such purpose will not be presumed where the instrument does not contain a general description of the indebtedness secured so as to put one who examines it on notice that this was its purpose in order that such person may pursue the inquiry which such knowledge would suggest." *Word* v.

Cole, 122 Ark. 457, 183 S. W. 757; *Patterson* v. *Ogle,* 152 Ark. 395, 238 S. W. 598.

The circumstances attendant upon the execution of the mortgage and the nature of the transaction subsequent thereto are always matters of consideration in determining the effect of the mortgage, and, as these circumstances and the language of the instruments vary "each case (as said in *Patterson* v. *Ogles, supra*) on this subject calls for an interpretation of the language of the mortgage so as to determine whether the description falls within the rule announced above."

As we have seen, the primary purpose of the execution of the mortgage to the appellant was to secure a note given by the mortgagor for money loaned for the purchase of an interest in a mercantile business. The mortgage in express terms secured only Harris' note for $9,600, the amount of the purchase price. The language of the mortgage which appellant interprets as security for debts incurred by Harris after the execution of the mortgage is found in its defeasance clause: "Now, if the said T. B. Harris and Susanna Harris shall pay said money at the time and in the manner aforesaid, together with renewals, extensions or advances, then the above conveyance shall be null and void."

This court, in *Thompson* v. *Reaves,* 170 Ark. 409, 279 S. W. 1011, under the particular facts of that case, held, as between the parties, that the future advances might be secured by reference to such only in the defeasance clause, but its language was essentially different from that of the mortgage in the instant case, the condition being that if the mortgagor should "pay said note or any renewals thereof at the time same fall due and all other indebtedness above provided for, then this deed is to be void." The mortgagee in that case conducted a general mercantile business, the mortgagor was a farmer, and it appears that the advances made were for such as would be ordinarily made by a merchant to a farmer, and were clearly referable to the specific obligations.

Appellant has cited the case of *Jones* v. *Dowell,* 176 Ark. 986, 4 S. W. (2d) 949, as authority for its contention that the defeasance clause in the mortgage was sufficient to cover future advances, but in that case the court said: "But whether it included the advances or not appears to be immaterial in this case." In order for future advances to come within the terms of the mortgage, that purpose must be unequivocally stated, and, unless the nature of such are otherwise clearly defined, they must bear some relation to the subject-matter for which the primary debt is incurred and which the mortgage is given to secure. *Whitener & Lark* v. *Beebe,* 12 Ark. 581; *Briggs* v. *Steele,* 91 Ark. 412-3, 121 S. W. 754; *Martin* v. *Halbrook; Gleason* v. *German Nat. Bank;* and *Word* v. *Cole, supra; Berger* v. *Fuller,* 180 Ark. 372, 21 S. W. (2d) 419.

In the case at bar the primary debt was incurred for the purchase price of a third interest in a mercantile business, and the debts subsequently contracted are not shown to have had any relation to the conduct of that business. Some of the subsequent indebtedness seem to have been notes which Harris had taken in payment of insurance premiums, discounting same at the bank, which were not paid when due and were accordingly charged back to his account. The other notes were personal notes of Harris, and had no apparent connection with the mercantile business.

Where one contracts in good faith with a debtor that the security given should include not only that specifically mentioned in the mortgage but other indebtedness, whether existing then or to be incurred in the future, it is not difficult to describe the nature and character thereof, so that both the debtor and third parties may be fully advised as to the extent of the mortgage. Sound policy demands no less. Especially is this true where the terms of the mortgage are sought to be extended by means of the language of the defeasance clause, which is usually at the end of the mortgage and, in the

prepared forms commonly in use, is in small type which escapes all but the closest scrutiny.

In the instant case the language is equivocal, and, applying to it the rules announced, we are of the opinion that it did not include within the security any indebtedness owing by Harris to the appellant except that specifically mentioned, and, since the chancellor found that this had been paid, the mortgage lien was by that fact discharged. It follows that the decree of the trial court is correct, and must therefore be affirmed. It is so ordered.

ARKANSAS POWER & LIGHT COMPANY *v.* BEAUCHAMP.

Opinion delivered November 16, 1931.

Robinson, House & Moses, for appellant.

H. B. Means and *John L. McClellan,* for appellee.

BUTLER, J. The appellant, Arkansas Power & Light Company, built a water power dam, called the Remmel Dam, across the Ouachita River in Hot Spring County, about midway between the towns of Hot Springs and Malvern, by which a reservoir known as Lake Catherine was created covering an area of approximately 3,000 acres. Later, the appellant began the construction of another dam about twelve miles above the Remmel Dam, and at the upper head of Lake Catherine, the construction of which was nearing completion in the fall of 1930. The appellees owned and operated some small farms lying adjacent to the Ouachita River, about ten to fourteen miles below the Remmel Dam. On October 7, 1930, a part of these farms were overflowed, and the matured crops of corn then standing thereon were destroyed.

The appellees brought suit against the appellant company to recover damages for the destruction of the crops on the ground that the same was occasioned by the negligent operation of the flood gates of the Remmel Dam, by which a volume of water was suddenly released from the reservoir above into the stream below in such quantity as to cause the overflow and damage. The appellant company denied the allegations of negligence, and contended that the damage to appellees' crops was not the result of any negligent act on the part of its servants, but was occasioned by an unusually large quantity of rain which suddenly fell during October 5th, 6th and 7th, in the watershed of the Ouachita River above the lands of the appellees, and that the overflow was the result of the high flood stage of the river due to natural causes, and not in any manner to the operation of the dam.

At the trial of the issues a verdict was rendered in favor of the appellees. In presenting the case here on appeal it is conceded that the court's declarations of law were correct except as to instruction No. 4½ given at the request of the appellees, and the giving of that instruction is assigned as error.

The principal question raised and argued by the appellant, however, is the sufficiency of the evidence, the contention being that there was no competent evidence of a substantial nature to support the verdict.

The Remmel Dam was so constructed as to impound the waters of the Ouachita River and raise them to a certain height and then permit the ordinary flow of the river to pass on over the dam to the river below. The dam was constructed with 12 openings, each 27½ feet wide and 18 feet deep, called flood gates, which were closed by means of a door let down from above. These floodgates were for the purpose of letting the excess water through in times of flood and were supposed to be large enough to permit the maximum floods of the river to pass through. The doors or gates were so arranged that they might be raised to any desired height at the will of the person in charge of the dam. The testimony of the witnesses for the appellant tended to prove that the floodgates were properly operated at the time of the flood, and that no more water was allowed to pass than the existing natural flowage, and that the quantity of water passing and the resultant overflow of appellees' lands were occasioned solely by unusual and excessive rains. Indeed, there is evidence that the construction and operation of the dams as shown by the records on the occasion of the overflow, instead of causing the overflow, had the effect of lessening its extent as the dams impounded the water and controlled its flow so as to lessen the volume of water which would otherwise have covered the lands of the appellees. It would serve no useful purpose to detail this evidence, for, as we have seen, it is sufficient to have warranted a verdict for the appellant, if it had been accepted as true by the jury.

Since this testimony was not accepted by the jury, it becomes important to review such circumstances as appear in the evidence tending to contradict that testimony and to refute the contention made by the appellant. It is well settled that the verdict must not rest on

mere conjecture or speculation, but on some substantial testimony tending to establish the negligence alleged or proof of some other related facts from which the negligence might reasonably be inferred, but, where there is some substantial testimony, the verdict of the jury may not be set aside by this court, although it may appear against the preponderance of the evidence. It may be conceded that there is no direct evidence contradicting the testimony of the witnesses for the appellant regarding the operation of the floodgates of the Remmel Dam. Such contradiction, if any, must appear from proof of circumstances. The jury has found by its verdict that such circumstances existed, and that from these the reasonable inference arose that the appellant was negligent, and that this negligence was the proximate cause of the damage to the lands of the appellees.

The circumstances which the testimony tended to establish are as follows: Prior to October 5th there had been a severe and protracted drouth, and the water of the Ouachita River, with its affluents, was extremely low. In the vicinity of the Remmel Dam and in the territory drained by the Ouachita River above the same, a heavy rain began falling on the afternoon of October 5th, continuing without intermission through the 6th and until the morning of the 7th. The heaviest precipitation was between the midnights of the 5th and 6th, 4.03 inches, and from midnight of the 6th until about eight o'clock of the morning of the 7th, 3.49 inches. The employees at the Remmel Dam had means by which they could communicate with the weather bureau and thus obtain information of the rainfall and the volume of water likely to come down the river. There is no testimony that the employees of defendant company availed themselves of this means of information, although the assistant engineer of the Phoenix Utility Company (a corporation not connected with appellant company) in charge of the work at the Carpenter Dam on the morning of the 7th did call by telephone at hourly intervals and obtained information

relating to the rainfall and the rise of the river above the dam. At this time the waters had already begun to pile up against the Carpenter Dam and were rapidly rising. From seven o'clock on October 6th till seven o'clock on the morning of the 7th it rose 11½ feet and at noon of that day it had risen 31.7 feet above the stage shown at seven o'clock on the day previous. There was no evidence offered from which it could be known at what time the reservoir began to rise, but it was shown to have been rising from 1:00 o'clock A. M., on the 7th to 5:50 A. M. on that morning. At that hour the floodgates of the Remmel Dam were begun to be opened at intervals of about fifteen to twenty minutes apart so that at eight o'clock seven floodgates had been raised to a height of ten feet and one to a height of six feet. At 8:45 A. M. the gates began to be gradually closed, this operation continuing until 8:00 P. M. At about six o'clock on the morning of the 7th of October the river below the Remmel Dam and opposite the lands of the appellees was about 26 inches above low water mark. At eight o'clock it had risen to 12 feet, between nine and ten o'clock it was 16 feet, and at noon it had reached its highest point of about 19 feet. The water which came down the river that morning was as clear as spring water. Before this, from a low water stage, it had always taken from 24 to 36 hours for the water to rise sufficiently to flood the lands of the appellees. These circumstances warranted the inference that the water came from Lake Catherine, and that the floodgates had been opened negligently, thus precipitating within a few hours the water which before had flowed more slowly down stream. Had the appellant kept informed of the amount of water falling and the stage of the river, and gradually lowered the level of Lake Catherine, the reservoir might have held the floodwaters, but appellant neglected to take any precautions until the morning of the 7th and the jury were justified in the conclusion that the appellant then opened the floodgates more than was necessary and to such an extent that the flood resulted.

The appellant argues that the fact that the water was clear would have no probative force, but it is well known that water when confined in a lake become clear by reason of the sediment being deposited, and that when flood-waters, loaded with silt, are poured into such a reservoir they push the clear water before them, and this clear water will first flow out. This is evidently what happened in this case.

Instruction No. 4½ is as follows: "The court instructs the jury that while negligence cannot be inferred merely from the happening of the injury, but the court instructs you that negligence may be inferred from the facts shown and detailed in the testimony introduced in the case."

The appellant specifically objected to the giving of this instruction, and now insists that it erroneously applied the doctrine of *res ipsa loquitur* when such doctrine was not involved, and, further, that it amounted in effect to a peremptory instruction for the plaintiff because its language amounted to a judicial interpretation that there were sufficient facts already introduced in the case from which negligence would be inferred, and that the only prerogative of the jury would be to determine the amount of the damage.

Such interpretation is not justified by a fair analysis of the language used in the instruction. Nowhere are any words used which in their ordinary meaning can be construed to mean that the proof of the happening of the injury made out a *prima facie* case of negligence. This is the doctrine of *res ipsa loquitur*. The language used could not have been so construed by the jury, especially when in every instruction given the burden of proof is cast upon the plaintiff and more especially so by instruction No. 6½ given at the instance of the defendant, in which it is emphasized that the plaintiffs are "required by law to establish all of the material allegations of their complaint on which they claim damages by a preponderance of the evidence before they can recover," and

[redacted]

"* * * if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance * * * then * * * your verdict should be for the defendant." It is elementary law that any fact at issue may be proved by circumstantial evidence, and this, we think, is all that the instruction complained of, as reasonably interpreted, undertook to say.

Finding no error, the judgment is affirmed.

[redacted]

KANSAS CITY FIBRE BOX COMPANY *v.* F. BURKART MANUFACTURING COMPANY.

Opinion delivered November 16, 1931.

[redacted]

William G. Holt and *Carmichael & Hendricks,* for appellant.

Sam T. Poe, Tom Poe and *McDonald Poe,* for appellee.

MEHAFFY, J. The appellee brought suit in replevin against W. E. Smith, alleging that it was a Missouri corporation authorized to do business in Arkansas, and that it was the owner and entitled to the immediate possession of 375,727 feet of cottonwood lumber located and stacked on section 12, township 2 south, range 11 west, in Pulaski County; that said lumber was of the value of $22.50 per thousand feet, or a total value of $8,453.85; that W. E. Smith was in possession of all the lumber described, and that appellee had been damaged in the sum of $2,500, and that its cause of action accrued within one year, and prayed for recovery of the lumber and $2,500 damages. An affidavit in proper form to obtain order of delivery was filed.

W. E. Smith answered, denying that appellee was the owner and entitled to the immediate possession of the lumber mentioned in the complaint, and denied that he was in unlawful possession of same. He stated that he was not the owner of said property; that said lumber had been sold to the Kansas City Fibre Box Company long before any controversy arose; that said lumber had been checked up by it and taken into its possession, and that bill of sale had been made and delivered; that the Kansas City Fibre Box Company had agreed to buy his entire output; and that the Kansas City Fibre Box Company was the real party in interest and is a necessary party to the suit.

The Kansas City Fibre Box Company filed a petition to be made a party defendant. It stated that it was a corporation organized under the laws of Ohio, doing business in the State of Kansas, and that it was the owner of all the lumber seized and replevied in this case and now claimed to be held by the appellee; that

the petitioner is the real party in interest and that it was necessary that it be made a party in order that justice might be done; that it was willing to make a bond and comply with the order of the court.

Appellee had filed bond, and the property described in appellee's complaint had been taken by the sheriff and delivered to the appellee. The court ordered that appellant be made a party and permitted to give bond in the sum of $18,000 within 48 hours.

The appellant executed bond, and the lumber was delivered to it, and by it shipped out of the State and sold.

The jury returned a verdict in favor of appellee for the possession of the property or its value, $8,446.89, and judgment was entered accordingly. The case is here on appeal.

The following agreement was entered into: "It is agreed by and between Sam T. Poe and Tom Poe, attorneys for plaintiff, and Carmichael & Hendricks, attorneys for the defendant and for the intervener, that plaintiff's deraignment of title to the fractional east half, northwest quarter, section 12, fractional northeast quarter of section 12, fraction north half, southeast quarter, section 12, all in township 2 south, range 11 west, heretofore filed in this case may be introduced in evidence as deraigned with the same effect as if plaintiff had introduced certified copies of all instruments of conveyance as set out in the deraignment of title; and that the defendant and the intervener may introduce in evidence deed, or copy thereof, from Charles W. W. Hogue to John Kaufman, dated June 9, 1900; and special warranty deed, or copy thereof, from John A. Kaufman and wife, Marguerite, George K. Kaufman and wife, Nettie May, to W. A. Case, George R. Case and H. R. Case, dated January 23, 1929.

It is expressly agreed that all other rights or evidence of the parties may be introduced subject to objection, and that this agreement is made for the purpose of saving expense.

There was then introduced in evidence a decree of the Pulaski Chancery Court, entered February 20, 1890, in an action between *Sue E. Banjamin* v. *D. F. Rose et al.*, also a decree of the Pulaski Chancery Court entered on January 22, 1927, in the case of *F. Burkart Mfg. Co.* v. *Oscar Winn et al.*

The controversy is with reference to the ownership of land and possession of the land from which the lumber was cut. It is claimed by the appellee that it is the owner of sections 12 and 13, and the Cases, who sold the timber to Smith, claim to be the owners of section 13.

Appellees claimed, and introduced evidence to show, that there were three tracts of original land in section 12, and that the timber was cut on accretions to these original tracts.

The evidence on behalf of appellees showed that it was the owner and in possesson of the land from which the timber was cut. This was contradicted by evidence offered by the appellant. It would serve no useful purpose to set out the evidence in full. It was in conflict, and therefore a question for the jury. The timber in question was cut from land which at one time formed the bed of the Arkansas River.

It is first contended by the appellant that the appellee claims without any evidence that this land was not formed by accretion to Hogue Island or any other land in section 13, but was formed by accretion to section 12.

Martin testified that he had known the land since 1912; that he made a survey for Dan Rose, who owned the property at that time; he had been over and around there a number of times. In 1826, when the Government made a survey, there was large timber growing there. Martin, from the map and decree, pointed out the lands and showed which was accretion to a portion of section 12. He also pointed out where Hogue Island was located, and pointed the particular land in 12, 13 and 14, and stated that it was allotted to Mr. Rose long before Hogue Island had accreted to his land; that this was included in the

survey ordered by the chancery court in 1890; also that everything in the red line was accretion; pointed out the three pieces of original land in section 12, and testified particularly as to the description of the original land and the accretion.

There is no dispute about the law with reference to accretion. The appellant calls attention to the case of *Nix* v. *Pfeifer,* 73 Ark. 199, 83 S. W. 951, and says that the burden was upon appellee, and that appellant's witnesses should be believed and accredited more than the others, because they knew what they were talking about. The case of *Nix* v. *Pfeifer, supra,* was an appeal from the chancery court, and was therefore tried here *de novo.*

The case at bar was tried in the circuit court, and the questions of fact submitted to the jury, and the rule here is that, if there is any substantial evidence to support the verdict of the jury, it is binding here, although the preponderance of the evidence may appear to the court to be against the verdict of the jury. It is the province of the jury to decide questions of fact; they are the judges, not only of the credibility of the witnesses, but the weight to be given to their testimony. The principles of law are well settled.

As was said in the case of *Nix* v. *Pfeifer, supra*: "The law governing the case is clearly established and entirely free from difficulty, and we need search no further than the decisions of this court to determine the rights of riparian landowners so far as the questions involved in this suit are concerned.

"Land formed by gradual and imperceptible accretion or by gradual recession of the water, belongs to the owner of the contiguous land to which the addition is made. The river line is the natural boundary, and its gradual advance or retreat carries the owner's line with it, except in case of an avulsion, or sudden or perceptible change of the water course, in which latter case the line remains at the old water line, and becomes fixed by it, not subject to further change by the caprice of the river." *Nix* v. *Pfeifer,* 73 Ark. 199, 83 S. W. 951.

We deem it unnecessary to call attention to further authorities as to what constitutes accretion, not only because it is so well settled, but because there is no dispute about the law.

It is next contended by the appellant that the Cases held the land from which the timber was cut in adverse possession at the time the timber was cut. We think the overwhelming weight of the evidence shows that the land from which the timber was cut was not held in adverse possession. Smith and Case both testified as to the timber cut on section 12. Smith said it was good timber, and that he was going to take a chance. The letter written by Poe to Case, and Case's reply, clearly show that, when Case built his fence, he was not claiming the land or the timber, but built the fence for the purpose of pasturing his stock. At any rate, it was a question of fact as to whether they held it in adverse possession, and the jury's finding on this question is conclusive.

The court gave, at the request of appellant, the following instruction: "You are instructed, if you find from the evidence that the Cases sold the timber to the defendant, Smith, or if you find they are not complaining about the timber Smith cut, although it was not included in Smith's deed, and find that the Cases are in adverse possession of the land from which the timber was cut and were so in adverse possession at the time of the cutting, to find for the defendant and the intervener."

Since that question was settled against appellant's contention, it becomes unnecessary to discuss or decide the question whether replevin can be maintained for timber or lumber cut from land in adverse possession of another.

The next contention of appellant is that the measure of damages was the stumpage value, instead of the value at the mill. Assuming that the land from which the timber was cut belonged to the appellee, as the jury found, and taking into consideration the letters heretofore referred to, and the fact that the land was fenced some

years ago by the appellee, and that appellant, without right and as to a portion of the timber without any claim of right, but merely taking a chance because it was good timber, we think the proper measure of damages was its value in its improved state.

If this were not true, a trespasser or wrongdoer who wished to purchase timber from an owner who did not want to sell, could wrongfully cut the timber, convert the lumber to his own use, and pay for the stumpage value, thereby wrongfully depriving the owner of his property.

The law is well settled in this State, that where timber is cut by an innocent trespasser, that is, where the trespasser acts in good faith, believing he has a right to cut the timber, then the stumpage value would be the proper measure of damages; but it is equally well settled that, where a trespasser who does not act in good faith, and is not an innocent trespasser takes timber from another's land, the wrongdoer is liable for the value of the timber so taken, in its improved state.

The case of *Eaton* v. *Langley,* 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474. deals with the question of an innocent trespasser, and, after deciding what the measure of damages is in that case, the court said: "Hence the law protects the unintentional trespasser in such cases by limiting the right of the owner to recover. * * * As to the extent of this limitation, the authorities are not agreed. But we think that, inasmuch as this is an exception to the general rule made for the purpose of protecting the unintentional trespasser, it should be allowed to prevail only to the extent it is necessary to give protection, and that the owner in actions for possession of personal property in the new form into which it has been converted, inadvertently, under a *bona fide* but mistaken belief of right, in case a delivery cannot be made, is entitled to recover the value of the property in its new form, less the labor and material expended in transforming it, provided the expenditures do not exceed the increase in value which was added to the trans-

formation, in which event he should recover the value of the property in its new form, less the increase."

It is clear from the opinion in the case above mentioned that it has, and was intended to have, application to an innocent trespasser. The evidence in this case we think clearly shows that the timber was not cut in good faith, and shows that Smith was not an innocent trespasser.

We think the correct rule is stated in 1 C. J. 389: "A wilful trespasser is not entitled to any compensation, allowance, or mitigation of damages on account of the labor expended or materials added by him in improving or increasing the value of the property. * * * So, if the owner has regained the possession of his property in its improved condition, such trespasser cannot maintain an action against him to recover for such labor or materials; and if the owner brings an action to recover the property, he is, if entitled to recover at all, entitled to recover it in the condition in which he finds it, and defendant cannot claim any compensation or allowance for his labor or materials."

The authorities do not seem to be in entire harmony where the action is replevin and the wrongdoer has disposed of the property so that it cannot be delivered, but we think the rule here announced is the only just and fair rule where the property was not taken in good faith.

Appellant states that Smith testified that he did not know, until the trial of the case, of Mr. White's statement that he was going to cut on 12. He might not have known that, that is, he might not have known where 12 or any other particular section was, but he admits himself that he did not try to find out where the lines were; he had, through White, purchased the timber, and he knew that he did not have any right to cut on 12. He also testified that he did not have the line run until after the cutting was done. We think the evidence clearly shows that Smith was not an innocent trespasser. We agree with appellant that it has the same right that W. E. Smith

would have had, but we have already shown that W. E. Smith had no right.

It is next contended by appellant that the court erred in giving instructions 1, 2, 3, 5, 6 and 11.

Instruction No. 1 is as follows: "If you find from the preponderance of the evidence, under the instructions of the court that in 1890 and ever since that time, and prior thereto, there were three tracts of original land in section 12, township 2 south, range 11 west, in Pulaski County, Arkansas, described as follows, to-wit: North half southeast quarter, east half northwest quarter and fractional northeast quarter, and that all of the land lying between the above described tracts and the eastern, western and southern boundaries of the land from which the timber, out of which the lumber in controversy was made, was cut and removed, had been washed away and accreted or built back to the three above described tracts of land, and that such accretions include all the land from which the timber, out of which the lumber in controversy was made, was cut and removed, and that plaintiff owned the three above described tracts, and the accretions belonging thereto, and was entitled to the possession of same at the time the timber was cut and removed therefrom and now owns said land, then you are instructed to find for plaintiff; unless you find the land from which the timber, out of which the lumber in controversy was made, was cut and removed, was accretion to a tract of original land in section 13 or 18, or unless you find that W. A. Case and others were in good faith asserting an adverse claim of ownership to the lands from which the timber was cut and were in actual possession thereof, lawfully obtained, when the timber was cut."

We do not think that this instruction is either confusing or contradictory, but it was as favorable to appellant as it had any right to ask. The appellant objected especially for the reason that appellee cannot accrete except toward the now river as presently located; that the original land in 1890 was accretion and not the basis for accretion; that prior to that time the Cases, successors in title, had title and possession to the land.

These were questions of fact settled by the verdict of the jury.

Appellant argues that said instruction was erroneous because it attempts to state too many of the facts and ignores other facts. In the first place, we do not think the instruction is open to this objection, and, in the next place, if it had been, appellant should have made this specific objection, which it did not do.

Instruction No. 2 reads as follows: "You are instructed that, if you find from a preponderance of the evidence, under the instructions of the court, that W. A. Case and others in building the fence built the fence with no intention of asserting any claim of title to the land across or upon which it was built adverse to plaintiff, F. Burkart Manufacturing Company, and that W. A. Case and others only intended to use the property for pasturage purposes, and that at the time the fence was built, or thereafter, W. S. Case expressly recognized the title of plaintiff, F. Burkart Manufacturing Company, and such possession, use and occupancy of the land as W. A. Case may have obtained thereby did not constitute adverse possession, unless W. A. Case brought the knowledge home to plaintiff, F. Burkart Manufacturing Company, by word or act that he claimed it adversely to plaintiff, F. Burkart Manufacturing Company, and for himself.

"You are also instructed that the burden is on defendant and the intervener to show by a preponderance of the evidence W. A. Case gave notice to plaintiff, F. Burkart Manufacturing Company, of his adverse claim."

The specific objection to this instruction was that the Cases did not have to occupy the property for the full period of seven years if they were in actual, open, notorious possession for any length of time, etc. The finding by the court that the Cases were not in adverse possession answers this objection. We think the evidence conclusively shows that the Cases were not holding this land in adverse possession.

Instruction No. 3 reads as follows: "If you find from a preponderance of the evidence, under the instruc-

tions of the court, that plaintiff, F. Burkart Manufacturing Company, was in actual possession of the land from which the timber was cut by defendant, W. E. Smith, and out of which the lumber involved herein was made, and that plaintiff had owned the land since July 8, 1918, and had it inclosed with a fence, and that defendant, W. E. Smith, and the intervener, Kansas City Fibre Box Company, or their grantors, W. A. Case, and others, broke through the inclosure against the consent of plaintiff, the entry was unlawful and such entry and subsequent possession as may have been obtained thereby did not dispossess nor oust the possession of plaintiff, unless you find that W. A. Case was already in possession of the land."

The specific objection to this instruction was that there could be no unlawful fence breaking where there was not an inclosure. The undisputed evidence shows that the Cases did cut the fence. It is true the Cases had built a fence there, but, as we have already shown, Case testified that he did it for the purpose of using it as a pasture, and he was not claiming the timber.

Instruction 5 reads as follows: "The court instructs the jury that the defense of adverse possession is an affirmative defense, and the burden of proof is on the defendant and intervener to establish such adverse possession by a preponderance of the evidence."

Number 6 reads as follows: "If you find from a preponderance of the evidence, under the instructions of the court, that plaintiff, F. Burkart Manufacturing Company, was the owner and entitled to the possession of the land from which the timber, out of which the lumber in controversy was made was cut and removed at the time the timber was cut and removed from the land, you are instructed to find for plaintiff for the possession of the lumber you find was cut and removed or its market value in its improved state, at the time of the filing of this suit, at whatever price or value you find the evidence in this case shows that lumber was worth at the mill when this suit was filed."

Number 11 reads as follows: "The word 'accretion' means the slowly and imperceptible building to original lands by the water receding therefrom and filling in by deposits of sand, mud, or vegetation which gradually and slowly raises the surface of the lands and thereby brings it above water level. The accretion must be toward the river at the time the accretion is added."

We have carefully considered all the instructions, and, when considered as a whole, they constitute a correct guide for the jury.

It is next contended by the appellant that the verdict is excessive, and that no attention was paid to the fact that it cost $5 per thousand to haul the lumber from the yard to the railroad. The court, in instruction No. 6, told the jury that, if they should find for the appellee, their verdict should be for the possession of the lumber, or its market value at the mill. This was a clear statement to the jury that they should find the value of the lumber at the mill.

Witness Denison testified that the lumber was worth $25 per thousand feet at the mill and $30 per thousand at the railroad.

Appellant's witnesses testified that the stumpage value was $3.50, and that appellant had paid Smith $17.50 on the yard, and that it was worth $22.50 on board the cars.

It thus appears that there was a conflict in the evidence as to the value, ranging from $17.50 on the yard to $25 per thousand on the yard, and the verdict of the jury was necessarily based on the evidence of the value on the yard. They were expressly told in the instructions that they must do this.

Instruction No. 8, requested by appellant, told the jury that, if appellee recovered, it could only recover the lumber stacked on section 12 at the time the suit was brought, and that it was not entitled to recover this unless it showed that the particular lumber belonged to it and was in its possession.

Appellant finally contends that its peremptory instructions should have been given. What we have already said answers this contention.

The weight of the evidence and the credibility of the witnesses was for the jury, and they found that the appellee was the owner of the land from which the timber was cut, and that Smith went upon said land and cut the timber without right.

Appellee prosecutes a cross-appeal and asks a modification of the judgment, claiming that he is entitled to interest, and calls attention to the case of *Bradley Lumber Co.* v. *Hamilton,* 117 Ark. 127, 173 S. W. 850.

In the Bradley Lumber Company case the court said, referring to another case: "In that case the court held that, where damages were capable of ascertainment by reference to reasonably certain market values and various items of damage have been duly and adequately presented, and payment demanded before suit is commenced, the claimant is entitled to interest from the time of such demand." The facts in this case do not bring it within this rule.

In the case of *Griffith* v. *Ayer-Lord Tie Co.,* 109 Ark. 223, 159 S. W. 218, the court held that the instrument under consideration conveyed the absolute title to the appellee, and that he was therefore entitled to recover the value with 6 per cent. interest.

In the instant case, no demand was made for the payment of the timber, but it was simply a suit in replevin, the purpose of which was to recover the timber, and the statute provides that in suits of this character the jury must assess the value of the property as also the damages for the taking or detention wherever by their verdict there will be a judgment for the return or the recovery of the property.

Section 8654 provides that a judgment for the defendant may be for the return of the property or its value in case the property cannot be had, and damages for the taking and withholding of the property.

The appellee in this case brought suit for the recovery of the property and damages for its detention. It

had the right to introduce proof to show it had been damaged by the wrongful taking and detention of the property, but it was not entitled in this case to recover interest. *Brown* v. *Vaughan, ante* p. 364.

The judgment is affirmed, both on appeal and cross-appeal.

QUAILE & COMPANY *v.* WILLIAM KELLY MILLING COMPANY.

Opinion delivered November 23, 1931.

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Evans & Evans, for appellant.

Cochran & Arnett and *C. E. Chalfant,* for appellee.

HART, C. J., (after stating the facts). At the outset it may be stated that the contract was reduced to writing and signed by the parties. It was contemplated that the written contract should be confirmed at the home office of appellee, and this was done both by telegram and by letter when the contract was received by appellee at its home office. It is true that a member of the firm of appellants testified that it was also intended that appellant should sign the confirmation of the contract, and that this was never done. This evidence was not admissible because it tended to contradict and vary the terms of a valid and unambiguous written contract which had been signed by the parties and was complete in itself. *Colonial & United States Mortgage Co.* v. *Jeter,* 71 Ark. 185, 71 S. W. 945; *Ogletree* v. *Smith,* 176 Ark. 597, 3 S. W. (2d) 683; and *Wright* v. *Marshall,* 182 Ark. 890, 33 S. W. (2d) 43.

It is earnestly insisted by counsel for appellants, however, that the damage clause of the contract, which

forms the basis of this lawsuit, should be construed as a penalty and not as liquidated damages. The general rule is that contracts for liquidated damages, when reasonable in their character are not to be regarded as penalties and may be enforced between the parties. But agreements to pay fixed sums, plainly without relation to any probable damage which may follow a breach, will not be enforced. *Kothe* v. *Taylor,* 280 U. S. 224, 50 S. Ct. 142; and *Robbins* v. *Plant,* 174 Ark. 639, 297 S. W. 1027, 59 A. L. R. 1128.

There is no sound reason why persons capable of contracting may not agree upon the subject of liquidated damages when fairly entered into with the view to compensation for anticipated loss. So it is generally held that, where the intention of the parties on this point is clearly ascertained from the written contract, effect will be given to the provision for liquidated damages where such damages are uncertain in nature or amount, or difficult to ascertain, or where the amount stipulated for is not so greatly disproportionate to the damage which might result from the failure of the seller to deliver the property as to show that the parties must have intended a penalty, and could not have meant liquidated damages. There must be an element of uncertainty and the apparent absence of any reasonable connection between the method of computation of the loss and the actual performance of the contract. In other words the parties under the law may contract as to the measure of damages where the liquidation bears a reasonable relation to the probable damages for the breach.

The evidence in the present case is uncontradicted that the parties contemplated that the seller should manufacture a particular brand of flour and deliver it to the buyer. The price of wheat fluctuates greatly, and it was necessary for the seller to buy an amount of wheat necessary to cover the contract and carry it until the time came for manufacturing the flour in order that it might not suffer great loss. Orders were taken to the end that the mill would be kept busy during the year, filling

the contracts as they came due. The contract was not for the sale and delivery of flour by the seller, which was purchased in the open market and delivered to the buyer, but it was a contract for the manufacture of a certain brand of flour from wheat. Therefore, wheat was the basic raw material; and, inasmuch as the price of it fluctuated greatly, what damages might be suffered from the failure on the part of the buyer to carry out his part of the contract varied greatly and were uncertain.

It was said in *Sheffield-King Milling Co.* v. *Domestic Science Baking Co.*, 95 Ohio St. 180, 115 N. E. 1014, by the Supreme Court of Ohio:

"The parties agreed that wheat, the thing from which the flour was to be made, should be the basis upon which to calculate the damages. They could, of course, have agreed that the flour should be such basis, but they did not do so. That was a matter for them to agree about. They did not fix an arbitrary lump sum which might turn out to be wholly inequitable, but fixed a method, the chief element of which was the price of wheat from which the flour was to be made, a matter not within the control of either. In this situation, when the plaintiff proved it had performed the terms of the contract on its part, had purchased the necessary wheat, and showed the damages that had accrued on the basis agreed on, it was entitled to recover."

In view of the situation of the parties and the surrounding circumstances, it cannot be said that the stipulated damages appear to be greatly in excess of the damages sustained or to have no relation thereto. The surrounding circumstances indicate that it would be necessary to purchase wheat and store it until the time to manufacture it into flour, and also to consider the cost of manufacturing the wheat into flour. It is a matter of common knowledge that the price of wheat fluctuates greatly, and that the cost of running a mill or manufacturing plant would be greatly increased where it was necessary for it to be idle at uncertain intervals. Similar provisions for liquidated damages in contracts for the manufacture and sale of flour have usually been sus-

tained. *International Milling Co.* v. *Reierson,* (S. D.) 225 N. W. 218, and cases cited; *Yera, Andrews & Thurston, Inc.,* v. *Randozzo Macaroni Mfg. Co.,* 315 Mo. 927, 288 S. W. 20, and cases cited; *Sheffield-King Milling Co.* v. *Jacobs,* 170 Wis. 389, 175 N. W. 796; *Larabee Flour Mills Co.* v. *Carignano,* 49 Fed. (2d) 796; and *Rock* v. *Gaede,* 111 Kan. 214, 207 Pac. 323, 27 A. L. R. 1152.

In this connection we call attention to the case of *Kirchman* v. *Tuffli Brothers Pig Iron & Coke Co.,* 92 Ark. 111, 122 S. W. 239, where it was held that, upon a breach by the vendee in a contract for the sale of goods, the general rule is that the measure of the vendor's damages is the difference between the price fixed by the contract and the market value of the goods at the time and place of delivery, provided the contract price exceeds such market value.

That principle of law would apply here, if there had been no valid contract for stipulated damages, and it might be said to apply in any event, where no steps had been taken in the performance of the contract, and no expense had been incurred. If there had been a breach of the contract in the present case before the seller had gone to the expense of purchasing wheat to be used in the fulfillment of its contract, then the principle of law just referred to would govern. But, as already pointed out, the seller, as soon as the contract was executed, purchased sufficient wheat to cover the terms of its contract with the buyer, and kept it on hand until the contract was terminated because the buyer refused to send shipping instructions to the seller. The undisputed evidence shows that the wheat was not sold by the seller until the contract was terminated.

On the cross-appeal, but little need be said. It appears from the testimony that the salesman of appellee never received any commission for the sale made to appellants, and contemplated none until the flour was delivered. Therefore, the court properly held that the seller was not entitled to recover under clause (b), twenty cents per barrel as the cost of selling.

Therefore the decree will be affirmed, both on the appeal and the cross-appeal.

MISSOURI PACIFIC RAILROAD COMPANY *v.* ROGERS.

Opinion delivered November 23, 1931.

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Thos. B. Pryor and *H. L. Ponder*, for appellant.

Miller & Yingling and *Tom W. Campbell,* for appellee.

HART, C. J., (after stating the facts). This case was not brought under the lookout statute or under the failure of the railroad to give the statutory signals by ringing the bell or sounding the whistle for a public crossing. It was based upon the alleged negligence of the railroad company at common law in the operation of its train as it approached the public crossing in the town of Garner and struck and killed Mrs. Rogers while she was on the public crossing there going across the railroad tracks, and also upon the doctrine of discovered peril.

In a case note to 7 Ann. Cas., at page 990, in discussing the question of the speed of the train as negligence in the absence of a prohibitory statute in connection with precautions, the annotator announces the general rule to be as follows: "Where it appears that no warning was given of the approach of a train to a crossing, the speed at which such train was moving is an essential element for the consideration of the jury in determining whether the company used due care under the circumstances." 22 R. C. L., § 243, p. 1012, and 52 C. J., § 1527, pp. 242, 244.

In discussing the same question in Ann. Cas. 1914B, at page 604, it was said that recent cases are in accord to the effect that, where no warning is given of the approach of a train to a crossing, the speed at which the train is moving is of material consideration on the question of negligence. The annotator further stated that the relation which the speed of a train bears to the various precautions which may be taken to avert an accident at a crossing was well stated in *Louisville, H. & St. L. Ry.*

Co. v. *Lyons,* 146 Ky. 603, 143 S. W. 31, where the court said:

"The lookout answers one purpose, the warning another, and the control of the speed yet another; and it often happens that the observance of either without the observance of all will not afford the required or indeed any protection. The lookout is primarily to enable the trainmen to control the movement of the train when they discover danger, while the warning is to give the traveler notice to keep out of the way, and the control of the speed is designed to make both the lookout and the warning more effective. In this case, for example, the fact that the engineer was keeping a lookout did not do any good, as at the speed the train was going he did not discover the peril of appellee in time to warn her of danger or avoid the accident."

Among the numerous cases cited in favor of the rule laid down by the annotator is *St. L. I. M. & S. Ry. Co.* v. *Kimbrell,* 111 Ark. 134, 163 S. W. 513. In that case, the court said that the unusual speed of the train was a proper element of consideration under the circumstances of the case, although the speed of the train alone would not be sufficient to establish liability if all other precautions were observed by those in charge of the train. It is true that this case was decided after the passage of our lookout statute and after the passage of our statute requiring the blowing of the whistle and the ringing of the bell for a certain stated period before reaching a crossing; but the principle would be the same. In the absence of a statute requiring such provisions to be given, the railroad would not be allowed to operate its train at a rapid rate of speed over a public crossing in a town or a village where it might be supposed that people would be constantly going across the tracks at a public crossing without giving any warning or signal of any kind of its approach. In that case, the court recognized that, when the accident happens in a populous town, the jury might find that it constituted negligence to run the train at a rapid rate of speed without giving any kind of warning of its approach.

This same rule was again recognized upon the second appeal in that case, reported in 117 Ark. 457, 174 S. W. 1183. Where public necessity and convenience may require the operation of trains at a high rate of speed through cities and towns, yet such speed may be found by the jury to be an element of negligence where no warning is given of the approach of the train.

In the present case, the engineer and fireman both testified that they were observing the statutory signals for the approaching crossing by blowing the whistle and ringing the bell; but other witnesses testified that these statutory signals or warnings of the approach of the train to the crossing were not being given. They testified that they were at places where they heard such signals given by the train approaching from the south and did not hear any signals from the train coming from the north, either by ringing the bell or blowing the whistle. They were in possession of their faculties of hearing and would have heard the signals had they been given. Hence their testimony was not negative testimony, but was of affirmative character, to be given such weight as the jury might attach to it. *St. L. I. M. & S. Ry. Co.* v. *Kimbrell,* 117 Ark. 457, 174 S. W. 1183; *St. L. S. F. Ry. Co.* v. *Horn,* 168 Ark. 195, 269 S. W. 576; *St. L. S. F. Ry. Co.* v. *Haynes,* 177 Ark. 104, 5 S. W. (2d) 737; C. R. I. *& P. Ry. Co.* v. *Thomas, ante* p. 457.

Again, the engineer and fireman testified that they were keeping a lookout; but, as we have already seen, that alone would not satisfy the requirement in cases of this sort. The jury might have found from the testimony a state of facts as follows: Mrs. Rogers' attention was attracted to the train from the south by the giving of the statutory warnings of its approach, by the bell ringing and the whistle blowing, and, not hearing any whistle blowing or bell ringing on the train from the north, her attention was concentrated on the train from the south, and the fireman or engineer keeping the lookout observed this and should have given a short blast of the whistle, which might have attracted her attention so that she would have quickened her pace and stepped

from the place of danger to a place of safety. It will be remembered that the witnesses testified that she did not quicken her steps, and that one or two steps would have carried her to a place of safety. It is true that the witnesses testified that the train from the north did sound the blast of the whistle at a public crossing a half a mile north of the crossing at Garner, but they said that the whistle was not sounded or the bell rung any more after the first blast of the whistle was given. Hence the jury might have inferred that, although Mrs. Rogers might have heard this, when she heard the train approach from the south, she thought she was mistaken about having heard the whistle from the north, and that her safety lay in watching the train from the south. The jury were the judges of the credibility of the witnesses, and the weight to be given to their testimony; and, under the circumstances, it cannot be said as a matter of law that the railroad company was free from negligence, and that the negligence of Mrs. Rogers was greater than that of the railroad company.

While public convenience and necessity may require the running of trains through cities, towns and populous communities at a high rate of speed, yet the rapid rate of speed in connection with other facts and circumstances, such as the failure to give any warning whatever of the approach of the train to a public crossing and the like, is for the consideration of the jury in determining whether the railroad company was guilty of common-law negligence; and the conduct of its employees as a whole constituted negligence at the common law, which was the proximate cause of the injury in cases like this.

In this connection, it may be stated also that error is claimed on account of the admission by the court of evidence as to the position of gravel cars on the switching or storage track east of the main tracks. It will be remembered that one of the gravel cars was north of the public crossing at Garner, and the other three were south of it. We do not think there was any error in this respect. It tended to show that Mrs. Rogers' vision was to some extent obstructed by the position of these gravel cars;

and, as their position with reference to the crossing at Garner was definitely stated, the jury could intelligently tell what, if any, obstruction to the vision of Mrs. Rogers was occasioned by their position.

It is also insisted that the court erred in submitting to the jury the question of comparative negligence under § 8575 of Crawford & Moses' Digest. The section reads as follows:

"In all suits against railroads, for personal injury or death, caused by the running of trains in this State, contributory negligence shall not prevent a recovery where the negligence of the person so injured or killed is of less degree than the negligence of the officers, agents or employees of the railroad causing the damage complained of; provided, that where such contributory negligence is shown on the part of the person injured or killed, the amount of recovery shall be diminished in proportion to such contributory negligence."

This was an independent act passed by the Legislature of 1919 and constituted a modification of the common-law doctrine of contributory negligence. It will be noted that the section expressly provides that in all cases against railroads for personal injury or death, caused by the running of trains in this State, contributory negligence shall not prevent a recovery where the negligence of the person so injured or killed is of less degree than the negligence of the railroad company. There is nothing whatever in the language of the statute which would confine it to cases brought against the railroad under the lookout statute or under the statute for the failure to give signals for the approach to a public crossing. No reason is assigned why the language of the statute should not be construed according to its ordinary meaning and be applied to all suits of this sort against railroads, and we can perceive none. Therefore we are of the opinion that the statute applies, and that the court correctly instructed the jury on the question of contributory negligence according to its provisions.

As we have already seen, the case was also submitted to the jury under the doctrine of discovered peril. On

this branch of the case but little need be said. Before the passage of our statute on comparative negligence, the court held that the doctrine of contributory negligence could not be used as a defense after the consequences of plaintiff's negligence had been discovered and when the injury might still have been avoided, had the defendant used ordinary care appropriate to the subject-matter, being greatest, of course, where human life is in danger. *St. L. I. M. & S. Ry. Co.* v. *Freeman,* 36 Ark. 41.

Again, in *Little Rock & Fort Smith Ry. Co.* v. *Cavanesse,* 48 Ark. 106, 2 S. W. 505, the court said that the negligence of a plaintiff makes no difference where the direct cause of the injury complained of is the omission of the defendant, after becoming aware of the injured party's negligence, to use a proper degree of care in avoiding the consequence thereof.

In the case of *C. R. I. & P. Ry. Co.* v. *Elzon,* 132 Ark. 431, 200 S. W. 100, the court said that the doctrine of discovered peril is well settled in this State, and is to the effect that, when a traveler is discovered in a perilous position on or near the railroad track by the engineer on a moving train, it is his duty to use every reasonable precaution, consistent with the proper operation and management of their train, to avoid injuring the traveler. See also *Huff* v. *Mo. Pac. Rd. Co.,* 170 Ark. 665, 280 S. W. 648, and *St. L. S. W. Ry. Co.* v. *Simpson, ante* p. 633. Many other cases, applying the doctrine according to the facts of the particular case by this court, might be cited, but we deem such course unnecessary.

As a general rule, the engineer in a case of this kind might assume that a person, before starting across the track and while crossing it, would exercise due care and caution for his own safety. The case at bar, however, presents the question to be determined by a jury as to whether or not, under all the facts and circumstances here, the engineer and fireman knew of the impending peril of Mrs. Rogers, and that she was unaware of it, and should have given warning by a blast of the whistle or by ringing the bell, or by checking the speed of the train when he saw that Mrs. Rogers would likely reach a dan-

gerous position on the crossing which she was unaware of, and which would result in her injury or death. Hence the jury might have found that the train operatives were negligent in the performance of their common-law duty in the premises, by not at least sounding the whistle, one blast of which might have prevented the injury.

It is also claimed that the court erred in not transferring the case to the Federal court, and on this point but little need be said. The case was removed to the Federal court and was remanded by it to the State court. It is well settled by the decisions of this court, and by the decisions of the Supreme Court of the United States, that where a case was removed to the Federal court and was remanded to the State court, the propriety of the remanding order will not be reviewed in the State court. *K. C. So. Ry. Co.* v. *Wade,* 132 Ark. 551, 201 S. W. 787; *Powers* v. *Chesapeake & O. Ry. Co.,* 169 U. S. 92, 18 S. Ct. 264; *McLaughlin Brothers* v. *Hallowell,* 228 U. S. 278, 33 S. Ct. 465; *Mo. Pac. Ry. Co.* v. *Fitzgerald,* 160 U. S. 556, 16 S. Ct. 389; *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440, 36 S. Ct. 637; and *Yankaus* v. *Feltenstein,* 244 U. S. 127, 37 S. Ct. 567.

The case was fairly tried before a jury under the principles of law applicable to the allegations of negligence relied upon for recovery, and was heard upon competent testimony. Therefore the judgment will be affirmed.

[redacted]

RAWLS *v.* FREE.

Opinion delivered November 23, 1931.

[redacted]

R. W. Wilson and *Coleman & Gantt,* for appellant.

E. W. Brockman, for appellee.

SMITH, J. This is a suit for damages for the breach of an alleged contract to convey four separate farms which, collectively, comprised the J. S. Ross estate. Ross died in 1920, and was survived by four children, who, as his heirs at law, mortgaged the lands thus inherited to T. H. Free to secure an indebtedness of $12,000. Default being made in the payment of this indebtedness, a suit was brought to foreclose the mortgage which secured it, and a decree of foreclosure was rendered in October, 1928. Pursuant to this decree, the lands were sold to Free by the commissioner appointed to make the sale, which was soon thereafter reported to and confirmed by the court.

Pending the foreclosure, L. O. Rawls, who had married one of the Ross heirs, entered into negotiations with Free for the purchase of all four of the farms which are referred to as the Ross estate. These negotiations were evidenced largely by letters which passed between the parties.

On January 15, 1929, the day appointed to consummate the sale from Free to Rawls, the parties met for that purpose, when a disagreement arose about certain rental contracts, and the sale was not made, whereupon Rawls brought this suit to recover damages for the alleged breach of the contract by Free.

At the conclusion of the plaintiff's testimony, the defendant requested the court to direct a verdict in his favor, and a similar request was made by the plaintiff,

and no other instructions were requested by either party. Under this state of the record, the case was in effect withdrawn from the jury and submitted to the court as a jury, and the ruling of the court would have the same force and effect as the verdict of a jury, and the judgment must be affirmed if the evidence is legally sufficient to support it.

The suit was defended upon two grounds. First, that the lands forming the subject-matter of the contract were not sufficiently described to comply with the statute of frauds. But we think the undisputed testimony shows that it was.

The letters referred to the lands as the property of the Ross estate upon which Free held a mortgage which he was then foreclosing. An accurate description of the lands might have been obtained from the mortgage or from the decree ordering its foreclosure, and the contract furnished the key by which the property might be certainly identified. The court could not therefore have found for the defendant upon the ground that an insufficient description had been employed. *Miller* v. *Dargan,* 136 Ark. 237, 206 S. W. 319; *Skinner* v. *Stone,* 144 Ark. 353, 222 S. W. 360, 11 A. L. R. 808; *Dollar* v. *Knight,* 145 Ark. 522, 224 S. W. 983; *Kirby* v. *Malone,* 145 Ark. 608, 215 S. W. 592; *Moore* v. *Exelby,* 170 Ark. 908, 281 S. W. 671; *Davis* v. *Davis,* 171 Ark. 168, 283 S. W. 360; *Schweitzer* v. *Crandell,* 172 Ark. 667, 291 S. W. 68.

Upon the question of the ability and readiness of the plaintiff to perform, the testimony is conflicting, and the judgment of the court might be affirmed upon that ground but for the fact that the undisputed testimony shows that on January 16, 1929, the day following the date upon which the parties had met to consummate the contract, there was placed of record a deed from Free for one of the farms to a third party. This deed was dated and acknowledged December 21, 1928, and was filed for record at 9 A. M. on January 16, 1929, and the record is silent as to when the deed was delivered.

The text writers say there is a rebuttable presumption that an instrument was delivered on the date on

which it was dated, provided, at least, it is not acknowledged on a different date. When the date of an instrument differs from the date of acknowledgment, the delivery is by some courts presumed to have taken place on the former date, and by some on the latter. Here, however, the date of the instrument and that of the acknowledgment is the same date, to-wit: December 21, 1928. Tiffany on Real Property, vol. 2 (2d ed.), p. 1764; Thompson on Real Property, vol. 4, p. 956; Devlin on Deeds, vol. 1 (3d ed.), p. 260; *Meech* v. *Fowler,* 14 Ark. 29; *Smith* v. *Scarborough,* 61 Ark. 104, 32 S. W. 382; 18 C. J., p. 414, § 493, of chapter "Deeds."

There is therefore a presumption, in the absence of testimony to rebut it, that Free was unable to perform the contract on January 15, 1929, as he had previously conveyed to a third party one of the farms forming a part of the subject-matter of the contract. This being true, *prima facie* so at least, in the absence of testimony to the contrary, it was not necessary that Rawls tender performance, as the law does not require a tender to be made which would be vain and useless. It was waived by Free's conduct. *Fourche River Lbr. Co.* v. *Bryant Lbr. Co.,* 97 Ark. 633, 135 S. W. 796; *Roberts Cotton Oil Co.* v. *F. E. Morse Co.,* 97 Ark. 513, 135 S. W. 334; *Hollowoa* v. *Buck,* 174 Ark. 497, 296 S. W. 74.

The court should not therefore have rendered judgment for the defendant, and for this error the judgment will be reversed, and the cause remanded for a new trial.

WESTBROOK *v.* MCDONALD.

Opinion delivered November 23, 1931.

J. W. Westbrook and *J. S. Utley,* for petitioners.

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

Geo. P. Whittington, E. H. Wootton, S. W. Garratt and *A. T. Davies,* for protestants.

C. Floyd Huff, amicus curiae.

SMITH, J. J. W. Westbrook, for himself, and on behalf of all other petitioners herein referred to, has

prayed this court to award the issuance of a writ of mandamus, directed to Ed F. McDonald, as Secretary of State of the State of Arkansas, requiring that officer to receive and file certain petitions praying that an act to amend § 3505, Crawford & Moses' Digest, passed at the 1931 session of the General Assembly, be referred to a vote of the people at the next ensuing general election, under the authority of the seventh amendment to the State Constitution adopted in 1920. Applegate's Constitution of Arkansas, Annotated, page 203.

The complaint praying this relief, which was filed June 27, 1931 alleges compliance with the amendment and with act No. 2 of the extraordinary session of the General Assembly in 1911, approved June 30, 1911. General Acts 1911, p. 582.

The petitions were lodged in the office of the Secretary of State on June 9 and 10, 1931, but the Secretary of State refused to indorse them as having been filed, because, in his opinion, under the advice of the Attorney General of the State, there had not been a substantial compliance with the Constitution and laws of the State in the particulars hereinafter discussed.

The act in question here sought to be referred to a vote of the people appears as act 71, and was approved by the Governor February 26, 1931, (Acts 1931, page 201). It reads as follows:

"Act 71.

"An act to amend § 3505 of Crawford & Moses' Digest of the statutes of the State of Arkansas.

"Be it enacted by the General Assembly of the State of Arkansas:

"That § 3505 of Crawford & Moses' Digest of the statutes of the State of Arkansas be and the same is hereby amended so as to read as follows, to-wit:

"The plaintiff, to obtain a divorce, must prove, but need not allege, in addition to a legal cause of divorce:

"First. A residence in the State for three months next before the final judgment granting a divorce in the action, and a residence for two months next before the commencement of the action.

"Second. That the cause of divorce occurred or existed in this State, or, if out of the State, that it was a legal cause of divorce in this State, the laws of this State to govern exclusively and independently of the laws of any other State as to the cause of divorce.

"Third. That the cause of divorce occurred or existed within five years next before the commencement of the suit.

"Fourth. If any provision of this act be declared unconstitutional, the validity of the remainder of the act shall not be affected thereby.

"Approved: February 26, 1931."

The petitions are all identical in form, and contain the following caption:

"PETITION FOR REFERENDUM

"To the Honorable Ed F. McDonald, Secretary of State of the State of Arkansas.

"We, the undersigned, legal voters of the State of Arkansas, respectfully order, by this, our petition, that act No. 80 of the General Assembly of the State of Arkansas, approved on the second day of March, 1931, entitled, 'An act to amend section 3505 of Crawford & Moses' Digest of the statutes of the State of Arkansas,' also known as the 'Divorce Bill of 1931,' and being an act to permit the granting of divorces after a residence in the State for three months next before final judgment granting divorce in the action and a residence of two months next before the commencement of the action, be referred to the people of the State of Arkansas, to the end that the same may be approved or rejected by the vote of the legal voters of the State at the biennial regular general election to be held Tuesday, the 8th day of November, 1932; and each of us for himself says:

"I have personally signed this petition; that I am a qualified elector of the State of Arkansas, and my residence, postoffice address, county and voting precinct are correctly written after my name.

Name	Residence	P. O. Address
.....	.....	.....

County	Voting Precinct
.....	....."

It will be observed that the petition refers to the act as act No. 80, and as having been approved on the second day of March, 1931, whereas, act No. 80, approved March 2, 1931, was an act making appropriations for the agricultural college of the fourth district. Acts 1931, page 224.

Each petition was a single page, and on the reverse side of each petition there was prepared an affidavit to be made by the circulator of the petition as to its genuineness, etc., with spaces in which to write the names of the signers appearing on the obverse side.

The petition containing the name of J. W. Westbrook, who appears here as the petitioner for the writ of mandamus, was filled out by copying the names of the petitioners and was signed by the circulator, but there was no jurat thereto as required by law. Immediately below the jurat there appears: "Copy of Act, Act No. 80," following which an exact copy of act 71 is set out. There then appears the following certificate of the Secretary of State:

"Certificate

"State Capitol,
"County of Pulaski, } ss.
"State of Arkansas.

"I, Ed F. McDonald, Secretary of State of the State of Arkansas, do hereby certify that the foregoing and hereto attached instrument of writing is a true and perfect copy of act No. 80 of the General Assembly of the State of Arkansas, and entitled, 'An act to amend section 3505 of Crawford & Moses' Digest of the Statutes of Arkansas,' approved March 2, 1931, the original of which was filed in my office on the 2d day of March, 1931.

"In testimony whereof, I hereunto set my hand and affix my official seal. Done at my office at the city of Little Rock, Arkansas, this the 1st day of April, 1931.

"Ed F. McDonald, Secretary of State.

"(Seal)"

We digress to say that the error in the number and date of the act was, in fact, made by the petitioners, and

not by the Secretary of State. Of this fact there is no question.

It is not questioned that, *prima facie,* the petitions contained the requisite number of signers, but it is insisted that the petitions were insufficient for various reasons. The Secretary of State declined to indorse the petitions as having been filed in his office, hence this suit.

It may be first said that it was expressly held in the recent case of *Townsend* v. *McDonald, ante* p. 273, that act No. 2 of the extraordinary session of 1911, hereinbefore referred to, which was passed as an enabling act to the amendment voted on as amendment No. 10, was not repealed by the adoption of the I. and R. amendment adopted in 1920, except in so far as it was in conflict with the amendment, and the act will therefore be read in connection with the amendment of 1920, which superseded the previous I. and R. amendment to the Constitution. The I. and R. amendment of 1920 recites that it "shall be in substitution of the initiative and referendum amendment, approved February 19, 1909, as the same appears in the Acts of Arkansas for 1909."

It was also expressly decided in the Townsend case, *supra,* that, unless there has been a substantial compliance with the provisions of the act of 1911 in the matter of attaching to the petition seeking to invoke the referendum a full and correct copy of the measure sought to be referred, the Secretary of State is without power to act, and mandamus will not lie to compel him to file petitions failing to set out a full and correct copy of the measure sought to be referred.

The first question for decision is therefore whether the petitions here under review substantially complied, in the matter of form, with the I. and R. amendment of 1920.

The opinion in the Townsend case discussed the purpose of the requirement that a copy of the act to be referred appear on the petitions, and the reason why its mandatory provisions should be followed, the reason being that the petitioner might, if he wished, be informed as to the exact provisions of the act sought to be referred.

But it was also said: "It is only necessary that a full and correct copy of the measure on which the referendum is asked be filed with the petition and attached thereto in order that the petitioners may have the opportunity to read it and inform themselves as to the act to be referred before signing the petition, if they wish to do so."

The Townsend case held also that a substantial compliance with the enabling statute and the amendment was sufficient, and, we think, there has been a substantial compliance in this respect.

It has been mentioned that the respective petitions comprised a single sheet, and that, except as to the error in number of the act and the date of its approval, an exact copy of the act was printed on the reverse side of the petition, and was available for the inspection of any person whose signature was solicited to the petition upon its presentation. There appears to be no requirement in the statute, or in the amendment itself, that the act be set out at any particular or certain place on the petition.

It is true, as has been said, that the act was numbered 71, and not 80, and that it was approved on February 26, 1931, and not on March 2, 1931; but this was obviously a clerical misprision, an error which should not have occurred, but one not fatal to the validity of the petition. The purpose of stating the number of the act and the date of its approval was to aid in its identification, but these errors could not have been misleading when an exact copy of the act otherwise appeared on the petition. It is settled law that even the title of an act is not controlling in its construction, although it is considered in determining its meaning when such meaning is otherwise in doubt. *Conway* v. *Summers,* 176 Ark. 796, 4 S. W. (2d) 19.

Upon the proposition that the petitioners failed, at the time of filing the petitions, to submit a title to be used on the ballot, it may be said that the amendment does provide that "At the time of filing petitions the exact title to be used on the ballot shall by the petitioners be submitted with the petition, and on State-wide meas-

ures, shall be submitted to the State Board of Election Commissioners, who shall certify such title to the Secretary of State to be placed upon the ballot."

We think there was a substantial compliance with this provision. The following communication was addressed and delivered to the Secretary of State:

"Little Rock, Arkansas,
"June 9, 1931

"Hon. Ed F. McDonald,
"Secretary of State and Ex-Officio Secretary
of the State Board of Election Commission.
"Dear Sir:

"In your official capacity, you will hereby take notice:

"That on behalf of the petitioners for reference to the electorate of the State, that certain act of the Legislature, approved March 2, 1931, known as the three months' divorce law, and being an act to amend § 3505 of Crawford and Moses' Digest of the statutes of the State of Arkansas, so as to permit the granting of decrees of divorce to applicants who have resided in the State for a period of only three months, is hereby submitted for placing upon the official ballot for the general election to be held Tuesday, the eighth day of November, 1932, the following title:

"Referendum of the act of the Legislature of 1931, amending § 3505 of Crawford and Moses' Digest of the laws of the State of Arkansas so as to permit the granting of decrees of divorce to applicants who have resided in the State for a period of only three months.

"For act, known as the Three Months' Divorce Law amending § 3505 of Crawford and Moses' Digest.

"Against act, known as the Three Months' Divorce Law, amending § 3505 of Crawford and Moses' Digest.

"Most respectfully submitted,
[Signed] "J. W. Westbrook,
"For himself and all other petitioners."

The Constitution does not require that the ballot title be furnished to each member of the State Board of Election Commissioners. The requirement is that it be

submitted to the board, and the communication set out above was addressed to the Secretary of State as ex-officio secretary of the State Board of Election Commissioners, and we know, as a matter of law, that the Secretary of State is a member of the State Board of Election Commissioners, and is the custodian of the records of the board, and the communication recited that it was addressed to the Secretary of State in his official capacity, and we therefore conclude that the ballot title was submitted to the State Board.

It is insisted, however, that the ballot title as furnished was insufficient and misleading in that it appears to describe the act as one permitting the granting of decrees of divorce to applicants who have resided in the State for ninety days only, whereas the true purpose of the act is to amend § 3505, Crawford & Moses' Digest of the laws of the State of Arkansas, so as to permit suits for divorce to be instituted by persons who have only resided in the State for a period of ninety days.

It is true that, if one were to read the act itself, even casually, he would know that it had not been enacted that one might obtain a divorce in this State by proving a residence therein for ninety days only; but it is equally true that the great body of the electors, when called upon to vote for or against an act at the general election, will derive their information about it from the ballot title. This is the purpose of the title.

It was said by the Supreme Court of California in the case of *Wallace* v. *Zinman*, 200 Cal. 585, 254 Pac. 946, 62 A. L. R. 1341:

"Every reason going to protect the public from imposition by undesignated matter in the title of an act of the Legislature obtains with like, if not greater, force to a measure that is to be voted upon by the people. It is common knowledge that an initiative measure is originated by some organization or a small group of people, and they circulate a petition requiring the signatures of only 8 per cent. of the voters; that the measure is then placed upon the ballot and a large number of the population, not knowing what the context of the act is, rely

solely upon its title as a guide to intelligent voting thereon. Speaking of the identical question before us, the Supreme Court of Oregon, in *State ex rel. Gibson* v. *Richardson,* 48 Ore. 309-319, 8 L. R. A. (N. S.) 362, 85 Pac. 229, said: 'The validity of laws adopted at the polls must be determined, like enactments by the legislative assembly, by the test of the Constitution as modified by the amendment thereto. Though the argument that a proposed measure must depend upon its own merits may not apply to acts initiated by petitions, a valid reason for requiring that the subject-matter of laws to be adopted or rejected at the polls should be stated in the title nevertheless exists. The majority of qualified electors are so much interested in managing their own affairs that they have no time carefully to consider measures affecting the general public. A great number of voters undoubtedly have a superficial knowledge of proposed laws to be voted upon, which is derived from newspaper comments or from conversation with their associates. We think the assertion may safely be ventured that it is only the few persons who earnestly favor or zealously oppose the passage of a proposed law, initiated by petition, who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information and usually derive their knowledge of the contents of a proposed law from an inspection of the title thereof, which is sometimes secured only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage."

Upon the same subject, it was said by the Supreme Judicial Court of Massachusetts in *Re Opinion of Justices,* 171 N. E. 294, 69 A. L. R. 388, that the ballot title should be complete enough to convey an intelligible idea, and scope and import, of the proposed law, and that it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and that it must contain no partisan coloring.

As the ballot title here submitted might mislead, we have concluded that it was defective and insufficient, and

that the amendment was not sufficiently complied with in this respect.

Having reached the conclusion that this mandatory provision of the amendment has not been complied with, we might rest this opinion upon that holding, and refuse to order the writ of mandamus for that reason. But, in view of the public interest involved as to the procedure under the amendment and the enabling act, we proceed to pass upon certain other questions raised in the case which would themselves be conclusive of the plaintiff's right to have a writ of mandamus issued.

It is insisted that plaintiff Westbrook is not a petitioner, and that he therefore had no authority to supply the ballot title, and that, not being a petitioner, he has no right to maintain this suit for mandamus.

We have said that the petition containing the name of Westbrook did not have the jurat which the amendment requires. The amendment provides: "Only legal votes shall be counted upon petitions. Petitions may be circulated and presented in parts, but each part of any petition shall have attached thereto the affidavit of the person circulating the same that all signatures thereon were made in the presence of the affiant, and that to the best of the affiant's knowledge and belief each signature is genuine, and that the person signing is a legal voter and no other affidavit or verification shall be required to establish the genuineness of such signatures."

This language is too plain to leave any doubt as to its meaning. The petition is not complete and is not entitled to be filed until the jurat above set out has been attached thereto, and as the petition upon which the name of Westbrook appears did not contain this jurat, it follows that he is not to be counted or considered as a petitioner.

The complaint or the petition for a review of the ruling of the Secretary of State in which the mandamus is prayed does allege, however, that Westbrook is a resident, citizen and qualified elector of the State, and that he is proceeding for himself and on behalf of all other petitioners for the referendum. In other words, he is act-

ing for and on behalf of persons who are petitioners, and his attitude is that of a citizen who is proceeding as such on behalf of himself and of all others who are petitioners. It is alleged that there are over twelve thousand petitioners, and the amendment certainly does not contemplate that each and all of them shall submit the ballot title, nor is it required that each and all of them shall be made parties to the petition to review the action of the Secretary of State which the amendment expressly authorizes. It is insisted that § 9 of the enabling act of 1911 confers authority upon Westbrook thus to act.

Now the paragraph of the amendment entitled "Title" requires that at the time of filing the petitions the exact title to be used on the ballot shall by the petitioners be submitted with the petition. We think this is a matter in which one or more petitioners might act for themselves and for all other petitioners, but Westbrook, in his communication to the Secretary of State, named no person for whom he was authorized to act except himself, and he was not a petitioner. He did state that he was acting for himself and all other petitioners, but he named no one except himself. Proceedings of this kind should be had in the name of some one or more of the petitioners, so that it might be made to appear to the Secretary of State, *prima facie* at least, that the persons attempting to act were authorized to do so by the persons named as petitioners.

We have a statute which provides: "Where the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all." Section 1098, Crawford & Moses' Digest. But the person who so acts for a class must be a member of the class for whom he acts. *District No. 21, United Mine Workers of America* v. *Bourland,* 169 Ark. 796, 277 S. W. 546; *Howard-Sevier Road Imp. Dist. No. 1* v. *Hunt,* 166 Ark. 62, 262 S. W. 517.

It is insisted that, although Westbrook is not a petitioner, he has authority to maintain this suit as a citizen

under § 9 of the enabling act of 1911. This section provides that, if the Secretary of State shall refuse to accept and file any petition for the initiative or for the referendum, any citizen may apply within ten days after such refusal to the circuit court, or to the judge thereof in vacation, for a writ of mandamus to compel him to do so.

This section appears to have been repealed by the paragraph of the amendment entitled "Sufficiency of Petition." In this paragraph of the amendment it is provided that: "The sufficiency of all State-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes." This conflict between the act and the amendment is such that the repeal of this section of the act would appear to result by implication. But, if this be not true, the act conferring the right upon a citizen who might not be a petitioner limits the right of such citizen who is applying for such writ of mandamus to a period of ten days after the refusal of the Secretary of State to accept and file the petition. This suit, brought by Westbrook, was not filed until the eleventh day after the Secretary of State had refused to accept and file the petitions in a written statement addressed to Westbrook and had announced his refusal to accept and file the petitions on the ground of their insufficiency. Therefore, if § 9 be not repealed, it granted Westbrook, as a citizen, no right to institute this suit, because he did not institute it within the time limited by that section.

It is suggested in a brief by *amicus curiae* that the petitions had not been filed at all, inasmuch as the Secretary of State had refused to mark them as filed. We do not concur in this view. It is settled law that, while it is proper for an officer whose duty it is to receive and file an instrument in writing to indorse thereon the date of filing when he receives the instrument, such indorsement is not the filing, but is merely an evidence of filing, and that the instrument is filed when it is delivered to the

officer at his office to be received by him and kept on file. *C. A. Blanton Co.* v. *First National Bank of Marked Tree,* 175 Ark. 1107, 1 S. W. (2d) 558; *Hogue* v. *Hogue,* 137 Ark. 485, 208 S. W. 579; *Forehand* v. *Higbee,* 133 Ark. 191, 202 S. W. 29; *Montague* v. *Craddock,* 128 Ark. 59, 193 S. W. 268; *Neas* v. *Whitener-London Realty Co.,* 119 Ark. 301, 178 S. W. 390, L. R. A. 1916A, 525; *Case & Co.* v. *Hargadine,* 43 Ark. 144.

Therefore, we hold that the petitions were, in fact, filed with the Secretary of State when they were delivered to that officer at his office for the purpose of being filed, although he refused to indorse thereon the fact that they had been so received and filed.

We conclude, for the reasons stated, that the writ of mandamus should not be granted, and it is so ordered.

HUMPHREYS and MEHAFFY, JJ., dissent.

MEHAFFY, J., (dissenting). I do not agree with the majority in holding that the ballot title submitted might mislead, and that it was therefore defective and insufficient, and that the constitutional amendment was not sufficiently complied with in this respect.

The ballot title submitted is as follows, "Referendum of the act of the Legislature of 1931, amending § 3505 of Crawford & Moses' Digest of the laws of the State of Arkansas so as to permit the granting of decrees of divorce to applicants who have resided in the State for a period of only three months.

"For act, known as the Three Months' Divorce Law, amending § 3505 of Crawford & Moses' Digest."

"Against act, known as the Three Months' Divorce Law, amending § 3505 of Crawford & Moses' Digest."

It will be observed that the title submitted does not undertake to state on what grounds or for what causes divorces may be granted, but it plainly shows that it is an amendment to § 3505 of Crawford & Moses' Digest, "so as to permit the granting of decrees of divorce to applicants who have resided in the State of Arkansas for a period of only three months."

I think anybody would understand from the title submitted that nothing had been changed in the divorce laws except the time applicants had to live in the State of Arkansas before a divorce could be granted.

There are numerous causes of divorce and the section of the statute amended provides: "The plaintiff, to obtain a divorce, must allege and prove in addition to a legal cause of divorce, a residence in the State for one year next before the commencement of the action."

The act of 1931 amended that section of the Digest so as to permit applicants who have resided in the State for three months instead of one year to obtain a divorce.

The act only requires a residence in the State of two months before suit is brought, and three months before the final judgment granting the divorce.

I do not see how any one old enough and qualified to vote could be misled by the title suggested by the ballot. The majority say that if one were to read the act itself, even casually, he would know that it had not been enacted that one might obtain divorce by proving a residence in the State for ninety days only, but they say the great body of the electorate, when called upon to vote for or against an act at the general election, will derive their information about it from the ballot title. If they do, they will know that the act provides that one need live in the State only ninety days in order to procure a divorce; they will know that it is an amendment to § 3505, of Crawford & Moses' Digest.

The majority calls attention to the case of *Wallace v. Zinman*, 200 Cal. 585, 254 S. W. 946, 62 A. L. R. 1341, as sustaining its holding that the ballot title is insufficient. The court in that case held that the act involved was violative of a section of the Constitution of California which provides: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title."

The court also held that it violated another section of the Constitution which reads as follows: "All laws of a general nature shall have a uniform operation."

It then held that the act was invalid for some other reasons. The title of the act passed on by the California court was as follows:

"An act to be known as the Usury Law relating to the Rate of Interest which may be charged for the loan or forbearance of Money, Goods, or things in action, or on acts after demand, or on judgments, providing penalties for the violation of the provisions hereof and repealing §§ 1917, 1918, 1919, and 1920 of the Civil Code and all acts and parts of acts in conflict with this Act."

The court then called attention to the provisions of the act and held that the subject-matter of the act was not referred to directly or indirectly in the title to said statute. If the decision in this California case has any application at all to the instant case, I am unable to see it.

Another case referred to by the majority is *In Re* Opinion of the Justices, 171 N. E. 294, 69 A. L. R. 388. That was a case where 13 questions were submitted to the Justices by the Senate, and the only question answered by the Justices that has any bearing on the present case was the first question, and it is as follows: "Does the 'description of the proposed law' (as it appears on the petition blanks, copy of which is submitted herewith and as reprinted on pages 130 and 131 of said Senate, No. 280) required by said article forty-eight to be printed at the top of each signature blank and also upon the ballot, meet the requirements of said article forty-eight and adequately inform the voters as to the provisions of said proposed law, especially as to the differences between said provisions and the present system of compulsory motor vehicle liability insurance?"

The court, among other things, said: "The description is inaccurate in that it includes these statutes as among those repealed. The description is insufficient in that by section 1 of the proposed law the limitation of one year after the rendition of the judgment for bring-

ing suit in equity to enforce against an insurer payment of a judgment for personal injuries or death caused by the insured is repealed. That repeal is not required because inconsistent with the proposed law. It relates to an independent and important matter to which no reference is made in the description."

There are a number of other things pointed out by the Justices that make the description insufficient. No such differences can be found in the ballot title in the instant case. Certainly it can not be supposed that any voter would think that the law intended that any person could obtain a divorce simply by living in Arkansas 90 days without showing some cause of divorce, and I think they could not have been misled by this ballot title.

The majority referred to one other opinion of the Oregon court, *State ex rel. Gibson* v. *Richardson,* 48 Ore. 309, 8 L. R. A. (N. S.) 362, 85 Pac. 229. In that case however, the court held that the title was sufficient, and in my judgment there is nothing in that opinion that supports the opinion of the majority in this case. The Oregon court was considering the title of the act and not the ballot title.

Neither of the cases cited by the majority support its decision for two reasons: first, the cases cited as authority by the majority were decisions on the sufficiency of the title of a bill or act and not the ballot title; second, the court held in each of the cases that the title violated a provision of the Constitution which designated things necessary to be stated in the title.

We have no provision either in the Constitution or the laws of Arkansas prescribing what the ballot title shall contain. The constitutional amendment simply provides that the exact title to be used on the ballot shall be by the petitioners submitted with the petition. There is no intimation in the Constitution or the law as to what the title shall contain.

After the adoption of the first initiative and referendum amendment, the Legislature passed an act to the effect that the Secretary of State should cause the ballot

title to be printed, and that the ballot title should be the legislative title of the measure.

Evidently the people, in adopting the present amendment to the Constitution, intended that the petitioners should submit the title, and did not intend that it should be the legislative title.

The constitutional provision also requires that the State Board of Election Commissioners shall certify such title, that is, the title submitted by the petitioners to the Secretary of State to be placed upon the ballot. The people could have adopted an amendment requiring the court or some other officer or officers to prepare the ballot title, but they did not see fit to do so.

The Oregon case cited to support the majority opinion, as we have already said, was considering the title of an act, and not a ballot title. The Constitution of that State provides: "Every act shall embrace but one subject and matters connected therewith, which subject shall be expressed in the title."

We have no such provision in our Constitution, and the Oregon case is therefore not authority for the opinion of the majority.

The majority might have cited an Oregon case discussing the identical question that we have here, that is, the ballot title. In a case decided by the Oregon Supreme Court more than three years after the opinion referred to by the majority, that court passed upon the sufficiency of a ballot title. In Oregon at that time, the law required the printing of the act in pamphlets. Our law requires the publication in newspapers in each county.

The Oregon court said, in holding that the ballot title was sufficient: "There is nothing in the Constitution as amended, implying that the full title, as appears in the proposed measure, shall appear upon the ballot; nor does the act under consideration so require. The method provided is adequate to identify the bill as indicated on the ballot with the proposed measure on file in the office of the Secretary of State, the full title and text of which appears in pamphlets, a copy of which

under the law in force, at the time the local option law was voted on, was presumably in the hands of each voter. The method then in use, and since improved upon, was and is analogous to the proceeding before the Legislative Assembly. * * * The only question then to determine is, does the title as designated and used on the ballot come within the purview of the Constitution as amended and supplemented by the act of 1903? We think it does. * * * As above stated, the title of a bill before the Legislative Assembly is required to be voted upon, and the full title is presumed to appear thereon. This method, under the Initiative, would be impracticable; for as manifest from the length of the title of the act under consideration, if any measures should be submitted to the voters at one time to print upon the ballot a full title to each would require the ballot to contain many pages of printed matter, which cumbersome method was plainly intended to be avoided. To recognize the rule invoked by appellant would defeat the very purpose contemplated by the adoption in our fundamental laws of our direct and additional system of law-making. The system provided as above considered was obviously designated to take the place of that employed by the Legislature and accomplishes the same purpose." *State* v. *Longworthy,* 104 Pac. Rep. 424.

To hold that the ballot title submitted by the petitioners in this case is insufficient would defeat the very purpose of the Initiative and Referendum Amendment.

The law requires that to every petition for the referendum shall be attached a full and correct copy of the measure on which the referendum is ordered, and the law also provides that, not later than the first Monday of the third month before any regular general election at which any proposed law referred is to be submitted to the people, the Secretary of State shall cause to be published in one newspaper in each county for thirty days a true copy of the title and text, and all that is required of the petitioners is to submit a ballot title which may

be compared with the act on file with the Secretary of State or the act as published in the county papers.

The purpose of the amendment is to permit the people to refer laws to themselves and to permit them to vote on these laws, and there is no provision anywhere in our Constitution or laws that the ballot title shall be such a full title as contended for in this case. It would be impracticable and probably no two persons would prepare the same ballot title for any measure. The only thing necessary is, as said by the Oregon court, that the ballot title be such that the voter can identify it as being the act on file with the Secretary of State. To hold otherwise would defeat the very purpose of the amendment.

With due respect to my associates, I think they have put form above substance and have underestimated the intelligence of the voters of Arkansas.

They quote some argument from the California and Massachusetts courts about protecting the people. The argument is plausible, but I do not think it is true. I think the people generally devote as much time to a discussion of measures of this sort as we do, and that they can vote on it just as intelligently. Not only people differ about what a ballot title should be, but courts differ about the construction of the Constitution and the laws.

An illustration of this may be found in the decisions of the Arkansas and Colorado courts on the question of the number of amendments that could be submitted at one time after the adoption of the Initiative and Referendum Amendment. This court held that only three amendments could be submitted at one election notwithstanding the adoption of the amendment which did not limit the number. *State ex rel.* v. *Donaghey,* 106 Ark. 56, 152 S. W. 746.

The Colorado court held exactly the reverse, and in so holding said: "We have no right to assume such a result, for such argument, if heeded, would sweep away our present form of government. * * * We cannot be unmindful that this court must not usurp power or abuse its right of construction or lose sight of the dangers

which might arise, not only to the State, but to the court itself, from such usurpation and abuse. It is just as important for the preservation and just administration of government of this State that the power of courts should be exerted only within the limits of the Constitution and be not abused as it is that the power of the people, the General Assembly or Executive Department, should be so exerted and not abused." *State ex rel. Tate* v. *Prevost,* 134 Pac. 129.

I think the words of the Colorado court above quoted are applicable here. Of course there may be a few voters who would not understand from the ballot title what act they were voting for or against, but that may be said with reference to any measure submitted to the people.

I think to hold, as the majority has, that this ballot title is insufficient destroys the constitutional amendment permitting the people to have measures referred to them. There must, of course, be a compliance with the provisions of the Constitution and the laws in order to permit the people to vote on any measure, but we have recently held that a substantial compliance is sufficient.

It is next held by the majority that Westbrook was not a petitioner, and that he therefore had no right to submit a ballot title or to bring suit. The opinion of the majority, to the effect that Westbrook was not a petitioner is based on a provision of the amendment to the Constitution. The first sentence of the paragraph on which the majority opinion is based, reads as follows: "Only legal votes shall be counted upon petitions."

It is true that this paragraph requires an affidavit, but the purpose of the affidavit is to show that the signer of the petition is a legal voter, and that his signature is genuine, and the Constitution provides that, if this affidavit is made, no other affidavit or verification shall be required to establish the genuineness of such signature. When this entire paragraph is considered, it clearly appears that any legal voter may sign the petition, and the only requirement is that the signer be a legal voter, otherwise his vote will not be counted.

The Constitution requires, in order to refer a measure, a certain per cent. of the voters of the State to sign the petition. That, of course, means legal voters, and it was the intention of this provision of the Constitution that the proper number of legal voters should sign the petition.

Westbrook was unquestionably, in my judgment, a petitioner, and it is not disputed that he was a legal voter, and to say that he is not a petitioner because the person who circulated the petition neglected to attach the jurat, is in my judgment a narrow technical construction of the Constitution.

The Constitution does not provide that proof that a petitioner is a legal voter may not be made in other ways besides the affidavit referred to, but, if it did, if Westbrook was a legal voter he was a petitioner, and, even though his vote could not be counted in determining whether a sufficient number had signed the petition, he would still have the right to submit the ballot title.

But, if he were not a petitioner, he would have the right as a lawyer, not only to file the petition with the Secretary of State, but to submit the ballot title for the petitioners. This court knows that Westbrook has been practicing law in this State for more than thirty years, and the other attorney with him in bringing the suit to review the action of the Secretary of State, is a former Attorney General of the State of Arkansas, and these lawyers had the right to bring the suit for the petitioners, even if it be conceded that Westbrook was not a petitioner.

It was publicly published and generally known that Westbrook was representing the petitioners, and the majority in its opinion holds that the petitions were properly filed, and I think this is correct. They were filed, however, by Westbrook, representing the petitioners. The fact that Westbrook represented the petitioners was not only published all over Arkansas, but the petitioners themselves referred to him as their representative publicly, and none of them ever questioned his authority to submit for them the ballot title or to bring this suit.

The majority state, however, that whoever acts for a class must be a member of that class, and cite several authorities and quote § 1098 of Crawford & Moses' Digest. I do not think that this section has any application here for several reasons. This is not the kind of action mentioned in said section; is not a civil action, but is in the nature of special proceedings. "A civil action is an ordinary proceeding in a court of justice by one party against another for the enforcement of a private right, or the redress or prevention of a private wrong. It may also be brought for the recovery of a penalty or forfeiture." Section 1028, Crawford & Moses' Digest.

The statute also provides that every other remedy in a civil case is a special proceeding. Section 1029, Crawford & Moses' Digest.

It clearly appears that this proceeding is not for the enforcement of a private wrong. It is therefore a special proceeding, and the section with reference to many persons interested in a thing of common or general interest has no application.

The provisions of the Constitution permitting people to refer measures to themselves should be liberally construed, so as to effect the purpose for which they were adopted. If narrow technical construction is resorted to, it defeats the very purpose of the Constitution and deprives the people of the benefits conferred by the constitutional provision.

I think the objection to the ballot title and as to Westbrook not having authority to submit the title and bring the suit for the petitioners is purely technical and ought not, in my judgment, to be used to prevent the public from voting on this law. It is not a question of whether the law is wise or unwise, good or bad, but the question is, shall the people have a right to vote on it? I think they should.

Mr. Justice HUMPHREYS agrees with me in the views herein expressed. We think the writ prayed for should be granted.

ARKANSAS STATE HIGHWAY COMMISSION *v.* ANDERSON.

Opinion delivered November 23, 1931.

Hal L. Norwood, Attorney General, *Claude Duty,* Assistant, and *Chas. A. Walls,* for appellant.

Jno. R. Thompson, for appellee.

HUMPHREYS, J. Appellant brought suit in the chancery court of Lonoke County to enjoin appellee from constructing a filling station on the northwest corner of block 32 in the town of Cabot, which property is owned by appellee. It was alleged as a basis for the action that, in order to widen State Highway 67 passing over the street in front of said property, the town enacted ordinance No. 50, making it unlawful for any person, firm, or corporation to place any building or obstruction within the extended boundaries of said highway, and imposing a daily fine of not less than $10 nor more than $50 upon any one violating said ordinance.

Appellee filed a demurrer to the complaint, alleging that it did not state a cause of action. The trial court sustained the demurrer, and dismissed the complaint, over appellant's objection and exception, from which is this appeal.

This is an attempt on the part of appellant to widen its highway under the protection of an ordinance to prevent adjoining property owners within the extended boundaries of highway 67 from constructing buildings on their property adjoining the original street in front of same. In other words, it is an attempted indirect method of taking private property for public use without just

compensation, which is prohibited by article 2, § 22, of the Constitution of 1874, as follows:

"The right of property is before and higher than any constitutional sanction, and private property shall not be taken, appropriated or damaged for public use without just compensation therefor."

Zoning ordinances are allowable in towns and cities when authorized by valid statutory authority and when in harmony with the Constitution of the State, but are not allowable when unauthorized and contrary to the Constitution.

Towns and cities may legally widen streets and alleys under authority delegated by §§ 4006, 4009 and 4010 of Crawford & Moses' Digest if the procedure provided therein is followed, but cannot do so by any other method.

The decree of the chancery court is affirmed.

BURLINGHAM *v.* HUTCHINS.

Opinion delivered November 23, 1931.

Golden Blount, for appellant.

HUMPHREYS, J. This is an appeal from that part of a decree of the chancery court of Faulkner County refusing to foreclose the interest of two minor heirs of Winnie G. Hutchins in certain real estate she separately owned and mortgaged on the 9th day of February, 1918, to secure an indebtedness evidenced by a note or bond she

owed H. G. Chalkley, which was due on the 19th day of February, 1923. Louis E. Hutchins, the husband of Winnie G. Hutchins, joined in the execution of the note and mortgage. H. G. Chalkley duly assigned the note and mortgage to appellant herein, who brought suit on the note and for foreclosure of the mortgage against Louis E. Hutchins and Winnie G. Hutchins on the 21st day of April, 1927, within five years after the due date of the note. Louis E. Hutchins entered his appearance, but Winnie G. Hutchins could not be found, and upon inquiry it was discovered that she died intestate in the month of October, 1918, less than a year after she executed the instruments, leaving two minor children, Robert Hutchins and Avey Hutchins, surviving her. There has never been an administration of her estate. The appellant, on learning the condition, filed an amendment to his complaint on the 13th day of October, 1928, more than five years after the due date of the note, making the two minors parties defendant, and obtained service upon them by warning order.

Upon the trial of the cause, the court rendered personal judgment against Louis E. Hutchins for the amount of the debt and interest, and decreed a foreclosure and order of sale of his interest in said real estate to apply on the judgment, but ruled that the debt and right to foreclose the minors' interest in said real estate was barred by the five years' statute of limitations before this suit was instituted against them.

Appellant contends for a reversal of that part of the decree adverse to him upon two alleged grounds: first, that the amendment to the complaint related back and became a part of the original complaint; second, that the statute of nonclaims applied, under which the debt would not be barred until one year after the appointment of an administrator for the estate of Winnie G. Hutchins, the mother of the minors.

(1) The amendment making the minors parties was clearly a new suit against them, and not a continuation of the original suit. Their mother, from whom they inherited the land, died many years before the original

suit was filed and could not have been made a party thereto; and, she not being a party, the so-called original suit against her could not be revived against her heirs under the guise of an amendment to the original complaint or otherwise. The heirs were not interested in their father's estate in the property, so could not be made parties on account of his estate therein. There was no connection between the two estates in the property, the father's being an estate by curtesy and theirs a fee estate in remainder. The estates being independent of each other, the suits attempting to foreclose the separate interests were in the nature of separate and independent suits, although joined, and each was commenced when the complaint against each was filed and summons issued against each. Under the view that the amendment including the minors as parties was tantamount to a new suit against them, it was not brought within five years from the due date of the note, and was barred.

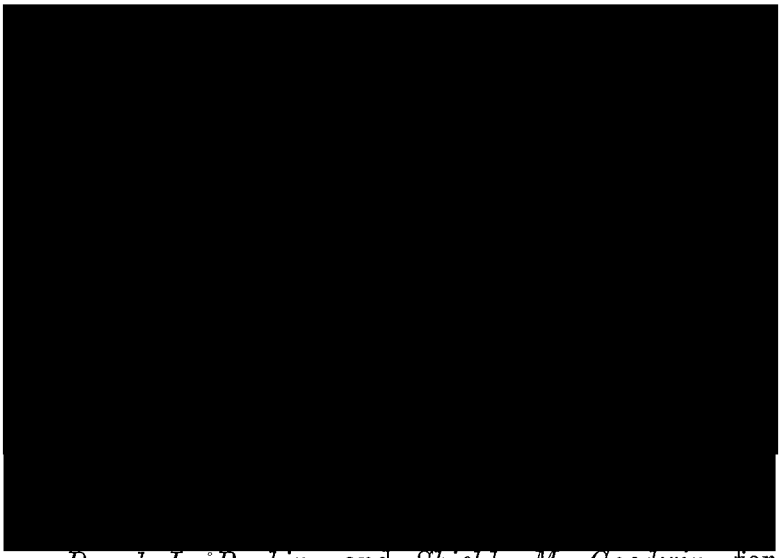
(2) The contention of appellant that the statute of nonclaim, instead of the general statute of limitations, applied is not tenable since the passage of act 260 of the Acts of the General Assembly of 1911 (Crawford & Moses' Digest § 7408). The statute of nonclaim and rule announced by this court in the case of *Mueller* v. *Light,* 92 Ark. 522, 123 S. W. 646, 31 L. R. A. (N. S.) 1013, to the effect that the statute of nonclaims was applicable in mortgage foreclosures where the mortgagor died before the debt was barred, was superseded by said act. *England* v. *Spiller,* 128 Ark. 31, 103 S. W. 86.

No error appearing, the decree is affirmed.

HAYWARD *v.* ROWLAND.

Opinion delivered November 23, 1931.

[redacted]



Duval L. Purkins and *Shields M. Goodwin,* for appellant.

D. A. Bradham, for appellee.

KIRBY, J., (after stating the facts). Section 5 of article 16 of the Constitution provides: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

In *Bank of Jonesboro* v. *Hampton,* 92 Ark. 496, 123 S. W. 753, the court, in interpreting this provision, said: "It is true the Constitution provides that all property subject to taxation shall be taxed according to its value, but this is done when the valuation is equalized with other property of the same kind in the county."

In *Doniphan Lbr. Co.* v. *Cleburne County,* 138 Ark. 449, 212 S. W. 308, the court said, in deciding a case of like kind: "Unless the undisputed facts in the case establish that the findings and judgment of the circuit court are erroneous, this court cannot reverse on appeal. The case falls within the general rule that the findings of the

trial court will not be disturbed by this court on appeal where the findings are sustained by sufficient legal evidence. * * * Under the rule thus announced, it is only necessary in the instant case for us to examine the record sufficiently to ascertain whether the findings and judgment of the trial court are sustained by sufficient legal evidence. It goes without saying that it was incumbent upon appellant, in attacking the assessments of the several boards, to show by proof that the valuations placed by them upon the several tracts of land were unfair and inequitable when compared with the valuations placed upon other lands of the same kind and character similarly situated."

It was incumbent upon the appellant in attacking the assessment to show that the valuations placed upon the several tracts of land were unfair and inequitable when compared with the valuations of other lands of the same kind and character similarly situated; and he failed to do this. Certainly it cannot be said that the circuit court's finding and judgment in favor of the fairness and reasonableness of the assessment and denial of relief to appellant was contrary to the undisputed testimony in the case; and, conceding that it is contrary to the preponderance of the testimony, which we by no means decide, still it is only necessary that its judgment be supported by substantial testimony, and the record discloses that it is amply sustained by sufficient legal evidence.

The testimony introduced showing the income realized from ownership of the lands and the amount for which the lands were purchased was not intended to establish a different rule for assessment than that prescribed by the Constitution and laws according to its market value, but only as it might tend to show the correct market value at the time. In other words, that the purchase price paid by appellant was not conclusive of the market value of the lands.

We find no prejudicial error in the record, and the judgment must be affirmed. It is so ordered.

KANSAS CITY LIFE INSURANCE COMPANY *v.* TAYLOR.

Opinion delivered November 23, 1931.

[redacted]

Carmichael & Hendricks, for appellant.

Gillison & Gillison, for appellee.

MEHAFFY, J. D. S. Clark was receiver in the case of *Kansas City Life Insurance Company* v. *Jewel Realty Company,* and was also president of the Chicot Trust Company. He was appointed receiver to rent out the land of the Sunnyside plantation, and rented it to Sam Epstein for $5,000, taking Epstein's note due December 1, 1930, for the rent of that year, and the note was paid on November 15, before it was due, to Clark, receiver, by a check drawn on the Chicot Trust Company, and deposited by Clark, as receiver, in said bank. The bank did not open on the 17th of November. It was open on

the day the deposit was made and was never open for business thereafter.

The property was rented by Clark before the sale under the foreclosure suit of *Kansas City Life Insurance Company* v. *Jewel Realty Company,* and the Kansas City Life Insurance Company became the purchaser.

D. S. Clark, receiver, and the appellant, filed an intervention, claiming that they were entitled to be paid the $5,000 in full; that the appellant is now the owner of the Sunnyside plantation in Chicot County, and that it had been rented in the year 1930 for $5,000. It was alleged that on November 15, 1930, Epstein paid the note, and Clark deposited the $5,000 as receiver, and that almost immediately thereafter the Chicot Trust Company closed its doors; that under act 107 of the Acts of 1927 the owner of said check and proceeds is entitled to preference; that the Kansas City Life Insurance Company was the beneficiary of an express trust, and the collection was made for its benefit by the receiver, but the receiver failed to remit the proceeds of said collection; that said funds had a distinctive identity, and that said check given by said Epstein added to the funds and property of the bank to the full extent of said check, and interveners prayed for preference.

An answer to said interveners was filed, denying all the material allegations of the intervention.

The following stipulation was introduced in evidence: "It is agreed and stipulated that this controversy may be tried upon the intervention, the answer thereto and upon the following statements of facts:

"In the fall of 1929 D. S. Clark was appointed receiver in the case of the *Kansas City Life Insurance Company* v. *Jewel Realty Company* in connection with a foreclosure of a mortgage of the Kansas City Life Insurance Company given by the Jewel Realty Company, and among the receiver's duties was the renting of the plantation known as Sunnyside. Said Clark, with the approval of the court, rented the property to Sam Epstein and took Epstein's note for five thousand and no/100 ($5,000) dollars, due on or before December 1, 1930. That on

November 15, 1930, the note being in the hands of D. S. Clark, receiver, Sam Epstein, the maker of the note, at twelve o'clock on said day, gave his check to D. S. Clark, as receiver, drawn on the Chicot Trust Company, in the sum of five thousand and no/100 ($5,000) dollars [who] deposited the five thousand and no/100 ($5,000) dollars in said Chicot Trust Company to his account as receiver.

"That the Chicot Trust Company did no business as a banking institution after that day; that it suspended on the 17th day of November for five days, and finally closed on November 24, 1930. That the note belonged to the Kansas City Life Insurance Company, who had become the owner of the plantation by purchase at the commissioner's sale in April, 1930, but the receiver had never turned the note over to the life insurance company.

"That there was never a check issued by the receiver against his account, and he had no chance to apply to court for order of distribution before bank failed. That the Kansas City Life Insurance Company never received anything from receiver on the account of said payment by Epstein to the receiver. That Epstein was on the receiver's bond, which bond was fixed at the sum of one thousand dollars.

"The interveners claim a preference and priority on said five thousand dollars ($5,000) under the pleadings and this stipulation, but the bank commissioner and liquidation agent deny that the Kansas City Life or D. S. Clark have any prior claim, and that the claim ought to be allowed only as a common claim in favor of the Kansas City Life Insurance Company."

There was no other evidence introduced.

A decree was entered denying the claim as a preferred claim, and allowing the $5,000 as a common claim to be paid *pro rata* out of the assets of the trust company.

The court held that Clark, as receiver, had no interest, and that the dividends should be paid to the appellant.

This appeal is prosecuted to reverse said decree.

The only question involved in this case is whether the appellant has a prior claim and should therefore be paid in full. The appellant argues that the priority, if any, is fixed by two principles of law: first, that funds in the hands of a receiver are trust funds, and second, that, by the provisions of act 107 of the Acts of 1927, it is entitled to a preference.

It was alleged that the Kansas City Life Insurance Company was the beneficiary of an express trust. In order to constitute an express trust, there must be some act on the part of the trustee expressive of an intent to create a trust and to make a designated party trustee. Express trusts are created by the direct and positive acts of the parties manifested by some instrument in writing. *Arnold* v. *Stephens,* 173 Ark. 205, 296 S. W. 24; *McCoy* v. *McCoy,* 30 Okla. 379, 121 Pac. 176, Ann. Cas. 1913C, 146; *Jones* v. *Byrne,* 149 Fed. 457; Perry on Trusts, vol. 1, § 24.

There was no trust created here in any way. The receiver, Clark, deposited the check in the bank, and it was immediately paid in the ordinary way and in the regular course of business. There was nothing done by the parties to create a trust.

Appellant is not entitled to a preference under act 107 of the Acts of 1927. That act provides that all creditors are classified either as secured creditors, prior creditors, or general creditors. There is no claim that appellant was a secured creditor, but it claims to be a prior creditor.

A prior creditor, under act 107 of the Acts of 1927, may be such in several instances. The owner of a special deposit expressly made as such in said bank, evidenced in writing, signed by said bank at the time thereof, and which it was not permitted to use in the course of its regular business, would be a prior creditor. This was not a special deposit in any sense, and was not evidenced by any writing signed by the bank.

We have already shown that it is not the beneficiary of an express trust. It may be a prior creditor where it is the owner of the proceeds of a collection made by the

bank and not remitted by it. No collection was made by the bank.

What is meant in the Acts of 1927 by "owner of the proceeds of collection" is a collection made by the bank from some other person, where the bank receives drafts, checks, notes, or other obligations for collection and makes the collection and does not remit it to the owner.

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 proceeds when collected, but holds same in trust for remitting bank. *Taylor* v. *Corning Bank & Trust Co.,* 183 Ark. 757, 38 S. W. (2d) 557.

There is no evidence in this case that a trust was created. The burden of proving the existence of a trust rests on the person asserting it. *Quattlebaum* v. *Hendrick,* 179 Ark. 494, 16 S. W. (2d) 591.

This court said: "The deposit of the funds of the improvement districts, taxes collected on the benefits assessed, although they were trust funds so far as the 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 other general creditors entitled to no preference or priority of payment." *Taylor* v. *Street Imp. Dist. No. 343,* 183 Ark. 524, 37 S. W. (2d) 84.

A deposit of public funds in a bank constitutes a general deposit as well as the relationship of a debtor and creditor between the bank and the beneficial depositor. *Taylor* v. *Whaley,* 183 Ark. 598, 37 S. W. (2d) 702.

The deposit made by Clark, the receiver, was a general deposit. No trust was created, and the appellant was not entitled to any preference.

The decree is affirmed.

HOWELL *v.* THEW SHOVEL COMPANY.

Opinion delivered November 23, 1931.

A. F. Barham, James G. Coston and *J. T. Coston,* for appellant.

Sam Coston and *G. B. Segraves,* for appellee.

MEHAFFY, J. This action was begun by the Thew Shovel Company against J. M. Howell to recover certain machinery purchased by Howell from the Thew Shovel

Company. The purchase price was $11,855. Howell had defaulted in payments, and there was, at the time suit was begun, a balance due of $5,177. The contract under which the machinery was purchased contained the following:

"It is agreed that title to said property shall not vest in purchaser or in any other person, firm or corporation until paid in full. If cash payment is not made as agreed, or if there be default at any time in any payment or other condition of this agreement, the full amount unpaid hereunder, including any notes given, shall become due and payable forthwith. In default of payment or other condition herein expressed, said property may be removed by the manufacturer or its agents without legal process."

There was a judgment for appellee for the possession of the machinery sued for, and the court found that there was still due the appellee on the purchase price of said machinery the principal sum of $5,177, with accrued interest, making a total of $5,911.47.

The judgment provided that there should be deducted from this amount $1,162 damages allowed Howell on account of appellee having wrongfully used the machinery while in its possession, the damages being the difference between $7,680, the value of the machine when delivered to appellee, less the depreciated value of $6,518.

There was no conflict in the evidence about the sales contract. The undisputed facts are that the appellant purchased this machinery from the appellee for the price above named; that he had not paid all the purchase price, and that the balance of the purchase price was due. It would therefore serve no useful purpose to set out the testimony as to the contract, the only conflict in the evidence being on the question as to a tender of payment. Attention will be called to this evidence when we consider the question of offer of payment.

It is first contended by appellant that the instrument signed by Howell is in law a chattel mortgage.

In a case recently decided by this court, it was said: "The bill of sale executed by the lumber company to

appellant is on its face an absolute conveyance, but the evidence tended to show that it was really intended as security for the money advanced by appellant for the payment of the price of the logs. This fact is mentioned for the reason that counsel for appellee treated it as of primary importance in sustaining the judgment of the court. Their argument in support of the judgment is that the bill of sale was nothing more nor less than a chattel mortgage and that it was void against third parties because not filed or recorded. The answer to this contention is that the instrument was not in form of a mortgage, even though so intended by the parties, and is not controlled by registration laws governing mortgages." *Cate-LaNieve Co.* v. *Plant,* 172 Ark. 82, 287 S. W. 750.

In the case at bar the contract was not in the form of a mortgage, but was an ordinary sales contract in which title to the property sold was retained by the seller. This court has repeatedly held that the purchaser of property under a conditional sales contract has such an interest in the property that he may sell or mortgage it, but it is also well settled by the decisions of this court that the seller may retake the property, not only from the original purchaser, but from any person to whom the original purchaser may have sold it or mortgaged it.

Appellant calls attention to *Hays* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027. In that case, however, the court was not considering the question that we have here, but the question there was whether a deed absolute on its face was intended as a mortgage. There is no such question involved in the case at bar.

Many decisions of this court might be cited holding that, under a conditional sales contract, where the seller retained title to the property sold, if there was a default in payment, the seller had the right to retake the property.

It has been repeatedly held that he had two remedies: that he might treat the sale as absolute and sue for the balance of the purchase price, or bring suit for the possession of the property. Where property is purchased

with the agreement that the title remains in the seller until the purchase price is paid, a subsequent purchaser, though without notice of such reservation, acquires no title as against the original vendor, and such reservation may rest wholly in parol. *Home Fire Ins. Co.* v. *Wray,* 177 Ark. 455, 6 S. W. (2d) 546; *Meyer* v. *Equitable Credit Co.,* 174 Ark. 575, 297 S. W. 846; *McGraw* v. *Calhoun,* 179 Ark. 328, 15 S. W. (2d) 409; *Laird* v. *Byrd,* 177 Ark. 1114, 9 S. W. (2d) 571; *S. E. Lux, Jr., Mercantile Co.* v. *Jones,* 177 Ark. 342, 6 S. W. (2d) 302.

Appellant's next contention is that, after the machine was taken from Howell and delivered to the appellee, the legal status of the appellee was that of a mortgagee in possession. What we have already said answers this contention.

The instrument involved in this case is not a mortgage, and it becomes unnecessary to refer to or discuss the authorities cited under this contention. This also is true of the next contention of appellant, that a mortgage in possession is liable for the usable value of the property. In the instant case the title was at all times in the appellee, and, after default in payment, it had a right to retake the property, and, while it had it in its possession rightfully, being the owner, it is not liable for the usable value while the property was so held.

The next contention of appellant is that the allowance of the court and finding of the jury totaled an amount against appellant of $12,800. We do not agree with appellant in this contention. The court found in favor of the appellee for the possession of the property; found that appellee was the owner, and, prior to the statute, this would have been the end of the controversy.

Appellee could have kept the property and would not have had to surrender it, even though the appellant had offered to pay the entire amount due.

Section 8654a of Crawford & Moses' Digest, however, provides, among other things, that the judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment for the balance

due and costs within ten days and satisfy the judgment and retain the property.

Under this section, the appellant could, at any time, have paid the balance due on the property, and he would have been entitled to the possession, but he does not claim that he ever offered to pay the balance due within ten days after the judgment.

His contention is that some person for him offered to pay the balance due after the property had been taken in the replevin suit before the trial.

This contention is based on the evidence of E. H. Polk, who testified that he had an agreement with Howell to pay what he owed on the shovel; that Howell said it was a little less than $5,500, and that he, Polk, agreed to pay it for him. He testified that he went to Memphis prepared to pay what Howell owed, and that he offered it to Mr. Moore, and he refused it. He said he was going to pay the appellee and hold title to the machine until he got his money, and that he offered to pay whatever Howell owed, and that they never did tell him what it was.

This evidence is the only evidence relied on by appellant to show any offer of payment, and it was made, not to the appellee, but to Mr. Moore of Memphis. Conceding that Mr. Moore had a right to accept the pay after the replevin suit had been brought, still Polk's testimony was contradicted, and this was a question of fact decided by the trial court.

Polk, however, does not claim to have offered any specific amount. Evidently he intended to offer what Howell told him was due, if in fact he made any offer

at all, which, as we have already said, was denied by the witnesses for appellee.

The court properly found the amount due appellee at the time of the judgment was the principal sum with interest. This could have been paid by appellant at any time under the judgment of the court, and he would have been entitled to the posession of the property, but he never offered to pay it. If he did not intend to pay the balance due and take the machinery, then it was immaterial whether he was charged with interest or not, because the taking and keeping of the property by appellee canceled the debt, but the amount must not be greater than the balance due because the purchaser has the right to pay the balance due and costs within ten days and keep the property. As we have already said, the seller, where he retains title to the property sold, may elect to make the sale absolute and sue for the balance of the purchase price, or he may bring suit for the possession of the property.

For a discussion of the law as to conditional sales and rights of the parties, see *Beene Motor Co.* v. *Dison,* 180 Ark. 1064, 23 S. W. (2d) 971; *Hardin* v. *Marshall,* 176 Ark. 977, 5 S. W. (2d) 325; *Wright Motor Co.* v. *Shaw,* 171 Ark. 935, 287 S. W. 177; *Natl. Bank of Ark.* v. *Interstate Packing Co.,* 175 Ark. 341, 299 S. W. 34; *Meyer* v. *Equitable Credit Co.,* 174 Ark. 575, 297 S. W. 846; *Clark* v. *Hagan,* 183 Ark. 226, 35 S. W. 585; *Trice* v. *People's Loan & Investment Co.,* 173 Ark. 1160, 293 S. W. 1037; *Passwater Chevrolet Co.* v. *Whitten,* 178 Ark. 136, 9 S. W. (2d) 1057; *Commercial Investment Trust* v. *Foreman,* 178 Ark. 695, 10 S. W. (2d) 897; *Brunswick-Balke-Collender Co.* v. *Culbertson,* 178 Ark. 957, 12 S. W. (2d) 903.

We find no error, and the judgment is affirmed.

FIRST NATIONAL BANK OF PARIS *v.* HOLZMAN.

Opinion delivered November 23, 1931.

Evans & Evans, for appellant.

McHANEY, J. On December 7, 1929, appellee Holzman, as principal, with the other appellees as sureties, executed and delivered their negotiable promissory note for the sum of $400 to the American Bank & Trust Company of Paris, Arkansas, hereinafter called the trust company, due and payable October 7, 1930, with interest from maturity at 10 per cent. per annum. On March 24, 1930, prior to maturity, appellant, who had $18,000 of county funds on deposit with the trust company, purchased said note and others of the value of $18,000 from the trust company, thereby canceling the amount of its deposit on the books of the trust company. At the same time appellant loaned the trust company $10,000, taking its note secured by bills receivable of the trust company. On April 19, 1930, the trust company was found to be insolvent, and was placed in the hands of the bank commissioner for liquidation. On April 28, 1930, appellee Holzman was notified by appellant that it held his note as owner thereof. When the note became due payment was demanded and refused, and this suit followed. Holzman admitted execution of the note, but defended on the ground that at the time of its purchase by appellant, the trust company was insolvent, known to be so by appellant, and that he was a depositor in the trust company with the right of offset against said note to the extent of his deposit; that he did not owe the

trust company any other note. A trial to a jury resulted in a verdict and judgment in appellant's favor for the amount of the note with interest less a deposit of $249.52, which Holzman had in the bank at the time it was placed in the hands of the Bank Commissioner. From this judgment allowing the deposit of Holzman as an offset against the note this appeal is prosecuted.

We think the trial court erred in refusing to direct a verdict in appellant's favor for the full amount of the note and interest, as requested by it at the conclusion of the testimony. While it is true that the trust company was probably insolvent at that time, there is no substantial proof that appellant knew that it was insolvent. On the contrary, the undisputed proof shows that appellant investigated the affairs of the trust company and had practically agreed to take it over or purchase it, which proposition was submitted to the comptroller of the currency, who advised against it, and the deal did not go through. It is also true, as above stated, that at the time the note in question was acquired with others covering its deposit of county funds with the trust company, it loaned the trust company $10,000 additional, on collateral to bring up its cash reserve. Whether the trust company was insolvent at that time or not, it was not shown to be so to the knowledge of appellant, its officers and agents, within the meaning of § 717, Crawford & Moses' Digest, prescribing when a bank shall be deemed to be insolvent. This section provides five different grounds, the existence of any one of which determines its insolvency, and there is no proof in this case that any one of these grounds existed on that date, March 24, 1930, or that appellant knew that it was insolvent within the meaning of said section. On the contrary, it appears that the officers of appellant believed it to be solvent, and that it would be able to continue its business. Appellant was therefore a holder in due course of the note sued on. Under the Negotiable Instruments Law, § 7818, Crawford & Moses' Digest, a holder in due course of business is defined as follows: "A holder in due course is a holder who has taken the instrument under the fol-

lowing conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it had previously been dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The note sued upon is complete and regular upon its face. Appellant purchased it before maturity, in good faith and for value, and without notice of any infirmity in the instrument or defect in the title of the trust company. In fact, said note had not been previously dishonored. It was taken in good faith and for value, and there was no infirmity in the instrument or defect in the title of the trust company. Appellant did not know that Holzman was a depositor in the bank at the time it acquired his note, and it would make no difference under the circumstances in this case if it had known such to be the fact. The learned trial court instructed the jury that if the trust company was insolvent at the time it sold the note to appellant and was known so to be by appellant and Holzman had a deposit with the trust company to the knowledge of appellant, they should find for appellant for the difference between the amount of the note and the deposit. Conceding, but not deciding that such is a correct declaration, as we have already shown, there is no evidence to support it.

Moreover, as shown by the testimony taken on the supplemental motion for a new trial, it appears to be the undisputed fact that Holzman had on deposit in the trust company on March 24, 1930, only the sum of $6.42 instead of $249.52, and that the trust company held his additional note on which he appeared as joint maker with two others in the sum of $2,907.36, which had been credited by the liquidating agent with the amount of his deposit appearing on the books of the bank when it closed its doors in the sum of $249.52. Holzman admitted that he signed this latter note, but stated that he did not owe it. He stated only a conclusion in this regard,

without testifying to any facts which would tend to show that he did not owe it.

It follows that the request for a directed verdict in appellant's favor should have been given, and, as the case appears to have been fully developed, the cause will be reversed and judgment will be entered here for the full amount of the note and interest against the appellees.

[redacted]

REPUBLIC MINING & MANUFACTURING COMPANY *v.* MAY.

Opinion delivered November 23, 1931.

[redacted]

J. S. Utley and *Wm. T. Hammock,* for appellant.

R. D. Lee, Barber & Henry and *Troy W. Lewis,* for appellee.

McHANEY, J. Appellee brought this action against J. M. McNeill, Dr. E. A. Buckley, and appellant, to recover his fees for professional services rendered said Mc-

Neill from the 25th day of November, 1925, to July 26, 1929, at the request of Dr. Buckley, who is the chief surgeon of appellant's hospital at Bauxite, Arkansas. McNeill was an employee of appellant and had received a severe injury to his right leg in the course of the performance of his duties as such employee and had been unsuccessfully treated at appellant's hospital by Dr. Buckley. Appellee alleged that Dr. Buckley, acting as agent for appellant, brought McNeill to his office, employed him to treat McNeill for said injury, and agreed that appellant would pay him a reasonable sum for his services; that he accepted such employment, began treating McNeill and that his fees for such services were of the reasonable value of $3 per treatment for a total of 340 treatments or $1,020, for which amount he prayed judgment.

McNeill did not answer, and judgment was taken against him by default. Dr. Buckley and appellant answered separately, denying all the allegations of the complaint. A trial to a jury resulted in a verdict and judgment against appellant alone for the sum sued for, $1,020.

For a reversal of the case it is first urged that the verdict is contrary to the evidence. In determining this question, we must view the evidence in the light most favorable to appellee, and, if there is any substantial evidence to support the verdict, this court will not set it aside on this account. Considering the evidence in this way, the following facts are established: In 1919 McNeill received an injury to his leg which tore off the skin and flesh from the ankle to the knee, exposing both bones. He was taken to appellant's hospital in Bauxite where his injuries were treated with indifferent success to November 25, 1925. He was not confined in the hospital after December, 1919, but continued to work for appellant, and made frequent trips to the hospital for treatments. In 1922 he made a settlement with appellant for $1,250, but stated that a part of the consideration was that appellant would continue to treat his leg, which it thereafter did, in accordance with the superintendent's

oral agreement at the time he signed the release. Treatments were continued at the hospital until November 25, 1925, when Dr. Buckley brought him to Dr. Carruthers in Little Rock, who examined the leg, advised that Dr. May be consulted, and that they all went to see Dr. May, who advised them he could cure the leg with violet ray treatments, but it would take a long time. Dr. Buckley agreed that appellant would pay any reasonable charges, and that appellee should send appellant his bill when a cure was effected. Treatments began at once and continued to September, 1929, during which time 340 treatments were given. During all this time McNeill was in appellant's employ, asked for and received permission from appellant to come to Little Rock to Dr. May for all these treatments without loss of time or salary deduction. For a time such trips were made daily and later twice a week. The officers of appellant knew he was taking the treatments and told him to go ahead and take them. No other treatments were given by Dr. Buckley at the hospital after he took him to Dr. May. Appellant paid Dr. Carruthers for the examination he made without question. We think these facts are sufficient to establish the fact that appellee was employed by Dr. Buckley with the knowledge and consent of the executive officers of appellant, and that, if he did not have the express authority as an agent of appellant, his act in doing so was ratified by it.

It is true that appellant's witnesses denied that they had authorized the employment of appellee, but they admitted that they knew that McNeill was taking these treatments, and they testified that they authorized Dr. Buckley to take him to Little Rock to consult a specialist. In addition to this, McNeill said that he talked to the superintendent the next day after his first treatment, and that the superintendent asked him if he thought Dr. May could cure him, and that he told the superintendent he thought he could, and that the superintendent told him it would be all right and to go ahead. There are other

facts and circumstances that might be stated, but this, we think, is sufficient to take the case to the jury.

It is next said that appellee should be limited in his recovery to the sum of $500, because that is the amount for which he sent bill to appellant after effecting a cure on McNeill. But the proof shows that appellee sent that bill in that amount to effect an immediate settlement; that he informed it in a separate letter that his bill was really about $1,100, but that for immediate payment he would accept $500. Appellee stated that his usual charge for treatments of this kind was $5 each, but that, because it took so long and so many of them, he reduced the charge to $3 per treatment. Although appellee is contradicted to some extent by his bill and by letters, we think it was a question for the jury to determine, and, having determined it in appellee's favor, this court will not disturb it for lack of sufficient evidence to support it.

It is finally insisted that the court erred in giving instruction No. 2 at appellee's request over its objection. This instruction told the jury that, if they should find that Dr. Buckley was not authorized to employ appellee, but that he did so without authority from appellant, still, if they found by a preponderance of the evidence that Dr. Buckley did employ appellee and that appellant later ratified the employment, the verdict should be for appellee. No specific objection was made to this instruction, but it is now argued that the court should have instructed the jury as to what constitutes ratification. The instruction was not inherently wrong, but was a correct declaration; and, if appellant desired the court to instruct on what constituted ratification, it should have requested an instruction in that regard, or at least made a specific objection embodying the argument now made. We find no error, and the judgment is accordingly affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* TROTTER.

Opinion delivered November 23, 1931.

Thos. B. Pryor and *H. L. Ponder,* for appellant.

John E. Miller and *C. E. Yingling,* for appellee.

BUTLER, J. Zack Trotter, the appellee, was injured between six and seven o'clock on the 17th day of December, 1930, at the Kennison crossing about one-half mile north of the depot of the appellant company in the town of Judsonia, by the operation of one of appellant's trains.

He brought suit to recover for his injuries and alleged that these were the result of the negligence of defendant's servants, in failing to give the statutory signals of the train's approach, and in failing to keep an efficient lookout, which, if kept, would have disclosed his peril in time to avoid injuring him.

At the close of the testimony adduced at the trial, appellant moved the court for a directed verdict on the theory that the undisputed evidence failed to estab-

lish any negligence on its part in the operation of its train and that it did establish negligence on the part of the appellee. This motion was overruled and the action of the court in failing to direct a verdict in favor of the appellant is the principal assignment of error urged on this appeal. The other errors assigned will be disposed of in our discussion of the principal assignments.

■ *Statutory signals.* The engineer and fireman testified that the whistle was blown for each crossing and the bell continuously rung for more than 80 rods before the Kennison crossing was reached. Their testimony is corroborated by that of a section hand who lived in Judsonia near the crossing and who testified that at 6:45 P. M., the time when the passenger train was due, he was eating supper, and heard the whistle blown for the crossings south of the depot and also the blast usually given for the depot; that he heard the whistle sounded again north of the depot before it reached the Kennison crossing and heard the bell continuously ringing from about the point of the depot on north to the crossing. The section foreman testified in effect that he met the appellee just before he was injured; and about then that he heard the whistle blown and the bell rung as the train approached Judsonia, but that he paid no further attention as to whether or not these signals were given for the Kennison crossing.

All of this testimony is opposed by that only of the appellee, who stated that the whistle was not blown or the bell rung, and he gave as a reason for making this statement that, if the signals were made, he did not hear them. But he did not see the light from the locomotive as he approached the crossing or when he stepped upon it, although the track and right-of-way were in the full glare of a brilliant light. He did not see the light, but it was there. Therefore, his statement that he did not hear the whistle or the bell is entitled to no weight, for it is quite obvious that he was oblivious to his situation, both as to sight and

hearing. In no case that has been brought to our attention has evidence so slight and unsubstantial been held to be of probative value sufficient to contradict the direct testimony of the operatives, corroborated by the testimony of other witnesses. We are therefore of the opinion that the court erred in giving instructions 2, 3 and 6 by which that issue was submitted to the jury.

■ *Negligence of appellee.* The appellant requested the following declaration of law: "The jury are instructed that, if you find from the evidence that the plaintiff failed to look and listen before going upon the crossing of the defendant company, or to take due regard for his own safety, and that his own negligence and carelessness contributed to his injury, then he would not be entitled to recovery, and your verdict should be for the defendant."

It must be conceded that the undisputed facts and the appellee's own testimony convict him of negligence. The injury occurred after nightfall, and as appellant's train approached Judsonia its headlight was burning. This cast a brilliant light down the track for a long distance ahead, its brightest point being about 700 feet ahead of the locomotive and at that place illuminated the track and entire right-of-way with a broad beam of light approximately 100 feet wide. Kennison crossing is 900 feet north of the depot and the track from at least 300 feet south of the depot to the crossing was straight and it and the right-of-way free from obstructions. Therefore the plaintiff had an unobstructed view of the oncoming train at any time after he had gotten on the right-of-way until it reached the crossing, had he looked, and there was nothing to distract his attention or excuse his failure to look. He admitted he walked upon the track without looking or listening for the approach of the train, with his vision obscured by a sack which he was carrying upon his shoulder, and that he failed to observe the light of the approaching train until it was so near that he could not spring aside and save himself from injury. But, since the passage of act No. 156 of the Acts of 1919,

(§ 8575 of Crawford & Moses' Digest), contributory negligence will not bar a recovery unless such negligence is equal or greater than that of the employees of the railway company. *St. L. S. F. R. Co.* v. *Horn*, 168 Ark. 191, 269 S. W. 576; *Gregory* v. *Mo. Pac. Ry. Co.*, 168 Ark. 469, 270 S. W. 621; *Adler* v. *St. L. S. W. Ry. Co.*, 171 Ark. 419, 294 S. W. 729. The court was therefore correct in its refusal to give the instruction requested.

■ *Failure to keep an efficient lookout.* The engineer and fireman testified that they were keeping a constant lookout at the time of the accident, and there is no direct testimony to dispute this. The appellant insists that because of this the court erred in submitting to the jury, by instruction No. 7, the question of whether or not such lookout was kept.

It is true that this was all the direct testimony on that question, and it should not be arbitrarily disregarded by the court or jury, but it was not all of the evidence in the case. As before stated, the appellee was negligent in not seeing the approaching train. The reason that he did not see it was because he did not look. The fireman and engineer testified that they did not see the appellee as he approached the railroad track, while he was upon it, or at any other time as the train approached and passed Kennison crossing, and they did not know of the injury until the following morning.

As a general rule, where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted and there are no circumstances shown from which an inference against the fact testified by the witness can be drawn, that testimony may not be arbitrarily rejected, and the fact will be taken as established. But there are exceptions to this rule: Where the witness is interested in the result of the suit, or where facts are shown which 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 such fact can not be said to be undisputed and a case arises for determination by a jury. *Skillern* v. *Baker*, 82 Ark. 86, 100

S. W. 764; *Mutual Life Ins. Co.* v. *Raymond,* 176 Ark. 879, 4 S. W. (2d) 536; *Casteel* v. *Yantis-Harper,* 183 Ark. 475, 36 S. W. (2d) 406.

The same circumstances however which convict the appellee of negligence, dispute the testimony of the trainmen and raise and support an inference against it, which made an issue of fact for the jury.

■ *Negligence of appellee compared with that of appellant.* As we have seen, the undisputed proof in the case establishes the negligence of the appellee, and the jury found that there was negligence on the part of the appellant in the operation of its train, and by its verdict has said that such negligence was greater in degree than that of the appellee. In the case of *St. L. S. F. R. Co.* v. *McClinton,* 178 Ark. 73, 9 S. W. (2d) 1060, the court held as a matter of law that in any reasonable view of the testimony the negligence of the appellee contributing to his injury was equal in degree to that of the railway company. In that case there was evidence tending to show that the railway company failed to keep an efficient lookout. The appellee was not at the place of his employment when injured, but he was hurt while climbing between two cars. The court said: "No practical lookout which a train crew could maintain would suffice to prevent one from climbing between cars, and the undisputed testimony shows that no member of the train crew saw appellee as he went between the cars, nor is there any testimony or inference therefrom which would support the finding that the railroad company could have done anything which would have averted appellee's injury." Appellee was hurt by the movement of cars while between two which were being switched on the side tracks. The court further said: "Appellee, had he looked, must have known that all the platforms were up, which fact was a warning that switching might be done, and he must necessarily have known there was peril in climbing between cars which might be moved. There is a presumption of negligence arising out of the fact that appellee was injured by the operation of trains, but the undisputed

testimony is such that it must necessarily appear that appellee's negligence was greater than that of the operatives of the train, and this being true, a recovery is not authorized by § 8575 of Crawford & Moses' Digest."

In *Jemell* v. *St. L. S. W. Ry. Co.*, 178 Ark. 578, 11 S. W. (2d) 449, the court held that the contributory negligence of the plaintiff was greater than that of the crew operating the train which injured him. There the undisputed facts were that the fireman saw the plaintiff approach the crossing and then back down the grade before the accident occurred, and the court held that under the circumstances the fireman was justified in believing that the plaintiff would not attempt to go upon the public crossing until after the train had passed, and therefore there was no negligence shown on the part of the defendant in failing to stop or check the approaching train. It was admitted by the plaintiff that he did not look for the approach of the train, that he could have seen it if he had looked; and, as the facts showed that he could have stopped in time to avoid the accident he was guilty of negligence. Since there was no negligence shown on the part of the defendant, the negligence of the plaintiff was greater than that of the defendant.

In the instant case, however, a different state of facts is presented. The approach on the right-of-way at the crossing was fifty feet on either side of the center of the track; the train was approaching at the rate of 60 miles an hour or 88 feet per second, and the appellee was on the track when he was injured. Therefore, it is reasonable to presume that he was on the right-of-way and approaching the track as the locomotive was passing the depot, and that he could have been seen by the operatives of the train. The train was traveling through a village at a high rate of speed, which made it all the more important for the engineer and fireman to be vigilant in order to avoid injuring any one who might go upon the tracks, and the jury might have believed that, with the track and right-of-way brilliantly lighted, had they been exercising an efficient lookout, they would have

seen and appreciated the danger of appellee in time to prevent his injury. As it was, he almost escaped, and the engineer by slackening the speed of the train but very slightly might have avoided the injury.

In *Davis* v. *Scott,* 151 Ark. 34, 235 S. W. 407, the plaintiff's intestate was killed by the operation of a train, the alleged negligence on the part of the operatives of the train being that it was operated at an unusual rate of speed, that the signals were not given as required by law, that no lookout was kept and no ordinary care taken to prevent the injury after the discovery of the perilous situation. It was shown and the court found as a matter of law that the lookout was kept, and no other negligence was proved except it was held to be a question for the jury as to whether or not the rate of speed at which the train was traveling was negligence which was the proximate cause of the killing. It was proved by the undisputed testimony that the deceased was entirely deaf, but had not entirely lost his powers of speech. He was thirty-five years of age, strong, alert and quick-minded; that he saw the train approaching and attempted to cross the track at a crossing in front of the train and was killed by the locomotive. The court held that the deceased was negligent as a matter of law which negligence directly contributed to his injury. The testimony as to the rate of speed at which the train was traveling was conflicting, the engineer testifying that it was running at the rate of about 25 miles an hour, and the testimony adduced on the part of the plaintiff tending to show that it was traveling at a much higher rate of speed—about thirty-five miles an hour. In discussing this testimony and the relative conduct of the engineer and the deceased, the court said: "If he (deceased) had had only a moment more, he would have crossed in safety, and this extra time might have been afforded by an attempt on the part of the engineer to stop the train at a lower rate of speed than that which was being maintained at the time. * * *

"While the fact was undisputed that deceased was guilty of contributory negligence, the jury might under

the circumstances of the case have found that this negligence was of a lesser degree than that of those operating the train."

In the instant case the negligence of the appellee was no more flagrant than that of the deceased in the case of *Davis* v. *Scott, supra.* We think the facts are sufficient to justify the inference that the negligence of the appellant was equally as great here as it was in that case, and we are not warranted in holding as a matter of law that the degree of negligence of appellee equaled that of appellant, but are of the opinion that this was a question for the jury which was properly submitted in the instruction given by the court. *Huff* v. *Mo. Pac. Ry. Co., supra; Mo. Pac. Ry. Co.* v. *Rogers, ante* p. 725.

As we have seen, the court erred in submitting to the jury the question of appellant's negligence in failing to give the statutory signals. By submitting that issue the court indicated to the jury that there was evidence tending to establish negligence on the part of the appellant in that particular. What effect this had upon the jury in comparing the negligence of the appellee with that of the appellant, we are unable to say. The jury might have found that the negligence of the appellant in failing to discover the peril of the appellee was greater than that of the appellee in going heedlessly upon the track, and again it might have found that this negligence was not equal to that of appellee, but that appellant's negligence in that regard, coupled with the failure to blow the whistle and sound the bell, made its negligence greater than that of the appellee and warranted a recovery. The error indicated was prejudicial to the appellant, and for this error the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

Moss *v.* Moose.

Opinion delivered November 9, 1931.

Buzbee, Pugh & Harrison, for appellant.

W. P. Strait, for appellee.

Mehaffy, J. Mabel Kissire, 12 years of age, was struck by an automobile driven by Eugene Coxsey on December 3, 1928, in Morrilton, Arkansas. On December 14, Mrs. N. A. Kissire, mother of the child, was appointed guardian and curator of the person and estate of Mabel Kissire. On the same day a petition was filed by the guardian in the probate court for authority to settle the claim of the minor for the injuries received as a result of being struck by the automobile.

The court, without hearing any evidence, but taking the statements of the attorney for the insurance company and the guardian, made an order authorizing

the guardian to settle the claim for damages for the sum of $200.

The claim was thereupon settled by the guardian, and she executed a release as guardian and in her own right as mother. Mabel Kissire, a minor, was at the time when the petition was filed and the order made, in the hospital, seriously injured.

The petition of the guardian for authority to settle the claim and the order of the court were prepared in Little Rock by attorneys for the insurance company. The father and mother of Mabel Kissire were not living together at the time, were divorced, and the mother had custody of the child. The father objected to the settlement and refused to approve it.

The attorney for the insurance company and Mrs. Kissire went to W. P. Strait's office, an attorney at Morrilton, and he advised against the settlement at that time. Notwithstanding the advice of Mr. Strait and the objection of the father, the guardian and Mr. Wright, attorney for the insurance company, went to the probate court and represented to the court that the girl was not injured much and would soon be well. Mr. Wright presented the matter of settlement to the probate judge.

No proof was taken and the probate judge knew nothing of the child's condition, and it was represented to him by the insurance company's attorney that the injuries were not serious. The probate judge said he did not think he read the petition, and made the order without hearing any evidence, but relying on the statement of the attorney that the child's injuries were not serious.

After this Eugene Coxsey died, and A. J. Moss was appointed administrator of his estate.

J. S. Moose was appointed curator of the estate of Mabel Kissire, and on November 2, 1929, filed a petition in the probate court asking that the order of settlement previously entered be set aside. The petition alleged that Mabel Kissire was seriously and permanently injured on December 3, 1928, by the negligence of Eugene Coxsey in running his automobile upon, over and against her, and

that, as a result of this, she, for a long period of time, experienced intense physical pain and mental anguish; that one of her limbs were severely crushed and broken, that she was otherwise injured and wounded, and that she is permanently crippled; that said Coxsey carried casualty insurance in the sum of $5,000.

The petition alleged that 11 days after her injuries, when she was still in the hospital and when large expenses were being incurred, agents and representatives of the insurance company, with said Eugene Coxsey, procured the appointment of Mrs. N. A. Kissire, mother of said child, as guardian, and that on said date, by fraud and intimidation and without the knowledge of Mrs. Kissire as to the nature of said transactions, they procured her signature to the petition to the probate court of Conway County asking for authority to settle all the rights of said minor for her injuries and damages for the sum of $200, representing to the court that her injuries were of minor importance and not serious, and thereby procuring an order authorizing said settlement.

It was alleged that the representations were false and constituted a fraud upon the court, and that Mrs. N. A. Kissire, in fact, made no such petition to the court. The petition prayed that the cause be reopened, and said order set aside and annulled.

The court took testimony and made an order stating in said order that it appeared that Coxsey carried casualty insurance in the sum of $5,000, and that the agent of said insurance company and Eugene S. Coxsey, by deceit and misrepresentations perpetrated on Mrs. Kissire, guardian, procured her signature to the petition, and that the insurance company and Coxsey procured the appointment of Mrs. Kissire as guardian, and it further appeared by the testimony of J. H. Reynolds, judge of the probate court at the time the original order was made, that a fraud was perpetrated upon him and the facts misrepresented, and that no proof was taken, and that it was further shown by proof that the child was seriously injured and permanently crippled, and that

Mrs. Kissire understood that she was simply settling expenses.

The court found in favor of the petitioner, set aside the order of the court authorizing settlement for $200, and from said judgment of the probate court the administrator of the estate of Coxsey appealed to the circuit court. The case was tried in the circuit court by the court sitting as a jury, and judgment was entered sustaining the order of the probate court in setting aside the order for settlement. The case is here on appeal.

Much evidence was taken on the question of whether the order of the probate court authorizing a settlement of the damages for $200 was a fraud practiced on the court by the successful party. We deem it unnecessary to set out the testimony, for the reason that the probate court had no jurisdiction to settle the matter, and its judgment was therefore void, whether any fraud was practiced or not.

Probate courts have no common-law jurisdiction. The nature, extent, and exercise of the jurisdiction of probate courts depend on the terms of the constitutional and statutory provision, and they cannot exercise any powers other than those which have been expressly conferred upon them, or which are necessarily implied from those conferred.

The constitution provides: "The judge of the county court shall be the judge of the court of probate, and have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates as is now vested in the circuit court, or may be hereafter prescribed by law. The regular terms of the court of probate shall be held at the times that may hereafter be prescribed by law."

Section 34, article 7 of the Constitution.

The statute provides: "The court of probate shall have original jurisdiction in the following cases:

" 'First. In all matters relating to the probate of wills and testaments, the estate of deceased persons,

executors, administrators, guardians, and persons of unsound mind and their estates.

" 'Second. In the settlement and allowance of accounts of executors, administrators and guardians.

" 'Third. To hear and determine all controversies respecting last wills and testaments, rights of executorship, administration or guardianship.

" 'Fourth. To issue process and to cause to come before such court all persons whom they may deem it necessary to examine, whether parties, or witnesses, or who as executors, administrators, or guardians, or otherwise shall be interested or in any wise accountable for any lands, tenements, goods, chattels, moneys or effects belonging to any minor, orphan, or person of unsound mind, or to the estate of any deceased person'." Section 2256, Crawford & Moses' Digest.

In speaking of the powers granted probate courts, this court said: "The most important interests, the guardianship of widows, children and estates, are committed to their superintending care. Some possibly are dishonest, many are not wise or discriminating. Taking into account the magnitude of the property interests which they have in charge, these courts should be required to proceed in exact conformity to law, instead of being panoplied by the presumptions which attend the exercise of superior jurisdictions by other courts." *Apel* v. *Kelsey,* 52 Ark. 341, 12 S. W. 703, 20 Am. St. Rep. 183.

It has been repeatedly held that it was not the purpose of the constitutional and statutory provisions to invest the probate court with jurisdiction of contested rights and matters of litigation as to the title of property between the executor or administrator and others. *Fancher* v. *Kenner,* 110 Ark. 117, 161 S. W. 166; *Moss* v. *Sandefur,* 15 Ark. 381; *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39.

"It is well to remember that these tribunals have only such specific and limited jurisdiction as is conferred upon them by the Constitution and statutes, and can only exercise the powers expressly granted and such as are

necessarily incident thereto." *Lewis* v. *Rutherford,* 71 Ark. 218, 72 S. W. 373; *Union & Mercantile Trust Co.* v. *Hudson,* 147 Ark. 7, 227 S. W. 1; *Paget* v. *Brogan,* 67 Ark. 522, 55 S. W. 938; *Shane* v. *Dickson,* 111 Ark. 353, 163 S. W. 1140.

The original judgment of the probate court was void because the court had no jurisdiction, and it is unnecessary to determine whether fraud was practiced on the court in procuring the judgment.

The judgment of the circuit court is affirmed.

HART, C. J., (on rehearing). Counsel for appellant have filed a very earnest and exhaustive brief on rehearing; and, in the opinion of the majority of the court, they have to some extent misconceived the issues raised by the appeal in this case, and the effect of the opinion of the court. For this reason, we have deemed it best to write an additional opinion.

The record shows that a guardian was appointed for a minor who had been injured in an automobile accident. The guardian filed a petition in the probate court, stating that he had been offered $200 in settlement of said injury, which he considered reasonable. He asked the court to grant him authority to settle for that amount and to execute a full release. The court granted the prayer, and the release was duly executed under it. It is the effect of this order which is raised by the appeal in this case. The order was not set aside at a term at which it was rendered.

It was insisted by counsel for appellant, both in their original brief and in their reply brief, that the order of the probate court could not be set aside at a subsequent term except for fraud in its procurement. Thus, it will be seen that counsel for appellant claim for it all the binding effect as *res judicata* which attaches to other judgments of courts of record. This would, under the order of the probate court, make the order conclusive except for fraud in procuring it upon the settlement of the accounts of the guardian. The practical effect of

such a holding would be to give probate courts jurisdiction of suits for unliquidated damages.

At the outset, it may be said that a guardian, unless restricted by statute, is authorized by virtue of his office to compromise claims for or against his ward. He stands in the same position as any other trustee who may compound a claim for or against his *cestui que trust,* who acts in good faith and with a sound discretion.

Under our Constitution, the judge of the probate court has such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, and persons of unsound mind and their estates, as may be hereafter prescribed by law. Article 7, § 34, of the Constitution of 1874. In order to carry into effect this provision of the Constitution, probate courts are vested by statute with jurisdiction of accountings and settlements by guardians. Section 5064 of Crawford & Moses' Digest provides that guardians shall make annual settlements of their accounts with the court of probate in which their proceedings shall be, and that guardians neglecting or refusing to make such settlements shall be liable to be attached and imprisoned until they do so. If, by previous orders, the probate court could settle the items of the account, great confusion would result, and the door would be open for fraud to be practiced upon a class of persons, who, by reason of immaturity, it is the design of our Constitution and statutes to protect; for, as claimed by counsel for appellant, if the previous order had the binding force and effect of a judgment of a court of record, it could only be set aside at a subsequent term of the court for fraud in its procurement.

In recognition of this principle, in *Burke* v. *Coolidge,* 35 Ark. 180, it was held that, if an executor claim credit in his settlement with the probate court for an illegal expenditure, the court should reject it, although it may have previously approved the expenditure and authorized the executor to take credit for it.

As pointed out in *Sumrall* v. *Sumrall,* 24 Miss. 258, without such a construction of the statute, the grossest wrongs and injuries might be perpetrated by executors, administrators, and guardians under its provisions. Continuing, the court said: "Nothing, in fact, would be easier for them than the establishment of unjust claims to any extent upon *ex parte* applications to the probate court, and the rights of creditors and distributees be thus seriously compromised, and they left without redress, unless the privilege of contesting the claim is accorded to them when the account of the administrator is presented for allowance and settlement after notice to them, according to law."

The doctrine of *Burke* v. *Coolidge, supra,* was reaffirmed in the subsequent case of *Boyd* v. *Duncan,* 178 Ark. 772, 12 S. W. (2d) 395; and *Souter* v. *Fly,* 182 Ark. 791, 33 S. W. (2d) 408.

Counsel for appellant, however, earnestly insist that such holding is opposed to certain cases of this court cited by them in their brief on rehearing, but, after a careful consideration of the matter, a majority of the court has concluded that the principles herein announced are in harmony with these cases.

In *Waldrip* v. *Tulley,* 48 Ark. 297, 3 S. W. 192, it was held that a guardian is the authorized agent appointed by law to take care of the ward's estate and manage his affairs. The guardian, acting in entire good faith, spent a sum of money in repairing a gin upon the land of his ward; and in his account current the guardian asked credit for the sum so expended. The mother of the infant as next friend filed exceptions. Upon appeal to the Supreme Court, the judgment of the circuit court was reversed, and the cause was remanded with directions to overrule the exceptions to the guardian's account.

In *Wilks* v. *Slaughter,* 49 Ark. 235, 4 S. W. 766, the court held that at common law the administrator had authority to compromise a claim or compound a debt of his intestate.

Again, in *Nashville Lumber Company* v. *Barefield,* 93 Ark. 353, 124 S. W. 758, 20 Ann. Cas. 968, it was held that both at common law and under the statute, a guardian is authorized to compromise a claim for personal property, provided the compromise was made in good faith and not in fraud of the minor's rights. That was an action in replevin to recover possession of a lot of logs and lumber or their value by the next friend of a minor. The suit was defended on the ground that there had been compromise of the matter with the statutory guardian of the minor. The court refused to permit the introduction of testimony to this effect; and, under the instructions given, the jury returned a verdict in the circuit court in favor of the minor for his proportionate part of the lumber and logs. The judgment was reversed because the court refused to permit the introduction of the testimony of the guardian showing the alleged compromise. In that case, the court said that a guardian may compromise a claim of his ward, when acting in good faith and in sound discretion. The reason is that the guardian stands in the same position as any other trustee who may in good faith compound a claim for or against his *cestui que* trust. The court approved the rule, however, that, if the compromise or release was made without sufficient justification or fraudulently or upon a grossly inadequate consideration, the guardian will be answerable for it in his account. The court further said such compromise can be impeached upon the trial of the action in which it is presented as a defense by showing that it was not made in good faith, but in fraud of his rights.

Thus, it will be seen that this case recognizes that no previous order of the probate court can be made which will prevent the guardian from being answerable upon the settlement in his account unless acting in good faith and with sound discretion. If the judgment of the probate court ordering the settlement in advance was a valid and binding judgment, the guardian could not be held accountable for it in his settlement unless, as we have

already seen, the order authorizing the settlement was obtained by fraud.

In the case of *Treadway* v. *St. Louis, Iron Mountain & Southern Railway Company,* 127 Ark. 211, 191 S. W. 930, it was held that an administrator may compromise and accept a settlement of an unliquidated claim for damages without special authority from the probate court. It was further held that, where the personal representative acts in good faith, those who would impeach his conduct must show fraud or mistake or such gross negligence as would amount to fraud. This showing would have to be made in the court where the compromise judgment was rendered in an action to set it aside.

Finally, it is insisted that the holding of the court in the present case is in direct conflict with that in *Pace* v. *Richardson,* 133 Ark. 422, 202 S. W. 852. We do not think so. In that case, the controversy arose between certain heirs and devisees among whom was an infant represented by her husband as guardian. A large estate was involved, and the will of the deceased was being contested. Under our Constitution and statutes, jurisdiction over the probate and contest of wills is vested in the probate court. Hence the suit originated there. Protracted and costly litigation confronted the interested parties, and a compromise agreement was adopted as the best mode of securing the estate to those entitled to it. The probate court, having jurisdiction of the main suit, had jurisdiction to render judgment upon the issues involved upon competent proof. This power to render final judgment upon the merits included the power to render judgment upon a compromise agreement. Upon the proof offered, the compromise agreement was upheld because there was no showing of bad faith in the matter.

If the case had originated in the chancery court in a proper case upon the construction of the will, as it sometimes does, that court, as an incident to its jurisdiction in the main case, would have had the right to ren-

der judgment upon a compromise agreement entered into in good faith.

To sum up, in the present case, if the guardian had brought suit for damages in behalf of the minor in the circuit court, that court having jurisdiction of the subject-matter, would have had the power to render judgment upon a compromise agreement. Hence, its judgment would have been binding upon the probate court in like manner as other judgments upon the settlement of the account of the guardian. The order of the probate court in advance of the settlement of the guardian's account gave him no additional authority in the matter, and did not constitute *res judicata*. The reason being that the probate court, having no jurisdiction of the subject-matter of the action, could not render upon the *ex parte* application of the guardian a judgment which would be *res judicata* of the issue. The probate court upon the settlement of the account of the guardian could inquire into his good or bad faith in the premises.

The result of our views is that the judgment on the former opinion was correct, and the motion for rehearing will be overruled.

BRAMLETT *v.* STATE.

Opinion delivered November 23, 1931.

Jackson & Blackford, for appellant.

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

BUTLER, J. An indictment was returned against Jeff Bramlett by the grand jury of Randolph County charging him with the crime of manslaughter, committed as follows: "The said Jeff Bramlett in the county and State aforesaid, on or about the 9th day of August, A. D., 1930, unlawfully, wilfully and feloniously did kill one Cecil Mitchell by striking and beating him, the said Cecil Mitchell, and from the effects of said striking and beating him, the said Cecil Mitchell did die on the 9th day of August, 1930," etc. To this indictment the defendant interposed a general and special demurrer, which was overruled. The defendant was duly arraigned, tried and convicted of the crime of involuntary manslaughter, and sentenced to six months' imprisonment in the State penitentiary. From that judgment is this appeal.

The demurrer to the indictment challenged its sufficiency because it did not state the manner in which the deceased was killed or the instrument or thing with which he might have been struck or beaten from the effects of which he later died. The case of *Ray* v. *State,* 102 Ark. 594, 145 S. W. 881, and the cases therein cited are relied on by the appellant to sustain the objection urged to the indictment in the instant case. In the Ray case the rule is laid down that an indictment must con-

tain such a description of the facts and circumstances as to constitute the offense charged so that the person accused may be informed of the specific charge which he is called upon to answer, and the court and jury the issue they are to try. The indictment before the court in that case charged that the killing was done with a certain gun "loaded with powder and leaden bullets and shot." Applying the rule to this language, the court held that it was defective because it did not allege the manner of the killing, whether he was shot with the loaded gun or killed by its use in some other manner.

We have held that where the indictment alleges that the deceased came to his death at the hands of defendant in some manner and by the use of weapons to the jury unknown, this allegation is regarded as sufficient. If information contained in allegations of that nature is sufficient, it is difficult to perceive how the indictment in the instant case is defective. Formerly great particularity was required in setting forth the manner of the death of the deceased and the means by which death was inflicted, but it is the modern tendency of courts to relax the rigidity of requirements in indictments, and the particular circumstances of the offense, under the modern practice and our statutes need not be charged unless they are necessary to constitute a complete offense (§ 3012, Crawford & Moses' Digest); and where the act charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment of conviction, the indictment is sufficient. Section 3013 Crawford & Moses' Digest.

As suggested by the Assistant Attorney General, the indictments in the Ray case, *supra*, and in the cases there cited, which were held to be defective, did not indicate the manner of the killing. In those indictments the instruments used were named, but the fault lay in failing to indicate in what manner such instruments were used as they might have produced death in being used in more than one way. This seems to be the reason for the support of those decisions. In the instant case, however, no instrument is named, but the manner in which death

was inflicted is alleged with sufficient certainty, *i. e.*, "by striking and beating him the said Cecil Mitchell from the effects of such striking and beating him the said Cecil Mitchell did die." No case of our own court has been cited directly in point, but in sustaining our view that the indictment was sufficient we refer with approval to Joyce on Indictments, (2d ed., § 360, p. 395); *Marquez* v. *Territory,* 13 Ariz. 135, 108 Pac. 258; *State* v. *Nielson,* 38 Mont. 451, 100 Pac. 229; *People* v. *Hymdman,* 99 Cal. 3, 33 Pac. 782, cited by appellee.

■ A witness, Otis Spencer, testified as to a conversation he had with the deceased which was admitted over the objection of the appellant as a dying declaration. It is urged that because the witness who testified to the declaration would not testify that the deceased was conscious of his language at the time the declaration was made, the testimony was incompetent, and because, after stating who gave him the beating from which he stated he was dying, he used the expression, "To Hell with you," which, it is argued, clearly indicated that the deceased was not conscious of impending death. Whether or not he was conscious and the language used during the making of his declaration was for the jury to consider in testing the weight of the testimony. He was in fact in a dying condition for death occurred shortly after the conversation detailed by the witness. It is evident that he knew of his condition because he said so, and expressed the desire to see his wife and baby once more. In the late case of *Goymes* v. *State, ante* p. 303, we said: "It was not the duty of the State to show that the deceased was rational, but the evidence in this case does not tend to show that he was not rational, and whether the deceased was of sound mind when he made the statement was a question of the credibility, rather than the admissibility, of the declaration." See *Sanderlin* v. *State,* 176 Ark. 217, 2 S. W. (2d) 11; *Adcock* v. *State,* 179 Ark. 1055, 20 S. W. (2d) 120.

■ It is lastly insisted that the court erred in instructing the jury on the law of self-defense on its own

motion because that plea was not made by the defendant. Defendant entered his general plea of not guilty, and, as the evidence tended to show that the deceased was the aggressor in the fight resulting in the death of the deceased, it was not improper to instruct the jury upon the law of self-defense. Certainly, the defendant could not have been prejudiced by such instruction. Defendant argues that he himself requested an instruction on the law of self-defense, whereas the instructions given by the court were abstract and misleading. We deem it unnecessary to set out these instructions, for it is clear to us that the instructions given by the court correctly stated the law, and, assuming that the instruction asked by the defendant was a correct declaration, the court was not obliged to give it, having already covered that phase of the case by the instructions given.

The testimony, which is uncontradicted, is to the effect that the defendant and the deceased were drunk, and while in this condition engaged in a fight. Thereafter the deceased was found in a bruised and bloody condition, and died within a short time following. An examination of the body resulted in the discovery that deceased's skull was fractured above the ear, several teeth knocked out and his jaw broken. We deem it unnecessary to set out the testimony in detail, as we are of the opinion that, considering it in the light most favorable to the appellant, it abundantly justified the verdict of the jury.

Affirmed.

FIRST NATIONAL BANK OF HUTTIG *v.* RHODE ISLAND INSURANCE COMPANY.

Opinion delivered November 30, 1931.

Gaughan, Sifford, Godwin & Gaughan, for appellant.

Verne McMillen, for Rhode Island Ins. Co., and *Marsh, McKay & Marlin,* for J. V. Spencer, appellees.

HART, C. J., (after stating the facts). The court erred in holding that the First National Bank of Huttig was not entitled to the proceeds of the insurance draft for two reasons:

In the first place, under our Negotiable Instruments Act, § 7896 of Crawford & Moses' Digest, where, in a bill of exchange, the drawer and the drawee are the same person, the holder may treat the instrument at his elec-

tion either as a bill of exchange or as a promissory note. This was the law prior to the passage of the act in question. A bill of exchange drawn by the maker upon himself is in legal effect a promissory note and cannot be countermanded. Where a bill of exchange is drawn by a corporation upon itself, the instrument may be treated as an accepted bill or as a promissory note, at the election of the holder. 8 C. J., ¶ 23, pp. 42-43; 3 R. C. L., ¶ 62, p. 878; 1 Daniel on Negotiable Instruments (6th ed.), §§ 128 and 426; *Hasey* v. *White Pigeon Beet Sugar Co.*, 1 Doug. (Mich.) 193; *Cunningham* v. *Wardwell,* 3 Fair. (Me.) 466; *Marion and Mississinewa Rd. Co.* v. *Hodge,* 9 Ind. Rep. 163; *Drinkall* v. *Movius State Bank,* 11 N. Dak. 10, 88 N. W. 724; *Pavenstert* v. *New York Life Ins. Co.,* 203 N. Y. 91, 96 N. E. 104, Ann. Cas. 1913A, page 805; and *Bailey* v. *Triplett Bros.,* (Tex. Civ. App.) 286 S. W. 914.

In the present case, the instrument which is the basis of the suit was in form a bill of exchange. It was drawn by the corporation, Rhode Island Insurance Company, under the signature of its president upon itself. In other words, it was a bill of exchange drawn by the corporation through its proper officer upon itself, and was not therefore subject to countermand.

It is claimed, however, that it was conditional because of the words "upon acceptance" in it. Under our statute, and under the principles of law above announced, these words had no legal effect on the instrument. They were in the instrument when it was signed by the president of the corporation, and the very act of drawing the bill is deemed an acceptance of it, and the holder may treat it as an accepted bill of exchange or as a promissory note.

It is also suggested by counsel for the insurance company that this case is ruled by the principles of law announced in *Berenson* v. *London & Lancashire Fire Ins. Co.,* 201 Mass. 172, 87 N. E. 687. We do not think so, but, on the other hand, think the conclusion we have reached is supported by the reasoning in that case. In that case

the draft was drawn upon the Hartford agency of an English insurance company, and the signature to it was by one who described himself as "special agent." Reading this language in connection with the words "upon acceptance" makes it plain that the transaction was limited to the extent of requiring approval or ratification by the Hartford agency of the insurance company. This was because an agent of limited authority drew the bill, and the Hartford agency was required to give life to it by its approval of the adjustment of the loss. Hence the court held that, since the draft had not been accepted by the Hartford agency of the insurance company, it never became a complete contract and was not a negotiable instrument.

Here the draft was signed by the president of the company, who had authority to sign it; and the contract became binding and complete when he did sign it, because he had authority to make the contract, and no approval or ratification of his act was necessary.

In the next place, there was no legal garnishment against the insurance company at the time it turned over the draft to its agent to be delivered to A. L. Barber, which was done on the 28th day of August, 1930. The record shows that J. V. Spencer filed the complaint in this action on the 25th day of August, 1930, and that the writ of garnishment was issued on that day, and that the writ was served on the insurance company on the 27th day of August, 1930. No summons was issued upon the complaint until the 30th day of August, 1930, which was after the date of the issuance of the garnishment. Garnishment is a proceeding whereby the plaintiff seeks to subject to his claim property in the hands of a third person or money owed by such person to the defendant. *Davis* v. *Choctaw, Oklahoma & Gulf Rd. Co.*, 73 Ark. 120, 83 S. W. 318, 3 Ann. Cas. 658. The stage of proceedings at which garnishment may issue is purely statutory, and judicial garnishment at law is a creature of the statute which authorizes it. This principle is elemental, and no citation of authorities is necessary to support it.

Under § 4906 of Crawford & Moses' Digest, it is provided that, in all cases where any plaintiff may begin an action in any court of record and such plaintiff shall have reason to believe that any other person is indebted to the defendant, he may have a writ of garnishment issued by complying with the statutory procedure in doing so. Thus it will be seen that the plaintiff had no right to have a writ of garnishment issued until after the commencement of the action.

In this State an action is commenced when the complaint is filed in the office of the clerk of the court, and a summons is issued thereon. Crawford & Moses' Digest, § 1049; *Barker* v. *Cunningham,* 104 Ark. 627. Under our garnishment statute, it is essential to the writ of garnishment that, at the time the writ is issued, the plaintiff has begun his action. Under our statute, and the decision of this court construing it, above cited, the action was not commenced until the complaint was filed and the summons was issued. It is true that the plaintiff, J. V. Spencer, testified that he did not know why the clerk did not issue summons until after the writ of garnishment had been issued, but it is not shown that he asked that a summons be issued at the time he filed his complaint, and that the clerk neglected or refused to do so. Our garnishment statute plainly means that the writ may be issued where the plaintiff has begun his action, or at any time thereafter; but, as we have just seen, the action was not commenced until the complaint was filed and the summons issued upon it. Hence, at the time the instrument, which is the basis of this lawsuit, was turned over by the agent of the insurance company to A. L. Barber, as the agent of the payees in the instrument, no legal garnishment had been issued against the insurance company. Therefore, J. V. Spencer was not entitled to the proceeds of the insurance. On the other hand, A. L. Barber and D. R. Spencer, two of the payees in the draft, had indorsed it to the bank, which was also a payee, and as such became entitled to the proceeds of it. Therefore the court erred in rendering judgment

in favor of J. V. Spencer against the Rhode Island Insurance Company, and in holding that the First National Bank of Huttig was not entitled to the proceeds of the instrument which is the basis of this action.

Both the bank and the insurance company have appealed to this court. The bank has appealed from the judgment against it, and the insurance company has appealed from the judgment against it in favor of J. V. Spencer. Therefore the judgment will be reversed, and the cause will be remanded with directions to render judgment in favor of the bank for $439.03 against the insurance company and to dismiss the garnishment proceeding of Spencer against said insurance company, and for such further proceedings, according to law, as may be necessary and which are not inconsistent with this opinion. It is so ordered.

GRAND COURT OF ARKANSAS, ORDER OF CALANTHE, *v.* CARTER.

Opinion delivered November 30, 1931.

Scipio A. Jones, for appellant.

Sam M. Levine, for appellee.

SMITH, J. This suit was brought in the Jefferson County Circuit Court against the Grand Court of Arkansas, Order of Calanthe, (hereinafter referred to as the Order) a fraternal benefit society, whose principal office or headquarters is in the city of Little Rock, in Pulaski

County, by appellees, who alleged that they were the beneficiaries in a certificate issued to one Mattie Carter, a deceased member of said Order, and that, although said certificate was in full force and effect at the time of the insured's death, payment of the certificate had been refused after proper demand for payment had been made.

A summons was issued and was returned as having been served on W. E. Floyd, the State Insurance Commissioner, as "the agent designated for service by the Grand Court of Arkansas, Order of Calanthe," by the sheriff of Pulaski County, Arkansas. Thereafter a judgment was rendered in the circuit court of Jefferson County on September 20, 1930.

On October 6, 1930, a motion was filed to quash the summons and to vacate the judgment, for the reason that the circuit court of Jefferson County had no jurisdiction of the cause of action. The motion to vacate the judgment alleged the existence of a valid defense to the original suit, in that the certificate sued on had lapsed for the nonpayment of dues, and that the plaintiffs were not the real beneficiaries under the certificate.

The motion to vacate the judgment alleges that the Order is a fraternal benefit society duly organized under the provisions of act 462 of the Acts of 1917 (vol. 2, Acts 1917, page 2087), appearing as §§ 6068 *et seq.* of Crawford & Moses' Digest, and that, under a section of this act appearing as § 6071, Crawford & Moses' Digest, the Order was exempt from suit in any county except that of its domicile, or principal place of business, which was in Pulaski—and not in Jefferson—County. This section reads as follows: "Section 6071. Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein."

A portion of § 17 of the act of 1917 appears as § 6091, Crawford & Moses' Digest, and provides that "Every

society * * * shall * * * appoint in writing the commissioner of insurance * * * to be its true and lawful attorney on whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society * * *."

Another portion of the same section appears as § 6092, Crawford & Moses' Digest, and reads as follows: "Section 6092. Copies of such appointment, certified by said insurance department, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as original thereof might be admitted. Service shall only be made upon such attorney, must be made in duplicate upon the commissioner of insurance, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such society; provided, however, that no such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense in less than thirty days from the date of the mailing the copy of such service to such society. When legal process against any such society is served upon said commissioner of insurance, he shall forthwith forward by registered mail one of the duplicate copies prepaid and directed to its secretary or corresponding officer. Legal process shall not be served upon any such society except in the manner provided herein."

It is insisted that, under §§ 6071 and 6092, Crawford & Moses' Digest, and under § 1177, Crawford & Moses' Digest, the defendant Order should have been sued in the county of its domicile, and not elsewhere. Section 1177, Crawford & Moses' Digest, reads as follows: "Section 1177. Where any action embraced in the preceding section is against a single defendant, the plaintiff shall not be entitled to judgment against him on the service of a summons in any other county than that in which the action is brought, unless he resided in that county at the commencement of the action, or unless, having appeared

therein, he fails to object, before the trial, to its proceeding against him."

We think counsel have misinterpreted the purpose and effect of the sections of the act of 1917 above quoted. Section 4 of the act, appearing as § 6071, Crawford & Moses' Digest, does exempt appellant order and other fraternal benefit societies from all provisions of the insurance laws "of this State, not only in governmental relations with the State, but for every other purpose and no law hereafter enacted shall apply to them unless they be expressly designated therein;" but we think this means, as the title to act 462 indicates, that they are exempt from statutes "pertaining to the regulation and incorporation" of such associations, and not from laws regulating service upon corporations generally.

In the case of *Mutual Aid Union* v. *Blacknall*, 123 Ark. 377, 185 S. W. 465, it was insisted that the defendant, a mutual aid society, having its principal office and place of business in Benton County, had been improperly sued in Logan County. This insistence was based upon § 4348, Kirby's Digest, which provides that: "The insurance laws of the State shall be so construed as not to apply in their operation and requirements to any mutual aid society or organization in this State." But, in overruling that contention, we said that the statute did not undertake to deal with the subject of service upon such mutual companies, and could not therefore be held to provide for a different manner in which such companies may be sued and served with process, and therefore the suit had been properly brought in Logan County.

Here the act of 1917 does to some extent deal with the question of service, but only to the extent of providing that such companies must agree, as a condition upon which they may be authorized to do business in this State, that service may be had as against them upon the Insurance Commissioner. It is not provided in the act of 1917 that such suits must be brought in the county where the Insurance Commissioner maintains his office. Indeed, many of these societies do not have their prin-

cipal offices in Pulaski County, the capital county of the State, where the Insurance Commissioner maintains his office. So, therefore in many cases, it would not be possible to sue such societies in the counties where they have headquarters and also obtain service in that county against the Insurance Commissioner, who maintains his office in another county. If suits can only be maintained in the county where service is had, then all suits would have to be brought in Pulaski County, for service cannot be had on the Insurance Commissioner elsewhere, even though the society had done no business in that county and had no office there.

We therefore conclude, as was said in the Blacknall case, *supra,* that the statute had not undertaken to deal with the question of service, and that it did not do so further than to provide that it should be had upon the Insurance Commissioner. The exemption of the act of 1917, as its title indicates, is limited to the regulation and incorporation of such societies.

It was not so expressly held in the case of *United Order of Good Samaritans* v. *Brooks,* 168 Ark. 570, 270 S. W. 955, but such was the effect of that decision. That was an appeal in which, as in the instant case, a motion had been filed to vacate a default judgment and to quash the service, and § 6092, Crawford & Moses' Digest, was invoked in support of the motions. It is true, the point there raised was that the summons was defective, but we held there had been no violation of the statute rendering judgment in Arkansas County, although we know, from an inspection of the record in that case, that the defendant, a fraternal benefit society, had its principal place of business in St. Francis County. The opinion in that case was delivered April 13, 1925, and the case arose subsequent to the passage of the act of 1917.

Now, it was held in the case of *Phillips* v. *Mosaic Templars of America,* 154 Ark. 173, 241 S. W. 869, that the provisions of § 6153, Crawford & Moses' Digest, did not apply to the certificates there in suit, which had been issued by a fraternal insurance society. Section 6153, Crawford & Moses' Digest, provides that suits arising

on policies of insurance may be maintained at any time within the period prescribed by law for bringing actions on promises in writing, and that any stipulation to the contrary in the policy should be void. It was there held that a limitation in a benefit certificate issued by a fraternal insurance society requiring suit to be brought within one year after the cause of action accrued was valid, notwithstanding the provisions of § 6153, because § 6071, Crawford & Moses' Digest, had exempted such societies from all insurance laws of the State regulating them unless they were expressly designated therein.

That holding is not in conflict with the view here announced, for the reason that § 6071 had exempted fraternal orders from the insurance laws of the State in the matter of their regulation in their dealings with their memberships, and the adoption of a rule by such societies and made a part of the certificates issued to their members was one of these regulations. It is not alleged here that appellant order had any regulations or rule prescribing the venue of suits brought against it, whereas in the Phillips case, *supra,* the fraternal order did have a limitation in its benefit certificates as to the time within which suits might be brought upon certificates issued by it.

We conclude therefore that the suit was properly brought in Jefferson County, and the defense now asserted should have been there interposed.

We are not unmindful that § 6092 has been amended by act 104 of the Acts of 1931 (Acts 1931, page 290), it being there provided that service had in conformity with § 6092 "shall be sufficient to give jurisdiction to the courts of the State, sitting in any county where such society has a local lodge, or where the death of the insured occurred, or where the beneficiary in the certificate or policy of insurance resides."

The act of 1931 is not a legislative construction of the act of 1917. Indeed, the act of 1931 may have been passed to put at rest the question raised in this suit, the judgment in which was rendered before the passage of the act—a question which does not appear to have been

previously raised in any of the many suits prosecuted against fraternal insurance societies, just as the instant case was.

The judgment is correct, and is therefore affirmed.

SMITH *v.* LAWSON.

Opinion delivered November 30, 1931.

Philip McNemer, for appellant.

Linwood Brickhouse, for appellee.

SMITH, J. Appellant filed a petition in the court below for a writ of mandamus to be directed to James Lawson, as collector of the city of Little Rock, to require that officer to receive the purchase money for certain property and to require the delivery of the property to appellant upon payment thereof. He alleged that the council of the city of Little Rock, by resolution No. 1253, ordered the sale of an abandoned light plant, which resolution was vetoed by the mayor, but was later passed over his veto. Pursuant to the authority conferred by this resolution, the property was sold, and appellant became the purchaser for the price of $10,500. He tendered

this sum to the city collector and demanded delivery of the property. The collector declined to receive the money or to deliver the property; hence this suit.

The collector declined to receive the money or to deliver the property for the reason that a petition had been filed praying that the proposed resolution be referred to the electors of the city, and the sole question presented for our decision is whether such a resolution may be referred under the I. and R. amendment, adopted at the 1920 general election. Applegate's Constitution of Arkansas, Annotated, page 203; General Acts 1919, page 481.

Petitioners for the referendum assert that authority for this proceeding is conferred by the paragraph of the amendment, which reads as follows:

"Every extension, enlargement, grant, or conveyance of a franchise, or any rights, property, easement, lease, or occupation of or in any road, street, alley or any part thereof in the real property or interest in real property owned by municipalities, exceeding in value three hundred dollars, whether the same be by statute, ordinance, resolution, or otherwise, shall be subject to referendum, and shall not be subject to emergency legislation."

Learned counsel say they have been unable to find any other State Constitution containing a similar provision to assist us in its interpretation; and we have been unable to find any decision construing any constitutional provision sufficiently similar to ours to cover the exact point raised by this appeal.

In support of the prayer for mandamus, it is insisted that the amendment is not applicable to such an administrative act as that of the resolution in question under which the property was sold, and that, if applicable to such resolutions, it does not apply to sales of personal property, but applies only to sales of real property. We do not concur in this view. The amendment, to be properly construed, must, of course, be read in its entirety—as a whole; and, when so read, we find that the people of the State, or of any county, city or town, are author-

ized to initiate and refer measures in the manner there provided. Another paragraph of the amendment defines the word "measure" as therein employed, and this definition reads as follows:

"Definition. The word 'measure' as used herein includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character."

There would appear to be little question as to the inclusion of resolution No. 1253 within this definition of the word "measure," if read by itself; but it is insisted that the paragraph immediately preceding the one containing that definition and quoted above narrows and restricts this definition in the exercise of the power conferred on the electors of municipalities. The insistence is that the authority to refer ordinances and resolutions relating to the sale of municipal property is limited to real property exceeding in value three hundred dollars, and that having expressed the power to refer ordinances and resolutions relating to such real property, there was an exclusion of the power to refer ordinances and resolutions relating to personal property.

We do not agree, however, that this is the correct construction of the amendment or that the power is thus limited.

It is a matter of common knowledge that a high per cent. of the revenues of all cities and towns is expended for personal property variously employed, and, if the amendment does not apply to personal property, the council might dispose of the city's personal property unwisely and to the great damage of the city or town.

The limitation of three hundred dollars as to value is not without significance. Section 7715, Crawford & Moses' Digest, was in force when the amendment was submitted to and adopted by the people of the State. This section confers upon boards of public affairs in cities of the first class (to which class the city of Little Rock belongs) the exclusive power to make purchases of all supplies, apparatus, materials and other things requi-

site for public purposes in cities of the first class, but imposes the requirement upon the boards, where the amount of expenditure exceeds three hundred dollars, to transmit an estimate thereof to the city council with their recommendation only relating thereto. If the recommendation of the board is approved, an ordinance is passed making it the "duty of said board to advertise and let the work or contract to the lowest responsible bidder." The use of the same monetary value in the amendment appears therefore to indicate the intention, to reserve to the people the right to subject to the referendum any contract disposing of city property where the value exceeds three hundred dollars.

It might, in many cases, in view of the expense of the referendum, be unwise to refer such contracts to the people. On the other hand, the existence of this power has a tendency to prevent hasty or improvident action on the part of the council. But this is a question of policy not addressed to us and may be considered by us in so far only as it tends to aid in the interpretation of the amendment.

It must be confessed that the paragraph of the amendment first above quoted is somewhat ambiguous, but, when read in connection with the paragraph immediately following in which the word "measure" is defined, we think the distinction cannot be made that ordinances and resolutions relating to real property may be referred, whereas ordinances relating to personal property may not, the value in each case exceeding three hundred dollars.

The prayer for mandamus was denied in the court below, and that judgment will be affirmed. It is so ordered.

HART, C.J., concurs in the judgment only; BUTLER, J., dissents.

HALE *v.* CENTRAL BANK.

Opinion delivered November 30, 1931.

Harb & Barnard, for appellants.

Raymond Jones, for Central Bank, and *Arthur G. Frankel,* for J. C. Green, appellees.

HUMPHREYS, J. The main and controlling question presented by this appeal is whether notes signed by duly elected trustees and a mortgage executed by them to secure the notes upon real estate owned by the Arch Street Baptist Church, unincorporated, to raise money to construct a church building thereon are valid.

Appellants brought this suit to cancel the notes and mortgage upon the ground that they were void *ab initio* because executed and delivered to a contractor to raise money to complete the church building without specific authority from the congregation to do so.

Appellees, who acquired the notes before maturity from the contractor to collaterally secure notes which he owed each of them, defended the action upon the ground that the trustees had authority to execute them.

Upon a trial of the cause the court ruled that the instruments were valid and duly assigned to appellees as collateral security, and that they should not be canceled or returned to appellants until the amounts due by the

contractor to the respective appellees were paid, from which is this appeal.

The facts material to a determination of the questions involved on this appeal are as follows: The Arch Street Baptist Church, unincorporated, authorized its duly elected trustees to enter into a contract with Cullins to erect a church building upon their lot for the sum of $25,000, and to do additional work for $1,755, totaling $26,755. After the payment of a large part, or perhaps all of the contract price, the building was not completed, and the trustees, in order to enable the contractor to raise money to complete same, executed a series of negotiable notes to him in the total sum of $6,177.24, and secured same by the execution of a mortgage upon the property without further authority from or knowledge of the congregation. Instead of obtaining additional money upon the notes and mortgages to complete the building, the contractor assigned notes numbers 2, 3, 4 and 5 to J. C. Green as collateral security for the balance of purchase money the contractor owed Green for lots he purchased from Green, in order to obtain a release of the vendor's lien; and assigned notes numbers 6, 7, 8, 9, 10 and 11 to the Central Bank as collateral security to secure the payment of a note for $2,245 he owed it. All these notes were assigned before maturity to the respective appellees to secure the payment of *bona fide* indebtedness which Cullins owed them. The record is cloudy as to whether the money advanced by the Central Bank evidenced by the $2,245 note had been used by Cullins in the construction of the church building. At any rate, no work was done by Cullins on the church building after he procured the notes and mortgage from the trustees. The trustees who executed the notes and mortgage were elected as successors to the trustees who made the contract by authority of the congregation to construct the church building.

The general rule of law is that duly elected trustees of churches operating under congregational government hold the naked legal title to the property and have no authority to mortgage same unless authority to do so is

conferred upon them by resolution voted by a majority in number of the congregation in a meeting called for that purpose. *Calvary Baptist Church* v. *Dart,* 68 S. C. 221, 17 S. E. 66; *Pallilla* v. *Gallilee Baptist Church,* 215 Ala. 667, 112 So. 134; *Gallilee Baptist Church* v. *Pallilla,* 219 Ala. 683, 123 So. 210; *Patterson* v. *Baptist Church,* 8 La. App. 109; *Kennesaw Free Baptist Church* v. *Labmire,* 105 Neb. 755, 174 S. W. 296, 8 A. L. R. 98; *Hyde Park Supply Co.* v. *Peck-Williams Heating & Ventilating Co.,* 176 Ky. 656, 197 S. W. 391. The general rule announced in these cases has no application in this State to contracts entered into or notes and mortgages executed by trustees of congregationally governed churches to erect buildings. In Arkansas the status of trustees of congregationally governed churches is fixed and made secure by § 8637 of Crawford & Moses' Digest; and authority is conferred upon them to improve the property by § 8638 of Crawford & Moses' Digest, which is as follows:

"The trustee or trustees for the time being, of any religious society aforesaid shall have the same power to defend and prosecute suits at law or in equity, and to do all other acts for the protection, improvement and preservation of said property as individuals may do in relation to their individual property."

The erection of a church building constituted an improvement of the property in the instant case, and authority to raise the money on negotiable notes secured by mortgage was conferred upon the trustees by the statute when it conferred upon them authority to improve the property "as individuals may do in relation to their individual property." It cannot be gainsaid that an individual has a right to mortgage his individual property to obtain money with which to improve same. But for this statute the trustees could not have pledged the property to raise money with which to construct a church building without action by the congregation. The statute conferred such authority upon them.

The decree is therefore affirmed.

HART, C. J., and MEHAFFY, J., concur; MR. Justice KIRBY, dissents.

TRACY *v.* TRACY.

Opinion delivered November 30, 1931.

A. A. McDonald, for appellant.

Cravens & Cravens, for appellee.

HUMPHREYS, J. In February, 1931, appellee was cited by the chancery court of Sebastian County, Fort Smith District, for failure to pay alimony of $7.50 per week alleged to have been adjudged against him in a divorce proceeding against him by appellant in 1927.

Appellee interposed the defense that, when the final decree was rendered in the cause on the 4th day of January, 1928, permanent alimony was not adjudged against him, and that the order allowing temporary alimony theretofore made was superseded by the final decree. Thereupon, appellant by permission of the court, amended her motion for the citation so as to pray for a *nunc pro tunc* entry in the final decree adjudging permanent alimony of $7.50 per week alleging that it was made and omitted from the original decree through oversight.

Upon a trial of the issues joined the court found that the only order made for alimony was the order allowing temporary alimony of $7.50 per week. Based

upon that finding, the court dismissed appellant's petition for a citation and amendment thereto praying for a *nunc pro tunc* order, from which is this appeal.

The attorney for appellant testified that, when the original cause was tried, the court took the case under advisement and later granted a decree of divorce and announced that the temporary order for alimony should stand. When asked why he did not include the announcement or order in the precedent prepared by him and okayed by the court and followed by the clerk in entering the final decree, he replied that he guessed he omitted it because the chancellor thought it was unnecessary to include it.

The ex-chancellor, who rendered the final decree, testified that he remembered rendering the decree, but could not recall the particulars or details in connection therewith. He gave it as his opinion, after reading the temporary order for alimony and final decree which contained no reference to alimony, that it was unnecessary to make or enter an order for permanent alimony, as the order theretofore made for temporary alimony remained in force until changed or modified.

The attorney for the appellee testified that on the final trial of the cause the court took the case under advisement, stating that he would continue the temporary order for alimony until the further orders of the court, but that he was not present when the case was finally decided and does not know what was said or done except as reflected by the written decree which contained no reference to alimony.

The rule is that, in *nunc pro tunc* orders correcting judgments or decrees so as to incorporate provisions not appearing therein, such provisions must be shown by clear and decisive evidence to have been made by the court and omitted therefrom. Applying that rule, we cannot say that the finding of the trial court is contrary to the weight of the evidence.

We cannot agree with appellant's further contention that, even though no order for permanent alimony was

made, the temporary order for alimony survived until changed or modified by the court. The general rule is that the final order and decree supersedes an order for temporary alimony. 19 C. J. page 221; 1 R. C. L. page 895. Under our statutes temporary alimony is allowed if necessity exists during the pendency of the divorce proceeding. Sections 3506 and 3510 Crawford & Moses' Digest.

No error appearing, the judgment is affirmed.

[redacted]

BIGGS *v.* DAVIS.

Opinion delivered November 30, 1931.

[redacted]

J. A. Tellier and *Grace W. Tellier,* for appellant.

Sam T., Tom and *Donald Poe,* for appellee.

KIRBY, J., (after stating the facts). The statute requires the clerks of courts of record in entering judgments and decrees to leave a space or margin on the record for entry of memorandum of satisfaction thereof and to enter such satisfaction in certain instances, and that, whenever a judgment is satisfied otherwise than by execution, it shall be the duty of the party or his attorney within sixty days thereafter to enter satisfaction in the judgment books by writing the words "satisfied in full" with the date of the entry and the signature of the party making it. Sections 6280-81; 6325-26, Crawford & Moses' Digest. The statute also provides by whom the satisfaction of a judgment may be entered and the effect thereon. Expressly, "Satisfaction entered in accordance with the preceding provisions shall forever discharge and release the judgment or decree." Section 6330, Crawford & Moses' Digest. See also *Gordon* v. *Moors,* 44 Ark. 349, 51 Am. Rep. 606.

Hodges was a joint judgment debtor. The appellant concedes the judgment was satisfied in full as to him

and set out in his petition to revive the judgment against appellee that it was satisfied in full as to Hodges. Appellee was a joint maker of the note, upon which judgment was rendered against both Hodges and himself, each of them being bound to the payment of the whole amount thereof, so far as the judgment creditor is concerned, with the right of contribution against the other as between themselves. This right of contribution was necessarily destroyed by the satisfaction of the judgment as to one of the debtors for a substantially less amount than one-half thereof, and deprived appellee, the other judgment debtor, of any right to contribution in case of his having to make payment of the judgment without any consent or any fault on his part, and must be so far as he is concerned held to release him also from a liability upon said judgment satisfied in full as to his co-obligor. *Tankard* v. *First National Bank of Fort Smith,* 124 Ark. 154, 187 S. W. 160; 4 Page on Contracts, § 2456, pp. 4349-50; *Whiting and Slak* v. *Beebe Bros.,* 12 Ark. 421.

Appellant insists, however, that there was no intention to satisfy the judgment as against appellee, as expressly stated in the entry of satisfaction thereof as to Hodges, "but said judgment is not satisfied as to Wallace Davis"; and that the entry of satisfaction must be considered only as a covenant not to sue Hodges leaving the other joint judgment debtor liable to the payment of the judgment.

In *Pettigrew Machine Co.* v. *Harmon,* 45 Ark. 290, the distinction between a release of a debtor and a covenant not to sue is fully discussed, and it was there said that the whole instrument should be considered together in determining whether it was intended by the parties to be a release and to remit the claim or merely to create a covenant undertaking not to sue one of the parties. In that case there was an express reservation of liability of the other obligors, and it was held that the effect of the instrument was to constitute merely a covenant not to sue. It is true this entry of satisfaction of judgment states: "but said judgment is not satisfied as to Wallace

Davis''; the entry of satisfaction as to Earl W. Hodges, the other judgment debtor, is, in the language of the statute, ''satisfied in full'' as to him, and the effect thereof is declared as a discharge or release of the judgment. There can be no question of the intention being other than the effect as prescribed by the statute in the use of the words for showing satisfaction of the judgment, and it cannot therefore be held to be only a covenant not to sue contrary to the meaning of it as declared by the statute in conformity with which it is executed. There was no entry of satisfaction of the judgment upon the record in accordance with the statute in the case of *Hadley* v. *Bryan*, 70 Ark. 197, 66 S. W. 921, wherein a release to one of the parties was held to be only a covenant not to sue, and the case is not controlling here.

It follows that no error was committed by the court in sustaining the demurrer and dismissing the complaint. The judgment is accordingly affirmed.

WRIGHT *v.* LECROY.

Opinion delivered November 30, 1931.

Joe Joiner and *Garner & Whitley,* for petitioners.

Henry Stevens and *A. A. Thomason,* for respondents.

MEHAFFY, J. On December 31, 1931, O. A. Reed filed a claim in the county court of Columbia County for $368; and on the same day there was placed upon the record a sale of certain machinery to O. A. Reed amounting to $368. The order of the court approving the sale to Reed recited that it had issued to Reed warrants for the amount and had sold him this property. It appears that both orders were made at the same time. Emmet Atkinson was the judge of the county court, but his term expired on the day that he made the order.

S. G. Wright, a citizen and taxpayer of Columbia County, on the 10th day of January, 1931, filed an affidavit for appeal from the order of the county court, and the appeal was granted.

After the appeal was lodged in the circuit court, application was made to the judge of the circuit court in vacation for an order to supersede and stay the judgment of the county court and to order the possession of the property delivered to Columbia County. The circuit court required a supersedeas bond, and directed the circuit clerk to issue an order directed to the sheriff to take possession of said property and deliver it to Columbia County.

Thereafter, Reed filed a complaint in the Columbia Chancery Court, praying an order from said court enjoining the sheriff, C. T. Fincher, from levying on or otherwise interfering with his possession of said property pending an appeal taken from the county court of

Columbia County to the circuit court; and the chancellor issued a temporary restraining order as prayed for in the complaint. The petitioners herein filed a motion to dissolve the temporary injunction, denying the right of the chancery court to issue a temporary injunction. The chancery court declined to either make the injunction permanent or to dissolve it, but entered an order continuing the temporary restraining order during the pendency of the case in the Columbia Circuit Court.

The petitioners then filed an original suit here, asking that the chancery court and the chancellors thereof be restrained from interfering with the sheriff in executing the order of the circuit court made by the judge of that court in vacation when the Columbia Circuit Court was not in session. The chancery judges entered their appearance and filed response, and the question here is whether the chancery court had authority to issue a restraining order interfering with the sheriff in serving the writ issued by the circuit judge.

It is first contended by the respondents that S. G. Wright as a citizen and taxpayer had no authority to appeal from the order of sale made and confirmed by the county court, and they call attention to the cases of *Armstrong* v. *Truitt,* 53 Ark. 287, 13 S. W. 934, and *Van Hook* v. *McNeil Monument Co.,* 101 Ark. 246, 142 S. W. 154. It is insisted that, in order to appeal from the order of sale, it is necessary for the person seeking to appeal to become a party and that a citizen and taxpayer has no right to appeal without first becoming a party to the suit. It is urged that this is not an appeal from an allowance made by the county court, but is an order affirming a sale. We do not agree with respondents in this contention because, at the same time the order confirming the sale of the property to Reed was made, there was an order made allowing Reed $368, as a claim against the county. It is evident from the record that this was all one transaction, and it was in fact an allowance to Reed.

Section 2287 provides that appeals shall be granted as a matter of right to the circuit court from all final

orders and judgments of the county court. We think none of the authorities cited and relied on by respondents have any application here for the reason that we hold that this is an appeal from an allowance made by the county court. This, of course, answers the second and third contention of the respondents. The appeal was properly taken from the county court to the circuit court and properly lodged in the circuit court, and the circuit court therefore had jurisdiction of the parties and the subject-matter.

Section 2232 of Crawford & Moses' Digest gives the circuit court authority to issue, hear, and determine all necessary writs to carry into effect their specific powers, and it further provides that any such writs may be issued upon the order of the judge of the appropriate court in vacation. We think it therefore clear that the circuit judge had the right to issue a writ staying proceedings.

It is next contended that the order of supersedeas can not be made to have a retroactive effect or compel restoration of property. Whether this exceeded the authority of the circuit court or not, Wright, if it was an erroneous judgment, could appeal; and under the decisions of this court, if it were a void judgment, he could either appeal or treat it as a nullity. He would certainly have had the right to so supersede or stay the proceedings so as to prevent the disposition of the property by Reed until it was tried in the circuit court and determined whether the county actually owed him the $368 for which allowance was made.

It is then contended that Aubey Rowe, county judge, violated the law in becoming a party to the order directing the circuit clerk to issue a writ for the property. It is true that, in claims against counties, the law required the county judge to defend; but this is not the character of action that requires that action on the part of the county court. If the judge had reason to believe that the allowance to Reed should not have been made and that the sale was therefore void, it would have been his

duty to become a party and protect the interests of the county.

It is next insisted that the chancery court had jurisdiction to restrain processes from courts of coordinate jurisdiction. When a chancellor or a circuit judge has jurisdiction in a cause pending in his court and issues a writ, the other court of coordinate jurisdiction would not have the right to interfere and prevent the service of the writ. The chancery court could not prevent the service of a writ by the circuit court, nor could the circuit court interfere in the service of a writ issued by the chancery court. If this practice were permitted, it would create no end of confusion, and the sheriff or other officer would not know which judge or court to obey. To prevent situations of this sort and the confusion that would arise if such practices were permitted, this court will grant a writ of prohibition. *Arkansas Highway Commission* v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879; *Caldwell* v. *Dodge,* 179 Ark. 235, 15 S. W. 318; *Metzger* v. *Mann,* 183 Ark. 40, 34 S. W. (2d) 1069. Circuit courts and chancery courts are of equal dignity; and, in cases where there is concurrent jurisdiction, the court that first acquires jurisdiction has the right and jurisdiction to conduct the matter to an end without interference by another court of equal dignity. *Salem* v. *Colley,* 70 Ark. 71, 66 S. W. 195; *State of Arkansas* v. *Devers,* 34 Ark. 188; *Bradley* v. *State,* 32 Ark. 722; *Estes* v. *Martin,* 34 Ark. 410; *Kastor* v. *Elliott,* 77 Ark. 148 91 S. W. 8; *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S. W. 467; and Ex parte *Dame,* 162 Ark. 382, 259 S. W. 754.

It follows from what we have said that the chancery court had no jurisdiction to issue an order restraining the sheriff from serving a writ issued by the circuit judge, and the writ of prohibition is therefore granted.

HOGAN *v.* BATEMAN.

Opinion delivered November 30, 1931.

[redacted]

Kent K. Jackson, for appellant.

Buzbee, Pugh & Harrison, for appellee.

MEHAFFY, J. The appellant, Clyde Hogan, Jr., begun work for the appellee, Bateman Contracting Company, which is a partnership composed of N. S. Bateman and Allen Bateman. The appellee was engaged in the construction of the White River bridge at Cotter, Arkansas. The appellant was 16 years of age. He begun work on the 27th day of May, 1930, and was injured on the 30th day of June, 1930. He alleges in his complaint that he was required and suffered to work seven days per week, ten hours per day every day, and some days ten and a half hours, and others eleven hours per day and more than fifty-four hours per week, contrary to law.

Appellant bases his right to recover on § 7091 of Crawford & Moses' Digest, which reads as follows: "No boy or girl under the age of 18 years shall be employed, permitted, or suffered to work in any occupation for more than six days in any week, or more than 54

hours in any week, nor more than 10 hours in any one day, or before the hour of six in the morning or after the hour of ten in the evening.

The undisputed proof shows that the appellant was 16 years of age; that he went to work for the appellee on the 27th day of May, 1930, working under a foreman named Williams, who has since died; that he worked at whatever they told him to do; part of his duty was to carry cement and help operate the mixer; that the first week beginning on the 27th day of May, he worked 70 hours; and that on some days he worked ten and a half hours, and on one day worked eleven hours; that the day he worked eleven hours he began work at seven in the morning, worked until 12:25, took five minutes off for dinner, and worked until six o'clock. His physical condition, when he entered the employment of appellee, was good; he had been examined so that he could go to the C. M. T. C., a training camp for boys.

He was injured about 10 or 11 o'clock on the 30th day of June, while lifting sacks of cement, weighing about 95 pounds. He was suffering with pains in his side, picked up the sack and threw it in, and, according to his testimony, something tore loose in his side. He started home, but was unable to go, and he was taken home in a car and put to bed. He suffered a great deal.

He was then taken to the hospital and treated by Dr. Rollins, who was the physician and surgeon for the appellee. He suffered great pain in the hospital, where he stayed for two or three days, and was then taken to Little Rock and operated on for hernia. He was in the hospital at Little Rock for about 18 or 19 days.

At the time of his injury he was earning $2.50 a day and was averaging 24 or 25 days a month. He was unable to do any labor for three or four months. He had been examined for a rupture prior to this time, was advised to wear a truss, but was told that he was not ruptured. This examination was in 1927.

It was admitted that at the time of the trial he was in a perfectly sound physical condition, and that he only claimed four months' disability.

He was injured on the 30th day of June, 1930, and had not worked on the 29th, 28th or 27th. The three days before the 27th, that is the 26th, 25th and 24th, he worked 10 hours a day. The evidence also shows that he did not work on Sunday, the 22nd.

Appellant, after his injury, when he was at the hospital, made a statement to Dr. Rollins. This statement was written out by Dr. Rollins, who then called in a notary public, had her to swear appellant to the statement. This statement was introduced in evidence, and the notary public testified that she was called in by Dr. Rollins, read the statement to appellant, and he signed it. The undisputed evidence shows that at the time he made the statement he was suffering excruciating pain, and he says that he simply said "yes" to what they asked him.

The trial court directed a verdict for appellee. Judgment was entered accordingly, and this appeal is prosecuted to reverse said judgment.

It is first contended by the appellant that the court erred in admitting the statement made by him to Dr. Rollins and the testimony of Miss Myrtle Shoemaker, the notary public.

The evidence of Dr. Rollins was clearly inadmissible under § 4149 of Crawford & Moses' Digest. He received his information while attending the appellant in a professional character, and of course he could not, over the objection, testify as to any information so received.

This court has said: "The purpose of § 3098 of Kirby's Digest is to cover the relation of doctor and patient with the cloak of confidence and thus to allow a greater freedom in their communications to each other in regard to matters touching the disease of the patient. Such statutes are enacted as a matter of public policy to prevent physicians from disclosing to the world the in-

firmities of their patients." *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554, 164 S. W. 720.

This court in the same case quoted with approval the decisions of other courts holding that a physician who was requested by the attending physician to be present could not testify, and that a physician's partner could not testify as to a communication made in his presence.

In the case at bar the physician, Dr. Rollins, wrote the statement in pencil and then called the notary public, had her to type it, and then in the presence of the physician read it to appellant and witnessed his signature. Her testimony was no more competent than that of the physician.

If a physician could call any third person and disclose to such person his information and thereby enable her to testify, the statute would be of no effect. The physician could always evade the statute in this way.

In the case at bar, however, in addition to this, the undisputed evidence shows that the appellant was suffering so much pain that he did not know what they were doing.

It has been repeatedly held that other physicians either partners or physicians called in consultation, and present when the statement was made, could not testify; that the communication in their presence was privileged under the statute, and that it would be an evasion of the statute to permit evidence of facts thus obtained. *Ætna Life Ins. Co.* v. *Deming,* 123 Ind. 384, 24 N. E. 86 and 375; *Green* v. *Town of Nebagamain,* 113 Wis. 508, 89 N. W. 520. See notes 16 L. R. A. (N. S.) 888.

The appellant contends that the court erred in directing a verdict for the appellee.

Persons are prohibited by the statute from employing children under 18 years of age in any occupation to work more than the hours prescribed by the statute. Section 7091, Crawford & Moses' Digest.

If a child under 18 is injured while employed in violation of statute, he may recover damages from his em-

ployer. Statutes like the one involved here are enacted for the purpose of protecting the lives and limbs of children by prohibiting their employment in any occupation to work more than certain hours, and, if one is injured while employed in violation of such statutes, he is entitled to recover.

The evidence, however, in the case at bar, conclusively shows that appellant was not injured while the statute was being violated and shows that the violation of the statute was in no way connected with the injury. It is true that the evidence shows that the first week appellant was employed, beginning May 27, 1930, the statute was violated, but there is no evidence tending to show that it was violated at any time thereafter. The evidence shows that the appellant was injured on the 30th of June. On the 29th, 28th and 27th of June he testified that he did not work at all; that on the 26th, 25th and 24th he did not work more than 10 hours, and did not work on Sunday.

There is therefore no evidence tending to show that the injury resulted from a violation of the statute or that it was in any way connected with the violation of the statute.

The court said in one case: "If the negligence, whether *per se* or otherwise, does not proximately cause the injury, there can be no recovery on account of it. This brings us to the question of whether there was any causal connection between the disobedience of the statute and the injury. In short, was there any intervening cause?" *Terry Dairy Co.* v. *Nalley,* 146 Ark. 448, 225 S. W. 887, 12 A. L. R. 1208.

If appellant had been injured while the statute was being violated, the violation of the statute by the employer would not only be negligence, but would be the proximate cause of the injury, but it can not be said that the violation of the statute three weeks prior to the injury had any connection with the injury, or that there was any causal connection between the disobedience of the statute and the injury.

It is true that appellant says that working overtime previous to the date of his injury weakened his condition, and the strain of lifting excessive weights caused him to become ruptured, but there is no evidence that his long hours of labor the first week weakened his condition in any way. If he had been working in violation of the statute up to near the time of his injury and there was any evidence tending to show that this violation of the statute had any connection with the injury, it would then be a question of fact for the jury, even though he was not at the time of his injury being required to work in violation of law. If he had been working over hours the three weeks preceding his injury, then the fact that he was injured on Monday morning when it could not be said he was working over hours that week, could not prevent his recovery.

There must, in order for the injured party to recover, be some evidence that the prohibited working was the proximate cause of the injury. *Birmingham News Co.* v. *Andrews,* 204 Ala. 649, 87 So. 168; *Terry Dairy Co.* v. *Nalley,* 146 Ark. 448, 225 S. W. 887, 12 A. L. R. 1208.

The violation of the statute does not appear to be the proximate cause of the injury, and the judgment is therefore affirmed.

HYATT *v.* WROTEN.

Opinion delivered November 30, 1931.

Utley & Hammock and *A. F. Barham*, for appellant.

James G. Costen and *J. T. Costen*, for appellee.

McHaney, J. The subject of this controversy is the will of John L. Wroten executed by him and properly attested on the first day of September, 1928. He died in November, 1929, at the age of 75. In this will he bequeathed $5 each to the appellees, three of whom are his children and one a grandchild. Of the remainder of his estate he devised and bequeathed one-fourth thereof to the board of trustees of the Arkansas Masonic Home and School and by the fourth paragraph thereof he gave the entire remainder of his estate "to my faithful housekeeper, Mrs. Lula Garner." He appointed W. W. Prewitt as the executor of his will, and directed that the executor sell all his real and personal property in the manner provided by law, and, after the payment of his debts, he should make the distribution of the estate in the manner above set out. The chief beneficiary, Lula Garner, died intestate in December, 1929, leaving surviving her the contestees, J. R. Hyatt and M. M. Hyatt, her brothers and only heirs at law. The will was duly probated, and thereafter the appellees appealed from the order of probate to the circuit court. Said Prewitt qualified as executor of the will of John L. Wroten, and A. S. Rogers as administrator of the estate of Lula Garner, deceased, and they, together with J. R. and M. M. Hyatt, constitute the contestees and appellants in this case. The contest in the circuit court was based upon two allegations of incapacity of the said John L. Wroten to make a will, first, that he was mentally incapable, and second that its execution was procured by the undue influence of Lula Garner on the testator. On the trial of

the case the court instructed the jury as to the form of the verdict as follows: "Gentlemen, the forms of verdict in this case, the first one reads, 'We, the jury, find for the will.' If you find the will was valid, you will sign that form of verdict. That is, if Wroten had mental capacity to make a will, and it was not obtained or procured by undue influence, you will sign the first form of verdict which reads, 'We the jury find for the will.' If you find that the will was obtained by undue influence or that Wroten didn't have the mental capacity to make it, then you will sign the next form of verdict which reads, 'We the jury find against the will.' That means the will is invalid, of no force. If you sign that form of verdict finding against the will, then I have got other interrogatories for you to answer, 'If you find against the will answer the following interrogatory: Was the execution procured by the undue influence of Lula Garner?' Answer, yes or no. That is, if you find against the will. If you find that the execution of the will was procured by the undue influence of Lula Garner answer this interrogatory: 'Was the whole will procured by her undue influence or was just that part of the will that was made in her favor procured by such undue influence?' If you sign the first verdict, there is no occasion to answer the interrogatories, but, if you find against the will, then there is occasion to answer the interrogatories. If you find that the whole will was not caused by her undue influence, but find that part of it here was caused by her undue influence you will set out that part you find was due to her undue influence, if any."

The jury, under the above instruction returned the following verdict: "We, the jury, find against the will. Hiram Cox, Foreman." In addition the jury answered the interrogatories submitted by the court as follows: "Was the execution procured by the undue influence of Lula Garner? Answer, yes."

"Was the whole will procured by her undue influence or was just that part of the will that was made in her

favor procured by such undue influence? Answer: Just that part of the will that was made in her favor."

Thereupon the court found from the verdict that it was the intention of the jury to sustain the will as to the bequest in favor of the Masonic Home and School, and against the will as to the bequest in favor of Lula Garner and instructed judgment accordingly. From this judgment both sides have appealed.

It is first strenuously insisted by counsel for appellants that there was no substantial evidence introduced upon the trial of the case to show either mental incapacity on the part of the testator or undue influence on the part of Lula Garner, and that therefore there was no substantial evidence to support the verdict upon which the judgment is based. We cannot agree with counsel in this contention. It appears, however, from the verdict that the jury did not find against the will because of the mental incapacity of the testator, but solely on the ground of the undue influence of Mrs. Garner. There were a great many witnesses who testified in this case *pro* and *con* on both questions, and, while the testimony of the undue influence of Mrs. Garner is meager, yet we are of the opinion that the evidence was sufficient to take the case to the jury on both questions, that of mental capacity and undue influence. Both questions were submitted to the jury on instructions that are not questioned, and the verdict of the jury must be sustained if there is any substantial testimony to support the finding of undue influence on the part of Mrs. Garner. In determining this question, we must view the evidence in the light most favorable in support of the verdict. The facts are, briefly stated, that the testator was 75 years old at the time of his death and Lula Garner was 40 or 50. She had been living with him as his housekeeper about five years at the time of his death, and it appears that she exercised a great influence over him—"was always willing to do anything she wanted him to do," as one witness put it. She went with him almost everywhere in his car, and, when she did not go with him, she would walk

out to the car and see him off. The evidence further discloses that there were three bedrooms in the house where they lived alone, one on one side of the hall and two on the other; that she occupied a bed in the room adjoining the testator's bedroom with a door opening from one to the other. She was seen to "wash his neck and ears and put his shoes on him," and he was seen with her in the house with nothing on but his shirt and underwear with her adjusting his neck tie. The testator was a married man, his wife being confined in the State Hospital for Nervous Diseases for many years prior to her death which happened prior to that of the testator. While no witness testified directly that the testator and Lula Garner were guilty of illicit relations, the facts and circumstances testified to were such as to justify the jury in inferring such relationship. We think the fact that they thus lived together for four or five years in the same house alone and with adjoining rooms with a door between, as said by this court in *Alford* v. *Johnson,* 103 Ark. 236, 146 S. W. 516, "was amply sufficient to justify the jury in finding that their relations were meretricious and adulterous." And, as was said in the same case: "There can be no doubt that a long continued relation of adulterous intercourse is a source of great mutual influence of each of the parties over the mind and person and property of the other. * * * When, therefore, undue influence is charged, the fact that the person accused of exercising it lived in illicit relations with the testator is properly admitted in evidence, to be considered by the jury, and from such testimony the jury may draw an inference of fact of such undue influence. And, when in addition to this there is any direct testimony adduced in evidence showing that such influence has been actually exercised, then it will be sufficient to justify the finding that the execution of the will was not a free and unrestrained act of the testator, and therefore that it was executed through undue influence sufficient to invalidate it. While it is true that a presumption of undue influence will not arise as a matter of law from the mere fact that the will is favorable

to one occupying illegal relations to the testator, yet it is an important fact to go to the jury as a circumstance to be considered by them along with other testimony in the case tending to prove the exercise of undue influence. There is a distinction between influence exerted through a lawful relation and that exercised by one occupying an unlawful and adulterous relation. Much less evidence will be required to establish undue influence on the part of one holding wrongful and meretricious relations with the testator." See cases cited.

The proof further shows that the testator was ever ready to do whatever she wanted done and to do things about the farm in the way she directed it to be done. Also that he was suffering from hardening of the arteries and high blood pressure which the physicians said tended to lower his mentality and break down his will power. Being subject to her influence in matters of minor importance when coupled with that wicked influence which arises from an illicit relation, we are forced to the conclusion, or at least the jury was justified in so finding, that he disinherited his own children and gave his property to his paramour, or a major portion of it, as a result of a baneful influence operating with great force on a diseased body and a waning will power. We think that if such relation existed between the testator and Lula Garner, as the jury has evidently found, when taken in connection with the bequest to her, this of itself is sufficient evidence of an undue influence exerted by her over the testator as to justify the verdict against the will. As said by the Supreme Court of Florida in *Newman* v. *Smith*, 77 Fla. 633, 82 Sou. 251: "We do not mean to say that a will should be disturbed merely because it is unreasonable and unjust, but where, as in the instant case, it does violence to the natural instincts of the heart, to the dictates of fatherly affection, to natural justice, to solemn promises, to moral duty, such unexplained inequality and unreasonableness is entitled to great influence in considering the question of testamentary capacity and undue influence."

Undue influence is generally difficult of direct proof. It is generally exercised in secret, not openly, and, like a snake crawling upon a rock, it leaves no track behind it, but its sinister and insidious effect must be determined from facts and circumstances surrounding the testator, his physical and mental condition as shown by the evidence, and the opportunity of the beneficiary of the influenced bequest to mold the mind of the testator to suit his or her purposes. We cannot therefore say that there was not substantial evidence to support the jury's verdict.

It is next urged that the verdict resulted from the admission of the incompetent testimony of two physicians who had treated the testator in the past as to what diseases he had and as to his mental condition. It is contended that such testimony was admitted in violation of § 4149, Crawford & Moses' Digest. This statute provides that physicians and nurses shall not be compelled to disclose information which they have acquired from a patient while attending him in a professional capacity. The physicians were not claiming the privilege and the heirs of the testator, the appellees, specifically waived the privilege by putting the physicians on the stand, and we think the court unduly limited their testimony under the rule announced in the recent case of *Schirmer* v. *Baldwin,* 182 Ark. 581, 32 S. W. (2d) 162, where we held that the heirs may waive the privilege extended to physicians and nurses. The remarks of counsel about which complaint was also made were made in connection with the testimony of the physicians, and, since we hold that the testimony was competent and that the court unduly limited it, the remarks of counsel become unimportant.

The only other question that has given us any concern is the question as to whether the verdict of the jury, both general and special, that is, the general verdict against the will, and the answers to the two interrogatories, constitutes a conclusive finding against the will as a whole, or whether it is a finding that the will is valid as to the Masonic Home and School and invalid as to

Lula Garner. It will be remembered that the court told the jury that, if they found against the will, "that means the will is invalid, of no force." Appellees have appealed on the ground that the effect of the verdict both general and special is that the whole will is invalid. The answer to the second interrogatory propounded by the court, however, contradicts that idea, and is a special finding of the jury that "just that part of the will that was made in her favor" was procured by undue influence, and that constituted a special finding of the jury to that effect. Under our Code of Civil Procedure, § 1304, Crawford & Moses' Digest, it is said: "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." The question then arises as to whether a will may be valid in part and invalid in part because of the undue influence of the beneficiary as to the invalid part. In Page on Wills, (2d ed.) § 195, page 341, it is said: "Undue influence avoids such part of the will as is caused thereby. If the whole will is the product of undue influence, it is thereby entirely avoided, including a clause of revocation, and a condition against the contest of the will by disappointed heirs. Fraud, which amounts to undue influence, vitiates a will like any other form of undue influence. If a part of the will is caused by undue influence, and such undue influence does not affect the remaining provisions of the will, the validity of the provisions which are not caused by such undue influence depends, in part, on whether it is possible to ascertain which portions are caused by the undue influence, and whether such portions, if ascertained, can be held to be invalid, and the rest can be given effect. If it is not practicable to ascertain what portions of the will were caused by undue influence and what were free from it, or if effect cannot be given to such provisions as are not caused by undue influence, without defeating the intention of the testator, the entire will is invalid." To the same effect see Schouler on Wills, (6th ed.) vol. 1, p. 400. There is no difficulty in this case in separating the valid portion from

the invalid portion as the testator directed his executor to sell his entire estate and then distribute the proceeds, one-fourth to the Masonic Home and School and three-fourths to Lula Garner. Therefore the bequest to the former will stand and the latter fail.

We therefore conclude that the court correctly construed the verdict of the jury and entered judgment accordingly, sustaining the bequest to the Masonic Home and School and invalidating the bequest to Lula Garner. Affirmed.

SMITH, MEHAFFY and BUTLER, JJ., dissent.

WILLIAMS *v.* HULSE.

Opinion delivered November 30, 1931.

J. V. Walker and *C. D. Atkinson,* for appellant.

Pearson & Pearson, for appellee.

MCHANEY, J. Appellants are the owners of a house and lot fronting 80 feet on East Lafayette Avenue in the city of Fayetteville, which they acquired October 2, 1928, and which they have since occupied as their home. Appellees are the owners of the adjoining lot to the east, on which is a duplex apartment occupied by tenants. In August, 1924, Gus Bridenthal, the then owner of appellant's house and lot, entered into a written agreement with appellees for the construction of a driveway from Lafayette Avenue to the rear of their properties so as to serve both properties. This driveway was constructed wholly at appellee's expense, but entirely on the lot now

owned by appellants. The agreement is as follows: "This contract and agreement, made and entered into at Fayetteville, Arkansas, this 28th day of August, 1924, by and between Gus Bridenthal, hereinafter known as the party of the first part, and Marcus Hulse, hereinafter known as the party of the second part, as follows, to-wit:

"For and in consideration of the sum of one dollar paid by the party of the second part to the party of the first part, the receipt of which is hereby acknowledged, and for other good and valuable consideration, the said party of the first part grants to the said party of the second part, his heirs and assigns, the use of a strip of ground off the east side of his property, located at 412 East Lafayette Avenue, Fayetteville, Arkansas, to be used as a joint driveway between the property of the party of the first part and the property of the party of the second part, located at 416 East Lafayette Avenue, in the city of Fayetteville, Arkansas.

"The party of the second part agrees to the joint use of said driveway, either by the party of the first part, or his heirs or assigns.

"It is agreed that the said joint driveway has been constructed at the expense of the party of the second part, as follows: A solid slab of concrete 6 x 7, extending from the inside of the curb, across the parking to the sidewalk; a 28.5 foot concrete retaining wall to protect the property of the party of the first part; 7 x 37 feet of concrete and 7 x 91 feet of gravel base on driveway; also 24 x 30 feet of gravel for a turn around, the latter being located on the property of the party of the second part, but for the joint use of the parties hereunto.

"This contract is made in good faith and executed in duplicate at Fayetteville, Arkansas, on the date first above written."

This agreement was not acknowledged, but was subscribed and sworn to, and was filed for record and recorded more than a year after appellants had purchased the property from Art Lewis, who acquired it under foreclosure of a mortgage from Bridenthal. The driveway was constructed so as to run straight north from

the street to appellant's garage, being of concrete a portion of the way and gravel the remainder, with gravel in front of the garage of appellees extending to the driveway covering an area sufficient to turn a car around and which was used by appellants and their grantors as well as appellees for such purpose. Both parties used the driveway and the turnway until a disagreement arose between them and the right to the use of the driveway by appellees and their tenants was disputed by appellants, whereupon the appellees placed the written agreement of record. Appellants shortly thereafter learned of this agreement for the first time and brought this action to quiet title as to the use of said driveway and to cancel the above mentioned contract as a cloud on their title. After hearing the evidence and viewing the subject of controversy, the court found no equity in appellants' complaint and dismissed it for want thereof.

We will assume, in the disposition of this appeal, that the above instrument was sufficient in form and substance to convey an easement and that it was subject to record. Still, it was not recorded for more than a year after appellants purchased their property, and it is conceded by appellees that constructive notice was lacking. It is contended by appellees, however, that appellants had actual notice, or that they had actual notice of such facts and circumstances as to put a person of ordinary prudence and business sagacity upon inquiry as to the true situation, and that they must be held to a knowledge thereof. We cannot agree with appellees in this contention. The rule is, as stated by this court in *Wilson* v. *Nugent,* 174 Ark. 1115, 299 S. W. 18, "that notice of facts and circumstances which would put a man of ordinary intelligence on inquiry is equivalent to knowledge of all the facts a reasonable inquiry would disclose, where there is a duty to make the inquiry." See also cases there cited. What are the facts and circumstances relied on to put appellants on inquiry? They inspected the property as prospective purchasers twice for about fifteen minutes each time before buying. They saw the

driveway. Knew it was on the east edge of the lot they were viewing and went directly north from the street to the garage thereon. Could have seen, but say they did not because they gave it no attention, the gravel turnway on appellees' lot. Appellees testified they told appellants about the arrangement for the driveway, but failed to say they did so before he bought. It is true that appellants permitted appellees and their tenants to use the driveway for a time after purchasing, but without knowledge of a claim of absolute right or of said contract, and this was a permissive use only. We do not think these facts sufficient to put appellants on inquiry, and the proof is lacking to show actual knowledge of the contract. Their grantor knew nothing about the contract between Briddenthal and appellees, and they testify they knew nothing about it and would not have bought had they been so advised. It is all due to appellee's negligence in failing to record their contract for an easement, if subject to record, and calls for an application of the rule that where one of two innocent persons must suffer a loss, it should fall upon him whose negligence caused it.

We are therefore of the opinion that the learned trial court erred in dismissing the complaint for want of equity. Decree reversed, and cause remanded with directions to grant the relief prayed.

KIRBY, J., dissents.

MILLER *v.* FEARIS.

Opinion delivered November 30, 1931.

Coulter & Coulter, for appellant.

Ragsdale & Matheney, for appellee.

BUTLER, J. The appeal in this case questions the sufficiency of the appeal from the probate court on the ground that it was not perfected within the time required by law. The appeal was granted by order of the probate court on March 2, 1927, and the transcript lodged with the clerk of the circuit court on January 30, 1928.

The appellant invokes § 2262 of Crawford & Moses' Digest in support of his contention, and argues that § 6525 of the Digest, regulating appeals from the justice court, is in the identical language of this section, and that it (§ 6525) has been construed by a number of our decisions to support the contention made that the appeal here was not perfected within the time prescribed by law. The two sections are in fact identical and read as follows: "All appeals allowed ten days before the first day of the term of the circuit court next after the appeal

allowed shall be determined at such term unless continued for cause." In construing that section regulating appeals from the justice court, this court has held in a number of decisions, beginning with the case of *Smith* v. *Allen,* 31 Ark. 268, cited by appellant here, that it is the duty of one appealing from the justice court to see that the transcript is lodged by the justice within the time prescribed by § 6225, and a failure to do this is ground for the court, acting within its discretion, to dismiss the appeal for failure to prosecute with due diligence. The failure to have the transcript filed, however, does not give the other party to the suit absolute right to have the case dismissed, but the court should hear the party in default to the end that he may excuse his delay if possible. *Hart* v. *Lequieu,* 110 Ark. 284, 161 S. W. 201.

The state of the record in this case does not disclose any facts from which it can be said that the refusal of the court to dismiss the appeal was an abuse of this discretion, and, inasmuch as the appeal was taken within twelve months from the judgment of the probate court, it was taken within time. Section 2258, Crawford & Moses' Digest.

This case arose upon the filing of a note of the appellant's intestate in the probate court, it having been first presented to the administratrix (appellant) and disallowed by her. The probate court disallowed the claim, and on appeal to the circuit court, after having moved to dismiss the appeal for the reasons heretofore given, moved to dismiss the case on the ground that the claim was not authenticated as required by law. This motion was overruled, and the cause proceeded to trial before a jury, and judgment was rendered in favor of the claimant on the instruction of the court. The refusal of the court to nonsuit the claim because of the insufficiency of the affidavit is the principal assignment of error and the one that has given us most concern. After a careful examination of all of the authorities cited by the appellant, we have concluded that the affidavit was a substantial compliance with the statute, and that the court did not err in its refusal to nonsuit the claim. The affidavit filed with the claim is as follows:

"I, M. P. Matheney, as attorney for the Fearis Separator Company, do solemnly swear that the above and foregoing demand against the estate of W. H. Murray, deceased, is just and correct, and that nothing has been paid or delivered toward the satisfaction of said demand, except what is credited thereon; that the sum of one thousand ($1,000) dollars, with interest from 12/13/1925 is justly due. M. P. Matheney, attorney for J. J. Fearis and Fearis Separator Company. Subscribed and sworn to before me this 27th day of February, A. D. 1926. J. G. Ragsdale, Notary Public."

The statute directing the manner in which claims may be authenticated is found in § 101, Crawford & Moses' Digest, and reads as follows: "And the claimant shall also append to his demand an affidavit of its justice, which may be made by himself, or an agent, attorney or other person. If made by the claimant, it shall state that nothing has been paid or delivered toward the satisfaction of the demand, except what is credited thereon, and that the sum demanded, naming it, is justly due. If made by any other person, it shall state that the affiant is acquainted with the facts sworn to, or that he had made diligent inquiry and examination, and that he verily believes nothing has been paid or delivered toward the satisfaction of the demand, except the amount credited thereon, and that the sum demanded is justly due."

This court has held on numerous occasions that the making of an affidavit is a jurisdictional requirement, but that it need not be in the exact language of the statute, but will be sufficient if there is a substantial compliance with the statutory requirement. *Ross* v. *Hine,* 48 Ark. 304, 3 S. W. 190; *Eddy* v. *Loyd,* 90 Ark. 340, 119 S. W. 264; *Wilkerson* v. *Eads,* 97 Ark. 296, 133 S. W. 1039. It will be observed that the affidavit was not made by the claimant in person, but by his attorney, and it is insisted that the affidavit is insufficient because is does not state that the affiant "is acquainted with the facts sworn to or that he has made diligent inquiry and examination, and

that he verily believes that nothing has been paid or delivered toward the satisfaction of demand except the amount credited thereon." This omission is the identical language of that part of § 101, *supra,* prescribing upon what terms a person other than the claimant may make the affidavit. Among the cases cited by the appellant, and the one which most nearly supports his contention, is that of *Lanigan* v. *North,* 69 Ark. 62, 63 S. W. 62. In the opinion in that case the affidavit is not set out, the court contenting itself with the following statement: "The affidavit attached to the claim of the Union Lime Company, a partnership, was made by F. O. Wyman, who does not show that he was a member of the firm or that he was acquainted with the facts sworn to." It cannot be determined from the opinion whether or not the affidavit contained the positive statement "that nothing has been paid or delivered toward the satisfaction of the demand except what is credited thereon, and that the sum demanded is justly due." The statute providing for the affidavit contemplated that it would not always be convenient or possible for the affidavit to be made by the claimant himself, and that as another might not certainly know the facts, provision was made that, where he made diligent inquiry, he might state that he verily believed nothing had been paid except what appeared credited thereon, and that the sum demanded was justly due. When one has certain knowledge, then it is unnecessary to make the allegation of diligent inquiry and of belief; "but if the affiant possesses positive, definite and certain information of the truth of the matter alleged, it would be a work of supererrogation to require him to make inquiry about a fact already known, and we think the act set out above was not intended to deprive the affiant of the right to make an affidavit, the truth of which rests upon his own knowledge." *Willard* v. *Willard,* 134 Ark. 197, quoting from page 201, 203 S. W. 1019, 1020.

In the affidavit before us, knowledge of the facts is stated in unequivocal and positive terms as a truth which appellant knew, and not something which he believed to be true. In the case of *Breckenridge* v. *Weber Dry*

Goods Co., 167 Ark. 429, 268 S. W. 593, the court had before it a claim to which the following affidavit was attached: "H. R. Warden, being first duly sworn, on oath declares and says that he is a resident of the county and State aforesaid; that he is bookkeeper for the firm of Weber-Walters Dry Goods Company; that the above account is true and just and unpaid, after allowing all due credits and set-offs." In that case appellant contended among other things that the affidavit was not a sufficient compliance with § 101, *supra*. In passing upon that question the court said: "We think the positive statement of H. R. Warden, the cashier of appellee, to the effect 'that the above account is true and just and unpaid, after allowing all due credits and set-offs', is a substantial compliance with the statute requiring him to state that he has made diligent inquiry and examination and he does verily believe that nothing has been paid except the amount credited and that the sum demanded is justly due."

It seems that there was no defense offered by the administratrix to the claim on its merit, but that she contented herself with a bare technical defense which courts are not inclined to favor and which are not allowed except in such cases as from which there is no escape. The affidavit in this case, while not a literal copy of the language of the statute, is a substantial compliance with its terms. The judgment of the trial court is therefore correct, and it is affirmed.

SCHOOL DISTRICT NO. 18 OF JACKSON COUNTY *v.* GRUBBS SPECIAL SCHOOL DISTRICT.

Opinion delivered November 30, 1931.

Jones & Wharton, for appellant.

C. M. Erwin, for appellee.

BUTLER, J. This case is here on appeal from a judgment of the circuit court affirming the action of the county board of education of Jackson County, by which School District No. 18 and a part of School District No. 27 were consolidated with the Grubbs Special School District. The remonstrants, who are the appellants here, urged for a reversal of the case errors of the trial court in four particulars.

It is first insisted that the notice of the proposed consolidation, having been signed by only four petitioners, was not a compliance with the statute regulating the manner in which notices should be given, in that the notice should have been signed by all of the petitioners. That part of the statute which the remonstrants say justifies their contention is as follows: "Notice shall be given by the parties proposing the change." Section 8821 of Crawford & Moses' Digest.

In the recent case of *Nathan Special School District No. 4* v. *Bullock Springs Special School District No. 36,* 183 Ark. 706, 38 S. W. (2d) 19, we held that it was unnecessary for each signer of the petition to also sign a notice.

In that case the notice was signed by only four of the petitioners, as in the instant case, and it was contended there, as here, that the notice, having been signed by four only of the petitioners was insufficient. There we said: "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 remonstrants urged as error the ruling of the trial court (a) that the signers were presumed to be qualified electors, and the burden was upon the remonstrants to show otherwise; (b) in permitting the "enumeration records" of the districts affected to be identified by the county superintendent and introduced for the purpose of showing the ages of certain signers of the petition whose names did not appear on the poll tax list; (c) in permitting a witness to testify as to the qualifications of two signers whose names did not appear on the poll tax list.

If it be conceded (which we deem it unnecessary to decide) that the court erred in its aforesaid ruling, no prejudice resulted. The court went very thoroughly into the question of whether or not a majority of the electors signed the petition. From the evidence considered by the court, it unquestionably appears, and the court found, that there were 194 qualified electors within the territory affected, and that a majority of the names of the signers appeared upon the official list of poll taxpayers, so that, if the testimony relative to those who became twenty-one years of age after the time for assessment had expired and that relative to those who had moved into the district and paid their poll taxes elsewhere in the State were improperly admitted, the petition would still have been signed by more than a majority of those whose qualifications were indubitably proved.

[redacted]

It is contended that the proceeding of the board was void because a member of the county board of education, Mr. Grant, who acted as chairman at the hearing of the petition, was one of its signers. To sustain this view, art. 7, § 20, of the Constitution is invoked, which is as follows: "No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity within such degree as may be prescribed by law, or in which he may have been of counsel or presided in any inferior court." The legal definition of "judge" is one who presides and administers the law in a court of justice. The word "justice" is one of broader signification and is a term used in the United States and England to designate judicial officers and magistrates of every grade. From a consideration of the language of § 20, in connection with the entire article, it is apparent that the words "judge" and "justice" were used in their legal sense and referred only to the judicial officers named in article 7.

It affirmatively appears from the record that Mr. Grant's attendance at the meeting of the board was not necessary to form a quorum of the county board of education which the court judicially knows consists of five members, and it appears from his testimony, which was all the testimony taken on that question, that Grant did not vote. He testified that it was not necessary to vote. He, however, acted as chairman at that meeting. The fact that he was a member of the county board of education did not preclude his signing the petition. In *Carroll* v. *Lemon Special School District,* 175 Ark. 274, 299 S. W. 11, where the sufficiency of a petition was challenged because it contained the name of one who was a member of the board of directors, in passing on that question, the court said: "There is nothing in the statute that prohibits a director from signing the petition if he is a patron, and we hold he may do so." So, in the case at bar, there is no statutory inhibition against a member of the school board signing a petition and no more reason

why he may not do so than a member of the board of directors. Although a member of the county board may sometimes be called upon to act in a *quasi* judicial capacity, he is neither a judge nor justice within the meaning of art. 7, § 20, *supra,* and the case of *Ferrell* v. *Keel,* 103 Ark. 96, 146 S. W. 494, cited by counsel for appellants, has no application here.

■ It is lastly the contention of the remonstrants, and one which counsel earnestly urge, that the appellee, Grubbs Special School District, is estopped to avail itself of the consolidation because of a contract entered into on June 3, 1911, by its president on the one part and two members of the school board of district No. 18 on the other, by which it was agreed that, for a consideration moving to it, the Grubbs Special School District should not in the future seek to acquire any of the territory of school district No. 18, or extend its boundaries so as to impair the area of the latter. This contention is not tenable for a number of reasons: first, it was not the Grubbs Special School District that was proceeding in this matter, but the qualified electors of the territory affected, which might have included not only electors residing in Grubbs Special School District, but also in district No. 18 and a part of district No. 27 as well; second, it does not appear that the president of Grubbs Special School District or the two members of the board of directors of district No. 18 were authorized by their respective school boards to enter into the contract; third, it also may be said that boards of directors can only enter into agreements which bind their several districts and the inhabitants thereof by reason of express statutory authority. *First Nat. Bank, etc.,* v. *Whisenhunt,* 94 Ark. 583, 127 S. W. 968. The authority of boards of directors existing June 3, 1911, the date of the alleged contract, is contained in § 8942 of the Digest, and that authority cannot be extended in any view of the case so as to empower boards to enter into a contract like the one before us. *Hatfield* v. *School Dist.,* 178 Ark. 260, 10 S. W. (2d) 374; *Rural Special School Dist.* v. *First Nat. Bank,* 173 Ark. 604, 292 S. W. 1012. There might have been reasons

for making the contract at the date of its execution, but, regardless of what such reasons may have been, a contract of that nature cannot stand, for to so say would be to put it beyond the power of the Legislature by any means to alter the territorial limits or boundaries of the district, regardless of new conditions which might arise making a change expedient. Therefore, if the parties executing the contract had been authorized to do so, their act was, and is, void.

Learned counsel for the remonstrants have cited a number of cases, both of this and other courts, holding that school districts, as *quasi* public corporations, are empowered to acquire and dispose of real property and to enter into contracts for the benefit of their respective districts, and that, where contracts are made by persons not authorized to do so, or which are voidable for some informality, the districts are estopped from contesting their validity where they had accepted and received the benefits arising therefrom. All the contracts with which those cases dealt, however, were such as the boards had power to make, but which have no application where the power in the first instance is lacking, as in the contract now under consideration. *Ark. Nat. Bank* v. *School District,* 152 Ark. 507, 238 S. W. 630.

In the brief for the remonstrants, no point is made that the evidence shows an abuse of discretion of the county board of education in ordering the consolidation. It was in testimony that the consolidation would be for the best interests of the children within the territory affected, and the county board so found. In reviewing this finding, the circuit court found that the evidence justified the finding of the board.

After a careful examination of the testimony and a consideration of the questions raised by the appellants, we conclude that there was no error committed by the trial court. Its judgment is correct, and it is therefore affirmed.

DENT *v.* ADKISSON.

Opinion delivered November 30, 1931.

George F. Hartje and *Patterson & Patterson,* for appellant.

R. W. Robins, for appellee.

BUTLER, J. The appellants, R. E. Dent and wife, on December 30, 1927, were the owners of a plantation in Faulkner and Pulaski counties containing approximately 4,200 acres, more than half being fertile lands situated in the Arkansas River bottoms, with a total of approximately 3,000 acres under cultivation upon which was a ginnery and other improvements. The appellants owned, in addition to the plantation, 41 mules, 2 head of horses, 31 head of grown cattle, 31 calves, 57 head of hogs, and farming machinery necessary for the cultivation of the plantation. On the date mentioned, they executed two promissory notes to the appellee, one for $10,000 due October 1, 1928, and the other for $60,000 due December 30, 1928. To secure these notes and such further advances of money as the appellee might make to them, they executed a real estate mortgage on their plantation and also a chattel mortgage covering the property above

referred to, together with the crops to be grown during the year 1928.

On January 22, 1929, the appellee, G. W. Adkisson, brought suit to foreclose these mortgages, and on the 26th of January following made application for a receiver to take charge of the property. Thereupon W. W. Bishop was appointed as receiver, who, on February 1, 1929, with the approval of the court, delivered all the said property into the possession of the appellee. Of the original amount loaned and for the moneys advanced during the year 1928 there remained a balance unpaid of $56,473.94, for which sum judgment was rendered and a decree of foreclosure entered on February 13, 1929, and an order for the sale of the property embraced in the mortgages. The commissioner appointed by the court to make the sale advertised the property for sale on the 12th of September. On the 11th of September the appellants paid to the appellee $10,000, in consideration of which payment the sale was extended to the 12th day of December following. On December 12th the appellant paid the appellee the sum of $5,000, and the sale was extended to March 14, 1930. On that date $5,000 more was paid with an extension of the sale to April 14th, on which date another $5,000 was paid by the appellants and an extension of sale given. On September 3, 1930, the court made an order further extending the sale of the property until November 3, 1930, at which time the appellants paid to the appellee a further sum of $5,000. In other words, the date of sale was postponed from time to time in consideration of cash payments, the total of which amounted to $30,000 from September 11, 1929, to September 3, 1930. The rents collected by the appellee during and for the years 1929 and 1930, not all being accounted for on October 21, 1930, the appellants waived claim for the balance of these rents, and entered into a written agreement with the appellee by which it was agreed that no further postponement of the sale would be asked, and that at the sale the appellee should bid an amount equal to the balance due in his favor, and that the hearing of the report of sale be postponed until

December 15th, at which time confirmation of sale would be made unless the indebtedness should on or before that date be paid. The agreement concluded as follows: "In event the defendants shall, on or before December 15, 1930, pay to the plaintiff the amount that should be then due on the indebtedness, including interest up to that date, and costs, mentioned in and covered by the decree in this case, then plaintiff will join with the defendants in asking the court to refuse to confirm the said sale, or, if the defendants prefer, and shall so direct the plaintiff in writing, upon the payment to the plaintiff of the amount which should then be due on said indebtedness, including interest up to date and costs, the plaintiff will assign and transfer without recourse from him the decree and judgment in this case in his favor to such person or corporation as the defendants may direct in writing."

For some reason no action was taken by the court on December 15th, but on December 29th report of sale was made showing that the property had been purchased by the appellee for the balance due him in the sum of $39,659.01, and the report came up for confirmation, when the appellant filed a petition, which, omitting formal parts, is as follows:

"Come the defendants in the above-entitled cause and respectfully represent to the court: That on the day of....., 1930, they consented that the decree obtained in the above-entitled cause should be executed by the commissioner by selling the property mentioned therein; that their consent was obtained and given by the representation of the said plaintiff to said defendants that, if they procured the money due him before the confirmation of the sale, that he would satisfy said decree; that at the time these defendants gave their consent to a sale of the property they told the plaintiff, G. W. Adkisson, that they had made arrangements with the City National Bank of Fort Smith, Arkansas, whereby said bank would make the loan if the tenants to whom he had rented said place would make and execute a surety bond for the payment of the rents for the year 1931; that these defendants pro-

cured the agreement of the tenants to execute a surety bond for the payment of the rents, and one of them had signed said bond and the other was on his way to Lamar, Arkansas, to sign said bond when the plaintiff got in touch with him and made false and fraudulent representations to said tenant, and with promises to rent said place to said tenant at a cheaper price, caused said tenant to refuse to sign said surety bond; that said representations so made to the said tenant of the defendant was made for the purpose of defeating defendant's loan on said place and for the purpose of getting the place of the defendants at a very low and unfair price. That these defendants have already paid said plaintiff more than forty thousand dollars; that he has collected the rents from said place for the past two years and has failed to account for same, and that said plaintiff is doing everything possible to defeat the rights of the defendants in paying off said amount due. That the defendants have the original lease and surety bond signed by one of the party's tenants and attaches the lease and surety bond hereto as Exhibits A and B, respectively.

"That these defendants would have had said money to have tendered into court in full and complete settlement of the decree rendered in the above-entitled cause, had it not been for the false and fraudulent representations made by the plaintiff to the prospective tenant of the defendants, and had said plaintiff not connived with the tenant of the defendants, whereby he would rent said lands involved in this suit at a much cheaper and lower price, and had said plaintiff not procured the tenant of these defendants not to deal with said defendants and to wait until he had his deed confirmed and that he would rent to him cheaper; that, if the defendants are given a reasonable length of time from this date to procure a loan on said property, that the defendants can and will procure a loan on said property and pay the plaintiff all that is due him, including interest at the rate of ten per centum per annum; that these defendants were hindered in procuring the loan within the time given them by the

court heretofore for the purpose of redemption of said property by the false and fraudulent representations of the plaintiff and by said plaintiff conniving with the tenant of the defendants for the purpose of getting their said lands at a low and cheap price, and that said lands are easily worth more than four times the amount that is now due plaintiff; that, if plaintiff had not interfered with defendants' business, as above mentioned, that these defendants would have had the money due plaintiff at this time, and the above matter settled and fully paid off, including the amount due plaintiff with interest and all court costs of the suit."

A demurrer was filed to this petition which was sustained by the court, and an order to that effect made and entered. In the order confirming the sale, reference is again made to the filing of the petition by the appellant for postponement and to the demurrer interposed and the overruling of it. After reciting the report of the commissioner, the order of confirmation concludes as follows: "And said report coming on to be heard is submitted to the court along with a written agreement entered into between the parties on October 21, 1930, and along with the proof as to notices, etc., and, being well and sufficiently advised, it is by the court considered, ordered and adjudged that said report of sale be, and the same is hereby, approved, and that said sale be, and the same is, hereby in all things approved and confirmed."

From the order sustaining the demurrer, this appeal is prosecuted, and the appellants here insist that, as the demurrer for the purpose of the hearing admitted the allegations of the petition, the court erred in sustaining it for the reason that the facts alleged showed that they were prevented from carrying out their contract of October 21, 1930, because of the fraudulent practices of the appellee.

The appellee takes the position that, even if the allegations of the petition are to be taken as true, this would not entitle appellants to the relief sought, on the theory

that, as there had been a judicial sale of the lands, it ought not to be disturbed in the absence of a showing, in addition to the inadequacy of the purchase price, that there was fraud or misconduct which would affect the validity of the sale; and cites the cases of *George* v. *Norman,* 77 Ark. 216, 91 S. W. 557; *Johnson* v. *Baum,* 158 Ark. 441, 250 S. W. 354; and *Doyle* v. *Maxwell,* 155 Ark. 477, 244 S. W. 732. The principles announced in those cases have become the settled law in this State, and it is argued that application of those principles to the case at bar defeats the relief sought and justifies the chancellor's action because there was no fraud, misconduct or irregularity charged as to the conduct of the sale. The answer to this contention is that the appellants do not seek relief because of any irregularity in the sale, but for a fraud practiced by the appellee which prevented them from carrying out the agreement of October 21.

It is next insisted that the appellants may have no relief here because the order of confirmation recites that proof was taken, and, as the appellants have failed to incorporate this testimony in the record, the conclusive presumption must be indulged that the testimony was sufficient to authorize the order of the lower court. It is not to be doubted that on any issue made in the trial court, where testimony is taken and not preserved, the conclusive presumption arises that the evidence was sufficient to sustain the finding and decree of the court. *Price* v. *So. Lbr. Co.,* 98 Ark. 366, 135 S. W. 908; *Dierks Lbr. & Coal Co.* v. *Cunningham,* 81 Ark. 427, 99 S. W. 693; *Remmel* v. *Collier,* 93 Ark. 394, 130 S. W. 167. The appellants, however, have not challenged the regularity of the sale, and the order does not indicate that any proof was heard except that relating to the notice and other matters relative to the sale. No fair interpretation can be placed upon the language of the order of confirmation which would justify the inference that testimony was heard regarding the truth or falsity of the allegations contained in the petition. For the purpose of the hearing on the demurrer, these were admitted to be true, and all that the

record justifies us in concluding is that the chancellor heard no testimony, but, treating the allegations as true, held them insufficient to show such conduct on the part of the appellee as would justify the relief asked.

It remains, then, for us to inquire whether or not any facts were specifically averred which would constitute fraud, and, if so, if it can be said that the fraud practiced worked such injury to the appellants as would entitle them to the relief prayed.

What is, or is not, actionable fraud depends largely upon the circumstances of each particular case. Fraud is protean in its aspect and assumes many forms which are often difficult to distinguish and to point out with exactitude wherein they work harm. It may be well that no exact definition of fraud can be formulated, for, if so, those disposed to take advantage of the necessitous or confiding could use the definition advantageously to further their dishonest intentions. For, as is said by Mr. Parsons, quoted with approval in *Winters* v. *Bandell,* 30 Ark. 362: "It is the very nature and essence of fraud to elude all laws and violate them in fact without appearing to break them in form, and if there were a technical definition of fraud, and everything must come within the scope of its words before the law could deal with it as fraud, the very definition would give to the crafty just what they wanted, for it would tell precisely how to avoid the grasp of the law." It is evident that the property mortgaged exceeded many times in value the amount of the debt it secured. It is also apparent that the appellee was by no means an indulgent creditor, for within a few weeks after the debt became due, although it had been reduced materially, he brought his action to foreclose the mortgage. Forbearance is not given, but his indulgence, purchased by payment within a space of shortly more than a year of sums aggregating $30,000, which reduced the indebtedness approximately one-half. Having been able to raise these large sums by which the debt was thus reduced, it is not to be questioned that, when appellants made the agreement of October 21, 1930, there was a

reasonable certainty in their minds that they would be able to secure and pay off the remainder of the debt. It can be scarcely imagined that, had the appellants appealed to the chancellor upon a showing of the large payments made, he would not have given them a reasonable time to raise the balance due, and doubtless a much greater length of time than that which was asked and granted under the agreement of October 21st. Treating the allegations of their petition as true, the appellants had what they believed the means by which the debt could be paid in time for them to repossess the plantation and make arranagements for its operation through another year; they had the assurance of one of the large banks of the State that, if they could secure tenants for a three-year period with the rent of the first year guaranteed, the money would be advanced to them. They confided their plans to the appellee, and he deliberately took a sure means to prevent them from raising the money and redeeming the property. He learned who the tenants were and the annual sum they were to give for the rent of the property, and then went to these tenants, knowing the need and the plans of the appellants, and that it would be too late for them to devise another plan by which the money could be raised by the date agreed upon, and while the agreement between the appellants and the tenants was in the course of consummation, and offered the tenants the plantation for a lesser sum. Of course, appellee knew, if the tenants accepted his offer, what the result would be to the appellants, and it must be inferred that he intended such result to occur. It was an act of craft and unfairness which should have no countenance in the court. While he was under no legal obligation to aid the appellants, he was certainly bound by every sentiment of honor not to interfere with the consummation of the plans which they had confided to him. The inadequacy of the price bid by the appellee at the mortgage sale is not complained of, nevertheless the reason for this is apparent, as the contract by which he was to bid that amount was

with the understanding that it was to be repaid to him. This agreement lulled the appellants into security, and it was not to their disadvantage that such price be inadequate. The sum bid, however, should be considered, and this, together with the alleged conduct of the appellee, is sufficient, if it be established by proof, to warrant a court of conscience in setting aside the sale so that a reasonable time might be given the appellants to discharge their debt, or at least an opportunity that the lands might bring more nearly their value. *Union & Planters' B. & T. Co.* v. *Pope,* 176 Ark. 1023, 5 S. W. (2d) 330.

We have been referred to no case where the facts resemble the facts in this case, but we are of the opinion that an application of the general doctrine of fraud supports the conclusion reached. As we have said, because of the multiplicity of forms which fraud assumes, whether or not it exists must be determined from all the surrounding circumstances of each case as it arises. *Turner* v. *Huggins,* 14 Ark. 21; *White* v. *Smith,* 63 Ark. 513, 39 S. W. 555; *Bugg* v. *Wertheimer-Swartz Shoe Co.,* 64 Ark. 121, 40 S. W. 134; *Cross* v. *Bouck,* 175 Calif. 253, 165 Pac. 702; *Mudsill Min. Co.* v. *Watrous,* 61 Fed. 163; *Bellevue State Bank* v. *Coffin,* 22 Ida. 210, 125 Pac. 876; *Kronfield* v. *Missal,* 87 Conn. 491, 89 Atl. 95.

Our conclusion is that the court erred in sustaining the demurrer and in confirming the sale. The decree is therefore reversed, and the cause remanded with directions to set aside the order of confirmation and to overrule the demurrer to the petition, and for further proceedings, according to the principles of equity, and not inconsistent with this opinion.

PUBLIC UTILITIES CORPORATION OF ARKANSAS *v.* CORDELL.

Opinion delivered December 7, 1931.

Mahony & Yocum, for appellant.

McNalley & Sellers, for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted that the court erred in admitting as a part of *res gestae* the testimony of Mrs. Arthur Lang to the effect that she got to the home of Albert Lang and asked him how the accident occurred, and he replied that he struck a match to light a cigarette in the bathroom and this caused the explosion. The record shows that Albert Lang was very severely burned. One witness testified that his hair and eyelids, his face, his arms, and his hands were burned. He was in severe pain and died as a result of his injuries. The skin was blown off of his hands, and he was mangled and burned all over. Under these circumstances, we think the testimony of the witness was admissible as part of *res gestae.*

No hard and fast rule on the subject can be laid down, and each case, in the very nature of things, must depend upon the accompanying facts. Various elements for consideration must be looked into. The declaration need not be strictly coincident with the act which caused the injury, but it must stand in immediate casual relation to that act and be a part of it. The declaration must be so near in point of time as to grow out of and explain the character and quality of the main fact, and must be so closely connected with it as to practically constitute but one entire transaction. The evidence offered as part of *res gestae* must not have the earmarks of a device, or an afterthought, or be merely a narrative of a past transaction. *Clinton* v. *Estes,* 20 Ark. 225; *Carr* v. *State,* 43 Ark. 104; *Little Rock, Mississippi River & Texas Ry. Co.* v. *Leverett,* 48 Ark. 333, 13 S. W. 50, 3 Am. St. Rep.

230; *Little Rock Traction & Electric Co.* v. *Nelson,* 66 Ark. 494, 52 S. W. 7; *Itzkowitz* v. *P. H. Ruebel & Co.,* 158 Ark. 454, 250 S. W. 535, and *Kansas City So. Ry. Co.* v. *Morris,* 80 Ark. 528, 98 S. W. 363.

Many other cases on the subject from this court might be cited, but the rule is so well settled that the only difficulty is in the correctness of its application to a given state of facts. A good statement of the rule may be found in the case of *Kansas City Sou. Ry. Co.* v. *Morris,* 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618, in the following language:

"Was the statement made by the deceased to Daniels admissible? It was made within a few feet of where he had been mortally injured, and four or five minutes after the accident occurred, and while the excitement caused by the injury was unabated and in all probability controlled and dominated his mind. The injury was overwhelming and appalling, and sufficient at the time to drive from his mind all hope of surviving many hours —to bring him in the presence of immediate dissolution —and to drive from his mind any intention or desire to manufacture evidence for his benefit, and to force him to speak the truth, and to make his statement an emanation of the accident, 'so connected with the cause of his injuries as to preclude any idea that it was the product of calculated policy'."

As we have just seen, Albert Lang was badly burned, and shortly afterwards died as a result of his injuries. His first conscious act after the unfortunate accident was his remark to his sister-in-law, within five minutes after the explosion occurred. When we consider the severity of his burns and the condition under which he answered the question, it is practically certain that there was no time or thought of manufacturing evidence, nor was there any element of a device or afterthought. His sister-in-law ran to the scene of the accident when she heard the explosion and immediately called an ambulance. In an excited manner, she asked him how the accident occurred, and it is reasonably certain that his answer

was made with the excited feeling which had lasted from the moment of the accident until the question was asked him. Therefore, we do not consider this assignment of error to be well taken.

It is next urged that the court erred in admitting the testimony of the witness, Escoubas, to the effect that there was a reduction of the gas pressure on the morning of the accident at his place of business because his place of business was situated in the fire zone or low-pressure district, and the house was situated in the residential district, which had a different degree of pressure. According to the evidence of the manager of the defendant company, who was a witness for the plaintiff, there might have been some relation between the pressure in the two districts because both came from the intermediate lines. At any rate, the testimony was competent for what the jury might think it to be worth as tending to show that there was a reduced pressure of the gas throughout the city on the morning of the accident.

It is also earnestly insisted by counsel for the defendant that the evidence is not legally sufficient to support the verdict; but, while this may be regarded as a close question of fact, we think the evidence for the plaintiff, when considered in its most favorable light, was sufficient to show negligence on the part of the defendant. In the first place, it can make no difference in the defendant's liability for negligence that it purchased the gas from another company. The reason is that it must answer for its own negligence in the distribution of the gas to the same extent as though it had produced the gas from its own fields. *Martin* v. *Camden Gas Co.*, 179 Ark. 481, 17 S. W. (2d) 309. In the same case, following our earlier decisions on the question, it was held that a gas company must use a degree of care commensurate with the danger which it is its duty to avoid, and, if it fails to exercise such degree of care and injuries result from such negligence, it is liable. To the same effect see *Little Rock Gas & Fuel Co.* v. *Coppedge*, 116 Ark. 334, 172 S. W. 885.

According to the evidence adduced by the plaintiff, the jury might have found a state of facts as follows:

The morning of the 20th of December, 1929, was the coldest in the year and caused a reduction in the pressure of gas throughout the city of El Dorado because more gas was required to meet the demands of the consumer. Mrs. Lang as usual got up on the morning in question and lit the fire in the bathroom and turned it down so that the room would be ready for her son and a roomer, who both worked at night and were accustomed to get up along about noon. She went along about her business and heard nothing further until the explosion. It seems from the statement of Albert Lang that he went to the bathroom and struck a match to light a cigarette and this caused the explosion. The jury might have inferred that, because of the low pressure of the gas, about which the occupants of the house were not notified, the fire in the bathroom went out; and, when the gas pressure was increased without notifying the occupants, it escaped into the room and filled it so that when the lighted match came in contact with the gas, the explosion occurred. It is suggested that the remaining stoves in the house continued to burn, but this was explained by one of the witnesses for the plaintiff, who said that they would continue to do so because the flame had not been turned down in them. It is true that, according to the evidence for the defendant, the escaping gas was caused by a loose or defective connection in the stove, for which the plaintiff was responsible. But it is fairly inferable from the evidence for the plaintiff that the flame went out in the bathroom because of the reduced pressure of the gas, and that it was afterwards turned on by the gas company without notifying the occupants of the house so that, when Albert Lang went into the bathroom and lit a match the explosion naturally resulted.

Therefore the judgment will be affirmed.

PURVIS *v.* WALLS.

Opinion delivered December 7, 1931.

June P. Wooten, for appellant.

Trieber & Lasley, for appellee.

SMITH, J. The United States Government issued to Tim Walls while he was a soldier in the army two life insurance policies, each for five thousand dollars. Amy Walls, the wife of the insured, was the beneficiary in one policy and Ed Walls, a brother of the insured, was the beneficiary in the other. The insured died, and on February 26, 1928, his beneficiaries employed appellant, a practicing attorney, to render such legal services as were deemed necessary to aid them in presenting and prosecuting their claims for the collection of the policies in which they were named as beneficiaries, and it was agreed that appellant would receive therefor only such com-

pensation as is provided by the laws of the United States for such services.

Pursuant to this employment appellant made investigations, conducted correspondence, and negotiated with the Veterans' Bureau in the attempt to compromise and settle the claims. These negotiations terminated in a disagreement, and appellant was preparing to bring suits for the face of the policies and certain disability benefits in addition which had accrued before the death of the insured, but before the suits were brought the beneficiaries in each of the policies made full and final settlement with the bureau and surrendered the policies. The settlements were made for less than the face of the policies and without disability benefits.

The proceeds of these settlements were deposited in a bank in Little Rock, and were garnished by appellant in this suit which he brought to recover damages for the breach of his contract of employment. Upon a final hearing, the garnishment was discharged, and damages were assessed in a sum equaling the interest on the money during the time it had been impounded, and appellant's suit was dismissed.

Before the institution of this suit appellant was paid $17.50 in cash, and, after its institution, a tender of $2.50 additional was made, this tender being upon the theory that appellant was entitled to a compensation of $10 in each case, and no more.

It is provided by § 445, United States Code, Annotated, title 38, that, in the event of a disagreement as to a claim under a contract of insurance issued by the government between the Veterans' Bureau and the claimant, suit may be brought against the United States to determine the controversy. By § 551, United States Code, Annotated, title 38, it is provided that, when a judgment or decree shall be rendered in an action brought pursuant to § 445, *supra,* the court, as a part of the judgment, shall determine and allow a reasonable fee for the attorney for the successful party, "said fees not to exceed 10 per centum of the amount recovered and to be paid by the

bureau out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid."

Appellant is not entitled to recover here under this § 551, *supra.* It is not alleged that he had recovered judgment on the policies in question. It was only alleged that he had a contract under which he would have brought suit, had his clients not compromised their claims for a sum less than they were entitled to demand from the United States Government.

It is settled law that an attorney cannot compel his client to continue litigation, and that the client may dismiss or settle the cause of action without consulting his attorney. *Davies* v. *Patterson,* 135 Ark. 22, 205 S. W. 118. Of course, in ordinary litigation such settlement would be subject to the contractual rights of the attorney in the proceeds of the settlement. *St. L., I. M. & S. R. Co.* v. *Blaylock,* 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563; *St. L., I. M. & S. R. Co.* v. *Kirtley & Gulley,* 120 Ark. 389, 179 S. W. 648; *Davis* v. *Webber,* 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81.

But here the plaintiff alleges a contract under which he "would receive therefor only such compensation as was provided by the laws of the United States for such services." Indeed, he could not otherwise contract, as the federal statute fixes the compensation which may be paid attorneys. *Margolin* v. *United States,* 269 U. S. 93, 46 S. Ct. 64. Under this § 551, *supra,* it is provided that, except in the event of legal proceedings under § 445, *supra,* no claim agent or attorney can charge a fee as attorney or agent for services before the bureau in excess of $10 in any one case. This is the section which fixes appellant's compensation, and under it his compensation is $20, as he was concerned in two cases. As he has been paid $17.50 and tendered the balance of $2.50, he has no right to receive anything additional.

We are also of the opinion that damages were properly assessed upon the dissolution of the garnishments, and that damages were assessed in the proper amount,

to-wit, the interest at six per cent. on the money while it was wrongfully impounded.

It was expressly held in the case of *Wilson* v. *Sawyer*, 177 Ark. 492, 6 S. W. (2d) 825, that money due from the government under the World War Veterans' Act was not subject to the claims of creditors, and the writ of garnishment which had been sued out in that case was quashed because such funds were not subject to garnishment.

Appellant concedes that, under § 454, title 38, USCA, the funds were not subject to garnishment; but he insists that this section is unconstitutional, in that it enlarges the exemptions of citizens of this State to a sum in excess of that fixed by the Constitution of this State.

This contention is sufficiently answered by saying that the holding in *Wilson* v. *Sawyer, supra,* is to the contrary. The money was not subject to the demands of creditors, even after it had come into the hands of the beneficiaries of the policies or into the hands of another for their benefit. The *Wilson* v. *Sawyer* case so expressly held. Damages were therefore properly assessed for the wrongful garnishment of the money. The judgment of the court below dismissing appellant's cause of action is correct, and is therefore affirmed.

Moss *v.* Bushmaier.

Opinion delivered December 7, 1931.

Starbird & Starbird, for appellant.

Partain & Agee, for appellee.

SMITH, J. Appellant recovered a judgment against W. A. Bushmaier, hereinafter referred to as the defendant, and levied upon certain bank stock and a bank deposit as the property of defendant. An intervention was filed by W. A. Bushmaier, Jr., hereinafter referred to as the intervener, who claimed to be the owner of the stock and also of the deposit. Testimony was heard upon the intervention, from which the court found that the intervener was the owner of the bank stock, but not of the deposit, and a decree was rendered accordingly, from which all parties have appealed.

In response to a writ of garnishment which appellant had sued out and caused to be issued, the Citizens' Bank & Trust Company, of Van Buren, answered that defendant, W. A. Bushmaier, had on deposit in his name in said bank the sum of $507.83, and that he "also owned $500, par value, of the capital stock of this corporation, evidenced by its stock certificate now in the possession of said defendant." In addition to the levy made upon the stock alleged to be owned by the defendant in the Citizens' Bank, a levy was also made upon twenty shares of the capital stock of the First & Crawford County Bank, of Van Buren. The ownership of these shares of stock in the two banks and that of the deposit in the Citizens' Bank is the subject-matter of this litigation.

The following facts were developed in the testimony heard by the court. Intervener is the son of the defendant, and has his father's full name and is known as W. A. Bushmaier, Jr., and so signs his name. His father—defendant—appears to have been known as W. A. Bushmaier, and did not conduct his business as W. A. Bushmaier, Sr.

The bank deposit represents the proceeds of the sale of certain cotton grown on a farm owned by defendant,

the title to which intervener claims. Intervener claims to have advanced the money used by defendant in growing the cotton. But we think the testimony sustains the finding of the chancellor, that the cotton and the proceeds thereof represented by the bank deposit belonged to the defendant, and the decree upon that branch of the case is therefore affirmed.

Intervener claimed to have owned the farm upon which the cotton was grown; but the testimony shows that he had no deed to it, and that defendant was in possession and grew the crop. Intervener appears to have paid off a mortgage on this farm which his father had given, and to have taken an assignment thereof to himself, but the defendant operated the farm and made in his own name the original deposit of which the balance herein garnished was a part, and this account was at all times subject to the check of defendant.

Intervener testified that he advanced the money, a thousand dollars, with which the stock in the Citizens' Bank was purchased, and that he paid two for one for the stock. The stock certificate, however, was issued and delivered to defendant, although intervener testified, and so did the defendant, that, after the stock had been so issued to defendant, it was delivered to the intervener, and that it has since at all times been in intervener's possession.

Intervener admitted that his father was the original owner of $500 of the capital stock of the Crawford County Bank, but claims to have purchased this stock from his father, and to have paid $1,500 for it. The testimony shows that the Crawford County Bank was consolidated with the First National Bank of Van Buren, and that, on account of the difference in value of the stocks of the consolidated banks, intervener was required to pay, and did pay $137 additional in order to retain $500 of the stock of the consolidated bank. Mr. Izard had been the president of the Crawford County Bank, and became the president of the consolidated bank, known as the First & Crawford County Bank. He testified that the certifi-

cate for the $500 of stock in the Crawford County Bank originally owned by defendant was surrendered to the consolidated bank by intervener, and that, in a conversation between defendant and intervener, it was stated that the stock in the new bank was to be issued to the intervener, and that the intervener paid the difference in value by a check upon his own account, and that the stock in the consolidated bank was issued to W. A. Bushmaier. This stock, upon its issuance, was delivered to intervener, and was receipted for by him, and has since at all times been in his possession.

Defendant testified that he subscribed for $500 of the capital stock of the Citizens' Bank, for which he paid a thousand dollars, and that he had the transaction with Mr. Bryan, the president of that bank, but that he did not tell Mr. Bryan for whom he was purchasing the stock, and that, while the stock was issued to W. A. Bushmaier, it was paid for by W. A. Bushmaier, Jr., but witness signed the receipt for the certificate, which certificate he gave to his son, who has since been continuously in possession of it.

When asked if he was insolvent, defendant answered: "I expect I would be bankrupt if you pushed me down to bed rock," and he also stated that intervener had acquired title to practically all the property he had owned. He also admitted that the checking account of which the deposit with the Citizens' Bank was a part was kept in his name.

Mr. Izard, the president of the consolidated bank, testified that he had been president of the Crawford County Bank before the consolidation, and that upon the consolidation stockholders of the consolidated bank were allowed to pay the difference in value between the old and the new stock and retain the same amount of stock in the new bank; but, if this was not done, stockholders were issued their *pro rata* stock in the new bank and were given a participation certificate showing they had an interest in the assets of the old Crawford County Bank. This plan appears to have been adopted because of the

impairment of value of the assets of the Crawford County Bank.

Mr. Bryan, the president of the Citizens' Bank, testified that the account with his bank, of which the deposit garnished is the balance, was made originally by defendant and was carried in his name, and was subject to his check except for the garnishment, and that he sold the stock in his bank to defendant, W. A. Bushmaier, and issued it to him, and that defendant receipted for the stock, and that the subsequent dividends thereon had been paid to defendant. On his cross-examination, Mr. Bryan testified that his impression was that the stock was paid for with a check signed by W. A. Bushmaier, Jr., sheriff and collector, but all the transaction was with defendant, and that the stock was issued to him.

We are of the opinion, under this testimony, that defendant was the owner of the deposit in the Citizens' Bank, as found by the court, and was also the owner of the $500 stock in that bank outstanding in his name.

Defendant admits his insolvency, and, while he and his son both testified that intervener paid the value of the stock by assuming and paying certain of defendant's obligations, the stock in the Citizens' Bank has been permitted to remain in the name of defendant. Had that bank become insolvent, it is not likely that any stockholder's liability would have been asserted against intervener, and it is reasonably certain that no such liability could have been enforced.

The statute provides how bank stock may be transferred. Section 21 of the original banking act of 1913 (Acts 1913, p. 462), which provides how bank stock may be transferred, was amended by act 496 of the General Acts of 1921 (General Acts 1921, page 514), and by this amendatory act of 1921 § 21 of the original act of 1913 was amended to read as follows: "The stock of every bank shall be deemed personal property, and in case of sale shall be transferred only on the books of such corporation in such form as the commissioner shall prescribe, and whenever any stockholder has sold and may wish to transfer his stock, a certificate of such transfer,

signed by the president and cashier, or secretary, and setting forth the name and residence of the transferrer and the transferee, shall be deposited by said transferrer with the commissioner, who, after he has indorsed it as having been filed with him, shall return it for filing with the county clerk of the county in which the said bank is located. The said county clerk shall note the time of the filing thereon and record it in a book to be kept for that purpose, for which the clerk shall be entitled to a fee of twenty-five cents. No sale or transfer of stock shall be valid as against creditors of the transferrer until such certificate so filed with, and indorsed and returned by, the commissioner has been filed for record with said county clerk."

The purpose of this statute was to put at rest just such questions as we have here, and to furnish a conclusive evidence of the ownership of bank stock so far as creditors of the transferrer of certificates of bank stock are concerned. Transfers of such stock are not valid as against creditors unless the statute governing the manner of transfer has been complied with.

It may be true that the stock of the Citizens' Bank was paid for by a check drawn by intervener and signed by himself as sheriff and collector; but it is also true, as Mr. Bryan, the president of the bank, testified, and as the records of the bank show, that the stock was sold to defendant and was issued to him, and the receipt for the certificate therefor was signed by him and the subsequent dividends thereon were paid to him, and there is no record as required by law that he ever transferred the stock in the Citizens' Bank to his son, the intervener.

It was held in the case of *Taylor* v. *McKennon,* 178 Ark. 223 [10 S. W. 260], (to quote the syllabus in that case) that, "Where defendant transferred bank stock certificates to another stockholder before its insolvency, both parties being solvent, and authorized a change to be made on the books, defendant was relieved from the stockholders' statutory liability under Crawford & Moses' Digest, § 702, though the transfer was not made on the bank's books and was not indorsed by the bank

commissioner, as required by Acts 1921, c. 496, § 3." That was a case in which there was an attempt to enforce a stockholder's statutory liability, which relief was denied because both parties were solvent and had authorized a change to be made on the books of the bank, which was solvent when the stock was transferred; whereas no attempt was made here to show that defendant was solvent or had authorized and directed a transfer of the stock to be made as required by the act of 1921.

We conclude therefore that the defendant was the owner of the stock outstanding in his name in the Citizens' Bank. But we are also of the opinion that the act of 1921, *supra,* does not apply to the stock in the consolidated bank. The stock originally owned by defendant in the Crawford County Bank was never transferred to intervener, nor was there a reissuance of the stock of that bank. This bank passed out of existence by consolidation with another bank, and the consolidated bank became known as the First and Crawford County Bank, and became the successor of both the First National Bank and the Crawford County Bank. The stock in the consolidated bank was originally issued to intervener, and this transaction does not appear to have been in fraud of creditors, but was *bona fide,* as the intervener paid to the Crawford County Bank an indebtedness due it by defendant, his father, exceeding the value of the stock owned by defendant in the Crawford County Bank. There has therefore been no transfer of the stock of the First and Crawford County Bank, and the act of 1921, *supra,* has no application.

We conclude therefore that the chancellor was correct in holding that intervener was the owner of the stock in the new or consolidated bank, and it was therefore not subject to a levy by defendant's creditors.

The decree of the court below will be modified to the extent of holding that the stock in the Citizens' Bank was subject to levy and sale, and in all other respects it will be affirmed.

FOUST *v.* BLEVINS.

Opinion delivered December 7, 1931.

Oscar E. Ellis, W. F. Smith and *F. W. Benbrook,* for appellant.

J. Paul Ward and *T. R. Wilson,* for appellee.

HUMPHREYS, J. The judgment of dismissal appealed from in this cause was rendered by the circuit court of Izard County, sitting as a jury on appeal from the court of a justice of the peace. Appellant alleged that she traded a mule to appellee for a note executed to him or bearer, by Owen Hively and Jeff Hively, in the sum of $33, which he delivered to her without indorsement, before maturity, upon which he was and is liable as a warrantor under subdivision 3 of § 7831, Crawford & Moses' Digest, which, in part, reads as follows: "Every person negotiating an instrument by delivery or by a qualified indorsement, warrants: * * * (3) That all prior parties had capacity to contract."

Appellee denied liability under said subdivision of said section.

Upon the trial of the cause, it was developed by the undisputed evidence that, at the time the note was executed, Jeff Hively was under the age of twenty-one years, and that he signed the note as security for his brother, Owen Hively. The development of this fact entitled appellant to a judgment against appellee as warrantor of the payment of the note under the statute referred to as construed by this court in the case of *Commercial Credit Co.* v. *Blanks Motor Co.,* 174 Ark. 274, 294 S. W. 999.

The distinction contended for by appellee between the case at bar and the case cited is not tenable. The

instant case is controlled by the principle therein announced.

On account of the error indicated the judgment is reversed, and the cause is remanded with directions to enter judgment in favor of appellant.

AMERICAN RAILWAY EXPRESS COMPANY *v.* THOMPSON.

Opinion delivered December 7, 1931.

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

Frank C. Douglas and *W. D. Gravette,* for appellee.

HUMPHREYS, J. Swann-Abram Hat Company, Incorporated, of Louisville, Kentucky, brought suit against appellant and appellees to recover the value of a lot of hats which it sold to appellees and shipped by express from Louisville to Luxora, Arkansas, but which were never delivered to appellees at Luxora by appellant. Appellees filed an answer, denying that they received the hats, and a cross-complaint against appellant for the value of the hats for failure to deliver them, in case Swann-Abram Hat Company, Incorporated, should recover judgment against them. Appellant defended against the cross-complaint on the ground that the receipt which it gave for the hats provided that it should not be liable for failure to deliver same unless presented with a written claim for their value within six months and fifteen days after the date of the shipment. The cause was submitted upon the issues joined, the evidence adduced and

the instructions given by the court, resulting in a judgment in favor of Swann-Abram Hat Company against appellees, from which there is no appeal, and a judgment for $97.50, and interest, in favor of appellees on their cross-complaint against appellant, from which is this appeal.

The shipment of hats was made October 23, 1925, and, so far as the records kept by appellant in its office at Luxora disclose, the hats were not received, but the waybill for same was. This waybill, with several others, was lost by appellant's driver, and, upon his statement that he had delivered the goods, the agent at Luxora made him pay the express charges on the several shipments. In December following appellant sent tracers from its office in Louisville for the lost waybills covering these various shipments, which tracers were received at Luxora but never presented to the several consignees for their signature showing the delivery of the shipments. The agent signed and returned the tracers under his own signature, stating that the original waybills had been lost, but that the goods had been delivered, and did this without first going to the appellees, or other consignees, to see whether the deliveries had been made. The hats were sold to appellees on six months' time, or on what was called a six months' dating, and they knew nothing about the shipment of the hats, nor how they were shipped, until an attempt was made to collect for them, and more than six months and fifteen days after date of shipment. And after considerable correspondence they ascertained that they had been shipped by express in October, 1925. They then went to see the express agent, who stated that they had receipted for the hats. They denied having received them, and the agent agreed to take the matter up and make an investigation. A request was sent by the agent for the original receipt, which disclosed that the original waybill had been lost and that the agent had signed the tracer sent for the lost waybill himself, and he admitted that appellees had never signed any receipt for same.

The investigation was as full and complete as if appellant had received written notice of the non-delivery of the hats, and it disclosed that its own agent was at fault from the very beginning in handling the original waybill and tracer sent out in December, 1925. By making the investigation on verbal notice and thereby discovering the true facts with reference to handling the shipment, appellant waived its right to written notice of failure to deliver the hats. In making the investigation and reporting to appellees that the failure to deliver the shipment was due to the negligence of its own agent, appellant led appellees to believe that there was no necessity for a written notice of non-delivery, and thereby waived the clause in the original receipt providing for written notice in case of non-delivery of the shipment.

The facts in the instant case do not bring it within any case cited by appellant to support its contention that it was entitled to written notice of non-delivery of the hats.

No error appearing, the judgment is affirmed.

MILLER *v.* OIL CITY IRON WORKS.

Opinion delivered December 7, 1931.

Coulter & Coulter, for appellant.

J. R. Wilson and *Compere & Compere,* for Oil City Iron Works, appellee.

Graham Moore, for Pelican Well Tool & Supply Company, appellee.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for appellant that the circuit court erred in not dismissing the appeals of the creditors of the estate who filed exceptions to the account of the administratrix in the probate court. It is conceded that affidavits for appeal were filed by the creditors, and that the appeals were duly granted by the probate court, but it is claimed that the appeals were not perfected in the time required by the statute.

Section 2258 of Crawford & Moses' Digest provides when and how appeals may be taken to the circuit court from the probate court; and, as construed by this court, the filing of the affidavit and the order of the probate court granting the appeal is a prerequisite to the right of the circuit court to exercise jurisdiction. *Tharp* v. *Barnett,* 93 Ark. 263, 124 S. W. 1027; *Speed* v. *Fry,* 95 Ark. 148, 128 S. W. 154; and *Walker* v. *Noll,* 92 Ark. 148, 122 S. W. 488.

Section 2262 of the Digest provides that all appeals from the probate court allowed ten days before the first day of the term of the circuit court next after the appeal allowed shall be determined at such term unless continued for cause. The appeals in this case were allowed

by the probate court within ten days before the first day of the next term of the circuit court. In the case of *Carter* v. *Marks,* 140 Ark. 331, 215 S. W. 732, the court expressly declared that § 2262 is directory, but that it should not on that account be ignored, and should be followed by persons appealing from a judgment of the probate court.

In the case at bar, the record shows that the circuit court overruled the motion of administratrix to dismiss the appeals. The record does not show whether or not any evidence was introduced on the motion in the circuit court; and, in the absence of such showing from which this court might determine whether or not the circuit court abused its discretion in overruling the motion to dismiss, every presumption that it was correct must be indulged. Such is the effect of the reasoning of this court in *Huffman* v. *Sudbury,* 117 Ark. 628, 174 S. W. 1149. Many other cases might be cited tending to show that the probate court is a court of superior jurisdiction, and that the same presumption of the correctness of their judgments must be indulged as in the case of judgments of circuit and chancery courts. Therefore we hold that the court properly overruled the motion to dismiss the appeals from the probate court.

The court correctly allowed the widow one-third of the personal estate under the provisions of § 3535 of the Digest, and also an additional $300 under the provisions of § 80 of the Digest.

The circuit court also correctly allowed the administratrix credit by the amount paid Haynes and Rice in the sum of $1,522.65. The record shows that these persons probated a claim for that amount which was for the expenses of the last illness of the decedent, including fees for nurses, sanitorium and doctor's bills, and also sums advanced to the deceased in his lifetime by the physician. The claim was duly classified as a second-class claim by the probate court.

Under § 112 of the Digest, the probate court has the power to determine all demands against the estate and

the order of allowance has the same force and effect as a judgment. In *Jackson* v. *Gorman,* 70 Ark. 88, 66 S. W. 346, it was held that the allowance of a claim in the probate court is a judgment which is final after the expiration of the term at which it was rendered and cannot be attacked collaterally. The allowance and classification of the claim was conclusive after the expiration of the term, and the court then had not the power to set it aside. The allowance or disallowance of a claim against an estate in the probate court is a judgment by which all parties are bound unless fraud be shown in its procurement. *Stover* v. *Robinson,* 146 Ark. 262, 225 S. W. 315. Many other cases might be cited to the effect that probate courts in this State in the allowance and classification of demands against the estate are upon the same footing with other courts of record, and the same presumption of validity attaches to their judgments. Hence a judgment allowing and classifying a claim against an estate, unappealed from within the time prescribed by statute, is a final judgment, and is *res judicata* as to all issues upon which the judgment is based.

The circuit court also properly allowed the funeral expenses of decedent. *Yarborough* v. *Ward,* 34 Ark. 204; and *Security Bank & Trust Co.* v. *Costen,* 169 Ark. 173, 273 S. W. 705.

The circuit court properly allowed the administratrix the amount paid for her administratrix's bond made with a surety company in compliance with § 6144 of Crawford & Moses' Digest.

The circuit court also properly disallowed the claim of the administratrix for a large sum paid in defending oil leases which she claimed belonged to the estate of decedent in the State of Texas. It is true that she secured an order of the probate court allowing her to employ counsel and to make expenditures of money, but the court had no jurisdiction to make such order. In the first place, letters of administration have no legal force or effect

beyond the territorial limits of the State granting them. Woerner on Administration, (3d ed.) vol. 1, pp. 548-549; 23 C. J. 1014; 24 C. J. 1120; 11 R. C. L., § 532, p. 432, and § 551, p. 447.

In *Overby* v. *Gordon,* 177 U. S. 214, 20 S. Ct. 603, it was held that the sovereignty of one State and the jurisdiction of its courts at the time letters of administration are granted do not extend to or embrace assets of the decedent's estate within the jurisdiction of another State. This principle of law was also recognized in *Brown* v. *Fletcher's Estate,* 210 U. S. 82, 28 S. Ct. 702, where it was held that every State has exclusive jurisdiction over property within its boundaries, and, where the testator has property in more than one State, each State has jurisdiction over the property within its limits, and can, in its own courts, provide for the distribution thereof in conformity with its law. The same principle was recognized in *Greer* v. *Ferguson,* 56 Ark. 324, 19 S. Ct. 966, where it was held that, on the death of a defendant *pendente lite,* the suit cannot be revived against his executors appointed in another State so as to render a judgment against them binding upon his estate. The court there expressly recognized the rule to be that every grant of administration is strictly confined in its authority and operation to the limits of the State which granted it, and does not extend to other states. Hence we are of the opinion that the probate court could not confer upon the administratrix any authority to employ counsel and to prosecute suits on behalf of the estate of the decedent in the State of Texas. Ancillary administration would have been necessary in the State of Texas to have accomplished that purpose.

In the next place, the record does not show that it was necessary for the administratrix to take charge of the land belonging to the estate for the purpose of paying debts. The record in this case shows that the personal assets were amply sufficient to pay the probated claims against the estate, together with all proper costs of ad-

ministration. It is well settled in this State that an administrator does not represent heirs when the title to land is involved unless they are needed to pay debts: *Jones* v. *Jones,* 107 Ark. 402, 155 S. W. 117; *Miller* v. *Watkins,* 169 Ark. 60, 272 S. W. 846. In the last case cited, it was held that an administrator of an estate cannot sue to establish title to land and to recover possession thereof without showing that the land was needed to pay debts.

In this connection, it may be stated as settled in this State that the probate court has jurisdiction to disallow credits claimed by administrator for illegal expenditures, although they were ordered by the court to be paid. *Burke* v. *Coolidge,* 35 Ark. 180; and *Boyd* v. *Duncan,* 178 Ark. 772, 12 S. W. (2d) 395. In these cases the court expressly recognized that, when an administrator presents an account and claims credit for expenditures in preserving the estate, parties interested in the estate may except to the items included in the account, and, if they are ill-founded or based upon an illegal demand, it is the duty of the probate court, notwithstanding its previous order, to disallow and reject such expenditures.

The circuit court also properly disallowed two aggregate items which had been allowed by previous orders of the probate court in the course of administration, but which had not been embraced in any account current. The items of one of these amounted in the aggregate to $3,754.66. They included sums which the administratrix had paid out to the minors as their guardian; which she had paid for attorneys' fees and traveling expenses for certain attorneys and other matters relating to what she called expense of administration. The other claim amounted in the aggregate to $1,667.27, which was also for expenses in settling a matter against the estate for attorneys' fees, and various traveling expenses which she claims were incurred in looking after the affairs of the estate. Except for funeral expenses, no debts can be created against an estate after death. The debts must be existing at the time of death or arising out of ob-

ligations incurred by decedent. Only such claims can be presented for allowance, classification and payment out of the assets found in the hands of the representative after settlement. *Yarborough* v. *Ward,* 34 Ark. 204; and *Bomford* v. *Grimes,* 17 Ark. 567. These cases recognize that costs of administration are necessary and useful to the estate. They do not come within the ordinary scope of the administrator's personal duties, and the practice is not to allow them as debts against the estate and classify them, but to present them with the account of the administrator so that they may be passed upon and allowed by the court and exceptions taken thereto, if deemed necessary by those interested in the estate. The reason is that expenses of administration are entitled to payment before the debts of the estate because they are incurred for the very purpose of securing the payment of debts. If creditors and distributees of the estate could not except to them, great confusion and injustice would arise in their allowance by previous orders of the probate court, and the whole capital of the estate might be wasted or lost before creditors or distributees would be entitled to anything, or have their day in court.

It would unduly prolong this opinion to take up each of these items and discuss them separately. We need only lay down the general principles of law applicable to them.

The circuit court properly refused to allow the administratrix the amount claimed to have been expended by her for the support and education of the minor children of the intestate. The reason is that the administratrix had nothing to do with the support and education of such minor children. *Alcorn* v. *Alcorn,* 183 Ark. 342, 35 S. W. (2d) 1027.

There are several matters connected with the estate which do not fall under the head of the personal duties of the administrator, and for such expenses reasonably incurred in taking care of and preserving the estate and collecting its assets, the administrator should be allowed a reasonable sum as expenses of the administration upon filing his account. *Scroggins* v. *Osborn Company,* 181

Ark. 424, 26 S. W. (2d) 95; and *James* v. *Echols,* 183 Ark. 826, 39 S. W. (2d) 290.

It is next insisted that the circuit court erred in the allowance of attorney's fees in favor of the administratrix. This question arises upon the cross-appeal of appellees. Sums paid to attorneys for conducting litigation for the benefit of the estate, when properly authorized, are a part of the expenses of administration. So, too, attorneys may be employed and paid reasonable sums for advising the administrator in the affairs relating to his office, and for giving proper legal assistance in the conduct of the administration. No hard and fast rule can be laid down in each particular case, and each must be governed to a large extent by its own particular facts. *Jacoway* v. *Hall,* 67 Ark. 340, 55 S. W. 12; *Carpenter* v. *Hazel,* 128 Ark. 416, 194 S. W. 225; *Gilleylen* v. *Hallman,* 141 Ark. 52, 216 S. W. 15; *Triplett* v. *Chipman,* 153 Ark. 12, 240 S. W. 23; *Souter* v. *Fly,* 182 Ark. 791, 33 S. W. (2d) 408.

The record in this case shows that the decedent had $20,000 life insurance which was collected without suit, and that oil and gas royalties to the amount of $819.31 were collected by the administratrix, and that she had the aid of attorneys in both of these matters. Claims were presented and allowed by the probate court in the sum of $13,659.69. She had the advice of attorneys in this matter. Claims in the amount of $2,351.39 were presented and allowed as fifth-class claims. Claims in the sum of $6,321.90 were disallowed, and the administratrix had the advice and assistance of attorneys in the premises. According to her testimony, she also had their advice in various other matters pertaining to the collection of assets and the establishment or disallowance of claims. Then, too, her good faith in trying to establish the claim of the estate to the Texas land is not disproved, although her attempt was wholly unsuccessful. The circuit court allowed one of the attorneys $500, and the other the sum of $2,000; and, without reviewing the evidence in detail on this branch of the case, we are of the opinion that the allowance in favor of R. M. Hutch-

ins for $500 should be allowed to stand, and that the allowance to Barney, Keeney & Barney, which was allowed in the sum of $2,000, should be reduced to the sum of $1,000, which we consider ample compensation for all services performed by them.

We are of the opinion also that the circuit court properly disallowed the claim of the administratrix in the sum of $535, for the payment of a note to the Vivian State Bank under claim that it was secured by a mortgage. There is no showing that administratrix received any assets belonging to the estate in consideration of this payment, and the debtor should have presented its claim and have been paid in the same proportion as other creditors of the estate. Of course, if it elected to do so, the bank might have foreclosed its mortgage; but no showing is made that it was prudent or necessary in the management of the estate for the administratrix to pay off this mortgage and take up the mortgage indebtedness as expenses of administration.

We are of the opinion that the principles of law above announced will make it unnecessary to take up and consider the remaining items of the account separately. 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 restate the account in accordance with this opinion and to certify its judgment down to the probate court for its guidance in the premises. It is so ordered.

TOWNES *v.* KRUMPEN.

Opinion delivered December 7, 1931.

J. A. Tellier, for appellant.

Raymond Jones, Louis Cohn, Tom F. Digby, Graham R. Hall, Barber & Henry, Geo. C. Lewis and *Buzbee, Pugh & Harrison,* for appellees.

KIRBY, J., (after stating the facts). Our statute, under the provisions of which appellees recovered judgments, reads as follows:

"It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and, in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her and for her use; and, in case of the death of the wife before the decease of her husband, the amount of said insurance may be made pay-

able to his or her children, for their use, and to their guardian, for them, if they shall be under age, as shall be provided in the policy of insurance; and such sum or amount of insurance so payable shall be free from the claims of the representatives of the husband, or of any of his creditors; but such exemption shall not apply where the amount of premium annually paid out of the funds or property of the husband shall exceed the sum of three hundred dollars." Crawford & Moses' Dig., § 5579.

The statute has not been construed by this court, except having been referred to once in the case of *Davis* v. *Cramer,* 133 Ark. 224, 202 S. W. 239, where the court held that the policy of insurance had been transferred during the lifetime of the insured to defraud his creditors.

It is contended by appellant that said statute, § 1 of the act of April 29, 1873, (§ 5579, Crawford & Moses' Digest), has been repealed by § 7, article 9, of the Constitution of Arkansas of 1874, and by acts 159, approved March 19, 1915, and 66, amending said act, approved February 11, 1919. This provision of the Constitution and these statutes have removed all common-law disabilities of married women to contract, acquire and hold property, leaving their status in such regard that of an unmarried woman or *feme sole.*

Our said statute was obviously borrowed from the laws of New York, being in the identical language of its statute of 1840, which had not been construed, so far as we can ascertain, by any of its courts before its enactment here in 1873, and any later construction of the statute by the courts of that State is not presumed to have been adopted in its enactment here, and is in no wise controlling upon our courts. *Wallis* v. *State,* 54 Ark. 611, 16 S. W. 821; *Nebraska National Bank* v. *Walsh,* 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301; *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865; 25 R. C. L., Statutes, § 294.

Most of the New York cases cited were in construction of its amended statutes. The only case construing the act of 1840, as existed at that time and identical with

our statute, is *Whitehead* v. *New York Life Ins. Co.*, 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 287, decided in 1886. The question raised here was not in that case, nor attempted to be determined therein. It was held there that the wife had a vested interest in the policies at the moment of their delivery to the insured, and also that the husband was the agent of the wife in making the contract of insurance and paying the premiums thereon. All amendments to the said New York statute of 1840 and the statute itself were repealed in 1896 by laws relating to insurance on the life of a husband taken for the benefit of his wife, in which it was provided that such insurance should be "free from any claim of a creditor or representative of her husband, except where the premiums actually paid annually out of the husband's property exceeded $500, that portion of the insurance money which is purchased by excess premiums above $500 is primarily liable for the husband's debts, * * *," (Laws N. Y. 1896C 272, § 22); and the courts of that State have held that such portion of the insurance money as was purchased by annual premiums in excess of $500 was impressed with a lien for the debts of the deceased in favor of all his creditors ratably. *Kittel* v. *Domeyer,* 175 N. Y. 205, 67 N. E. 433. Certainly the construction placed by the New York court in 1903 on a law passed in that State in 1896 granting an express lien to the creditors on the insurance purchased by the expenditure of money for premiums for insurance on the husband's life in excess of $500 yearly can have no weight in a construction of our statute. The cases hold in the construction of statutes of this kind that the contract of insurance is a contract with the wife, although procured by the husband for her benefit, and he is held to have been acting as her agent representing her, acquiring no interest in or power of disposition over the policy, his relation being that of life insured while hers was that of the legal holder in whom solely was the vested interest. *Felrath* v. *Schonfield,* 76 Ala. 199, 52 Am. Rep. 319; *Stilwell* v. *Mutual Life Ins. Co.,* 72 N. Y. 386; *Gremes* v. *Travers,* 87 Misc. Rep. 644,

148 N. Y. S. 200; *Huston* v. *Maddux,* 179 Ill. 377, 53 N. E. 599; *Davis* v. *Cramer, supra.*

No allegation of fraud is made that the insurance was purchased for the benefit of the wife by the payment of more than $300 yearly for premiums, to cheat, hinder and delay creditors. Under our laws, the husband can make valid gifts of his property to his wife or any one else, provided he is not insolvent at the time, and has left enough property to pay his debts. It is also true that, in order for a subsequent creditor to impeach an otherwise valid conveyance by a debtor prior to the creation of his debt, he must show an actual intention to defraud. *Buchanan* v. *Williams,* 110 Ark. 335, 160 S. W. 190. There is no evidence in this case conducing to show any such actual intention at the time these policies of insurance were procured, and, so far as his creditors, prior or subsequent, are concerned, the testimony shows that the insured was carrying insurance policies in the sum of $15,000, payable to his estate, and continued to carry such insurance until his death, although he had borrowed a substantial amount upon the policies, leaving, however, something like $10,000 thereof to his estate. There was no actual intent to defraud subsequent creditors shown, nor any circumstances from which such intention would necessarily arise at the time of taking the policies of insurance in controversy, nor is there any testimony conducing to show that at that time the insurance payable to his estate would not have satisfied all prior debts, and no inference necessarily arises from the testimony in the case that, according to appellant's manner of living and earnings or accumulation of property, there would not have been sufficient money realized from the insurance payable to his estate to satisfy the claims of his creditors.

The wife had a vested right in these policies of insurance upon their issuance and delivery, and to the proceeds thereof upon the death of the insured. No steps were taken by the creditors to subject the proceeds of these insurance policies to payment of their debts, even if they had had the right to do so, before the death of the

insured, when the proceeds of the policies became her separate property, not subject to the payment of the debts of her husband.

It follows that the court erred in its finding and judgment holding otherwise, and the cause will be remanded with directions to enter a decree in accordance with this opinion, giving to the appellant the proceeds of said insurance free from all the claims of appellees herein, and denying them any rights therein. It is so ordered.

SMITH, J., dissents.

MCGRAW *v.* MILLER.

Opinion delivered December 7, 1931.

G. W. Botts, for appellant.

J. M. Brice and *Peyton Moncrief,* for appellee.

MEHAFFY, J. November 13, 1923, the appellant and John Pounders executed and delivered to Lige Miller their promissory note for $500, due and payable on or before May 13, 1924. No payments are credited on the note.

May 3, 1929, Mrs. Lige Miller, for herself and as next friend for her three minor children, Annie Mae Miller, Rlottie Miller, and Lige Miller, Jr., brought suit in the

circuit court of Arkansas County against C. E. McGraw, the appellant, to recover on said note. Lige Miller, the payee in said note, had been dead about two years. The appellant filed a demurrer, stating that there are not proper parties plaintiff, and that the complaint shows that the plaintiffs have no right to recover in this action against this defendant. The court overruled the demurrer, but permitted plaintiffs to amend their pleadings.

An amendment was filed more than five years after the cause of action accrued. Appellant filed a demurrer to amended complaint. In the amended complaint Mrs. Lige Miller sued as administratrix of the estate of Lige Miller, deceased, and as guardian of the minors and for the benefit of the estate.

As grounds of demurrer, the appellant stated: That the complaint does not state facts sufficient to constitute a cause of action against the defendant in the name of the plaintiff; that the complaint shows that the original party plaintiff had no cause of action against defendant; that said amended complaint shows that the party plaintiff had no cause of action against defendant in the original suit. Appellant further demurred, stating that there are not proper parties plaintiff to this cause, and because the complaint shows that plaintiffs have no right to recover against defendant.

The court overruled the demurrers; appellant saved his exceptions, and filed answer, pleading the statute of limitations. Appellant admitted giving the note, but testified that he had paid it to Miller before he died and before the note became due.

Appellant requested the court to give three instructions, which the court refused to give. Each instruction asked in effect directed a verdict for appellant.

It is undisputed that the first suit was filed before the cause of action was barred, and that the amendment was filed a few days more than five years after the cause of action accrued. It is the contention of the appellant that the amendment was the beginning of a new suit, and that it was barred by the statute of limitations. Attention is first called to the case of *Lambert* v. *Tucker*,

83 Ark. 416, 104 S. W. 131. That, however, was a suit in replevin, and the court held that the title and right to possession of the property must be determined by the status at the time of the commencement of the action. The administrator was held to be the person entitled to sue, and Tucker and his wife brought suit, but the court stated they showed no demand nor any refusal to give up the property, and that Lambert, having come peacefully into the possession of the property, detained it as the representative of the sisters of Ohaver. This was a contest between the representative and the heirs, and the court held that the right to possession was in the representative.

The court also said that neither the widow nor the heirs could disturb the possession of the other. It is contended, however, that the appointment of an administrator is conclusive as to the necessity. This is only true on collateral attack. In the instant case there is no attack, collateral or otherwise. It is true that the court said in the above case that the action of the probate court in appointing an administrator is conclusive of the necessity to appoint, but the court cited the case of *Stewart* v. *Smiley,* 46 Ark. 373, where the court held that the appointment could not be collaterally attacked. The appointment of administrator, however, is not conclusive except on collateral attack. In the instant case, the court declined to sustain appellant's demurrer, holding in effect that the plaintiffs in the suit had an interest, but that it was proper to have an administrator and guardian parties.

The next case to which attention is called is *Bertig* v. *Higgins,* 89 Ark. 70, 115 S. W. 935. The court in that case, however, said that the grant of letters of administration was conclusive of the necessity of appointment, but not of the right to take possession of the property, and it was decided in that case that the administrator had no right to the possession of the property.

Appellant also calls attention to the case of *Fencing District No. 6 of Woodruff County* v. *Mo. Pac. Rd. Co.,*

180 Ark. 488, 21 S. W. (2d) 959. In that case it appeared that suit had been brought originally against the St. Louis, Iron Mountain & Southern Railway Company, and the parties undertook to substitute for the sole defendant, the Missouri Pacific Railroad Company, a wholly different party. The first defendant had no interest whatever in the suit, and when a sole defendant or plaintiff is shown to have no interest in the suit, the substitution of another party, either plaintiff or defendant, for the sole plaintiff or defendant, would, of course, be the beginning of a new suit. The St. Louis, Iron Mountain & Southern Railroad Company had no interest in the suit, and there was therefore no suit pending against any defendant who had any interest in the litigation.

The statute (Crawford & Moses' Digest, § 1089): "Provides, every action must be prosecuted in the name of the real party in interest, except as provided in §§ 1091, 1092, 1094."

The widow and minor heirs, who were plaintiffs in the original suit, were the real parties in interest. Lige Miller had been dead about two years, according to the testimony, and the evidence does not show that there are any claims against his estate, or that he was indebted in any way. The fact that he was lending money is a circumstance tending to show that he was not indebted. However, there is no direct evidence as to whether the estate owed any debts or not, but the undisputed facts are that he had been dead about two years, and there is no showing that any person was claiming that he owed any debts, or that the property, including this note, did not belong to the widow and minor heirs; but, if he had been indebted, they still had an interest, and the amendment was not a substitution of a new party for the sole plaintiffs, but was the prosecution of the suit for the same parties in interest by their representatives.

In the case relied on by appellant, *Irby* v. *Dowdy,* 139 Ark. 299, 213 S. W. 737, the court said: "Had the suit been instituted, in the first place, by any one as the next friend of Herbert Irby, it would have been within the discretion of the court to have substituted his natural

guardian or any other person as next friend, for the next friend who had first brought the suit. * * * In the suit supposed, the infant would have been the real party in interest, and not the party who represented him, and the substitution of the natural guardian or another person as next friend would not have the effect of bringing a new cause of action." *Buckley* v. *Collins,* 119 Ark. 231, 177 S. W. 220; *St. L., I. M. & S. R. Co.* v. *Haist,* 71 Ark. 258, 72 S. W. 893.

The amendment in the instant case was not the bringing of a new suit, and the cause of action was therefore not barred by the statute of limitations.

It is unnecessary to set out the evidence because the appellant admits the execution of the note sued on, but he testified he had paid it by hauling logs for Miller during Miller's lifetime.

This court has repeatedly held that, where a party in interest testifies, his testimony is not to be regarded as undisputed. The question, however, as to whether he had paid the note, and the circumstances under which he claimed to have paid it, were questions of fact settled by the verdict of the jury against appellant, and the verdict is conclusive here.

The judgment of the circuit court is affirmed.

SMITH and HUMPHREYS, JJ., dissent.

SMITH, J., (dissenting). The only question of fact in this case was whether the note had been paid, and, as the majority say, that question was settled by the verdict of the jury adversely to appellant. His testimony on this issue was that he paid the note *before its maturity,* so that there was never a question of fact as to the arrest of the statute of limitations after the maturity of the note by a payment, partial or otherwise.

There was no allegation in the pleadings as to the existence or nonexistence of debts due by the intestate, the payee in the note, and no testimony whatever was offered on that subject.

The question whether the note was barred by the statute of limitations arises upon facts about which there

is no dispute, and it is therefore a question of law. These facts are as follows: The note was dated November 13, 1923. It matured May 13, 1924. Suit was filed by the widow and minor children on May 3, 1929, at which time the payee had been dead about two years. A demurrer, which questioned the right of the widow and minor children to sue, was overruled, but leave to amend was given. A second or amended complaint was filed June 26, 1930, which was about six years and one-and-a-half months after the date of the maturity of the note and more than two years after the death of the payee in the note, and more than thirteen months after the first complaint had been filed.

In this second suit the widow alleged that she *is now* the administratrix of the estate and the guardian of her children, and that she sues in the capacities of administratrix and guardian. Except for the allegation that the widow *is now,* that is, at the time of filing the amended complaint, the administratrix and guardian, the record is silent as to when letters of administration issued. The letters were not offered in evidence, and we do not know when the widow became the administratrix except from the allegation that she *is now* the administratrix.

The record is silent as to the value of the estate as well as to the debts of the intestate. But the fact is that the widow herself has taken out letters of administration, and the law is well settled, as the majority say, that the appointment of an administrator, in the absence of any direct attack upon the appointment or appeal from that order, is conclusive of the necessity for an administration. *Sharp* v. *Himes,* 129 Ark. 327, 196 S. W. 131. Here the widow not only made no question as to the necessity for an administration, but has actually administered and seeks to recover in that capacity.

While there was no testimony as to the value of the intestate's estate, we know that it exceeds $300, as the suit is upon a note for $500, with five years' interest

thereon. Therefore, § 80, Crawford & Moses' Digest conferred upon the widow and minor children no right to sue.

This section of the statute was construed in the case of *Bertig* v. *Higgins,* 89 Ark. 70, 115 S. W. 935. That was a suit by the administratrix of an intestate whose estate was less than $300 in value. It was there held that under § 3 of Kirby's Digest (§ 80, Crawford & Moses' Digest), where the personal estate of a deceased person does not exceed in value the sum of $300, the title thereto vests in the widow and minor children of such person under the statute, and they alone are authorized to sue for its possession, and the judgment was reversed, and the case was dismissed because the administratrix did not have capacity to sue.

The decision in that case that the suit should have been brought by the widow and not by herself as administratrix, although the widow was also the administratrix, was based upon the fact, expressly stated, that the value of the estate did not exceed $300, and upon that ground the case was distinguished from the case of *Lambert* v. *Tucker,* 83 Ark. 416, 104 S. W. 131. In the latter case the value of the estate of the intestate was variously estimated from seven hundred to a thousand dollars in value, and being, as the opinion recites, in excess of $300, the administrator was permitted to recover from the possession of the widow the two mules and wagon there in litigation. The court said: "Neither the widow nor the heirs could disturb the possession of the other. But the administrator could disturb the possession of both, and he would be entitled to the intestate's personal property. The action of the probate court in appointing an administrator is conclusive of the necessity for administration, and cannot be collaterally attacked. *Stewart* v. *Smiley,* 46 Ark. 373."

In the Lambert case, *supra,* the administrator was allowed to recover possession of the personal property from the widow because the value of the estate was from $700 to $1,000. In the Bertig case, *supra,* as is there

pointed out, the widow, and not the administratrix, was authorized to sue because the value of that estate did not exceed $300. In neither case was it intimated, as it is in the majority opinion in the instant case, that it made no difference whether the suit was by the administratrix or by the widow. Both cases are to the contrary. Upon the authority of both these cases, the instant case should have been brought by the administratrix, as the value of the subject-matter of the litigation was $500, with five years' interest, and we do not know that this was all of the property of the estate.

There is a condition under which the heirs may sue, regardless of the value of the estate, and this situation is covered by § 1, Crawford & Moses' Digest, which reads as follows: "When all the heirs of any deceased intestate and all persons interested as distributees in the estate of such intestate are of full age, it shall be lawful for them to sue for, recover and collect all demands and property left by the intestate, and to manage, control and dispose of such estate without any administration being had thereon in all cases where the creditors of such estate consent or agree for them to do so, or where they have paid or satisfied all valid debts and demands against such intestate, or where such intestate was, at the time of his death, under no legal liability, either matured or incipient, to any person; and in every such case, after they have taken such control and management of the estate, no letter of administration shall be granted thereon, or, if granted, the same shall, on their application, be revoked."

The inapplicability of this statute is apparent when it is stated that there was no allegation or proof of the existence of the conditions precedent there made necessary for the heirs to sue under that statute. On the contrary, it affirmatively appears that the children of the intestate are minors, and that the plaintiff herself is their guardian.

This statute has been several times construed. In the case of *Business Men's Accident Association of America* v. *Green,* 147 Ark. 199, 227 S. W. 388, it was held (to quote a headnote in that case) that: "Under Crawford & Moses' Digest, § 1, authorizing action by adult heirs to collect the ancestor's property without administration in certain cases, a complaint by the sole heir of a decedent must allege, either that the creditors consented, or that all of decedent's debts have been paid, or that decedent was under no legal liability, either matured or incipient, to any person."

In holding that the heir as such had no right to maintain that suit, it was there further said: "The allegations of the complaint are not, however, sufficient to bring appellee within the terms of this statute, in that it is not alleged that the creditors of the estate consent or agree for appellee to maintain the action, or that appellee has 'paid or satisfied all valid debts and demands against such intestate, or where such intestate was, at the time of his death, under no legal liability, either matured or incipient, to any person.' This omission is fatal to appellee's right to maintain the suit, and the demurrer should therefore have been sustained. *Chisholm* v. *Crye,* 83 Ark. 495 [104 S. W. 167]."

This case of *Chisholm* v. *Crye, supra,* also construed § 1, Crawford & Moses' Digest, it being there referred to as § 15, Kirby's Digest, where it was said: "This statute contemplates that suit can be maintained by the heirs themselves for the collection of debts due their intestate when the heirs themselves and all persons interested as distributees of the estate are of full age, and when the intestate was at the time of his death under no legal liability. The usual rule of *ex pressio unius est exclusio alterius* applies here. The expression that it shall be lawful for the heirs to sue under the condition named excludes the idea that they may sue under conditions not named." See, also, *Madison County* v. *Nance,* 182 Ark. 775, 32 S. W. (2d) 1073.

I submit, therefore, that the widow and heirs as such had no capacity to sue.

It appears to me to be equally as certain that the second or amended complaint filed in the name of the administratrix is not a continuation of the original suit brought by the widow and heirs, but is an entirely different suit. The first suit was, as it expressly professed to be, a suit by the widow and heirs, and was, of course, for their benefit, and the recovery therein would have inured to their benefit and not to that of the estate. The amended complaint was a suit by the administratrix and was, of course, for the benefit of the estate, and, while the widow and heirs might have had an interest in the money there sought to be recovered, their interest was incidental and collateral and not direct and individual, as it was in their own suit. Their interest in money recovered in the second suit would have been worked out through the ordinary processes of administration with which we are all familiar, whereas, if they had recovered in the first suit, their recovery would have been independent of the administration.

If citation of authority for this proposition is required it may be found in the case of *McCustian* v. *Ramey*, 33 Ark. 141. In that case an administrator had paid to the heirs of Mills their distributive shares of the estate, and these payments were pleaded against the suit brought by Mills' administrator to recover the original debt. In disallowing credits for such payments the court said: "The heirs of Aaron Mills could not sue appellant for the money because they had no direct legal cause of action against him; nor could he legally discharge himself from liability to the administrator, when appointed, by paying the money to the heirs. After the claims of creditors are paid by the administrator, the heirs get the remainder of personal assets by distribution through the probate court, as provided by the statute."

While it is true that the recovery was sought in both complaints upon the same cause of action, the parties

sue in different capacities, and the statute of limitations should therefore be computed down to the time when a suit was brought by a person having capacity to sue, which in this case was the administratrix.

In the case of *Davis* v. *Chrisp,* 159 Ark. 335, 341, 252 S. W. 606, it was held that where there is an amendment stating a new cause of action or bringing in new parties interested in the controversy, the statute of limitations runs to the date of the amendment and operates as a bar when the statutory period of limitation has already expired as to such new cause of action or new parties, and a number of our cases were there cited to support that statement of the law.

We have a statute appearing in the chapter on "Limitation of Actions" (§ 6968, Crawford & Moses' Digest), which reads as follows: "If any person entitled to bring any action in the preceding provisions of this act specified die before the expiration of the time herein limited for the commencement of such suit, and such cause of action shall survive to his representatives, his executors or administrators may, after the expiration of such time, and within one year after such death, commence such suit, but not after that period."

This section has no application for the reason that the original suit was not brought for two years after the creditor's death, and more than three years had expired after his death before the amended complaint was filed. There appears a note to this section of the Digest which reads as follows: "When the statute commenced to run in creditor's lifetime, it did not stop upon his death until administration granted on his estate," and cases are there cited in support of that statement, to which numerous others might be added.

These cases and the statement of the law announced in them, just quoted, appear to me to be decisive of this case, and should compel the holding that the cause of action was barred when sued on by the administratrix more than six years after the cause of action had ac-

crued, there being no allegation which would arrest the running of the statute. The cause of action appears from the face of the second complaint to be barred, and there was no word of testimony to show that the bar of the statute had not fallen, except that a suit had been brought on the note before it was barred by persons having no capacity to sue. But the law is settled that in order for a prior suit to prevent the running of the statute of limitations against a subsequent suit it must appear that both suits are for the same cause of action and between the same parties. *McClellan* v. *State Bank,* 12 Ark. 141; *Crow* v. *State,* 23 Ark. 684, 693; *Gray* v. *Trapnall,* 23 Ark. 510; *State Bank* v. *Sherrill,* 12 Ark. 183; *Trapnall* v. *Burton,* 24 Ark. 371; *Warmack* v. *Askew,* 97 Ark. 19, 132 S. W. 1013; *Temple Cotton Oil Co.* v. *Davis,* 167 Ark. 448, 268 S. W. 38.

In this case, while both complaints declared upon the same cause of action, the parties were not the same, and the first suit did not, therefore, have the effect of tolling the statute of limitations against the second suit. Such cases as *St. Louis, I. M. & So. Ry. Co.* v. *Haist,* 71 Ark. 258, 72 S. W. 893, and *Arkansas Land & Lbr. Co.* v. *Davis,* 155 Ark. 541, 244 S. W. 730, are not to the contrary. In the first of these cases it was held that where a suit was brought by an infant by her foreign guardian, it was not error to permit her to substitute a resident as her next friend. This holding was upon the ground that there was no substitution of plaintiffs because the infant was the real and proper party in both the original and amended complaints, and the suit was hers and for her benefit, whether brought by a guardian or by a next friend.

The case of *Arkansas L. & L. Co.* v. *Davis, supra,* was one in which an action had been brought within the time limited by law against one as Director General of Railroads when he was not such, and subsequently the Director General was substituted as defendant, the date of the substitution being such that a new cause of action would have been barred. This substitution was per-

mitted upon the ground that the cause of action was against the United States, and the substitution of the correct name of the Director was merely to correct an error in the name of the representative of the United States.

The inapplicability of these and similar cases to facts such as those out of which the instant case arises is made very clear in the opinion in the case of *Irby* v. *Dowdy,* 139 Ark. 299, 213 S. W. 1039, where it was said: "Appellant insists that the court erred in refusing to permit him to substitute, in his place, as plaintiff, himself as guardian and next friend of his son, Herbert Irby, who was the real owner of the horse in question. Had the suit been instituted in the first place by any one as the next friend of Herbert Irby, it would have been within the discretion of the court to have substituted his natural guardian, or any other person as his next friend, for the next friend who had first brought the suit. *Wood* v. *Claiborne,* 82 Ark. 514, 82 S. W. 514; *Nashville Lumber Co.* v. *Barefield,* 93 Ark. 353, 124 S. W. 758. In the suit supposed, the infant would have been the real party in interest, and not the party who represented him, and the substitution of the natural guardian or another person as next friend would not have the effect of bringing a new cause of action. *Freeman* v. *Lazarus,* 61 Ark. 247, 32 S. W. 680; *St. Louis, I. M. & S. R. Co.* v. *Haist,* 71 Ark. 258, 72 S. W. 893; *Haydon* v. *Haydon,* 98 Ark. 480, 136 S. W. 631; *Buckley* v. *Collins,* 119 Ark. 231, 177 S. W. 920. While it is true that § 3757 of Kirby's Digest provides the natural guardian shall have the custody and care of minor children and their estates, it does not follow that they can maintain suits in their individual names for their children's property, for it is provided by § 6021 of Kirby's Digest that 'the action of an infant must be brought by his guardian or his next friend.' Unless the minor was included as a party plaintiff when the action was brought, his inclusion thereafter would amount to the institution of a new suit. This court

said, in the case of *State* v. *Rottaken,* 34 Ark. 144, quoting the fourth syllabus: 'Where a plaintiff shows in his complaint that he has no cause of action, the court cannot amend it by making other plaintiffs who have.' This rule of pleading was reaffirmed in the case of *Schiele* v. *Dillard,* 94 Ark. 277, 126 S. W. 835. In approving the rule, the court said: 'The appellant sought by amendment to their complaint to substitute new parties defendant. This could not be done. While the court may in its discretion allow additional parties plaintiff or defendant to be added or struck out, it cannot make an entire change of parties plaintiff or defendant. That would be tantamount to a new suit between entirely different parties'.''

It is my opinion, therefore, that this cause of action was barred when the amended complaint was filed making for the first time a party plaintiff who had the capacity to sue, and a verdict should therefore have been directed in favor of the defendant for that reason.

I am authorized to say that Mr. Justice HUMPHREYS concurs in the views here expressed.

LUSBY *v.* SACHS.

Opinion delivered December 7, 1931.

X. O. Pindall and *Wm. H. Lusby,* for appellant.

Sam M. Wassel for certain interveners, and *D. K. Hawthorne,* for appellee.

MEHAFFY, J. Appellant, W. H. Lusby, who had been in the drug business in the city of Little Rock for a number of years, in January, 1930, closed his store and stored his stock of goods. About the 24th day of February, 1930, he purchased through appellee, from Mrs. Bertha Koban, a stock of goods, merchandise and fixtures, and executed his promissory note for the sum of $745, payable in monthly installments, and on the same day, to secure payment of the note, he executed and delivered to Mrs. Koban a chattel mortgage, which included the property purchased by appellant and also some merchandise and fixtures that appellant owned.

On the 7th day of June, 1930, Bertha Koban, the mortgagee, assigned and transferred the note and mortgage to appellee, M. L. Sachs. The note was not paid, and on July 1, 1930, appellee begun suit in the Pulaski Chancery Court to recover on said note and foreclose the mortgage.

On the same day that suit was filed, the court appointed a receiver to take charge of said property. On the 21st day of July, the appellant, W. H. Lusby, filed an answer to the original suit, denying all the material allegations in the complaint, and also filed a cross-complaint against M. L. Sachs and Bertha Koban.

On the 22nd day of July, 1930, W. H. I. Tate filed an intervention, alleging that Lusby was indebted to him in the sum of $1,350, evidenced by a promissory note

which was filed and made a part of his intervention. It was alleged that the indebtedness was incurred prior to the giving of the chattel mortgage to Koban, and it also alleged that the giving of the mortgage was contrary to the statute, and void, because no notice was given and no certified list of creditors as required by statute. He alleged that the mortgage was void, and asked that it be so held, and that the goods should be held in trust for the benefit of intervener.

On the same day, July 22d, Dad Chemical Company filed an intervention, claiming that W. H. Lusby was indebted to it in the sum of $39.50, and attached to the intervention was an itemized statement of account. The same allegations were made in this intervention that were made in the intervention of Tate.

Appellant filed answer to the intervention, and Bertha Koban and appellee filed their answer to the cross-complaint.

On July 28, 1930, the chancery court ordered the receiver to sell the property described in the mortgage. The receiver made a sale, and filed his report. Exceptions were filed to the report of the receiver and objections to confirmation of the sale.

On August 16, 1930, the case was heard on oral testimony and a decree was entered, finding that the appellant, W. H. Lusby, was indebted to the appellee, M. L. Sachs, $745, evidenced by promissory note and secured by mortgage upon certain property, describing it, and that appellant, Lusby, was also indebted to appellee, Sachs, in the sum of $120 for rent due.

The decree was also for 7 per cent. interest on the $745 and 6 per cent. on the $120. The court, after finding the amount due appellee, ordered the sale of the property, dismissed the cross-complaint of appellant, and continued the cause as to the intervention for further hearing. The decree directed the receiver to hold such money or securities as he received until the further order of the court.

The appellant and cross-complainant prayed and was granted an appeal to the Supreme Court. The interveners did not pray an appeal.

On September 11, 1930, Vadsco-Dales Corporation filed an intervention, claiming that appellant, Lusby, was indebted to it in the sum of $39.93, and that this indebtedness arose prior to the mortgage, and that the mortgage was void. It asked that the proceeds of the sale of the property be distributed *pro rata* amongst intervener and other creditors.

On November 12, 1930, W. H. Lusby filed a motion to set aside the judgment and decrees of the court. There was certain property that it was claimed belonged to others, and the appellee agreed that he had no mortgage on it, and it was turned over to the persons claiming it.

Mrs. Loella Lusby filed an intervention, claiming that she was entitled to salary, and, $100 was allowed her. There was also an allowance for rent to the Pulaski Building & Loan Association.

On January 21, 1931, after hearing oral testimony, the court allowed the claims of the interveners and directed the receiver to pay the rent, $120, and, by consent, the judgment formally entered against Lusby in favor of Sachs was credited with $213.89, leaving a balance of $531.11. The receiver was ordered to sell at private sale the merchandise and fixtures.

On February 8, 1931, the receiver was directed to accept a bid of $275 for the property, and the sale for that amount was confirmed. The receiver was directed to pay expenses incurred by him as shown by his report.

On the 10th day of February, 1931, by consent of all parties, all the expenses of the receiver, except the rent, was to be paid first, and after the payment of all other expenses, he was directed to pay the rent, and, upon the payment of this money as directed by the court, it was ordered that the receiver and the sureties on his bond be discharged and relieved.

Testimony of a number of witnesses was taken before the chancellor entered the decrees mentioned, and

on July 17, 1931, the appellant, W. H. Lusby, W. H. I. Tate, Dad Chemical Company, Mrs. Loella Lusby, and E. B. Jones prayed an appeal to the Supreme Court, which was on that day granted.

When the decree of foreclosure was granted on August 16, 1930, the parties were present, and the defendant prayed and was granted an appeal to the Supreme Court. The decree was entered for judgment in favor of the appellee against the appellant, Lusby, for the amount sued for and the cross-complaint of appellant, Lusby was on that day dismissed.

The cause was continued as to the interventions. It was evidently continued, however, for the sole purpose of determining the rights of the interveners as against appellant, W. H. Lusby. The court necessarily found that appellant was indebted to the appellee, and that the mortgage was valid and binding, and therefore its foreclosure was ordered. The court necessarily considered all the questions involving the validity of the debt and mortgage, and the decree of August 16, 1930, was a final decree. The statute provides: "A judgment is the final determination of the rights of the parties in the action." Section 6233, Crawford & Moses' Digest. All the rights as between appellant, Lusby, and appellee, Sachs, were finally determined on August 16, 1930, and the rights of the interveners, so far as they affected the appellee, were also determined.

Appeals must be taken within six months next after the rendition of the judgment, order or decree, sought to be reviewed. Section 2140, Crawford & Moses' Digest; *Stephens* v. *Williams,* 122 Ark. 255, 183 S. W. 527; *Newald* v. *Valley Farming Co.,* 133 Ark. 456, 202 S. W. 838.

"In peculiar cases the court may decree as to certain defendants, or property, while all the equities as to the other defendants and property are reserved for further consideration; and yet this decree as to certain defendants or property may be final. If, in the course of the proceedings, final decrees vital to the interest of any of the litigants are made, an appeal may be had." *Flan-*

nigan v. *Drainage District No. 17,* 176 Ark. 31, 2 S. W. (2d) 70.

There can be no question but what the decree of August 16, 1930, was final as to Sachs and Lusby. The court decreed the amount due from Lusby and dismissed Lusby's cross-complaint, and Lusby prayed an appeal at the time, but did not perfect it.

In the decree, however, the cause as to the intervention was continued for further hearing. There could not have been any further hearing as to the validity of the note and mortgage. The contention made by the interveners is that the mortgage was void because the sale of the property was made in violation of the statute.

It is contended by the interveners that they are entitled to a judgment against Sachs because of a violation of the Bulk Sales Law.

They cite and rely on, first, *Prins* v. *American Trust Co.,* 169 Ark. 455, 275 S. W. 914. This case construes § 4870 of Crawford & Moses' Digest, but this section does not make void a sale of a stock of merchandise, even when not complied with, except as to creditors. None of the interveners were creditors of Mrs. Koban. She sold the property to Lusby, and at the same time took note and mortgage from Lusby for the amount. It is not claimed that Mrs. Koban was indebted to any of the parties, and there is no claim that she did not have the right to sell in bulk or any other way she might wish to sell.

There could therefore be no question about the validity of the mortgage as to the property sold by Mrs. Koban, and this was the bulk of the property contained in the mortgage. In fact, the evidence does not show the value of the property included in the mortgage which belonged to Lusby. Lusby was not at the time engaged in business, but his property was stored, and, in order to go into business, he purchased the property from Mrs. Koban, and gave a mortgage on it and some of his own property to secure the payment of the indebtedness to Mrs. Koban.

The part of the property that originally belonged to Lusby was of very small value, and was, in fact, put into

the mortgage with the other property, to enable Lusby to go into business again. He was not only not selling his property in violation of the Bulk Sales Law, but he was endeavoring to establish himself in business again.

This court has said that the Bulk Sales Law was never intended to prevent a merchant from moving his business to a new location, and in so doing dispose of odds and ends or remnants. The purpose of the act was to prevent fraudulent sales. *Fiske Rubber Co.* v. *Hayes,* 131 Ark. 248, 199 S. W. 96.

A chattel mortgage covering a stock of merchandise, where the mortgagor remains in possession and has the usual right of redemption, creates a lien only, and does not pass title, and is not a sale, exchange or assignment within the meaning of the Bulk Sales Law, and is therefore not within the inhibition of the statute. *Farrow* v. *Farrow,* 136 Ark. 140, 206 S. W. 134.

As we have already said, however, the decree of August 16, 1930, necessarily considered all these matters. The chancery court found the mortgage valid as to all the property, dismissed appellant's cross-complaint, and this decree was not appealed from within time.

There is no evidence in the record of any fraudulent sale in violation of law, but, if such evidence had been introduced, the finding of facts by the chancellor could not be disturbed by this court, unless the finding was against the preponderance of the evidence. We do not think it was.

Lusby had owed these interveners, and the amounts had been due several months, and Lusby had quit business, and had no stock of merchandise in business, owned this property, which he pledged with other property purchased to enable him to go into business again. No effort was made by the interveners to collect their debts, and no claim by them that there was any violation of the Bulk Sales Law, until the appellee undertook to foreclose the mortgage.

The finding of the chancellor is sustained by the evidence, and the decree is therefore affirmed.

WELLS *v.* HUNTER

Opinion delivered December 7, 1931.

[redacted]

W. A. Leach, for appellant.

George C. Lewis, for appellee.

McHANEY, J. On April 20, 1923, appellees, who are nonresidents, executed and delivered to J. M. Peterson their promissory notes aggregating $11,000, secured by a mortgage upon their rice farm in Arkansas County. Appellees also executed a note and second mortgage on the same property to an Iowa bank with which appellants seemed to have been connected. Default having been made in the payment of the Peterson notes and mortgage, suit was brought to foreclose, and a receiver was appointed, who took charge of the rice farm and leased same for the year 1925. Appellants acquired the Peterson notes, and the suit to foreclose was abandoned, but the receivership was continued for the purpose of receiving and distributing the proceeds of the 1925 crop. In November, 1925, appellants brought suit to foreclose the Peterson mortgage, making the second mortgagee a party, which resulted in a decree of foreclosure both on the suit of appellants and the cross-complaint of the holder of the second mortgage, and the property was sold to the appellants on their bid of $13,000, a sum slightly less than was due them. This sale was confirmed in February, 1926, and deed executed and delivered to appellants. Appellees were not personally served, but, being nonresidents, were served by warning order. In December, 1927, within the two years allowed under § 6266, Crawford & Moses' Digest, the appellees appeared and moved for a retrial under the statute, stating that the receiver

had collected a considerable sum of money for the 1925 rice crop which should have been applied to the satisfaction of their debt in liquidation of the difference between the amount of appellants' bid and the judgment against the land, and the remainder to the satisfaction of the second mortgage, and praying that the decree and sale be set aside and that appellants be required to account not only for the amount they had wrongfully had from the receiver, but for all rents subsequently collected. It appears that appellee had procured a satisfaction of the decree in favor of the Iowa bank on its second mortgage and that appellants took possession of the rice farm under the sale aforesaid, and thereafter continued in possession thereof, claiming title thereto under said sale, collecting the rents and profits. No response was filed by appellants to the motion of appellees for a retrial under the statute until January 19, 1931, during which time depositions were taken on both sides which tended to show that appellants were claiming to own the land under their purchase at the foreclosure sale and entitled to the rents and profits. The appellee, Mr. Hunter, testified that he had made demand on the appellants for an accounting, which was refused on the ground that it was none of his business. In their response filed on the 19th day of January, 1931, appellants changed their former position somewhat by admitting that they were only mortgagees in possession, agreed that the sale be set aside, and offered to account for all moneys had from the receiver and all crops raised during the subsequent years of their possession. Thereupon appellees, by leave of court, amended their petition so as to ask only for a judgment against appellants for the surplus of the proceeds of the rice crop of 1925, after deducting the amount of appellants' bid from the judgment against them.

On a trial, the court found in favor of appellees in the sum of $2,922.67, with interest from March 21, 1926, which was made a lien on the land.

Appellants' contention on this appeal is that the court erred in allowing the filing of the amendment to appellees' motion for the reason that the cause had been

fully developed on the issues raised by the pleadings, and that the amendment was an abandonment of the motion to retry the cause, and was the commencement of a new and independent action not permitted or authorized by § 6266, Crawford & Moses' Digest. This section provides: "Where a judgment has been rendered against a defendant or defendants constructively summoned and who did not appear, such defendants or any one or more of them may at any time within two years, and not thereafter, after the rendition of the judgment, appear in open court and move to have the action retried; and, security for the costs being given, such defendant or defendants shall be permitted to make defense, and thereupon the action shall be tried anew as to such defendant or defendants as if there had been no judgment, and upon the new trial the court may confirm, modify or set aside the former judgment, and may order the plaintiff in the action to restore to any such defendant or defendants any money of such defendant or defendants paid to them under such judgment, or any property of such defendants obtained by the plaintiff under it and yet remaining in his possession, and pay to the defendant the value of any property which may have been taken under an attachment in the action or under the judgment and not restored; provided the provisions of this section shall not apply to judgments granting a divorce except so far as relates to alimony."

We cannot agree with appellants in this contention. What was sought to be accomplished in the original motion was an accounting by appellants for all they had received while in possession of the land, either through the receiver or under purchase at the foreclosure sale, and that the amount found to be due by such accounting be applied in satisfaction of the debt owing to them by appellee, their purpose being an effort to get back their land. The only thing accomplished by the amendment was to reduce the period of time for which an accounting was asked. This does not change the nature of the relief asked by appellees, but only the amount of such relief. Appellees made no contention that the amount of their

indebtedness was improperly adjudicated, but only that that indebtedness should have been reduced by the rents and profits for the years 1925, 1926, 1927. By the amendment they eliminated their request for an accounting for all years except 1925, and we fail to see wherein they have been prejudiced by the action of the court in permitting such amendment. We fail to see that the amendment stated a new cause of action or materially changed the old one, except to narrow the relief sought. As said by this court in *Foster-Holcomb Inv. Co.* v. *Little Rock Pub. Co.*, 151 Ark. 449, 236 S. W. 597: "We think the court properly permitted the amendment to the complaint. Our statute on amendments is very broad, and has been given a very liberal construction by the courts to effectuate its manifest purpose, that is, that litigation may be tried upon its merits. This statute is as follows:

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

"Among numerous other cases construing this statute is the case of *Midland Valley Rd. Co.* v. *Ennis*, 109 Ark. 206, 159 S. W. 214, where we said: 'Under this section the court may, in its discretion, before the commencement of the trial, allow a complaint to be amended so as to change the cause of action to another one which might have been joined in the same action; and at any time during the progress of the trial may permit an amendment which does not change substantially the claim so as to conform to the facts proved. The only limitation in the statute is that, after the proof is introduced, the pleadings cannot be amended so as to substantially change the cause of action'." See also cases there cited.

It will be seen that the statute expressly provides: "Upon the new trial the court may confirm, modify or set

aside the former judgment and may order the plaintiff in the action to restore to any such defendant or defendants any money of such defendant or defendants paid to them under such judgment," etc. The appellants, by order of court, had been paid a large sum of money by the receiver, to which they were not entitled, having bid $13,000 on a judgment for $14,340.82, and the order of the court here restores to appellees such excess.

No contention is made by appellants that the amount adjudged to be due by the decree of the court is incorrect. We have reached the conclusion that the court correctly permitted the amendment under the above statute, and the decree is accordingly affirmed.

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

Opinion delivered December 7, 1931.

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

Partain & Agee, for appellee.

McHaney, J. This is an action for damages for personal injuries received by appellee on September 8, 1930, while in the employ of appellant as a member of a bridge crew, by being struck by one of appellant's trains, on its main line south of St. Louis about 35 miles, at a bridge across Merrimac River in the State of Missouri, about 3 p. m. of that date. This same crew, including appellee, had been working on an overhead bridge at Old Orchard, Missouri, a few miles south of St. Louis, and, when they had finished that work, they proceeded to the Merrimac bridge on Saturday, September 6, where they unloaded their tools, machinery, etc., preparatory to the repair of that bridge. A part of the equipment was an air compressor machine, used in connection with, or to operate, the hammer to weld rivets in the steel plates on the bridge. It was a heavy piece of machinery, weighing about five tons, and was unloaded and set in place on the dump or fill, (which was from 100 to 200 yards long from the north end of the bridge) about 25 feet from the north end and on the east side of the track in the clear of passing trains. Appellee testified it was set about two feet east of the east end of the ties, but appellant's witness, who had measured the distance, testified it was six feet, two inches from the east rail. This compressor was about ten feet long, six feet wide and six feet high with an engine at either end and an air tank in the middle. While in operation, it makes a great deal of noise. The

bridge was constructed with a girder on each end about 100 feet in length, and had two spans in between these girders with steel overhead structure. The repairs to be made were on the overhead structure, and at the time of the accident the crew, together with the assistant foreman, were engaged in working on the overhead structure of the north span, about 125 feet from the air compressor. Appellant's fast passenger train, known as the Blue Bonnet, left St. Louis traveling south at 2:20 P. M. each day to the knowledge of the crew, including appellee, but appellee did not know what time it arrived at the bridge or its schedule. Appellee was working on the east side of the compressor attending to his duties in the usual way when the necessity arose to adjust a grease cup on the west side of the compressor (his duties being to oil, grease and otherwise attend the engines so as to keep them operating), so he walked around the north end of the compressor and then south between the compressor and the track, stooped over to adjust a grease cup, and was struck about the left buttock by some part of the engine of the passing train and was seriously injured.

He brought this action under the Federal Employers' Liability Act, charging that appellant was negligent in that the assistant foreman, Bezdek, who was in charge of the crew, the foreman being absent, directed him to operate the air compressor machinery, and that he, the assistant foreman, would watch out for trains and warn him of their approach, which he failed to do. The trial resulted in a verdict and judgment against appellant in the sum of $30,000. Wherefore this appeal.

For a reversal of the judgment, appellant first argues that the evidence is insufficient to support the verdict. We cannot agree with appellant in this contention, as we think the facts justify the submission of the question of negligence to the jury. It is conceded that the liability of appellant, if any, is governed by the Federal Employers' Liability Act (U. S. Comp. St., §§ 8659-8665), and, as we said in *St. L-S. F. Ry. Co.* v. *Smith,* 179 Ark. 1015: "Since this suit was brought and prosecuted under the

Federal Employers' Liability Act, which does not define negligence, the question as to the sufficiency of the evidence to establish negligence must be determined by that act and the applicable principles of the common-law as construed by the federal courts." See cases there cited. A brief statement of the facts, in addition to those already stated, are as follows: The train which struck appellee was running fifty miles an hour, and, at the time appellee walked from a place of safety on the east side of the compressor to a place of danger, the train was seen by the other employees and was only 150 or 200 feet away, north of the compressor, and was in plain view of all the crew, including appellee. There was nothing in the way to prevent him seeing it, and, in addition to this, there was a semaphore signal located about an eighth of a mile north of the bridge, also in plain view, which had a board or arm on it about three feet long and which automatically moved up and down to signal the approach of trains to the bridge. The arm stood straight up when there was no train in the block, but when one did get in the block the arm lowered to an angle of 45 degrees, and then went straight down when a train in the block got within two miles of the bridge. It was also equipped with a green and red light, the green indicating safety and the red danger. The air was conveyed from the compressor to the workmen on the bridge by means of a pipe to which was attached the equipment for operating the riveting hammer by air, and, when this was in operation, it also made a great deal of noise. It is conceded that all the machinery, both on the bridge and at the compressor, was in operation at the time of appellee's injury, and that the noise was such that the approach of the train could not be determined by the sense of hearing. Some of the employees on the superstructure of the bridge attempted to notify appellee of the danger by calling to him, but were unable to do so. Assistant foreman Bezdek, who had told appellee that he would look out for trains for him and advise him of their approach, which fact we assume to be true for the purpose of this decision,

as the jury has evidently so found on conflicting testimony, was on the bridge with the other workmen. Appellee did not know where Bezdek was, but did know about an hour beforehand that he was up on the bridge with the other members of the crew directing their work. Considering the evidence in the light most favorable to appellee, as we must do, under the decisions of this court in determining the sufficiency of the evidence to support the verdict, appellee did not know of the presence of the semaphore nor of the signals thereon nor the schedule of the trains, and, while there was nothing to prevent his seeing the approaching train, being no doubt engrossed with his work and his sense of hearing being of no avail on account of the immediate noise, he neglected to look, and he relied upon the positive promise of Bezdek to warn him not only of this train but of all trains. Appellant's witness testified that the company had a rule that employees in bridge crews must watch out for their own safety, but this was denied by appellee, or that, if there was such a rule, he knew of it.

We think these facts sufficient to take the case to the jury under the comparative negligence rule of the Federal Employers' Liability Act as contributory negligence, conceding appellee to be guilty of contributory negligence (and the court instructed the jury that he was as a matter of law) does not prevent a recovery, but only goes to reduce the damages awarded by the jury. Cases cited by counsel for appellant to sustain their contention on this point that the railway company ordinarily owes no duty of keeping a lookout, to give signals of approach or to reduce speed of trains in anticipation of employees along the track, we think have no application to the facts in this case. These cases for the most part apply to track walkers, flagmen, employees working in the yards, section foremen and the like, but we think the rule has no application to section crews or bridge crews where the crews are working under the immediate direction of the foreman and under his express promise to watch out for trains and warn them in time so they may leave their work for the shortest time possible in getting to a place

of safety. If all the members of such crews had to look out for their own safety by watching for trains, it would surely interfere with their work. The case of *C. R. I. & P. Ry. Co.* v. *Abel,* 182 Ark. 651, 32 S. W. (2d) 1059, relied on by appellant, we think, has no application to the facts in this case for the same reason. There the appellee himself said that their instructions were to be themselves on the lookout for trains and keep out of the way of them, and that he had done that until the time he was injured. Here, however, appellee was acting upon the direct order of his foreman and under a promise that the foreman would keep a lookout for trains. We think the case is governed by the rule announced by this and other courts that employees such as section men or bridge crews, working on the track or in dangerous proximity thereto, are entitled to warning of approaching trains, and that it is negligence to fail to do so. See *St. L., I. M. & S. R. Co.* v. *Rickman,* 65 Ark. 138, 45 S. W. 56; *Sw. Tel. & Tel. Co.* v. *Woughter,* 56 Ark. 192, 19 S. W. 575; *St. L. & N. A. R. Co.* v. *Mathis,* 76 Ark. 184, 91 S. W. 763, 113 Am. St. 85. Conceding that there is a rule requiring such employees to watch out for their own safety, still appellee had no knowledge of the rule, and an employee is not bound by a rule of the company not brought to his attention. *St. L., I. M. & S. R. Co.* v. *Puckett,* 88 Ark. 204, 114 S. W. 224. Therefore appellee was not bound by a rule of which he had no knowledge, and had the right to rely upon the express promise of Bezdek to protect him. Counsel for appellant say the language used by Bezdek in making the promise to appellee did not amount to a promise to warn or protect him, but, if it did not mean that, it amounted to nothing. Appellant says Bezdek told him to go ahead with his work, and he would watch out for trains. This means that he would do so for appellee's benefit.

It is next insisted that a number of the instructions are erroneous, some of those given for appellee and those refused requested by appellant. A discussion of these questions could not be made in a reasonable space by taking them up in detail, and we will not attempt to do so.

We will say, however, that we have carefully examined these instructions and do not find them open to the objections made, or, if so, specific objection should have been made thereto. For instance, in the instruction given at appellee's request on the measure of damages, no mention was made therein that the jury should reduce the damages in the proportion that his contributory negligence bore to the negligence of appellant. The court told the jury, however, in another instruction that they must do this, and, if appellant had thought that the instruction on the measure of damages should have contained the same advice, it should have made such suggestion to the trial court. A great many instructions were given at appellant's request, and some were refused. On the whole, we think the court fully and fairly instructed the jury on every phase of the case to which appellant was entitled.

It is finally insisted that the amount of the verdict is excessive, and we agree with appellant in this contention. It is true that appellee received a serious injury, that he was only twenty-two years of age, was a strong, healthy and able-bodied young man who was earning $150 per month. He was a common laborer, not being skilled in any particular occupation. At the time of the trial he had not been able to use his left leg. The injury occurred September 8, 1930. Suit was filed shortly thereafter, in October, and trial was had in January following. He was in the hospital about thirty days and was able to get around on crutches at the time of the trial. But no bones were broken, and such injuries as he received were to the muscles and nerves. Two examinations were made by one of the physicians, one in November and one a short time before the trial, which showed a distinct improvement in his condition between the examinations. Another physician testifying in his behalf stated that appellee is permanently crippled, and that in his judgment he may never be able to walk again without a stick or a crutch to assist him. We think the jury failed to properly reduce the damages in proportion to appellee's contributory negligence, for an allowance of $30,000 at 6 per cent. would yield him the same rate of pay per

month or per year he was making and still leave him an estate of $30,000 at his death. We think this amount is excessive and should be reduced by one-half the amount thereof. If, therefore, appellee will within 15 days enter a remittitur, the judgment will be affirmed for that amount. Otherwise it will be reversed and remanded for a new trial. It is so ordered.

TAYLOR v. FIRST NATIONAL BANK OF DEQUEEN.

Opinion delivered December 7, 1931.

Steel & Edwards, for appellant.

Abe Collins, for appellee.

BUTLER, J. The Bank of DeQueen and the First National Bank of DeQueen, appellee here, were two banks doing business in the city of DeQueen on and before July 15, 1930. At the close of the business on that date the officers of the two banks, as was their custom, met for the purpose of clearing checks they had paid for each other in the course of the day's business. It was ascertained that the appellee bank held checks of the Bank of DeQueen in the aggregate sum of $1,311.06, and the latter bank held checks on the appellee bank amounting to $413.71. The cashier of the Bank of DeQueen, in the settlement of the balance for that day's business, gave appellee bank a draft on its correspondent bank in Texarkana, where it had at the time money on deposit more than sufficient to take care of the draft.

The Bank of DeQueen failed to open its doors on the next banking day, and was taken over for liquidation by the appellant, the State Bank Commissioner. When the draft in controversy reached the correspondent bank, that bank had received notice of the insolvency of the drawer and thereupon refused to pay the draft applying the sums on deposit as a credit upon the indebtedness the Bank of DeQueen owed it. The checks drawn by depositors included in the settlement between the Bank of DeQueen and the appellee bank were marked paid and charged by the banks to the accounts of the depositors who had drawn these checks. When the liquidating agent, Simmons, took charge of the Bank of DeQueen, he offered to return to the bank the checks that it handled of the Bank of DeQueen on the last day of its business, and to reverse the entries on the books of that bank if appellee bank would return the $413.71 of checks drawn on it on that day or the cash equivalent, which proposition was declined by the appellee.

Appellee bank presented to the appellant bank commissioner the aforesaid draft which the Bank of DeQueen had drawn in its favor for allowance as a preferred claim. On the refusal of the appellant to so allow it, the appellee filed its petition and intervention in the chancery court of Sevier County, setting up substantially the facts leading up to the drawing of the draft and the rejection of the claim by the appellant as a preferred claim, with a prayer that it be allowed as a prior claim against the assets of the insolvent bank in the hands of the commissioner. An answer was duly filed to the petition and issue joined. At the hearing of the case, when the above facts were developed in testimony, the chancellor granted the prayer of the petition, and the bank commissioner has duly prosecuted this appeal.

The sole question presented is whether the transaction between the two banks and the check or draft given in consummation thereof entitled it to be allowed as a prior claim as contended by the appellee in the court below, and as the chancellor found.

It is settled law that one who holds a check or draft of a bank which becomes insolvent before such is paid is not entitled to any preference over other creditors. 7 C. J., p. 751. Under a state of facts practically identical with those before us, the court, in the case of *First National Bank* v. *Farmers' State Bank,* 120 Kan. 706, 244 Pac. 1049, 44 A. L. R. 1531, held that the holder of the draft of the insolvent bank, given for the balance in the holder's favor where checks were cleared between it and the insolvent bank on the last day of that bank's business, and which had been dishonored by its correspondent upon which the draft was drawn, was entitled to no preference over the general creditors of the insolvent bank, as there was no trust relation created by the transaction, and the relation existing between the two was merely that of debtor and creditor.

In *American Bank* v. *People's Bank* (Mo. App.), 255 S. W. 943, a similar state of facts existed, and there the court held that, under the facts, the relationship of debtor and creditor existed. In commenting upon the nature of the transaction, the court said: "There was nothing in the transaction to establish or create a trust relationship between the plaintiff and defendant. That the transaction augmented the assets of the defendant, if this be true, is not sufficient to entitle plaintiff to a preferential payment of its claim. To entitle it to such preference an agency or trust relationship between plaintiff and defendant must be shown. No such relationship appears."

The first-mentioned case is reported in 44 A. L. R., issued in 1926, at page 1531, and in the case note referring to that case and to the case of *American Bank* v. *People's Bank, supra,* the editor says: "The only two cases that seem to have arisen involving the question of whether the balance due other banks on clearing-house settlement is a preferred claim against the insolvent bank having reached the conclusion that such claim cannot be considered preferential."

Appellee bottoms its case upon subdivision 7 of § 1 of act 107 of the Acts of 1927, the terms of which it is contended, as applied to the facts in this case, establish the agency of the Bank of DeQueen for the reason that the draft drawn and dishonored covered the proceeds of a collection made by the Bank of DeQueen by honoring checks upon itself which were charged to the accounts of depositors who had drawn the checks. The language of that subdivision thought to be applicable is as follows: "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." The contention may be best stated in the language of the appellee: "This case turns, * * * on the question as to whether or not, under the facts in this case and the provisions of subdivision 7 of § 1 of act 107 of

1927, the entries involved could have been reversed at the time the deputy bank commissioner offered to return to appellee the checks delivered by it to the Bank of DeQueen two weeks prior thereto, conditional upon appellee paying him $413.71 or returning the checks in that amount drawn on it by its depositors and obtained from the Bank of DeQueen when the appellee and said bank last cleared, which alternative the proof shows it would have then been impossible to comply with because said checks had been paid and returned to the persons who drew them." This statement presupposed that the draft represented "the proceeds of a collection" within the meaning of subdivision 7, *supra*. Assuming that the statement of fact contained in the quotation from the appellees above that the deputy bank commissioner had been in charge of the Bank of DeQueen two weeks before he offered to return to appellee the aforesaid checks, is supported by the record, and assuming further that at that time it was impossible for the appellee to return the checks drawn on itself to the persons who had drawn them, we are of the opinion that these facts created no preferential claim, for the reason that appellee is in error in the assumption that the draft represented the proceeds of a collection within the meaning of subdivision 7, *supra*. Independent of the statute, if the checks received by the Bank of DeQueen were for collection merely, then it would have acquired no title to the proceeds of the same, but would have held them in trust for the appellee. *Darragh Co.* v. *Goodman*, 124 Ark. 532, 187 S. W. 673. But this was not the case. These checks were received in the ordinary course of business, not for collection but for payment, which was attempted to be effected by charging them to the accounts of the depositors who had drawn them and delivering to the appellee bank a draft for the gross amount of the proceeds less the checks drawn on appellee which it had acquired in the course of business, and the relation of debtor and creditor necessarily arose, which relation would continue as to this transaction until the draft had

been honored, and, it not having been honored, that relationship still subsists.

There is nothing in the statute hereinbefore quoted that conflicts with this conclusion, and therefore the general rule stated and the cases of *First National Bank* v. *Farmers' State Bank* and *American Bank* v. *People's Bank, supra,* are pertinent and sustain the view we have taken, which results in a reversal of the case with directions to allow the claim as that of a general creditor. It is so ordered.

HASTINGS *v.* PFEIFFER.

Opinion delivered December 7, 1931.

Arthur Sneed and *E. G. Ward,* for appellant.

W. E. Spence and *W. F. Kirsch,* for appellee.

BUTLER, J. A number of claims were allowed by the county court of Clay County in the last half of the year 1930 upon which warrants were issued payable out of the "County Highway Fund." Between March 7th and April 27, 1931, these warrants were by the appellees, then the owners of the same, presented to the county treasurer for payment, which, being refused, a mandamus proceeding was instituted by the appellees on the last-

named date to enforce the payment of said warrants, From the order awarding the writ this appeal is prosecuted.

The facts, about which there is no dispute, may be summarized as follows: The funds arising from the collection by the State of gasoline taxes and automobile license fees allotted to the county, prior to the passage of act 63 of the Acts of 1931, were carried on the books of the county treasurer as the "County Highway Fund." On a day of a regular term of the county court held on March 7, 1931, an order was made and entered directing the treasurer to keep the funds received by the county under the provisions of said act separate from other funds, and to carry the accounts thereof on his books as the "Clay County Road Fund," and directing him to pay out the moneys received only upon warrants drawn on said fund. After said date and order, the moneys received by virtue of act No. 63, *supra,* were carried on the books of the treasurer in accordance with said order.

At the time of the presentation of the warrants by the appellee, there remained a small balance amounting to about $..... in the county treasury to the credit of the "County Highway Fund," and in addition there was on deposit in various insolvent banks sums due this fund which were not then available, although it was expected that from these deposits payments would be received by the county in the future. The total amount of the warrants presented by the appellees was $4,545.94, and there had been received and placed to the credit of the Clay County road fund sums in excess of this amount which were in the treasury at the time the warrants were presented.

The proportionate amounts received by the counties from the State treasury derived from taxes on gasoline and automobile license fees, etc., is commonly known as "county turnback." This turnback had its origin in § 21 of act No. 5 of the Acts of 1923, special session of the General Assembly, popularly known as the Harrelson Road Law. That section provided that from the moneys received for gasoline tax, etc., the sum of

$3,000,000 should be allotted to the various counties according to the classification therein made, and the allotment was designated at times as "county highway fund" and at others as "county highway improvement fund" with the provision that it should be "by the county court expended upon the public highways of said county, and it shall be the duty of the county court to fairly and equitably apportion the funds so paid into the county highway improvement fund at the option of said court among the various road districts and road improvement districts, or road districts only, in said county for the purpose of constructing and maintaining roads."

By act 147 of the Acts of 1925, § 21 of act No. 5, *supra,* was amended in various particulars, but the method of expenditure of the turnback to the county remained as before. By § 2 of act No. 11 of the Acts of 1927, § 21 of act 5, *supra,* as amended by act 147 of the Acts of 1925, was repealed. In lieu of the provisions of that section, it was provided in § 10 of act No. 11 for aid to the counties by a certain turnback of the State Highway Fund to the counties. The fund to be paid to the counties was designated sometimes as "county highway fund" and sometimes as "county highway improvement funds," as in § 21 of act No. 5, *supra.* The purpose of this turnback, as expressed in § 10 of act No. 11, *supra,* was "for use on the county roads." The provision of the section directing that the money be expended by the county court at its option, etc., was omitted, and no specific direction made regarding its expenditure. This act was further amended by act No. 18 of the Acts of 1929. Section 9 of that act fixed the amount of the turnback to be allotted to the various counties "for aid to county highway funds." By subdivisions (e) and (f) of § 1, act 63 of the Acts of 1931, the revenue derived from taxes on motor vehicle fuel, license fees, etc., allocated to the county was designated as the "county highway fund." By subdivision (h) of § 1 of that act it was directed that the entire allotment of each county, where there were no outstanding road bonds, should be

remitted to the county treasurer of each county for credit to the county road fund to be disbursed by the county judge of said county for any of the following purposes: (1) For the building of farm-to-market roads or the maintenance of farm-to-market roads already built. (2) To the payment of maturities of bridge bonds issued by any bridge improvement district created prior to the passage of this act in such amount as the county court or judge hereof (thereof) shall determine.

It is argued first by appellant that the court erred in issuing a temporary injunction restraining the treasurer from paying out any moneys to the credit of the county road fund until the petition for mandamus might be heard, and that on the petition itself no proper notice was given, and that the writ prayed for was illegally awarded because other adequate remedies at law were available to the appellees. It would serve no useful purpose to review the authorities cited in support of these contentions because authority for the proceeding by mandamus is found in the act relied upon by appellees (act 63, *supra*). Section 7 says: "The provisions of this act may be enforced by mandamus by any interested parties."

The essential question presented is whether or not the writ was correctly awarded on the merits. It is the contention of the appellant that act No. 63, *supra,* provided for a new and different arrangement in regard to the use and purpose of funds delivered to the various counties for roads. We do not agree with appellant in this contention. Beginning with the passage of the Harrelson Road Law a certain part of the moneys arising from tax on gasoline, motor oil, motor vehicle license fees and privilege taxes accruing to the State Highway Funds were allotted to the various counties according to certain classifications. The manifest purpose of the act was to aid the counties in the construction and maintenance of county highways. The designation of the funds allotted was not considered by the Legislature as of any great moment for it uses one expression at one time and another expression at another—sometimes

"county highway funds," at others "county highway improvement funds," and, lastly, as "county road funds," all meaning one and the same thing, *i. e.*, a fund to be used by the county in the construction, maintenance or improvement of county highways. This is the purpose for diverting funds from the State Highway Funds to the counties from the beginning of the legislation until and including the Act of 1931, and no other. We have been unable to find in any text or decision of any court where the expression "farm-to-market" roads has been given a definition, but we are of the opinion that the expression as used in the act of 1931 means any of the public highways of the county leading either directly to, or intersecting, the State highways leading to markets, and under the proof in the case the circuit judge correctly found "that all of the highways in the county road system of Clay County, Arkansas, lead from the farms to some market in said county." They were therefore "farm-to-market" roads.

Attention is called to the emergency clause contained in § 9 of act No. 63, *supra,* and it is argued that the Legislature intended to restrict the expenditure of road funds allotted to the counties to such improvement or construction as would be made after the passage of the act, and therefore a warrant founded on a claim for improvement or construction made before the passage of the act and before the funds reached the county thereunder was precluded. The language of that clause is as follows: "In view of the existing conditions of the various counties of the State of Arkansas, which by reason of the drouth and financial depression have so retarded the building of roads that it is impossible for the various road districts and counties in this State to keep roads in a safe condition and enjoy equal opportunities in the matter of road transportation, which condition is unsafe and has retarded progress and enforced idleness upon a large portion of our people and jeopardized the safety of the traveling public, an emergency is hereby declared to exist," etc. In construing this clause, the provisions of the act must be taken into account and the

purposes for which the clause was inserted. The reason for the emergency clause was to give immediate effect to the act, and with this in mind we do not think that the clause warrants the construction placed on it by the appellant.

We are of the opinion that it is immaterial by what name the fund was called where it is shown, as in this case, that the "county highway fund" and the "Clay County Road Fund" were received from the same source, derived from the same character of taxation and devoted to the same purpose. We conclude therefore that the judgment of the trial court was correct, and it is affirmed.

GENERAL MOTORS ACCEPTANCE CORPORATION *v.* SANDERS.

Opinion delivered December 14, 1931.

Barber & Henry and *Troy W. Lewis,* for appellant.

R. W. Robins, for appellee.

SMITH, J. Appellee owned a second-hand automobile, which he traded to a dealer named Harton, at Conway, as part payment for a new sedan. According to the testimony of appellee, the trade was made on

January 2, 1930, at which time he signed a blank sales contract. He was allowed a credit of $500 for his old car, and was to pay a balance, including carrying charges, of $491, payable at the rate of $41 per month for eleven months and at the end of the year a twelfth payment of $40. The first and second payments of $41 each were made promptly by appellee to Harton, and a payment of $31 was made upon the third installment, leaving a balance of $10 due thereon.

The sales contract, which was assignable but not negotiable, was assigned by Harton to appellant, General Motors Acceptance Corporation, hereinafter referred to as the company, and that company seized the sedan and sold it in satisfaction of the balance claimed by it to be due. The title was reserved in the sales contract until the balance of purchase price was fully paid and the right to retake the car was given. The company sold the car at private sale and credited the proceeds thereof on the balance due on the purchase price.

Under the sales contract as filled in by Harton and as it read at the time of its assignment to the company, it was dated May 19, 1930, and required twelve payments to be thereafter made aggregating $491. Sanders contended that the contract had not been correctly filled in as to its dates, that is, that it should have been dated as of the date it was made, to-wit, January 2, 1930, and that had it been correctly dated it would have shown that only twelve monthly payments were to be made after the delivery of the car. On the other hand, Harton contends that the contract bore the correct date; that the dating of the contract had been postponed so that the deferred payments at $41 per month would cover only one year, and that this was done because the company would not buy a contract which provided for payments extending beyond one year. In other words, the question of fact in the case is whether there was an agreement, not expressed in the contract of sale, whereby Sanders was to make three payments in addition to the twelve provided for in the sales contract.

Sanders made default in his payments, and this fact would ordinarily have authorized the company to repossess the car, but before it was taken from him he offered to make his past due payments provided he was given credit for the three made to Harton. This the company declined to accept.

Under the contract the company had the right to retake the car and sell it publicly or privately, provided Sanders had made default in his payments. But the company did not have the right to retake and sell unless there was default. This question of fact is of controlling importance, and has been decided by the jury in Sanders' favor. Sanders testified that he signed the sales contract in blank under the assumption that the dates would be correctly filled in, and that he was promised a copy of the contract, but the copy was never given him.

As we have said, the contract was assignable, but not negotiable, and any defense which could have been made to a suit thereon by Harton could also be made against his assignee. It was said in the case of *General Motors Acceptance Corporation* v. *Salter,* 172 Ark. 691, 290 S. W. 584, which case involved a contract identical with the one here in suit and in which case the appellant here was also a party, that, "since the instruments were not negotiable, but assignable only, appellant took them subject to all defects or infirmities available to the maker as a defense against the payee therein."

According to the recitals of the contract of sale, only twelve payments were contemplated after the delivery of the car, and it is admitted that three payments had been made less $10, but Harton insists that these three payments were to be made in addition to the twelve monthly payments required by the contract. According to Sanders, there was no error in the number of deferred payments as recited in the contract, and the controversy arose out of the act of Harton in inserting a date after the contract had been signed by Sanders contrary to the facts and to the agreement of the parties. In the case of *Pictorial Review Co.* v. *Rosen,* 171 Ark. 719, 285 S. W.

385, a very similar question arose, and it was there said: "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. (Citing cases.)"

If, as the jury has found, the company refused to accept the past due payments and seized the car and sold it without right so to do, then it is liable for damages for the wrongful conversion, the measure thereof being the actual market value of the car (and not the price for which the company sold it privately), less the unpaid purchase price. *Roper Wholesale Grocery Co.* v. *Favor*, 8 Ga. App. 178, 68 S. E. 883; *Smith* v. *Goff*, 39 R. I. 437, 72 Atl. 289; *Goggan* v. *Garner* (Tex.) 119 S. W. 341; *Clark* v. *Clement*, 75 Vt. 417, 56 Atl. 94.

Damages appear to have been assessed in Sanders' favor in conformity with this rule, and, as the testimony sustains the finding that the car was wrongfully seized and sold, the judgment of the court below must be affirmed, and it is so ordered.

KIRBY, J., dissents.

TAYLOR *v.* COOPER.

Opinion delivered December 14, 1931.

Sam Rorex, N. R. Hughes and *Trieber & Lasley,* for appellant.

Cockrill & Armistead, for appellees.

Rose, Hemingway, Cantrell & Loughborough, for interveners.

SMITH, J. A suit was instituted by the heirs of J. H. Laster, deceased, for the purpose of partitioning a large body of land owned by their ancestor. The Exchange National Bank filed an intervention praying the foreclosure of mortgages held by it on the lands and personal property then in the hands of the receiver. Upon the motion of the bank the acting receiver was discharged and C. M. Connor, an active vice president of the bank, was appointed receiver, who qualified as such and took possession of all the property.

Connor, as receiver, was directed by the court to conduct and operate the commissary and gin on the lands and to farm the lands during the year 1930. To execute this direction the court authorized and ordered the issuance of receiver's certificates in the sum of $50,000, and $20,000 additional of such certificates were later authorized. The orders of the chancery court authorizing the issuance of these certificates provided that the certificates should be secured by all the live stock and personal property in the possession of the receiver and of all the crops to be grown and raised on the lands owned by the deceased and to secure such certificates by a pledge "of all the income, profits and avails" of the receivership arising by reason of the farming of said lands and the operation of the commissary and gin.

The order of the court authorizing the issuance of the certificates provided that they should be made payable on or before December 1, 1930, and should be issued from time to time in such amounts as in the judgment of the receiver and John M. Davis, president of the Exchange National Bank, might be necessary. The certificates could be issued only upon the countersignature of Davis. These certificates, when issued, were cashed and held by the bank, and when the first $50,000 of cer-

tificates had been issued and cashed by the bank a court order was obtained authorizing an additional issuance of $20,000 in certificates, it being agreed by the bank that this last issue should be upon a parity with the first issue of $50,000 and should have the same security.

The testimony in the record makes it clear that this was all done for the benefit of the bank. It held a second mortgage and desired to postpone the foreclosure of the prior mortgage. It did not want to choose between the loss of its security by the foreclosure of the prior lien and having to assume and pay that lien. In the effort of the bank to carry on and to postpone the foreclosure of the prior lien, the bank desired the receivership and caused one of its active vice presidents to be appointed receiver, and had cashed and held all the certificates which that officer issued as receiver.

Upon Connor's appointment as receiver, he employed A. C. Slaughter as plantation manager, and J. H. Rozzell as assistant manager, and G. T. Purinton was appointed manager of the commissary and bookkeeper. After making these appointments, the plantation and commissary were practically turned over to the appointees, who operated in the manner hereinafter stated. Purinton made all purchases for both the commissary and the plantation. R. H. Thompson was an active vice president of the bank, and Connor testified that whenever Slaughter came to the bank to discuss any question concerning the operation of the plantation, he was sent by the witness to Thompson. The bank's control of the business appears to have been almost as complete as it would have been had it owned the property or had itself been the receiver. Connor testified that Purinton made all purchases and drew checks signed by himself in payment, which were brought to witness for his signature as receiver. Ordinarily in paying these bills Slaughter and Purinton would come to the receiver's office, which was in the bank, and would then be sent to Thompson's desk to check over the bills and invoices.

At the beginning of the season two tractors were purchased, upon which the receiver made a cash payment of $800 and for which he signed two title-retaining notes each for the same amount, and these notes were included in the accounts presented by persons hereinafter referred to as interveners.

About July 1, 1930, Purinton furnished Connor a statement of outstanding accounts, and Connor testified that he was amazed to learn that all the receiver's certificates which he was authorized to issue had been sold to the bank, and that it would require eight or nine thousand dollars additional to finish the crop. Among the bills then due and unpaid was one of the Punkett-Jarrell Grocery Company, which company had the assurance of both Connor and Thompson that this bill would be paid.

Slaughter, the manager, testified that, while Purinton made all purchases, he did not buy anything without consulting witness and having the authorization of witness to make the purchase, and that bills covering such purchases were submitted to Thompson, the vice president, or to Davis, the president, of the bank.

Purinton's purchases appear to have exceeded the expectations of the officers of the bank, but this excess of expenditures appears to have resulted not from a lack of authority on the part of Purinton, but from a lack of supervision and direction on the part of the bank's officials to whom Purinton made report.

Purinton testified that about August 2d he took a list of outstanding and unpaid accounts to Davis and Thompson amounting to about $3,300, and he was informed by Davis' secretary that only about $1,980 was available to pay these bills, and he was then instructed by both Thompson and Davis to go to the concerns from which he had made the purchases in question "and see how many of these accounts you can stave off, and ask them if they will continue to sell the plantation the things needed for the operation of the store and the farm, until the first cotton can be harvested, at which time we will pay these bills before taking up receiver's certificates."

Witness obeyed this direction faithfully, as he testified. Purinton further testified that, on October 7, 1930, he took to Connor a list of the bills here involved, and Connor conferred with Thompson as to whether they should sell enough cotton to pay them. After this conference, Connor directed witness to tell Slaughter to sell enough cotton to pay the bills, but this order was countermanded the following day, and Purinton returned to Little Rock for further conference with Connor and Thompson. He was thereafter directed by Thompson and Davis to go to the various creditors and inform them that the cotton would be sold in October, and their accounts would be paid probably by the 1st of November, and not later than the 15th of that month, and witness so advised the creditors, and on November 1st he was advised by Thompson to buy no more goods and issue no more checks.

The claim of the Plunkett-Jarrell Company was in no manner different from that of the other creditors herein referred to as interveners, and on November 14th this claim was paid by a check drawn on the American Exchange Trust Company, this being the bank with which the Exchange Bank had merged.

The American Exchange Bank closed its doors the day after the Plunkett-Jarrell account was paid, and the affairs of the bank were taken over by the State Banking Department, and among the assets found on hand were the receiver's certificates herein set out.

The creditors whose accounts were incurred, as herein stated, after the proceeds of the sale of the receiver's certificates had been exhausted, or most of them, filed interventions in the chancery court where the receivership was pending, in which they prayed that they be first paid out of the proceeds of the cotton grown by the receiver before the receiver's certificates were ordered paid, there being insufficient funds on hand to pay all creditors. This prayer was granted, and the claims of the interveners were ordered first paid, and this appeal is from that decree.

We think, under the facts as summarized, that the Exchange Bank waived the right to insist on the prior payment of the receiver's certificates which it owned at the time of the consolidation of that bank with the bank which after the consolidation was known as the American Exchange Bank. It is true the court authorized the issuance of the receiver's certificates, and did not authorize the debts due interveners to be incurred, but the debts due the interveners were incurred under the authority of officers of the bank who were in control of the receivership. If the receiver's certificates were otherwise owned than by the bank, a different question would be presented from the one we have for decision, but the Exchange Bank and the bank which succeeded it has at all times owned these certificates, and the consolidated bank took therefore, just such title as the Exchange Bank originally had.

So therefore the question for decision appears, in effect, to be whether the bank shall, as holder of the certificates, be first paid, or whether persons who are, in effect, creditors of the bank, shall be first paid, and we answer by saying that the bank's creditors rather than the bank itself should be first paid.

Of course, the interveners are not technically creditors of the bank, but it is nevertheless true that in incurring these obligations Purinton was acting for the bank, as well as for the receiver. The total credit which the court had authorized the receiver to use had been exhausted, and, without obtaining further authorization to borrow money, the officers of the bank directed Purinton to incur obligations and to make promises of payment and to obtain indulgence in payment. Indeed, the account paid to the Plunkett-Jarrell Company was as to many of its items identical with that of the interveners, and differed only in that it was larger than the claims of all the interveners combined. There was no greater obligation, nor any more authority, to pay the Plunkett-Jarrell Company than there was to pay the claims of interveners, and we conclude therefore that the court below was correct in

holding that the claims of the interveners should be paid prior to the receiver's certificates, and that decree is affirmed.

PEARL CITY PACKET COMPANY *v.* TOWERY.

Opinion delivered December 14, 1931.

Buzbee, Pugh & Harrison, for appellant.

J. F. Parish and *W. R. Donham,* for appellee.

HUMPHREYS, J. Appellee brought suit in the circuit court of Jackson County to recover damages for injuries received from a falling derrick while engaged in the performance of his duties as an employee of appellant. The allegation in the complaint upon which appellee based his action was that appellant "negligently furnished a foundation, supports, and attachments for its derrick and boom which were old, defective, rotten and insecure."

Appellant filed an answer denying the negligence alleged.

The cause was submitted upon the pleadings, testimony, and instructions of the court, resulting in a verdict and consequent judgment against appellant, from which is this appeal.

Appellant concedes for the purposes of this appeal that testimony was introduced from which the jury might have found that the foundation supports of the derrick

which fell upon and injured appellee were defective, but contends that the court erred in admitting testimony tending to show a defective condition of bolts at the top of the masthead or derrick sixty feet above the foundation, for the reason that the allegation of negligence was not broad enough to cover defects in attachments on other parts of the derrick than the foundation. The meaning of the allegation is clearly that the foundation, the supports, and attachments, all three, were old, defective, rotten and insecure. It would indeed be a narrow construction to say that the allegation meant that the attachments to the foundation only were alleged to be defective. Unquestionably "attachments," as used in the allegation, referred to attachments to any part of the derrick. It was proper, under the allegation, therefore, to admit testimony relating to the defective condition of the attachments on any part of the derrick. Another objection to the admission of the testimony showing a defective condition of the bolts at the top of the masthead was that all witnesses interrogated on the point stated that the condition up at the top did not cause the derrick to fall. This was necessarily opinion evidence only, based upon the fact that the bolts in the masthead did not break. All the witnesses familiar with the operation of the derrick stated that the bolts at the top had to be replaced often on account of shearing off and becoming so small that they caused a vibration or wobbling of the derrick when in operation. The derrick had been used for years. It carried four or five thousand pounds when in operation, and the strain upon its supports and attachments was great. It was partly held in place by well anchored cables. Although the witnesses were of opinion that the bolts at the top did not cause the derrick to fall, yet the jury may have held a different opinion. The jury may have concluded that the vibration caused by the looseness of the bolts caused the cable to give way and one of the stiff legs or main supports to break and the foundation to collapse. One thing is certain, and that is that the derrick fell on account of defects either in the foundation

or supports or attachments, and for that reason it was allowable and within the allegation of negligence to prove defects in either the foundation or in the supports or attachments wherever located.

No error appearing, the judgment is affirmed.

SCHWEGMAN *v.* RICHARDS.

Opinion delivered December 14, 1931.

[redacted]

Scott & Goodier, for appellant.

Wilson & Wilson, for appellee.

KIRBY, J., (after stating the facts). The testimony is virtually undisputed that Boyce and his wife were both old and infirm, that they invited appellees to come to their home, live with and take care of them the remainder of their lives, agreeing to leave them their property at their death, in consideration of the service, and that the agreement was performed by appellees. It has been frequently held that, upon the showing of the performance of such an agreement, the persons performing it are entitled to a specific performance of same against the heirs of the decedents. *Hinkle* v. *Hinkle,* 55 Ark. 583, 18 S. W. 1049; *Naylor* v. *Shelton,* 102 Ark. 30, 143 S. W. 117, Ann. Cas. 1914A, 394; *Fred* v. *Asbury,* 105 Ark. 494, 152 S. W. 155; *Williams* v. *Williams,* 128 Ark. 1, 193 S. W. 82; *Speck* v. *Dodson,* 178 Ark. 549, 11 S. W. (2d) 456.

There is no merit in the contention that the decree is contrary to the weight of the evidence, which is, as already said, virtually undisputed. Appellees moved

from their home upon the written request and invitation of the Boyces, Taylor Boyce having legally adopted Nettie Richards in her infancy, under the agreement that they should have what property the Boyces owned at their death, and, pursuant to the contract and agreement, lived with, took care of and help support them throughout the remainder of their lives. The decree is not only not contrary to the weight of the testimony, but meets the requirement of the rule, being clear, convincing and satisfactory.

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

DEMOCRAT PRINTING & LITHOGRAPHING COMPANY *v.* VAN BUREN COUNTY.

Opinion delivered December 14, 1931.

Garner Fraser and *Roy D. Campbell,* for appellant.

Opie Rogers, for appellee.

MEHAFFY, J. During the fiscal years of 1926, 1927, 1928 and 1929, the appellant furnished the county officers of Van Buren County most of the records and office supplies used in the conduct of the business of the county. These were furnished from time to time, and the ac-

counts were filed with the county clerk for allowance against the county.

On January 20, 1930, the claim of appellant was allowed in the sum of $1,519.45. On February 8, 1930, the same term of court at which the claim was allowed, the county court entered an order vacating and setting aside its order of January 20, 1930.

An appeal was prayed from this order of February 8, to the circuit court, but when the case came on for trial in circuit court, the appellant filed a motion to quash the judgment entered by the county judge on the 8th day of February, 1930. The motion recited the judgment of January 20, 1930, allowing the claim of appellant, and stated without any just cause, the court, on the 8th day of February, 1930, vacated and set aside the order of January 20, 1930, and directed the treasurer not to pay the warrant if issued. The motion alleged that the order of January 20, 1930, was executed and a warrant delivered to the appellant, and had been in its possession since January 20, 1930, and that the court, on February 8, 1930, was without power to enter the order setting aside the order allowing the claim. The prayer of the motion was that the order of the county court made on February 8, 1930, be set aside, and that the order made on January 20, 1930, be in all respects upheld, for the reason that there was no just cause, reason or provocation for setting aside said order, and that the county court was without authority to vacate the order of January 20, 1930, because said order had been fully executed, and that the county court had no authority to amend or vacate its order which had been fully carried out and executed.

The motion of appellant to quash the order of February 8th was denied. Appellant then filed its motion for a new trial which was by the court overruled, and to reverse the judgment of the circuit court, this appeal is prosecuted.

There was considerable evidence introduced, but we think it unnecessary to set it out, since we hold that the

county court had authority to set aside its judgment during the same term of court. The judgment which appellant seeks to have quashed, simply set aside a former order allowing the claim of appellant, but it did not enter any order disallowing the claim.

Appellant contends first that no notice was given appellant that such order would be entered, and that the county court had no authority to vacate the order of January 20, 1930, without just cause or reason.

Appellant calls attention to many authorities, among which are the following. *Underwood* v. *Sledge*, 27 Ark. 296. The court in that case said: "It is well settled in this State that a court has control over its orders and judgments during the term at which they are made and for sufficient cause may modify or set them aside. * * * It is certainly good policy in the law to allow courts an hour's reflection; time to revise hasty actions, correct mistakes, and review such error as they may have fallen into for want of sufficient consideration, and to this end they have, during their respective terms, to make up their records and fully consider the propriety of their judgments, and to review and correct any mistakes, errors or indiscretions into which they may have fallen during the term, and, when such revision is had, the action of the court and the record stands precisely as if no such former mistake or erroneous judgment had ever been given or entered."

The court further said in that case that if, during the term the court, for sufficient cause or even without cause, sees fit to set aside such judgment, its benefits are lost to him in whose favor it was rendered. The court was speaking of an action of debt.

The court simply held in an action for debt, like the one here, that the court could set aside its former judgment with or without cause. It was also held in the above case that the record stands precisely as if no such former judgment had been entered.

When the county court, on the 8th of February, set aside its former order, wherein it had allowed appellant's

claim, the record stood just as if the order of January 20th had never been made. Appellant's claims were filed, and it would be the duty of the court to pass on them, and, if the county court should refuse to either allow or disallow the claims, it could be required by mandamus to do so.

The next case to which appellant calls attention is *Wells Fargo & Co.* v. *W. B. Baker Lbr. Co.,* 107 Ark. 415, 155 S. W. 122. The court in that case held that, during the whole of the term at which a judgment is rendered, it remains subject to the control of the court, and may be vacated, set aside, modified, or annulled.

Appellant calls attention to *Midyett* v. *Kerby,* 129 Ark. 301, 195 S. W. 674. In that case it was held that the court might, during the term, vacate its judgment, and that it might do so without notice, although it said the exercise of the power without notice was not to be encouraged.

The next case referred to by appellant is *Dawson* v. *Mays,* 159 Ark. 331, 252 S. W. 33, 30 A. L. R. 1463. That was a divorce case. The wife had sued for and obtained a decree for divorce, and, after the husband's death, sought to have the decree set aside in order to permit her to have dower in her deceased husband's estate. The opinion in that case has no application to the facts in the present case.

The next case relied on is *T. J. Moss Tie Co.* v. *Miller,* 169 Ark. 657, 276 S. W. 586. The court in that case said: "It is the settled public policy of this State that, during their respective terms, courts of record have complete control over their judgments and decrees, and may review and correct any mistakes or errors into which they may have fallen during the term." The court also holds in the last-named case that the record stands precisely as if no such mistaken or erroneous judgment had ever been entered. The claims of the appellant are filed in the county court, and the court will have to pass on them just as if the order of January 20, 1930, had never been entered.

The next case relied on is *Martin* v. *Street Improvement Dist. No. 349,* 178 Ark. 588. The court again announced and approved the rule that the court, during the term, had complete control over their judgments and decrees and might set them aside when good cause was shown.

Appellant calls attention to a paragraph in 15 R. C. L. 688, and quotes at length from the paragraph. The beginning of the paragraph, however, is as follows: "All courts of record have inherent power to vacate or set aside their judgments or orders during the term at which rendered. This is a power of daily exercise by courts, and its existence within proper limitations of time and propriety cannot be questioned."

It would, of course, be improper, without notice to the other party, to set aside a judgment and enter a different judgment, but in the instant case the court did not do this; it simply set aside the order allowing the claim, and left the parties just as they were before the judgment of January 20, 1930, was entered.

The court ordered that, if the clerk had issued his warrant, the county treasurer should refuse to pay it. That meant the warrant, of course, issued on the order of January 20th.

The judgment of the county court of January 20th was set aside, and this court said in *Underwood* v. *Sledge, supra*: "When an order or judgment of a court is set aside at the same term of court at which it was rendered, the whole suit or matter stands precisely as if no such consideration had been had or entered on record, and all parties interested are remitted back to such rights and remedies as they had before the making of the orders or judgments so vacated."

The appellant therefore had no right to appeal from the order of the county court setting aside its former judgment. There was no judgment there to appeal from, because, as stated by this court, the parties were remitted back, that is, they stood in the same situation that they did before the judgment of January 20th was ever en-

tered. The appellant has its claims filed and may have them passed on by the court. If the decision should be adverse to the appellant, it has the right then to appeal.

This court said, in determining whether a judgment setting aside a former judgment was final order from which an appeal might be taken: "Preliminary to a determination of this question, it may be said that this court is committed to the doctrine that courts of general jurisdiction have inherent power during the term at which judgments or orders are rendered to set aside, vacate, and annul them. * * * A motion to set aside a default judgment at the judgment term is not an independent action and, when set aside, does not determine the rights of the parties. It leaves the case in the condition it was before the default judgment was rendered with an opportunity to try the case upon its merits." *Hawkeye Tire & Rubber Co.* v. *McFarlin,* 146 Ark. 491, 225 S. W. 632.

This court also said: "It must be conceded that an order vacating a judgment or granting a new trial made in the term at which the judgment was rendered is not appealable except on the terms prescribed by the statute." *McPherson* v. *Consolidated Casualty Co. of Ark.,* 105 Ark. 324, 151 S. W. 283.

It is contended, however, by the appellant that, upon delivery of a warrant to the appellant, the judgment became fully executed, and that therefore the county court had no further control. It appears in this case that the warrant was issued by the clerk on January 20, 1930, the same day the judgment was entered. It appears also that the appellant still had the possession of the warrant.

In the case of *Murphy* v. *Garland County,* 99 Ark. 173, 137 S. W. 813, a judgment was entered by the county court, and the warrants were issued. This court said: "The judgment of the circuit court disallowing the claim rendered invalid the warrants previously issued under the judgment of the county court; and, when they were presented to the county court for reissuance, the court properly rejected them."

The judgment of the county court of Van Buren County was not executed. When the judgment was entered on January 20, 1930, the appellant was bound to know that any taxpayer might prosecute an appeal to the circuit court, and that, if the judgment was reversed, the warrant would be void. The action of the county court on February 8, 1930, was a long while before the time for appeal expired. *McLain* v. *Miller County,* 180 Ark. 828, 23 S. W. (2d) 264.

Appellant's remedy is to prosecute his claim in the county court. We find no error, and the judgment is affirmed.

AMERICAN INSURANCE COMPANY OF NEWARK, NEW JERSEY *v.* BRANNAN.

Opinion delivered December 14, 1931.

Verne McMillen, for appellant.

George W. Clark, for appellee.

MEHAFFY, J. The appellant issued its policy of insurance to appellees insuring against loss in the sum of $2,500. The policy was dated August 26, 1929. On December 8, 1930, the property insured was destroyed by fire. Notice of the loss was immediately given, and the company advised that its adjuster would make an investigation in the near future, and, in order that the adjuster might not be delayed, the appellant requested that the insured get some reliable contractor to make an estimate to repair or replace said building. The adjuster did not

make the investigation until 54 days after the property was destroyed.

There was some controversy as to whether there was a total loss and as to what the cost of replacing the building would be.

There was quite a good deal of correspondence between the appellant and the insured and his attorney, and on the third of March appellees filed with the company proof of loss. On April 3, 1931, appellees filed suit in the Faulkner Circuit Court alleging the contract of insurance, the destruction of the property, and the refusal of the appellant to pay.

It was alleged in the complaint that proof of loss was furnished the company, and that it acknowledged the same on December 16, 1930. This allegation was denied by the defendant.

The amount named in the policy, $2,500, less premium note of appellees, was paid, and there is therefore nothing claimed in the suit now except damages and attorney's fees.

There was nothing said in the complaint about a waiver of proof of loss, but the issue made by the pleadings was whether or not proof of loss was made on December 16th.

A jury was waived, and there was a trial before the circuit judge sitting as a jury. At the trial, the appellees did not introduce any evidence that proof of loss was made on December 16th, as alleged in the complaint, but introduced evidence to prove that the appellant had waived proof of loss.

The appellee, Brannan, and his nephew testified in substance that they came to Little Rock to the office of Bennett, the adjuster, and that he refused to pay the amount of the policy, and denied liability for the loss, but offered to pay a sum somewhat less than the amount named in the policy; that at that time there was a waiver of proof of loss. The appellant objected to this testimony on the ground that it changed the issues and it was not prepared to meet this proof; that appellant had not been

informed and did not know that appellees claimed that there had been a waiver, but was prepared to try the issues made by the pleadings; that is, as to whether proof of loss had been made on December 16th.

Appellant's request for postponement to enable it to get its witnesses was denied, and the case proceeded to trial over the objections of the appellant.

The court found that the appellee, Brannan, complied with the request of the adjuster and completed the estimate and called on the adjuster, Bennett, and that said adjuster made an offer of settlement, deducting more than 10 per cent. of the amount due under the policy, which the insured declined to accept; and that the adjuster refused to pay more.

The court further found that the entering into negotiations for settlement, offering a less sum than was due, and a refusal to pay the face of the policy, constituted a denial of liability and likewise a waiver of defendant to require proof of loss.

The court gave judgment for appellees in the sum of $2,361.64 with interest, and judgment canceling the premium notes amounting to $138.36; found also in favor of appellees a penalty of 12 per cent. and $200 attorney's fees, and adjudged the cost against appellant.

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

There is no controversy about the amount of insurance, but the appellant insists that it should not be required to pay 12 per cent. damages and attorney's fees.

Appellee's witnesses testified to facts which, if true, constituted a waiver of proof of loss as well as denial of liability. The testimony of Bennett, the adjuster, is in conflict with this evidence.

When a case is submitted to the trial judge, his finding of facts is as conclusive as the finding of a jury. If there is any substantial evidence to support the finding of the trial judge, it is conclusive here.

This court has said, in speaking of the finding of the circuit court sitting without a jury: "On this question

of fact, the circuit court sustained the finding of the county court, and, under settled rules of this court, where circuit courts are required by law to pass upon questions of fact, the findings are as conclusive on appeal as the verdicts of juries." *Little River County* v. *Buron,* 165 Ark. 535, 265 S. W. 61; *Mo. Pac. Rd. Co.* v. *Sloan,* 176 Ark. 179, 2 S. W. (2d) 15; *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. (2d) 1089, 59 A. L. R. 899; *Plunkett-Jarrell Grocer Co.* v. *Huie,* 175 Ark. 1148, 2 S. W. (2d) 1.

The finding of facts by the trial judge is conclusive here. The appellant, however, insists that there was an entire change of issues, and that, while the issue, as made by the pleadings, was whether proof of loss had been made on December 16th, the issue that it was required to try was a totally different issue; that is, it was required to try the question of whether there had been a denial of liability and waiver of proof of loss.

Appellant alleged that it was not prepared to try this issue, and, since no such issue was made by the pleadings, it could not be expected that the appellant could try this issue without some time to get ready.

The appellees were permitted, without amending their pleadings, to introduce evidence on an issue not made by the pleadings. It was, in fact, a wholly different lawsuit. This, we think, was error.

This court has said: "The court refused to confine the plaintiff in the introduction of evidence to the issues joined by the pleadings, by admitting the evidence objected to, and to confine itself to the issues by an instruction based in part upon such evidence, but tried the case in part outside the same, and, in so doing failed to confine itself to the rules adopted to maintain orderly procedure and to protect parties. Upon the objection to evidence, the plaintiff could have so amended its complaint as to have made it admissible, upon such terms as would have been just, but without such amendment the court should have rejected the testimony and instructed the jury accordingly." *Bryant Lumber Co.* v. *Clifton,* 85 Ark. 322, 108 S. W. 216.

The court, in holding that certain evidence was not objectionable on the ground of surprise, said: "The new issue in fact only related to the number of logs which had been cut and stacked at Worden's Spur; and no new or additional testimony was necessary." *Brown & Hackney* v. *Loveless,* 152 Ark. 540, 239 S. W. 21.

In the instant case there was new evidence, and evidence, we think, which could not have been anticipated by the appellant, because the issues tried were totally different from the issues made by the pleading, and the variance was material.

This court quoted with approval the following from Pomeroy: "If the divergence is total, that is, if it extends to such an important fact, or group of facts, that the cause of action or defense as proved would be another than that set up in the pleadings, there is plainly no room for amendment." *Railway Co.* v. *State,* 59 Ark. 165, 26 S. W. 824; *Shattuck* v. *Byford,* 62 Ark. 431, 35 S. W. 1107.

This court said in another case where it was insisted that the judgment must be reversed because there were elements of damages not claimed in the complaint: "This would follow if they had objected to the introduction of evidence as to the added element of damages, and saved their exceptions thereto." *Young* v. *Stevenson,* 75 Ark. 181, 86 S. W. 1000.

Our conclusion is that the court erred in permitting appellees to introduce the evidence of waiver and denial of liability without giving appellant an opportunity to prepare to try this new issue.

For the error indicated, the judgment is reversed, and the cause remanded for new trial.

ANDREWS *v.* SOUTHWESTERN HOTEL COMPANY.

Opinion delivered December 14, 1931.

Joseph R. Brown and *James B. McDonough*, for appellant.

Daily & Woods, for appellee.

BUTLER, J. The Goldman Hotel is one of the leading hotels in Fort Smith, Arkansas. It has no garage for the accommodation of automobiles of its guests, but usually notifies a nearby garage of the arrival of such cars which are desired to be stored, such notice being given by an electric bell connected with the garage from the clerk's office and operated by a push button. No one had access to this push button except the clerk on duty and the telephone operator at the hotel. When a guest arrived with a car which was desired to be stored, it was the custom to notify the garage by means of the push button, and it would send one of its employees to the hotel for the car. None of the employees of the hotel had any authority to transport automobiles of guests to the garage, and the bell boys (bell hops) were expressly forbidden from doing this, and it was ground for discharge for any one of them to violate this rule.

Judge Thomas G. Andrews, appellant here, is a resident of Oklahoma City, Oklahoma. On June 30, 1930, he left that city in his automobile, accompanied by his wife and mother, on a journey to one of the Carolinas, and on that trip reached Fort Smith at about 10 o'clock at night, and drove to the front door of the Goldman Hotel on its driveway and there stopped. He and his companions

alighted and went into the hotel leaving the key in the transmission (ignition). Judge Andrews went to the desk of the hotel where he registered himself and his companions as guests. One of the bell boys took the car, ostensibly to carry it to the garage of Yantis & Harper just around the corner from the hotel. The appellant went to his room and was notified about eleven o'clock that night that the automobile had been found practically destroyed at a point in the city about a mile from the hotel. No one was in the car when it was found, but there was a coat in it belonging to the bell boy. This bell boy has never been seen in Fort Smith since that time. Judge Andrews carried insurance upon his automobile covering such instances as this with the Fidelity Union Casualty Company. On being notified on the following day, the insurance company authorized Judge Andrews to purchase a new car, which he did, and assigned in part his claim for damage against the hotel company to the insurance company.

Suit was brought for damage to the car, and from an adverse verdict the plaintiffs have appealed.

There is no question as to the amount of damage, the only question being that of liability. After the verdict was returned in the court below, the plaintiffs moved the court for a judgment in their favor for the amount of the damage, notwithstanding the verdict, and, on the motion being overruled, a motion for a new trial was duly filed alleging, among other things, that upon the undisputed evidence the plaintiffs are entitled to a verdict in their favor.

It is insisted here that the court should have rendered judgment for the plaintiffs, notwithstanding the verdict in the court below, and that this court ought now to reverse the judgment of the trial court and render a verdict here for the amount of plaintiff's claim. They base their contention on the theory that the car at the time it was taken by the bell boy was *infra hospitium,* and that the rule announced in 2 Parsons on Contracts, at page 158, approved by this court in the case of *Pettit* v.

Thomas, 103 Ark. 593, 148 S. W. 501, 12 L. R. A. (N. S.) 122, Ann. Cas. 1914B, 726, is applicable to the instant case and establishes liability on the undisputed facts. That rule, referring to an innkeeper's duty to his guest, is as follows: "He is an insurer of the safety of whatever baggage or other things he receives into his inn for his guest, whether in fact negligent in their keeping or not, except against the two overwhelming forces termed the acts of God or of the public enemy. For example, if they are stolen or burned without the fault of either the guest or the landlord, the latter must be liable for them."

This rule was abolished by act No. 217 of the Acts of the General Assembly of 1913, now found in Crawford & Moses' Digest in §§ 5564-5573, both inclusive. In *Turner* v. *Weitzel,* 136 Ark. 503, 207 S. W. 39, this court, referring to the case of *Pettit* v. *Thomas, supra,* said: "That case was decided in the year 1912, but since that time the law on that subject has undergone a material change by the enactment of the act of March 29, 1913. (Act No. 217, *supra.*) * * * It makes the keeper of a hotel liable as a bailee for hire and abrogates the common-law liability as insurer. * * * The law requires ordinary care and diligence on the part of the bailee and makes him responsible only for ordinary neglect. And this is the extent of his duty and liability, even though he may be so interested in the property as to make him a bailee for hire. In such case the bailee is liable only for negligence; and such negligence must be proved by the party seeking to make him responsible therefor. The mere loss of the property does not ordinarily fix a liability for the loss upon him, but it must be further shown that said loss arose by reason of his negligence." See also *Huckins Hotels* v. *Smith,* 151 Ark. 167, 235 S. W. 787; *New York Hotel Co.* v. *Palmer,* 158 Ark. 598, 251 S. W. 34; *Fant* v. *Arlington Hotel Co.,* 170 Ark. 440, 280 S. W. 20.

It is insisted by the appellants, however, that the statute becomes applicable only when a copy of § 1 of said act is posted within the hotel in the manner prescribed

by that section, and that this compliance on the part of the innkeeper must be affirmatively shown before the benefit of the act may be invoked. That section relates only to the safeguarding of valuables of small bulk, such as money, personal ornaments, negotiable or valuable papers and bullion, to be kept within a safe or in the sleeping room used by guests and has no relation whatever to the safe care of automobiles. The court therefore did not err in its refusal to grant the motion of the appellants in the respects mentioned.

Besides, liability is not sought to be established in this case upon any statutory or common-law duty resting upon the innkeeper. The cause of action declared upon is an express agreement of bailment. Boiled down, the complaint alleges that the plaintiff, Judge Andrews, after registering as the guest of the hotel, made inquiry of the clerk on duty as to whether or not a garage was nearby where his car could be stored in safety. The clerk informed him that there was such a garage, and thereupon the plaintiff asked if some of the employees of the hotel would take charge of the automobile, and the clerk authorized and directed a negro man in the employ of the hotel to take the automobile and place it in the nearby garage. Acting on the invitation of the defendant and its employees, the plaintiff delivered the car to the negro to be taken to the garage, and the defendant, through its servants, officers, clerk and employees, assumed and took upon itself the duty and obligation to store said automobile in a safe garage.

The testimony adduced by the plaintiffs tended to establish these allegations, but this testimony was disputed by that of the clerk who, while admitting that Judge Andrews inquired about a safe garage in which his car might be stored and that he gave him the information requested, and that he did not communicate with the garage, denied that he told Judge Andrews that any one of the negro employees who happened to be bell boys would take the car to the garage. He stated that, after he gave Judge Andrews the information, the latter turned

and walked away from the desk, and that he did not know where the judge went. Judge Andrews testified that, after he was told by the clerk that one of the negro boys would take charge of the car, he turned and walked from the desk and met three of the bell boys about ten feet from the desk in the lobby of the hotel, and that he said, addressing them, "Which one of you boys will take the car," and one said, "I will"; that he then accompanied the boy to the car and the latter got in and drove it away.

It is argued here that, as the conversation between Judge Andrews and the bell boys occurred so near the clerk's desk, the clerk could have overheard the same. There is no positive testimony to show that he did, and he might or might not have done so. This question of fact was submitted to the jury in the following instruction requested by the appellants, embodying their theory of the case: "This is a suit by the plaintiffs against the defendants to recover damages sustained by the plaintiffs because of damage to the automobile of plaintiff, Thomas G. Andrews. If you find from the evidence that the clerk, or the employee acting as clerk at the time said Thomas G. Andrews registered at the Goldman Hotel, authorized said Andrews to turn his automobile over to a bell boy, or employee, of said hotel to drive to a garage, and, pursuant to said authority, Andrews turned said car over to a bell boy or employee, and said employee or bell boy took a ride in said car and damaged same by his negligence, it is your duty to find for plaintiffs." The only other declaration of law requested by appellants was that relating to the measure of damage, which instruction was given by the court.

At the request of the appellee, the court gave instructions (e), G, 4 and 5, to which objection was duly made and exceptions saved, and errors here assigned and argued. These instructions are as follows:

"(e) You are instructed that, under the evidence in this cause, the clerk in charge of the desk of the defendant's hotel had actual authority to cause Judge Andrews'

car to be stored at the Yantis-Harper garage and to call an employee of the Yantis-Harper garage to take charge and drive said automobile to storage, but you are further instructed that the bell boy who drove said car and wrecked the same had neither real nor apparent authority to take charge of said car and drive the same, unless you further find from the evidence that the clerk directed said bell boy to take charge of said car, or that said clerk directed Judge Andrews to turn said car over to the bell boy; so, if you find from the evidence that the clerk directed the bell boy to take charge of said car, or directed Judge Andrews to turn said car over to the bell boy, your verdict will be for the plaintiff. On the other hand, if you find that the clerk did not tell Judge Andrews to turn his car over to the bell boy, and that the clerk gave no instructions to the bell boy with reference to said car, then your verdict *must* be for the defendant.

"G. The burden of proof is upon the plaintiff to make out his case by a preponderance of the evidence.

"4. You are instructed as a matter of law under the evidence in this case that the bell boy had no authority to take the car of the plaintiff and store the same, or to have it done, unless you further find from the evidence that the clerk, Kenneth Newman, authorized or directed the bell boy to take charge of said car, or directed the plaintiff, Andrews, to turn the same over to the bell boy for that purpose. And in this connection you are instructed that, if you find from the evidence in this case that the clerk, Kenneth Newman, did not authorize or direct the bell boy to take charge of said car, or did not authorize or direct the plaintiff, Andrews, to turn his car over to the bell boy, then in that event your verdict will be for the defendant.

"5. You are instructed as a matter of law that the plaintiff, by his mere act of registering at the defendant's hotel, was not justified in turning his car, or the keys thereto, over to a bell boy, or instructing him to store his car in a garage. Before you can find for the plaintiffs in this case, they must show by a preponder-

ance of the evidence that the clerk, Kenneth Newman, either authorized or directed the bell boy to take charge of the plaintiff's car, or that he authorized or directed the plaintiff to have the bell boy do it. Unless the plaintiffs establish one or both of these facts by a preponderance of the evidence, your verdict will be for the defendant."

That part of instruction (e) objected to is the language used relating to the bell boy who drove and wrecked the car, of whom it is said, he "had neither real nor apparent authority to take charge of said car and drive the same, unless you further find from the evidence that the clerk directed said bell boy to take charge of said car." It will be noticed that instructions Nos. 4 and 5 are in effect the same as instruction (e), and it is argued that the language complained of disregarded the allegations of the complaint, which allegations based the right of recovery "upon the conduct of other servants of the hotel," and refers to that paragraph of the complaint which, after alleging with particularity the alleged special agreement, continues as follows: "In addition, said plaintiffs allege that defendant, through its servants, officers, clerk and employees, assumed and took upon itself the duty and obligation to store said automobile in a safe garage nearby." The answer to this contention is that this allegation was but a mere statement in general terms of what had already been particularly alleged, and this is the way in which it was interpreted by the appellants themselves, as the instruction they asked grounds the case solely on the special agreement. It is argued as to these instructions that they erroneously declare as a matter of law that the bell boy was without authority, real or apparent, to store the car, in the absence of instruction to do so from the clerk. This, in effect, is what the appellants themselves requested the court to tell the jury. Instruction No. 1 assumes that the authority of the bell boy was derived from the language and conduct of the clerk in his conversation with Judge Andrews. Therefore, the true effect of these instructions is but to state

the converse of the instruction requested by the appellants. *Western Union Tel. Co.* v. *Cowardin,* 113 Ark. 160, 168 S. W. 1133; *Pine Bluff S. & S. Ry. Co.* v. *Leatherwood,* 117 Ark. 524, 175 S. W. 1184.

It is next insisted that the court wrongfully placed the burden of proof upon the plaintiffs by instruction "G." The appellants base their argument upon the erroneous assumption that, under the facts as proved the innkeeper was the insurer of the automobile under the rule announced in *Pettit* v. *Thomas, supra,* whereas, as we have seen, the liability, if any, is based upon a special agreement which, if established, would create no greater responsibility than that of a bailee for hire, and the instruction correctly placed the burden of proof. *Bertig* v. *Norman,* 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D, 943; *Union Compress Co.* v. *Nunnally,* 67 Ark. 284, 54 S. W. 872; *Turner* v. *Weitzel, supra.*

The scope of this court's inquiry must be limited to the case tried in the court below. There the case, as we have seen, was whether or not there was an agreement as pleaded and as expressed in the instruction given at the request of the appellants. The theory now contended for is different and may not be allowed. *White County* v. *Bragg,* 168 Ark. 670, 273 S. W. 7; *American Ry. Express Co.* v. *Cole,* 183 Ark. 557, 37 S. W. (2d) 699.

It follows from what we have said that the judgment of the trial court is in all things correct, and it must therefore be affirmed. It is so ordered.

KIRBY, J., dissents.

THOMASON *v.* HESTER.

Opinion delivered December 14, 1931.

George W. Emerson, for appellant.

Charles A. Walls, for appellee.

BUTLER, J. After considerable negotiation, a contract was entered into between the appellees and one W. R. Cargile, which contract is as follows:

"This agreement, made and entered into this 26th day of May, 1930, by and between W. R. Cargile, party of the first part, and Luther Hester and Orrie Hester, parties of the second part, witnesseth:

"That the party of the first part agrees to convey to the parties of the second part the following described lands in the city of El Dorado, Union County, Arkansas, to-wit: (Here follows description), free and clear of all incumbrance except a building and loan mortgage, at this time not exceeding $6,000, which the parties of the second part are to assume and agree to pay. In payment for the above lands, the said parties of the second part are to sell and convey to the party of the first part the property which they agree to convey herein to the party of the first part.

"That the parties of the second part hereby agree to sell to the party of the first part the following described personal property, to-wit: (Here follows description.)

"That all of said lands the parties of the second part agree to convey and the personal property are to be free of any incumbrance except Federal land loan and fifteen hundred dollars owing to Dr. Hemphill, all not to exceed the sum of four thousand dollars.

"That it is hereby expressly agreed that each party is to furnish to the other good and sufficient abstracts of title to the lands agreed to be exchanged, the title to be approved by competent attorneys before title shall pass;

that possession is to be delivered of the property not later than the first day of June, 1930, whether the titles shall have been approved at that time or not.

"That the parties of the second part agree to secure manner of payment of the Dr. Hemphill indebtedness satisfactory to the party of the first part.

"That the party of the first part is to assume and to pay the indebtedness against the property to be conveyed to the party of the first part by the parties of the second part, provided same does not exceed in the aggregate the sum of four thousand dollars.

"That the deeds conveying the respective parcels of land shall be by warranty deed with relinquishment of dower and of homestead of the wives of any of the parties who may be married at the time of the execution of the deeds."

The above contract was never carried out, for, on the 28th of May, 1930, two days after its execution, the appellees disavowed the same, and advised of the withdrawal of their property from the market. The appellant thereupon brought this suit against the appellees, alleging that he was the broker with whom the lands of appellees were placed for sale; that he had negotiated the contract aforesaid, and that he had procured a purchaser for the property, ready, willing and able to purchase the same on terms acceptable to the appellees, and was entitled to his commission. The appellees answered, denying the allegations of the complaint, and asserted by way of defense certain misrepresentations and false statements of the appellant made to them, upon which they relied, and which induced them to enter into the contract. The case was submitted to the jury upon the pleadings and evidence adduced at the trial, and a verdict was returned in favor of the appellees. From that judgment is this appeal.

There was testimony tending to show that the appellant procured Cargile to enter into the contract, and that the latter was ready, willing and able to carry out his agreement; that the contract was breached by the

appellees upon the discovery that certain representations made to them by the appellant which induced them to make the contract were false, so that, if the liability of appellees depended upon the enforceability of the contract between them and Cargile, it seems as if they would be liable for the broker's fees claimed, as it appears that the contract was disavowed, not because any defects in Cargile's title to the property were ascertained or that he had failed in any particular to carry out his agreement (although these things might be shown in a suit by Cargile to enforce the contract). Cargile has withdrawn from the picture, and is not asserting any rights under the contract.

The court erred in giving instruction No. 2, requested by the appellees. The undisputed evidence shows that the appellant brought Cargile and the appellees together. It was shown that Cargile was worth from forty-five to fifty thousand dollars, was receiving a salary of $300 per month, and that immediately after the signing of the contract he deposited with an attorney in Little Rock a deed duly executed, by which he conveyed the property in El Dorado in conformity with the contract, and with this deed deposited his abstract of title for appellees' inspection, and, in so far as the evidence discloses, did everything that he was required to do under the contract to carry into effect its terms, and there is no testimony to the effect that appellees did not fully understand the terms of the contract, or that they were laboring under any disability. The instruction requested is as follows: "The court instructs the jury that the burden is on plaintiff in this case to show by a preponderance of the evidence that he found a purchaser who was ready, willing, and able to purchase their land according to the terms agreed upon; and if you find that there was no final agreement or meeting of the minds of the said W. R. Cargile, the prospective purchaser, and the defendants, then your verdict will be for the defendants."

There is nothing in the evidence, either from an inspection of the contract or the testimony relative to its

execution, tending to show that there was no final agreement or meeting of the minds of Cargile and the appellees. On the contrary, the evidence in this case shows that it was a completed and binding contract, and the court erred in giving the instruction.

It does not follow, however, that the instructions requested by the appellant were improperly refused or that he is entitled to a reversal of the judgment of the trial court and a judgment here for the amount of his claim. The appellant requested two instructions. Instruction No. 1 was for a directed verdict for the amount sued for, and instruction No. 2 directed the jury to find for the plaintiff if the evidence showed the procurement by him of a purchaser for appellees' property, and that a contract was entered into between them for the purchase and sale thereof. The testimony adduced on the part of the appellees tended to show that the appellant had discussed with them for a considerable period of time the question of the sale of their property, which was a farm consisting of 636 acres of land in Lonoke County; that they first placed a price of $20 per acre cash upon it, and later reduced this price somewhat. The appellant finally persuaded them to consent to an exchange of property with Cargile, representing to them that the property in El Dorado was being rented for $200 per month. At this time there was a debt of only $2,200 against the appellees' farm, and appellant represented to them that he had made arrangements with Dr. Hemphill, who at that time had a loan of about $1,500 secured by a mortgage on the farm, that he (Hemphill) would make an additional loan of 17 or 18 hundred dollars, bringing the amount of indebtedness on the farm up to $4,000, the payment of which Cargile would assume. The appellees would obtain in exchange for their farm the property in El Dorado and the 17 or 18 hundred dollars in cash. There was evidence further tending to show that the appellees relied upon these statements of the appellant, and that these induced them to sign the contract; that soon thereafter they discovered that the property in El Dorado was not

being rented for $200 per month, but for about $100, and that Hemphill had not agreed with the appellant that he would make the additional loan, but, although approached by the appellant for that purpose, stated that he would not do so; and that upon discovery of these facts the appellees declined to complete the transfer under the terms of the contract or to pay the appellant his commission.

A real estate broker owes to his principal the utmost good faith and loyalty, and he may not by deception or fraud induce his principal to enter into a contract for the sale of the principal's property and claim his commission although he has procured a prospective purchaser who is ready, willing and able to buy from the principal on the latter's terms. *Taylor* v. *Godbold,* 76 Ark. 395, 88 S. W. 959; *Reich* v. *Workman,* 110 Ark. 140, 161 S. W. 180; *Worthen* v. *Stewart,* 116 Ark. 294, 172 S. W. 185; *Lasker-Morris B. & T. Co.* v. *Jones,* 131 Ark. 576, 199 S. W. 900; *Wright* v. *Bennett,* 150 Ark. 154, 233 S. W. 1089; *Davis & Metcalf* v. *Haley,* 157 Ark. 232, 247 S. W. 1052; *Carnahan* v. *Lyman Real Estate Co.,* 170 Ark. 519, 280 S. W. 5.

The testimony raises an issue of fact within the rule announced, and presents a case for the determination of a jury. The judgment is therefore reversed, and the cause remanded for a new trial.

KNIGHT *v.* STATE.

Opinion delivered December 14, 1931.

T. A. Gray, for petitioner.

PER CURIAM. Petition of appellant for mandamus to require clerk to prepare a complete transcript of the record, including the indictment and all papers on file in his office, is granted. Petition for mandamus to require stenographer to transcribe his notes is denied, it being the duty of the circuit court to do that.

Mandamus from this court in aid of its appellate jurisdiction is an appropriate remedy to spur the clerk to the performance of his duty to prepare a complete transcript of the record in his office in order that the case may be reviewed here. In re *Barstow,* 54 Ark. 551, 16 S. W. 574; *Bell* v. *Rice,* 183 Ark. 105, 35 S. W. (2d) 88.

This court has no jurisdiction to compel the stenographer to perform his duties. He is accountable to the circuit court which appointed him, whose duty it is to compel him to perform the duties required of him. *Reynolds* v. *Union Bank & Trust Co.,* 182 Ark. 495, 30 S. W. (2d) 218; and *Bell* v. *Rice, supra.*

MILSAP *v.* HOLLAND.

Opinion delivered December 21, 1931.

W. A. Dickson, H. A. Dinsmore and *Price Dickson,* for appellants.

John Mayes, for appellees.

HART, J., (after stating the facts). The formation of a new school district by consolidating an old district with it is held to be within the sound discretion of the county board of education. Unless it appears from the testimony that its order is arbitrary and unreasonable, it is not proper to vacate it. *Bledsoe* v. *McKeowen,* 181 Ark. 584, 26 S. W. (2d) 900.

While a notice of a petition to dissolve a school district under the statute is jurisdictional, yet it is not necessary that the notice be signed by all of the petitioners. The reason is that the only purpose which a notice serves is to inform interested parties of the nature of the proceeding and the date upon which it would be submitted. Hence it has been held that the petitioners who sign the notice do so for themselves and all other signers. *Rural Special School Dist. No. 21* v. *Common School Dist. No. 87,* 35 S. W. (2d) 587; and *Nathan Special School Dist. No. 4* v. *Bullock Springs Special Sch. Dist. No. 36,* 183 Ark. 706, 38 S. W. (2d) 19.

In the latter case, it was also held that, after the petition had been filed with the county board of education, something more than a mere change of mind is necessary before the petitioners are allowed to withdraw their names from the petition. The court said that, before the filing of a petition, a signer would be privileged to have his name taken from the petition, but that after the petition had been filed this would be done only where the signature had been procured by some improper method, whereby the signer was deceived and a fraud perpetrated upon him.

Tested by these principles of law, we think the circuit court erred in finding for the remonstrants. The undisputed evidence shows that the certified list of qualified electors in Mt. Zion Common School District No. 2 amounted to thirty-six persons. The undisputed evidence also shows that twenty-five of these persons signed the original petition. Proof was introduced in the circuit court tending to show that four of these signers had not authorized their names to be signed to the petition, and had not signed it themselves. Hence this would leave twenty-one persons signing the petition, which would still constitute a majority of the qualified electors in said school district. But it is insisted that at least seven of these persons signed the remonstrance to the petition and testified that they wished their names erased from the original petition. They all testified that the only reason they had signed the remonstrance was because, after more mature investigation, they had concluded that it would not be best to consolidate their district with Farmington Special School District No. 6. None of them testified that they had been induced by fraud or deceit to sign the original petition. The only excuse they gave was that they had perhaps signed it too hastily. The person who carried the original petition to the signers testified that he made no false representations to induce the qualified electors of the district to sign the petition, and that each of them signed of his own free will and accord. The proof does not show that any of the parties asked that their names be taken from the original petition before it was filed. On the other hand, the undisputed proof shows that no such step was taken until after the petition had been filed with the county board of education.

Therefore the circuit court erred in holding that a majority of the qualified electors of said common school district did not sign the petition for consolidation, and erred in adjudging that the petition for consolidation should be dismissed for want of jurisdiction. Inasmuch as the undisputed evidence shows that a majority of the qualified electors of Common School District No. 2 signed

the petition for consolidation, and inasmuch as the case has been fully developed, the judgment will be reversed, and the cause will be remanded with directions to the circuit court to affirm the judgment of the county board of education consolidating the two districts, and to certify its judgment down to the county board of education to the end that it may be entered of record there.

[redacted]

MITCHELL *v.* MASON.

Opinion delivered December 21, 1931.

[redacted]

Harrison, Smith & Taylor, for appellant.

Holland & Barham, for appellee.

HART, C. J., (after stating the facts). This court has held that the sale of mortgaged property by the mortgagor without the knowledge or consent of the mortgagee constitutes a conversion of the property, and that both the mortgagor and the purchaser are liable to the mortgagee for a conversion of the mortgaged property. *Sternberg* v. *Strong,* 158 Ark. 419, 250 S. W. 344.

On the other hand, if a mortgagee consents to a sale of the property by the mortgagor, the purchaser takes title free from the lien. In such cases, the waiver on the part of the mortgagee may be established by oral evidence, which may be direct and positive, or may be established by circumstances surrounding the transaction. *Fincher* v. *Bennett,* 94 Ark. 165, 126 S. W. 392; and *Vaughan* v. *Hinkle,* 131 Ark. 197, 198 S. W. 705. In these cases, the court expressly held that, where a mortgagee verbally authorizes a mortgagor to sell the property and the property is sold to a *bona fide* purchaser for value, the latter acquires a good title, whether he knew of the existence of the mortgage or not.

In the present case, the mortgage was duly recorded, and this gave Mitchell & Bollard constructive notice of its existence. Actual knowledge may be imputed to them from the facts and circumstances in the case, which it is not necessary to state because they had constructive

knowledge of the mortgage and were bound thereby. The Masons executed a written power of attorney to Pyles which was very broad in its scope. We have not copied it in full in the record on account of its length, and we deem such course unnecessary for the reason that we are of the opinion that, although it authorized Pyles to waive the mortgage in favor of Mitchell & Bollard, yet we are of the opinion that Pyles did not waive the mortgage or consent to the sale of the mortgaged cotton.

On the one hand, Pyles denied having given Dickerson the right to sell the mortgaged cotton; on the other hand, Dickerson was equally positive that Pyles gave him the right to sell the cotton. It is claimed that the testimony of Dickerson is corroborated by the tickets given by the ginner for the said cotton when he purchased it. There were sixteen of these tickets for sales, amounting in the aggregate to something over $1,297.66, commencing on the 22d day of November, 1927, and ending on the 14th day of January, 1928. These tickets or orders, however, were shown in each instance to have been given to Pyles and indorsed by him before the proceeds were paid to Dickerson. The indorsement of Pyles in each case amounted to a consent of the sale of that much of the property, but it did not establish such a course of dealing as would give Mitchell & Bollard the right to think that Pyles had waived the mortgage on the remainder of the cotton. On the other hand, it would rather notify them that he did not intend to do so because his signature indorsing the order was secured by Dickerson before the proceeds were delivered to him by Mitchell & Bollard. *Imperial Valley Savings Bank* v. *Huff*, 126 Ark. 281, 190 S. W. 116.

We do not think that the evidence as disclosed by the record establishes any system or course of dealing between the parties which would warrant a belief that Pyles had by such course waived the rights of the mortgagee in the premises in favor of Mitchell & Bollard. A straight rental contract was entered into between the parties for each year, and the mortgage in question in

this case was executed in April, 1927, and contains the usual clause prohibiting the mortgagor from selling or removing the property.

According to the decree, the chancellor made a general finding of fact in favor of appellees, and it cannot be said that his finding is against the preponderance of the evidence. Therefore the decree will be affirmed.

TAYLOR *v.* NELSON.

Opinion delivered December 21, 1931.

C. T. Cotham, for appellant.

D. D. Glover, for appellee.

SMITH, J. The appellant bank made E. A. and Walter Nelson a loan of $3,000, which was secured by a deed of trust on a lot to which the Nelsons had the record title. At the time the loan was made an abstract of the title showed a perfect unincumbered title in the Nelsons. Default was made in the payment of the debt secured by the deed of trust, but, before filing suit to foreclose it, the bank caused the abstract to be brought down to date, and it was then disclosed that a warranty deed from the Nelsons to Dewey Roberts and his wife had been placed of

record. The deed of trust to the bank was executed February 24, 1930, and it was filed for record the following day. No one was occupying the mortgaged property at that time, although Mr. and Mrs. Roberts moved into it a few days later. The deed to the property from the Nelsons to the Roberts was dated February 10, 1930, but was not filed for record until April 19, 1930.

The bank filed suit to foreclose its deed of trust, and being advised by the abstract of the existence of the deed to the Roberts, they made the latter parties defendant. It was alleged by the bank that it had taken its deed of trust without notice or knowledge of the deed to the Roberts.

An answer was filed by the Roberts in which they admitted that the bank had taken its deed of trust without notice or knowledge of their deed, and that their deed was therefore subject to the deed of trust, but they filed a cross-complaint against the Nelsons in which they prayed judgment for damages for the breach of the warranty of their title.

The original complaint was filed May 28, 1930, and the Roberts filed their answer and cross-complaint on June 23, 1930. On July 30, 1930, a decree was rendered in favor of the bank for its debt against the Nelsons, and the mortgaged property was ordered sold. There was a sale pursuant to this decree, at which the bank was the purchaser, and this sale was later confirmed by the court.

On November 3, 1930, the Roberts filed a motion to set the decree aside and to impound a certain lien note alleged to be wrongfully held by the bank and to require the bank to account to them for the note or its proceeds.

Testimony was heard in support of and in opposition to this motion. The court declined to set aside the decree of the sale of the land and the sale thereunder, but did enter a decree requiring the bank to deliver up to or account for the note referred to in the motion, and this appeal is from that decree.

In support of this motion, it is insisted that the decree was prematurely rendered, in that ninety days had not elapsed after issues joined, nor had application been made or notice thereof been given to opposing counsel to try the cause sooner, as is required by act 37 of the Acts of 1929 (page 67, vol. 1, Acts 1929). See *Sisk* v. *Becker Roofing Co.*, 183 Ark. 101, 34 S. W. (2d) 1078.

This objection to the decree is answered by saying that the Nelsons filed no answer and were in default when the decree was rendered. The answer and cross-complaint filed by the Roberts raised no issue against the bank and did not question its right to the relief prayed. The decree did not undertake to adjudicate the matters set up in the Roberts cross-complaint, but these were reserved. We are of the opinion, therefore, that the decree of foreclosure was not prematurely rendered.

After having heard testimony on the motion to vacate the decree, the court made the following finding of fact: "The court finds from the preponderance of the evidence in this case that Walter Nelson and E. A. Nelson are insolvent, and were so insolvent when they transferred said note to the Community Bank & Trust Company as collateral on a past-due indebtedness due said bank." Upon this finding the court directed the bank to deliver the note in question to the Roberts and to account to them for any collections made on it.

It is apparent that this motion raised an issue not suggested by the original answer and cross-complaint of the Roberts. The testimony heard by the court on this motion is to the following effect. The Roberts owned a house and lot in the city of Hot Springs, which they sold for $3,250, and in payment therefor took the note of their purchaser dated 12-6-1929, and payable in installments of $31 each. This note was secured by a vendor's lien, and was drawn to include the interest in the monthly payments. After making this sale the Roberts contracted with the Nelsons, who were building contractors, to build them a house on the lot embraced in the original foreclosure suit. Under this con-

tract the Nelsons were to build the house and deliver possession thereof with an abstract of the title to the lot showing an unincumbered title. In payment therefor the Roberts paid $500 in cash, and were to pay $281 additional in cash upon the delivery of the abstract, which, however, was never delivered, and, in addition, they assigned to Nelson their purchase-money note given to them upon the sale of their lot.

The Roberts assigned this note to Walter Nelson by the following indorsement: "January 8, 1930. We hereby assign all our right, title and interest to the within note to Walter Nelson. (Signed) W. D. Roberts and Ollie Roberts." After receiving this note, Nelson deposited it with the bank for collection, and there was indorsed thereon the notation to, "credit all future payments to account of Walter Nelson."

In addition to the $3,000 note secured by the deed of trust herein foreclosed, Nelson was otherwise indebted to the bank, and he also desired additional credit, for which he applied and which was extended, and a new note covering the old balance and the new advance was made, and, as security therefor, Nelson assigned Roberts' note to the bank on April 3, 1930, by the following indorsement on the note: "For value received, I hereby assign and transfer the within note to the Community Bank & Trust Company, Hot Springs National Park, Arkansas, as collateral security for note of even date executed by me to said bank. [Signed] Walter Nelson."

This is the note referred to in the Roberts' motion to vacate the foreclosure decree, and the subject-matter of this appeal is the good faith of this transfer.

The court found that the Nelsons were insolvent when the assignment to the bank was made, although the motion contained no allegation to that effect. The testimony does show insolvency of the Nelsons at the time the testimony was taken, which was after the motion to vacate the decree had been filed, but does not show

whether the Nelsons were insolvent when the note was assigned on April 3, 1930.

This, however, is unimportant except as it bears upon the question of the good faith of the bank in taking the note as collateral to the new note which the bank took from Nelson upon lending him an additional sum of money. It may be said that this note of Nelson's to the bank was not paid, and, under the power there conferred, the bank sold Roberts' note, which had been deposited as collateral, for the full face value of the Roberts' note. The proceeds of this sale, which was made to the bank itself, were not sufficient to pay the note for which the Roberts' note was collateral.

It is insisted that the transaction whereby the Roberts' note was deposited with the bank as collateral to the loan to Nelson was fraudulent, in that the bank knew that Nelson was not the owner and had no right to so use the note.

The testimony establishes the fact very clearly that Nelson acquired this note as a payment on the house which he had built for the Roberts, but that Nelson was unable to convey an unincumbered title thereto, because he had mortgaged the lot on which the house stood, this being the mortgage which the original suit was brought to foreclose.

Without setting out the rather voluminous testimony, which we have carefully considered, upon this issue of fact, we announce our conclusion to be that the bank was not party to any fraudulent purpose of Nelson. It is true the consideration for the assignment of the note by the Roberts, which had been given them in payment for their home, has failed. They made this assignment in partial payment of the house and lot which Nelson had built for them, but which he had mortgaged to the bank, but it does not appear from the testimony that the bank was party to or was aware of this fraud. On the contrary, the cashier testified that, when Nelson proposed to use the Roberts' note, which had been assigned to him as herein shown, he declined to accept it unless a notation

of the assignment was made upon the margin of the deed record where the deed had been recorded in which the vendor's lien had been reserved which secured the purchase-money note, and on March 22, 1930, in the absence of any representative of the bank, Mr. and Mrs. Roberts made assignment of this lien to Nelson by indorsement to that effect upon the margin of the deed record. Thereafter, on April 3, 1930, Nelson executed the assignment hereinabove copied of the note to the bank.

If this transaction is what it appears to be, the bank took this note for value, before maturity, and without notice that Nelson did not have the title thereto, and, this being true, the bank acquired title to the note, however fraudulent the conduct of Nelson may have been in his dealings with the Roberts.

It is unnecessary to determine what the existing indebtedness of Nelson to the bank was, or what additional credit was extended when the collateral note was taken, as the law is settled that the indorsee of negotiable paper, taken before maturity, as collateral security for an antecedent indebtedness, in good faith and without notice of defenses which might have been available as between the original parties, holds the same free from such defenses. *Newell Construction Co.* v. *McConnell,* 156 Ark. 562, 246 S. W. 854.

The original cross-complaint filed by the Roberts did not question the good faith of the bank in the acquisition of the collateral note, and we think the testimony shows it was acquired in the usual and ordinary course of business, in good faith, for value, and before maturity. This being true, the decree directing the bank to surrender the collateral note to the Roberts is reversed, and the cause will be remanded with directions to dismiss the motion praying that relief. It is so ordered.

STATE EX REL. ATTORNEY GENERAL *v.* CHICAGO MILL & LUMBER CORPORATION.

Opinion delivered December 21, 1931.

Hal L. Norwood, Attorney General and *John M. Rose,* for appellant.

W. R. Statterfield and *Daggett & Daggett,* for appellees.

J. G. Williamson, Lamar Williamson and *Adrian Williamson, amici curiae.*

HART, C. J., (after stating the facts). The correctness of the decree of the chancery court depends upon the proper interpretation to be given to what is commonly known as our "back tax statute."

Our original back tax act was passed by the Legislature of 1887, and its title recites that it is "An act to provide for the collection of overdue taxes from corporations doing business in the State." Acts of 1887, p. 33; Kirby's Digest, §§ 7204-7213, inclusive. This act was amended by the Legislature of 1911 so as to fix the compensation to be paid to special counsel employed to assist the Attorney General in the enforcement of the act. Acts of 1911, p. 324. This act came up for construction by the court in the case of *State* v. *Kansas City & Memphis Ry. & Bridge Co.,* 106 Ark. 248, 153 S. W. 614, where it was held that, under the provisions of the act, the State could not recover back taxes for undervaluation made in assessing property, and that a review by the courts was only permitted when the assessing officers had proceeded on a wrong basis of valuation in omitting some property or element of value, or in adopting the wrong basis of estimating value.

In order to correct this supposed defect in the act, the Legislature of 1913 amended the former act by inserting a provision for the recovery of back taxes where an assessment was made on an inadequate valuation or undervaluation of the property. The amended act also provided that it should be construed as retrospective as well as prospective in operation. This amended act came before the court for construction in *State* v. *K. C. & Memphis Ry. & Bridge Co.,* 117 Ark. 606, 171 S. W. 248.

The first section with the word "or" inserted in brackets is copied in the statement of facts by the court, and reads as follows:

"Where the Attorney General is satisfied from his own investigation, or it is made to appear to him by the statement in writing of any reputable taxpayer of the

State, that, in consequence of the failure from any cause to assess and levy taxes, or because of any pretended assessment and levy of taxes upon any basis of valuation other than the true value in money of any property hereinafter mentioned, or because of any inadequate or insufficient valuation or assessment of such property or undervaluation thereof, or from any other cause, that there are overdue and unpaid taxes owing to the State, or any county or municipal corporation, or road district, or school district, by any corporation, (or) upon any property now in this State which belonged to any corporation at the time such taxes should have been properly assessed and paid, that it shall become his duty to at once institute a suit or suits in chancery in the name of the State of Arkansas for the collection of the same in any county in which the corporation owing such taxes may be found, or in any county in which any part of such property as may have escaped the payment in whole or in part of the taxes, as aforesaid, may be situated, in which suit or suits the corporation owing such taxes, or any corporation (or person) claiming an interest in any such property as may have escaped taxation as aforesaid, shall be made a party defendant, and the Governor is authorized to employ any attorneys that may be necessary to assist the Attorney General in such suits; provided, that this act shall be construed as retrospective as well as prospective in operation."

Although there is no express declaration of the court to that effect, it is apparent from the insertion of the word "or" in brackets by the court, and from its reasoning in the case, that the court considered that the word "or" had been left out of the act as amended by the Legislature of 1913 by inadvertence or clerical mistake. With the word "or" omitted, the terms of the act would be restricted or limited to property in existence in the State at the time of the bringing of the back-tax suit instead of enlarging its provisions so as to provide for the recovery of back taxes where the property had been grossly undervalued in making the original assess-

ment. With the word "or" omitted, it is plain that the statute would give the Attorney General the right to bring suit for back taxes where they were due by any corporation upon any property now in the State which belonged to the corporation at the time such taxes should have been properly assessed, the word "now" being used as contemporaneous with the thing to be done, which was the bringing of the back-tax suit. It is manifest from the title of the act, and from the context, that the Legislature did not intend to omit the word "or" in the act as amended in 1913, because the amended act provides that suit may be brought in any county in which the corporation owing such taxes may be found, thereby indicating that a personal judgment might be rendered against the corporation owing the taxes. It further provides that suit might be brought in any county in which any part of such property might be located.

In such event, a corporation owing the taxes or any corporation claiming an interest in the property shall be made a defendant, thereby indicating that a subsequent sale of the property should not defeat an action for the recovery of back taxes. The section concludes with a proviso that the act shall be construed as retrospective as well as prospective in operation.

It is a well-settled principle of statutory construction that statutes should receive a common-sense construction, and, where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent of the Legislature. Lewis' Sutherland Statutory Construction (2d ed.), vol. 2, pp. 796, 797.

It is the office of judicial construction to supply such omitted words as give effect to the act, if this can be done within the reasonable scope of language used by the Legislature, when read in connection with the purposes of the act. *Croze* v. *St. Mary's Canal Mineral Land Co.*, 153 Mich. 363, 117 N. W. 81.

In order to determine whether the omission of a word in an amended act was a mere inadvertence, the prior and subsequent legislation on the same subject may be sought to establish that fact. *Hutchins* v. *Commercial Bank,* 91 Va. 68, 20 S. E. 950.

This court, in numerous cases, has announced the same principle as to substitution, elimination or supplying words in conformity to the obvious spirit and purposes of the act in attempting to carry out the obvious intention of the Legislature. *Haney* v. *State,* 34 Ark. 263; *Bowman* v. *State,* 93 Ark. 168, 129 S. W. 80; and *Williams* v. *State,* 99 Ark. 149, 137 S. W. 927, Ann. Cas. 1913A, 1056, and cases cited.

The view that the word "or" was omitted in the amended act of 1913, through inadvertence or clerical mistake is manifest by the reasoning of the court in the case of *State* v. *K. C. & Memphis Ry. & Bridge Co.,* 117 Ark. 606, 174 S. W. 248. In that case the court said that, taking into consideration the origin and history of the legislation on the subject and the language of the different provisions, and particularly of that provision which restricts the operation of the act to property "now in this State," that is, within the jurisdiction of the courts of the State at the time, it was evident that the statute was intended to afford a complete remedy for the collection of back taxes, and operated retrospectively as well as prospectively, independent of any express declaration to that effect.

It is insisted, however, that the statute does not provide for the collection of back taxes on personal property, but we think that this view is opposed to our later decisions on the subject. In *State* v. *Bodcaw Lumber Co.,* 128 Ark. 505, 194 S. W. 692, the court expressly held that our back-tax statute refers not only to tangible property omitted from former assessments, but also back taxes omitted from assessments on capital stock of a corporation. The same principle was reaffirmed in *State* v. *Fort Smith Lumber Co.,* 131 Ark. 40, 198 S. W. 702, where it was held in a back-tax suit that a

domestic corporation in returning its capital stock for taxation cannot deduct investments of its surplus in shares of stock in other corporations in this State. In this case an application for a writ of certiorari was denied by the Supreme Court of the United States. *Fort Smith Lbr. Co.* v. *State,* 251 U. S. 513, 40 S. Ct. 304.

In the later case of *White River Lumber Co.* v. *State,* 175 Ark. 956, 2 S. W. (2d) 25, the court held that the provisions of our back-tax statute act do not entitle the State to personal judgment against a corporation, enforcible against its general assets in a suit for back taxes on lands undervalued, but merely authorize the court to find the amount due, declare same a lien on the lands, and order each tract sold for back taxes, unless paid within three months after the decree. The court, however, in its opinion in construing the statute, said that it gave the State a right to enforce its claim for back taxes against any corporation whose property might be of such a character that its payment might be enforced merely by the rendition of a personal judgment. Therefore we are of the opinion that the statute was intended to give the State the right to recover back taxes where there had been a gross undervaluation of the property in the hands of the corporation, whether it was real or personal property.

In this connection, it may be stated that in *White River Lumber Co.* v. *State,* 279 U. S. 692, 49 S. Ct. 457, it was held that our back-tax statute is not invalid under the equal protection clause of the Fourteenth Amendment because it is limited to the recovery of such additional taxes on lands of corporations and does not extend to the recovery of such additional taxes on lands of natural persons, which may likewise have been assessed at an inadequate valuation.

In the case of personal property, which has gone out of existence, the only remedy of the State in the collection of back taxes would be to take a personal judgment against the corporation which should have assessed the

property as its owner for the years in which it was omitted or in which there had been a gross undervaluation of it within the meaning of the statute. As we have already seen, where the property was still in existence, a lien might be attached to the property of the corporation which owned it at the time the back-tax suit was brought.

In *Weyerhaueser* v. *Minnesota,* 176 U. S. 550, 20 S. Ct. 485, it was said by the court that it agreed with the Supreme Court of the State of Minnesota that a gross undervaluation of property is within the principle applicable to an entire omission of property. The reason given was that otherwise the power and duty of the Legislature to equalize their burdens might be defeated by the fraud of public officers, perhaps induced by the very property owners who afterwards claimed its illegal advantage. Continuing, the court said that, if an officer omits to assess any property or grossly undervalues it, he violates his duty, and the property and its owners escape their just share of the public burdens.

In construing the back-tax statute of the State of Wisconsin, the Supreme Court of that State, in *State* v. *Pors,* 107 Wis. 420, 83 N. W. 706, 51 L. R. A. 917, said that the general purpose of legislation of this class is to provide means for enforcing the obligations of corporations to contribute to the existence of government according to the taxable property owned by them whenever they shall have escaped or avoided that obligation. The court also said that this purpose would in a large measure fail, if a disposal, consumption, or removal of personal property after the time when assessments should have been made, prevents its reassessment. The principle at the foundation of these reassessment laws is that the owner of property is under obligation to the State to pay a sum in taxes in proportion to other taxed property. This case was cited with approval in Cooley on Taxation, (4th ed.) vol. 1, § 59.

In summing up, it may be said that our statute provides for the collection of back taxes on personal property by personal judgment against the corporation which

owned it at the time it was omitted from taxation or was so grossly undervalued as to amount to an evasion of taxation; or if such property had gone into the hands of a subsequent purchaser, he might be made a party to the action, and the lien of the State enforced against the property itself.

In the application of these principles of law to the present case, it may be said that the court properly held that the suit against the Paepcke Corporation should be dismissed for want of jurisdiction. It is true that, under the allegations of the complaint, back taxes for the years 1927 to 1930 are sought to be recovered, and that the Paepcke Corporation owned such property for at least one year during said period of time, but it is equally true from the allegations of the complaint that the Paepcke Corporation is a foreign corporation and is not now doing business in the State. The act expressly provides for the collection of back taxes in any county in which the corporation owing such taxes may be found. In this connection, we quote from the complaint the particular allegations on this point:

"The defendant, Chicago Mill & Lumber Corporation, is a foreign corporation organized and existing under the laws of the State of Delaware, said company having been incorporated on October 19, 1928, and is authorized to do business in Arkansas. The Chicago Mill & Lumber Company was organized prior to the year 1926, under the laws of the State of Illinois. On October 23, 1928, said company changed its name to Paepcke Corporation," and on February 26, 1929, the Paepcke Corporation filed with the Secretary of State of the State of Arkansas a certificate of withdrawal from this State. Neither the Chicago Mill & Lumber Company nor the Paepcke Corporation is authorized to do business in Arkansas, and neither of said companies has designated an agent in Arkansas upon whom service of process can be made, although the said Paepcke Corporation is doing business in the State.

"The capital stock of the said Chicago Mill & Lumber Corporation and Paepcke Corporation is, and has always been, owned by the same stockholders, and the business of said companies is conducted by the same individuals constituting the board of directors of said companies. Plaintiff is informed and believes, and therefore alleges, that the said Chicago Mill & Lumber Company (now Paepcke Corporation) owned the machinery and stock of lumber hereinafter referred to at West Helena and Blytheville until the incorporation of the Chicago Mill & Lumber Corporation on October 19, 1928, and that since that date the latter company has owned said properties."

It will be noticed that the complaint specifically alleges that the Paepcke Corporation, on February 26, 1929, filed with the Secretary of State a certificate of withdrawal from this State, and that it is not authorized to do business in the State of Arkansas. Hence, under the very terms of the act, it is not subject to be sued for back taxes because it is not found within the State in the construction of the act.

In the next place, it is essential to the maintenance of a suit *in personam* against a foreign corporation that the corporation be subject to the jurisdiction of the courts of the State in which the suit is brought, or that it consent to the jurisdiction. 14A, C. J., p. 1368.

In *St. Louis, S. W. Ry. Co. of Texas* v. *Alexander,* 227 U. S. 218, 33 S. Ct. 245, it was held that, in order to hold a corporation personally liable in a foreign jurisdiction, it must appear that the corporation was within the jurisdiction, and that process was duly served on one of its authorized agents. Numerous other decisions of the Supreme Court of the United States to this effect are cited in a case note to 14A C. J. p. 1368.

In our view of the matter, it does not make any difference what caused the Paepcke Corporation to withdraw from the State. Under the allegations of the complaint itself, it is a foreign corporation, and is not authorized to do business in this State. Neither does it have an

agent in this State upon whom service of process can be made. Therefore, under the allegations of the complaint itself, we think the court was without jurisdiction to render a personal judgment against the Paepcke Corporation, and properly so held. It will be noted that the corporation did not enter its appearance to the action, but moved to quash the service of summons upon it for the reason that it was a foreign corporation and appeared for no other purpose.

The case against the Chicago Mill & Lumber Corporation stands upon a different footing. According to the allegations of the complaint, which are admitted by the demurrer, the Chicago Mill & Lumber Corporation was organized under the laws of the State of Delaware on October 19, 1928, and was authorized to do business in the State of Arkansas. It does not make any difference that its capital stock and that of the Paepcke Corporation have always been owned by the same stockholders, and that the business of said companies is conducted by the same individuals, constituting a board of directors of said company. Under the allegations of the complaint, the Paepcke Corporation was organized in the State of Illinois, and the Chicago Mill & Lumber Corporation was organized under the laws of the State of Delaware, and the courts of this State would have no jurisdiction in this suit to inquire into the reason for the organization of these corporations. As we have construed our back tax statute, no personal judgment can be rendered against a corporation except for the years it has omitted or underassessed its own property. It can not be made liable for the failure in this respect of another corporation to whose property it has succeeded. In such cases relief can only be had by proceeding against such property of the defunct corporation as now may be in existence in this State.

Acording to the allegations of the complaint, the Chicago Mill & Lumber Corporation, which was organized under the laws of the State of Delaware on October

19, 1928, has since that date owned the property which formerly belonged to the Paepcke Corporation. The Attorney General has sued to recover back taxes against it for the years 1927 to 1930, both inclusive. Under the principles of law above announced, it could not do this; but could only recover back taxes for undervaluations for the time during which the Chicago Mill & Lumber Corporation controlled the property, which, under the allegations of the complaint, was for the years 1929 and 1930.

The court properly held that the Chicago Mill & Lumber Corporation could not be proceeded against personally for gross undervaluations made by any other corporation, and that it might be made a party to a suit for undervaluations for such other corporations, provided the complaint alleged that such property was still in existence in this State. In that event the property itself might be proceeded against for the collection of the back taxes, although it was in the hands of the Chicago Mill & Lumber Corporation. The court erred, however, in holding that a personal judgment could not be rendered against the Chicago Mill & Lumber Corporation for undervaluation of its property in assessments during the years 1929 and 1930.

The record shows that the Chicago Mill & Lumber Corporation has complied with our statutes relative to foreign corporations doing business in this State; that its principal office is maintained in West Helena, Phillips County, Arkansas; that said office is in charge of F. W. Schatz, vice-president and general manager, who is the legally designated agent for service of process. Section 1151 of Crawford & Moses' Digest provides that, where the defendant is a foreign corporation having an agent in this State, the service may be upon such agent. Section 1826 of the Digest, which is a part of our act prescribing the terms upon which foreign corporations may do business in this State, provides, among other things, that such corporation shall designate its general office or place of business in the State, and shall name an agent

upon whom process may be served. Section 10,204 of the Digest, which is a part of our back-tax statute, provides that the suit may be brought in any county in which the corporation owing such taxes may be found. Therefore we are of the opinion that, for all back taxes owed by the Chicago Mill & Lumber Corporation, it was properly sued in Phillips County.

As the pleadings now stand, it could not be made a party defendant, as having in its hands property which another corporation had failed to properly assess for certain years, for the reason that it is not alleged in the complaint that such property is still in existence in this State. It will be noted that the act provides that suit may be brought in any county in which the corporation owing such taxes may be found, or in any county in which any part of such property may be found or may be situated.

For the errors indicated, the decree will be reversed, and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

BUTLER, J. (dissenting). I respectfully dissent from that part of the opinion of the majority in which the following statement is made: "The court properly held that the Chicago Mill & Lumber Corporation could not be proceeded against personally for gross undervaluation made by any other corporation."

I am of the opinion that the allegations of the complaint, if established by proof, entitled a recovery against the Chicago Mill & Lumber Corporation for back taxes for gross undervaluation made by the Paepcke Corporation for the years 1927 and 1928, for the reason that these allegations, if established, show a mere reorganization both in law and in fact, and that the corporations were in no wise changed except in name.

I am authorized to state that Justices HUMPHREYS and MEHAFFY agree with me in this dissent.

MISSOURI PACIFIC RAILROAD COMPANY *v.* KIRTEN GRAVEL COMPANY.

Opinion delivered December 21, 1931.

R. E. Wiley and *Henry Donham,* for appellant.

Rose, Hemingway, Cantrell & Loughborough and *J. W. Barron,* for appellee.

HUMPHREYS, J. This is a suit for double damages in the sum of $3,000 sounding in tort by appellee against appellant, a common carrier, for discrimination between appellee and its competitors, similarly situated and doing business under like conditions, by allowing said competitors rebates or absorptions of $2.50 per car on intrastate shipments of gravel from their respective pits for switching cars to and from their pits to the track of appellant, and refusing to allow it like rebates or absorptions on cars shipped from its pit for similar services rendered by it, in violation of §§ 848, 849, and 1007, of Crawford & Moses' Digest, and § 917 as amended by act No. 513, approved March 26, 1921. The suit was brought in the circuit court of Pulaski County, and the issues

joined by the pleadings were whether the circuit court had jurisdiction of the cause of action, and, if so, whether appellee and its competitors were similarly situated and doing business under like conditions, and whether the rebates or absorptions allowed its competitors were for substantially the same services rendered by appellee to appellant, and, if so, whether the cause of action was barred by the one year statute of limitations.

It is contended by appellant that the circuit court had no jurisdiction of the action because the rebates it paid to appellee's competitors were fixed by the Railroad Commission for services rendered it in switching their cars to and from their respective pits to the tracks of appellant, and that appellee's remedy, if it had any, was to apply to the Railroad Commission for a cancellation of the order allowing its competitors the rebate or absorptions. This might be true if the suit were an attack upon the allowance or the reasonableness of the allowance for services rendered to appellant by its competitors. The suit presupposes the reasonableness of the allowance for the services thus rendered, and alleges that the refusal to allow it like rebates or absorptions is an unlawful discrimination under the statutes of this State. The question at issue is judicial and not administrative, and is therefore one for determination by the courts, and not by the Railroad Commission. The authority to award reparations for unlawful discriminations of common carriers between shippers has not been conferred upon the Railroad Commission by the Arkansas Legislature as was done by Congress upon the Interstate Commerce Commission. For this reason, the authorities cited by appellant are not in point.

It is also contended that the circuit court had no jurisdiction of this action because the damages sought to be recovered for unlawful discrimination were $2.50 on each car and not sufficient in amount to be originally brought in the circuit court. The suit was for actual damages in the sum of $1,500 and double damages under the statute for unlawful discrimination covering a cer-

tain period of time, and constituted one action. The damages claimed exceeded $100 and were within the jurisdiction of the circuit court. This identical point was adjudged against appellant's contention in the case of *Cohn v. St. L., I. M. & S. R. Co.*, 181 Mo. 30, 79 S. W. 961.

It is also contended by appellant that the trial court both improperly and incorrectly submitted the issues of whether appellee and its competitors were similarly situated, and conducted their business under like conditions; and whether appellee performed substantially the same services as its competitors in switching cars to and from the pits to appellant's main line or shipping point. Appellant argues that it was improper to submit these issues because the undisputed testimony reflects that the situations and business conditions, as well as the services performed by appellee, were different from those of its competitors. We have carefully read the evidence and find it conflicting, and for this reason think it was properly sent to the jury to determine the issues of fact. Appellant argues that the instructions were incorrect in many particulars, but, after a very careful examination of them, we think they correctly charged the law applicable to the facts, and fully present the respective theories of both appellee and appellant. We are unable to see that it could serve any useful purpose to set out the substance of the testimony of each witness and the instructions given and refused.

Appellant also contends that the action of appellee for double damages was barred because not prayed for until more than one year after its action accrued. It is true that appellee did not specifically pray for double damages on account of unlawful discrimination until February 4, 1931, more than a year after its action accrued, and then by amendment to the original complaint; but the original complaint itself alleged the similarity of conditions prevailing at the plant of appellee and its competitors, the absorption allowed the competitors for services similar to those rendered by appellee to appellant, the duty of appellant to make it a similar allowance,

its refusal to do so, together with a prayer for damages, which brought it within the statute allowing double damages to the shipper who had been discriminated against through the process of rebates. The original suit was instituted within a year from the time appellee's action accrued.

Since appellee was entitled to double damages for a violation of the statute, the court correctly allowed appellee's attorney a fee under § 851 of Crawford & Moses' Digest.

No error appearing, the judgment is affirmed.

CRAWFORD *v.* STATE.

Opinion delivered December 21, 1931.

J. V. Walker, for appellant.

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

KIRBY, J. Charles E. Crawford prosecutes this appeal from a judgment of conviction upon an indictment charging him with receiving a deposit in the Citizens' Bank of Pettigrew, of which he was president, on the 19th day of December, 1930, when the bank was insolvent and known to be so by him at the time of his acceptance of the deposit.

Appellant urges for reversal that the court erred in giving and refusing certain instructions, in the admission of and refusal to exclude from the jury certain testimony, and the refusal of the court to direct a verdict for him on his motion at the conclusion of the testimony, it being claimed that there was not testimony sufficient to support the verdict.

Appellant complains of instruction number 3, given for the State, and the refusal of the court to give his requested instruction number 1. The statute, § 717, Crawford & Moses' Digest, defines insolvency within the meaning of the banking act, and the instruction complained of is substantially in the language of the statute, the case being tried upon the theory that at the time the bank closed its liabilities exceeded its assets, and it was insolvent within the meaning of the statute defining insolvency, and the contention that the instruction was erroneous cannot be sustained. If some portion of the instruction was abstract as applied to the case, no specific objection was made on that ground, and the instruction requested by appellant on the question of insolvency contained an exact copy of said statute, and was more

abstract than the one given by the court. The instruction given closely follows the language of the statute defining insolvency, and is necessarily a correct declaration of the law, from which doubtless any portion of the instruction which could be considered abstract would have been eliminated upon specific objection made calling attention thereto, and no error was committed in giving this instruction. *Hannah* v. *State,* 183 Ark. 810, 38 S. W. (2d) 1090; *Hunter* v. *State,* 180 Ark. 613, 22 S. W. (2d) 40.

■ An inventory of the bank's affairs was exhibited showing that on December 20, 1930, the date of its closing, its liabilities for deposits amounted to $33,765.55, its capital stock was $10,000, and its surplus $4,000, making a total liability of $47,765.55. Evidence of the appraisal appears at Exhibit Q showing losses on the actual value of the assets to be less than it was figured on the bank's inventory, as follows: loss in bank house, $250; furniture and fixtures, $1,181; cash items, $265.56; loans and discount loss, $12,607.91; the total of these amounts being $14,304.47, which, deducted from the assets of the bank, discloses that the liability for deposits exceeds the assets, and that the bank was insolvent, therefore, within the meaning of the said statute. There were a number of other items for large amounts not included in the losses that could have been, most of them being unsecured and no interest having been paid on them for more than a year. In the examiner's report, a Sullins note for $1,500 was included as a collectable item, upon which no interest had been paid for more than one year, also a note for $2,000 was not included in the loss column, although there was more than one year's interest due on it, and it was unsecured.

Appellant insists that the court erred in permitting the introduction of Exhibit P an appraisal of the assets and liabilities of the bank on the day it closed, in connection with the testimony of witness, Maxey, because the report was not prepared by him. This witness, however, stated that he was special deputy bank commissioner

in charge of the bank when the inventory of its assets was made; that he examined the inventory, and after taking charge of the bank investigated and verified it and found it to be correct. Certainly, the testimony was competent, and, although the witness referred to the inventory as having been prepared by another, he stated that he made an investigation of the bank's condition and affairs after taking charge of it, which disclosed that the inventory was correct, and the witness was therefore in effect testifying about his own knowledge acquired from an investigation and examination of the affairs and books of the bank, which verified the inventory as stated by him to be correct.

Objection is also made that the court erred in allowing the introduction of the testimony of other witnesses, or rather in not excluding such testimony or striking it from the record, about appellant's losses after it was permitted to be introduced without objection. These witnesses were depositors of the bank, and had been working in conjunction with the liquidating agents in making an appraisal of the bank's assets. Their testimony concerning the value of the assets was predicated on information obtained by them with reference to the value of the assets subsequent to the closing of the bank. In proving the value of assets, any competent evidence pertaining thereto should be received as illustrating and bearing upon the worth of the assets as of the time of December 20, 1930, the date the bank closed. 1 Michie, Banks and Banking, page 342; *State* v. *Hightower,* 187 N. C. 300, 121 S. E. 616; *State* v. *Miller,* 131 Kan. 36, 29 Pac. 483.

Some of the testimony of each of the said witnesses was competent, most of it, and, having been introduced without objection, it was within the discretion of the court to refuse to exclude it and withdraw it from the jury. *Martin* v. *State,* 180 Ark. 12, 22 S. W. (2d) 1012.

The testimony of C. D. Chaney, cashier of the bank when it closed, that appellant had actual management of the bank, passed on the loans, as the board of directors did not meet regularly, and also concerning the mass

meeting on December 13th and the resolution of the board of directors to prohibit the withdrawal of more than $5 per day by the depositors, and about the reserve, the overdrafts of appellant, his attempts to procure loans for the bank immediately prior to its closing, and his statements relative to the cash item of a two-year-old check drawn by J. H. Phipps and concerning the indebtedness of Phipps to the bank, were introduced without objection; and, although certain portions of this witness' testimony were objected to, no motion was made to strike any particular part of it out, and the court did not err in allowing it introduced. This testimony was admissible to show the knowledge of the defendant of the condition of the bank and to show the bank's failure to maintain its reserve. *State* v. *Cole,* 161 La. 829, 109 So. 505; 1 Michie, Banks and Banking, page 339.

In order to sustain the conviction, the State must not only show that the bank is insolvent, but also that the official receiving the deposit has knowledge of that fact. The proof of such knowledge is frequently by inference from the circumstances, and the official charged with the crime cannot complain of the proof of circumstances which impute to him knowledge of the bank's insolvency, but such proof should be limited to the purpose stated, and the State should not be permitted to prove any facts or circumstances from which the guilt of the accused might be inferred, unless such facts and circumstances also tend to show the bank's insolvency and the official's knowledge of that fact. *Skarda* v. *State,* 118 Ark. 182, 175 S. W. 1190, Ann. Cas. 1916E, 586.

The evidence in the case is voluminous and somewhat conflicting, but it showed that the deposit was received by appellant, the president of the bank, and that the bank at the time was insolvent within the meaning of the statute, and that the appellant was thoroughly familiar with the bank's condition, that he practically operated it, there being no discount board, and he necessarily knew the condition existing at the time the deposit was accepted, and the jury could have inferred such fact from the testimony.

It is true he was frantically urging certain of the debtors of the bank to pay up and trying to get enough money at the time to restore the reserve, although he had not been called on to do so, and may have believed that the bank would be able to weather the storm, but his good intentions and honest belief about being able to get the money to tide the bank over the difficulty does not excuse him from the penalty of the law for accepting a deposit when the bank was insolvent, and he must have known of that fact.

The jury have found, upon sufficient evidence, that his conduct was a violation of the banking act. The record being free from error, the judgment must be affirmed. It is so ordered.

POWERS *v.* WOOD PARTS CORPORATION.

Opinion delivered December 21, 1931.

A. M. Coates, for appellant.

W. G. Dinning, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment for damages for an alleged breach of contract to accept delivery of certain lumber ordered by appellee.

Appellant's brief recites: "The appellant by this appeal wishes to present only one question for determination by the court, that the judgment of the lower court should be here modified by awarding to the appellant the

full amount of damages proved to the extent of $8,763.47, instead of $1,904, as found by the jury."

The appellee did not deny the execution of the four orders for the magnolia lumber to be used in automobile building, but defended the action upon the ground that they were open orders, the shipping dates being left blank, giving it the right to cancel the orders by custom and usage of trade, provided they did not need the lumber themselves.

Appellant introduced copies of its letters of acceptance of the orders, in each of which the kind of lumber with the prices was stated, the terms, etc., and: "We have entered this order for shipment exactly as per above, shipments to be made as promptly as stock had been on rack for fifteen days or more. If this is not satisfactory, or should you wish to give us any other routing or shipping instructions, do not fail to wire us. Not hearing from you by wire, we will understand that the order as entered above meets with your entire approval, and will proceed to make shipment accordingly."

Testimony on the part of appellant conduced to show that they set about the manufacture of the lumber in accordance with the orders for supplying the amount desired; that they shipped only a certain amount of lumber because they could not get releases for any more shipments from the appellee company, and the amount of lumber remaining on hands in October, 1928, when appellee attempted by letter to cancel the orders. They declined to do this at the time, writing appellee that they had a large amount of lumber on hands, but did not have "releases" thereon. They requested appellee, upon receipt of the letter, to wire advice, whether they would send releases for shipments during December and also January.

Appellee company finally wrote that they had canceled the orders of a certain date, claiming they had the right to do so. The testimony shows that appellant was constantly trying to get releases from appellee company for shipment of the lumber; also the amount of lumber

claimed to be on hands after appellee company notified appellants that it had canceled the orders, and the damages resulting from the refusal of the appellee company to accept and pay for the lumber in accordance with the orders.

Appellee, in informing that the orders had been canceled, also stated that, if the lumber had not been stacked flat, it would be worthless for any purpose at the time of the cancellation of the orders. It also showed that there was very little lumber of the kind appellant claimed to have manufactured for the purpose of filling the orders on hand when the receiver took charge of appellant company, nothing like the amount for which appellant was claiming damages. The evidence also tended to show the difference between the market price of the lumber, claimed to have been manufactured under the orders at the time of their cancellation by appellee company, and the price agreed to be paid by appellee in the orders. Appellee denied any liability, claimed the orders were conditioned upon their releasing them for shipment, and that they had the right, according to custom of trade, to cancel them, being open orders without any date of shipment being specified therein or any release given for shipment.

The testimony was in conflict as to the amount of the damages resulting from the cancellation of the orders, that upon the part of appellant conducing to show the amount of the damages was $8,763.47, instead of $1,904, as the jury found.

The law requires, when a trial by jury has been had, that the judgment must be entered in conformity with the verdict, unless it is special and the court orders the case to be reserved for further consideration, and also that judgment can be entered notwithstanding the verdict, only where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor. Sections 6271, 6273, Crawford & Moses' Digest.

The appellant was not entitled to a judgment under the pleadings, which denied any liability, nor under the undisputed proof, and the verdict and judgment was for

a very substantial amount, there being no refusal to render judgment for more than a nominal sum. It may be true that the verdict is not consistent with either theory of the case, but this furnishes no ground for reversal of it, where it is supported by substantial testimony. *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. (2d) 49; *Moore* v. *Rogers Wholesale Grocery Co.,* 177 Ark. 993, 8 S. W. (2d) 457.

The trial court might have granted a new trial if it had regarded the verdict contrary to the preponderance of the testimony, but its failure to do so furnishes no ground for the entry of a judgment for the amount of damages claimed, notwithstanding the verdict of the jury for a smaller amount.

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

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* CLARK.

Opinion delivered December 21, 1931.

D. E. Bradshaw, O. C. Burnside and *W. G. Streett,* for appellant.

J. R. Parker, for appellee.

MEHAFFY, J. In February, 1926, the appellant, the Sovereign Camp of the Woodmen of the World, issued to Robert E. Ferris a certificate and policy of insurance for the sum of $2,000 and $100 for monument. Fannie E.

Ferris, the wife of said Robert E. Ferris, was the sole beneficiary.

On October 14, 1930, Fannie E. Ferris, the beneficiary, shot and killed the insured, Robert E. Ferris, and, in a few minutes thereafter, committed suicide.

D. S. Clark was appointed administrator of the estate of Robert E. Ferris, deceased, and began this action to recover $2,100 with 12 per cent. damages and attorney's fees. The appellant had denied liability.

The case was tried before the circuit judge sitting as a jury on an agreed statement of facts, which is as follows:

"First. That, on October 14, 1930, Fannie E. Ferris, wife of Robert E. Ferris, and sole beneficiary named in the certificate or policy of insurance sued on herein, intentionally killed the said Robert E. Ferris by shooting him, the said Robert E. Ferris, in the back, while the said Robert E. Ferris was talking over the telephone, and very shortly thereafter committed suicide by shooting herself with the same gun as she used in the murder of her said husband.

"Second. That, at the time the said Robert E. Ferris was murdered, as aforesaid, by the said Fannie E. Ferris, he, the said Robert E. Ferris, was a member of, and in gooding standing in, the defendant society.

"Third. That, shortly after the death of the said Robert E. Ferris, as aforesaid, J. R. Parker, the attorney for plaintiff, wrote the defendant, advising it of the murder of said Robert E. Ferris by the said Fannie E. Ferris, whereupon said defendant denied in writing all liability under the policy or certificate sued on herein, and refused to erect the monument as called for by the monument rider, and thereby waived the furnishing of proof of death of the said Robert E. Ferris.

"Fourth. That D. S. Clark is and was at the time of the bringing of this suit the duly appointed, qualified and acting administrator of the estate of Robert E. Ferris, deceased.

"Fifth. That the defendant is what is known as a fraternal benefit association, has a lodge system, a ritualistic form of work, and a representative form of government, and has no capital stock and transacts its business without profit and for the sole benefit of its members and their beneficiaries.

"Sixth. That a photostatic copy of the original application, signed by the said Robert E. Ferris, upon which the policy or certificate sued on herein was issued, may be used in evidence in lieu of the original of said certificate.

"Seventh. That, at the time said application was made by the said Robert E. Ferris for membership in defendant society, and at the time the policy or certificate sued on herein was issued and delivered, the constitution, laws and bylaws of the defendant, among other things, provided:

" 'The following conditions shall apply to every beneficiary certificate, and shall be binding on both the member and the beneficiary; * * * If the member holding this certificate * * * should die in consequence of a duel; or from the direct result of the drinking of intoxicating liquors; or while engaged in war, except in defense of the United States of America; or by his own hand or act, whether sane or insane, or by the hands of the beneficiary or beneficiaries, whether sane or insane, except by accident on the part of the beneficiary, * * * the certificate shall be null and void and of no effect, and all moneys which shall have been paid and all rights and benefits which have accrued on account of the certificate shall be absolutely forfeited without notice or service.'

"Eighth. That the statutes of Nebraska, under which defendant is incorporated, provides:

" 'That payment of death benefits shall only be made to the wife, husband, families, heirs, blood relations, affianced husband, affianced wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, step-father, step-mother, step-children, step-brother, step-sister, children by legal adoption or a per-

son or persons dependent upon the member, or under certain circumstances to an incorporated charitable institution or a person entering into a contract to support the member.' [See Comp. St. Neb. 1929, § 44-1207].

"Ninth. That the heirs of Robert E. Ferris, deceased, consist of his several brothers and sisters."

The appellant is a fraternal benefit society as described by § 6068 of Crawford & Moses' Digest. Section 6076 of Crawford & Moses' Digest provides, among other things: "The certificate, the charter, or articles of incorporation, or, if a voluntary association, the articles of association, the constitution and laws of the society and the application for membership and medical examination signed by the applicant and all amendments to each thereof, shall constitute the agreement between the society and member. * * * And any changes, additions or amendments to said charter or articles of incorporation or articles of association, if a voluntary association, constitution and laws, duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership."

One of the provisions in the contract is that, if the insured shall die by the hands of the beneficiary, whether sane or insane, except by accident on the part of the beneficiary, the certificate shall be null and void. The only question for our consideration in this case is whether that provision in the contract making the policy void if the insured is killed by the beneficiary is valid.

The appellee earnestly argues that the provision is immoral, base, revolting, and non-enforceable, and that it is contrary to public policy. He calls attention to numerous authorities to the effect that contracts against public policy are not enforceable. In this he is correct, but the question whether a contract is against public policy must be determined by its purpose and tendency. No one can lawfully do that which has a tendency to be injurious to

the public welfare. There is no contention that the provision in the contract here involved is injurious to the public welfare or that it violates any statute.

If the beneficiary in a policy had killed the insured, he could not recover. It would be against public policy for him to recover. No one can recover on a contract that is either against public policy or that is illegal, but the fact that the beneficiary who murders the insured cannot recover does not mean that the benefit society would not have the right to make a contract which would make the policy void if the beneficiary killed the insured.

The statute in Arkansas expressly authorizes fraternal benefit societies like the appellant to make contracts with their members. The appellant has no capital stock, transacts its business without profit for the sole benefit of its members. Therefore, if a policy is void, this is a benefit, not to the organization, but to all of the members, and we know of no law that prohibits fraternal benefit societies from making contracts of this kind.

The society is expressly authorized by statutes, not only to make contracts with its members, but it is authorized from time to time to change its constitution and bylaws, and the statute provides that the constitution and bylaws so changed shall be as binding on the member as if they had been in force at the time the contract was made.

This court said: "The wilful, unlawful, and felonious killing of the assured by the person named as beneficiary in a life policy forfeits all rights of such person therein. It is unnecessary that there should be an express exception in the contract of insurance forbidding a recovery in favor of such person in such event. On considerations of public policy, the death of the insured, wilfully and intentionally caused by the beneficiary of the policy, is an excepted risk so far as the person thus causing the death is concerned." *Metropolitan Life Ins. Co.* v. *Shane,* 98 Ark. 132, 135 S. W. 836.

The doctrine announced in the above case has been uniformly followed by this court since that time.

It is therefore the settled doctrine in this State that a beneficiary who murders the assured cannot recover. If that was all the provision there was in the benefit certificate, it would not avoid the policy, but recovery could be had by the estate of the assured. But this policy provides that, if the beneficiary kills the assured, the policy shall be void, and no recovery can be had. It is conceded that no recovery can be had unless this provision of the contract is contrary to public policy.

The Colorado court quoted with approval the following from the Supreme Court of Indiana: "While forfeitures are never favored, yet, if, upon a reasonable construction, it appears that the parties contracted for a forfeiture upon certain conditions, it only remains for the courts to enforce the contract as the parties have made it. It is neither unlawful nor against public policy for a contract of life insurance to stipulate that upon certain conditions or contingencies the policy should become void." *Grand Circle Women of Woodcraft* v. *Rausch,* 24 Cal. App. 304, 134 Pac. 141.

This court said: "The application for membership in appellant order and the certificate issued thereon both expressly refer to the laws, rules, and regulations of appellant, and make the certificate null and void, if the holder thereof fails to comply with such laws, rules, and regulations.

"It is well settled by our own cases, as well as the authorities generally, that the constitution and laws of a mutual benefit fraternal society, such as that of appellant form the basis and constitute a part of the contract of insurance. This contract measures the obligations of the members and the liability of the association or governing body." *Sovereign Camp of W. of W.* v. *Newsom,* 142 Ark. 132, 219 S. W. 759; *Sovereign Camp of W. of W.* v. *Barnes,* 154 Ark. 486, 243 S. W. 55; *Greer* v. *Supreme Tribe of Ben Hur,* 195 Mo. App. 336, 190 S. W. 72; *Griffith* v. *Mutual Protective League,* 200 Mo. App. 87, 205 S. W. 286; *Markland* v. *Modern Woodmen of America,*

(Mo. App.) 210 S. W. 920; *McDade* v. *Mystic Workers of the World,* 196 Iowa 857, 195 N. W. 603.

The last three or four cases cited above hold not only that both parties are bound by the contract they make, but that a contract like the one here involved is not a violation of the statute, and is not against public policy.

The law-making power could prohibit the making of contracts like the one here involved and could provide that, in a case like the one at bar, there might be a recovery by the estate of the assured, but that is a question for the Legislature and not the courts. The provision of the contract here involved does not violate any statute, and is not contrary to public policy.

The judgment is therefore reversed, and the cause dismissed.

FAIR OAKS STAVE COMPANY *v.* SHUE.

Opinion delivered December 21, 1931.

L. L. Campbell and *E. L. Westbrooke,* for appellant.

W. J. Dungan, E. M. Carl-Lee and *Tom W. Campbell,* for appellee.

McHaney, J. Appellant is a partnership composed of J. R. Riable, B. C. Wallace and A. E. Coyle. The Miller Lumber Company, in connection with its lumber plant, owns a tramroad running northward from a junction with the Missouri Pacific Railroad, known as C Spur, a distance of about eight miles in Woodruff County. It was built for the use of said lumber company in hauling logs to its mill. It is not a railroad in the common acceptation of that term, is not a common carrier, as it hauls no freight or passengers for hire or otherwise. By virtue of a contract with appellant, it permits appellant to use the tramroad, with appellant's equipment, for the purpose of hauling stave bolts from the woods along the tram to the public highway crossing said tram, where the bolts are unloaded and trucked into Fair Oaks and manufactured into staves. Appellant's equipment for hauling bolts consisted of a Fordson tractor set on a small flat car, built for the purpose, which was geared to the trucks of the flat car, with a flat car in front and one behind for hauling the bolts. When the machinery was going northward, the tractor was headed north, but, when coming south, the tractor was in reverse and backed up, and operated at a rate of three or four miles per hour. Appellant paid the lumber company 25 cents a cord for the privilege of operating over its tram at such time as their operations would not interfere with that of the lumber company. On the evening of August 17, 1929, appellee and his wife drove from their home in a truck to C Spur and there borrowed a hand-car from a man by the name of Henry Cupples, who was in the employ of the Miller Lumber Company, and started to visit his uncle, Charlie Shue, who lived some distance north of C Spur. The hand-car was an old-fashioned one, operated by pumping the handles up and down, and Mrs. Shue assisted her husband in operating the car for a short time. They were traveling north and were advised by Cupples before leaving that appellant's equipment was in north on the line about

Charlie Shue's place and to look out for it. Appellee and his wife started northward on the hand-car in the night-time, without any light thereon, and about a mile and one-half to two miles north of the highway crossing they had a collision with appellant's equipment coming southward, which resulted in the serious injury and subsequent death of appellee's wife. The hand-car made a considerable noise, and appellee had his back to the north while operating the car. There was no light on appellant's equipment, and no lookout was kept as the equipment was backed southward toward C Spur.

Appellee brought two actions against appellant, one as administrator of the estate of his wife for the benefit of the estate; the other for the benefit of the children for loss to them of the mother's care, training and companionship. It was alleged in the complaint, and some proof to support the allegation was offered, that it was customary for people in the vicinity to use the hand-car on the tram-road, and it was alleged that this custom was known to appellants. It was further alleged that appellants had always operated their equipment with a light on each end of the cars when operated after dark, but that upon the night of the collision there were no lights on the cars, and that appellants were negligent in operating their equipment without them. The answer denied all the material allegations of the complaint, and pleaded the contributory negligence of appellee and his wife as a defense. At the conclusion of appellee's testimony, and again at the conclusion of all the testimony, appellant requested a directed verdict which was refused. The jury found for appellant in the action for the benefit of the estate, but in the action for the benefit of the children there was a verdict for $1,500, and from the judgment thereon this appeal is prosecuted.

Appellee and his wife were on a joint mission to the home of Charlie Shue, for business and pleasure. They were advised by Mr. Cupples to "look out for that moose," meaning the tractor and two cars operated by appellant. He and his wife both assisted in operating

the hand-car, he with his back to the north and she with her face to the north when assisting in the operation. When not so assisting, she stood between the handles with her face to the north or east. Although advised to look out for this equipment, neither did so, but blindly proceeded into a collision, which resulted in her death. We think they were both guilty of contributory negligence as a matter of law, which precludes a recovery. Appellants were not required to keep a lookout as they were not operating a railroad as owners, lessees or otherwise. No statute of this State applicable to railroads applies. The injury did not occur at a highway crossing. Conceding that appellant's employees were negligent in the operation of that equipment in failing to have a light on the front end, appellees were guilty of contributory negligence, and cannot recover. The comparative negligence statute, (§ 8575, Crawford & Moses' Digest) has no application for the reason that this is not a suit against a railroad, and the injury was not caused by the running of a train. Nor does § 7145 of the Digest apply for the reason that the action is not against a corporation, nor is the appellee an employee of appellant. Appellee and his wife being on a joint mission, and both being guilty of contributory negligence as a matter of law, no recovery can be had, and the court should have directed a verdict in appellant's favor at their request, even though appellant may have been guilty of negligence. The judgment will be reversed, and the cause dismissed. It is so ordered.

ARKOLA BAUXITE COMPANY *v.* HORN.

Opinion delivered December 21, 1931.

W. A. Utley, for appellant.

Horace Chamberlin and *W. R. Donham,* for appellees.

BUTLER, J. We adopt the statement of the case made by counsel for the appellant, which is as follows:

"Appellees claim that, during the months of April and May, 1928, they entered into written leases with appellant granting the privilege of mining and operating for bauxite and other minerals, claiming that by the terms of said leases the appellant obligated itself to remove from said lands three thousand tons of ore per year, minimum, or in lieu thereof to pay the sum of fifteen hundred dollars, either of which would keep said lease in force and effect; that the appellant entered upon said lands and opened up a mine and took therefrom and shipped a car of bauxite, and each of said appellees state that certain payments were made to them, approximately $1,000 each, which paid, as they state, their rentals to about March 1, 1929, and thereafter appellant did not do any mining or operating of any kind and made no further payments. Each of said appellees seek to have their respective leases canceled and possession of said leases restored to them, and also to collect the amount stipulated in said leases which appellant could have paid and have kept said leases in force and effect from year to year, had it desired to do so.

"Appellant's contention is that appellees waived their right to collect said amounts or to have said leases canceled, since, owing to the depressed economic conditions, they had permitted payments to be deferred or rather withheld, and for this reason were not entitled to have said leases canceled; or, if entitled to have said leases canceled, they were not entitled to recover the amounts provided in said leases which appellant could have paid and have kept same in full force and effect."

That part of the lease material to the questions presented is as follows: "It is agreed that this lease shall remain in force as long as bauxite, kaolin and other min-

erals are produced from said lands in paying quantities by the lessee, and/or if lessee shall commence operations at any time while this lease is in force, this lease shall remain in force and its terms shall continue so long as such operations continue with due diligence, said lessee agreeing to mine and take from said lands a minimum of three thousand (3,000) tons per year, or in lieu thereof, to pay lessor the sum of $1,500 per year, which sum shall operate as a rental and cover the privilege of continuing this lease in force and effect from year to year on the same terms and conditions as herein set forth.''

There is no dispute as to the facts in these cases. The lease of the appellee, Mrs. Louella Horn, was made on the 25th day of May, 1928, and that of the appellee, Roy Bizzell, on April 25, 1928. The appellant, Arkola Bauxite Company, entered upon the demised premises and installed equipment thereon and built houses to the value of approximately $30,000, and began mining operations and removed a few tons of ore when it shut down its plant and has not operated it since. It paid Mrs. Horn $1,000 and Bizzell the rents for the year 1928 and $200 to apply on the rents for 1929.

The chancellor rendered judgment in favor of the appellees in the amount of the sums claimed as damages for breach of the leases, estimating the damages to be such as would have accrued for rents, and decreed the cancellation of the several leases.

It is clear that the appellant breached the leases by failing to take from the lands the minimum annual tonnage and failed to pay in lieu thereof the sums agreed upon. This entitled the lessors to sue in a court of equity for a cancellation of the leases and to recover damages for breach of same. The contract itself fixed the measure of damages which was $1,500 a year. This case is ruled by the doctrine announced in the case of *Miller* v. *Mauney,* 150 Ark. 161, 234 S. W. 498, as follows: ''In the construction of mineral leases such as is involved in this case, the authorities uniformly hold that there is an implied obligation on the part of the lessee to pro-

ceed with the search and also with the development of the land with reasonable diligence according to the usual course of such business, and that a failure to do so amounts in effect to an abandonment and works a forfeiture of the lease. * * * They may go into a court of equity to cancel the contract and recover any incidental damages; they may in a separate action at law sue for damages for breach of the contract; or they may treat the contract as rescinded and sue to recover possession of the property."

The appellant argues that the payments of $1,500 per year would not be due until the second year, that is, that under the terms of the lease they would have a year in which to explore the lease and prepare to mine the ore and the $1,500 a year would accrue only in and during the second year. The appellant has called to our attention no provision of the lease to warrant this position, and indeed there is no such provision. We think the interpretation of the chancellor of that part of the lease which we have quoted is the correct one. The decree is therefore affirmed.

SPEAR *v.* STATE.

Opinion delivered December 21, 1931.

[redacted]

Hardin & Barton, for appellant.

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

BUTLER, J. Between 8 and 9 o'clock on the night of January 28, 1931, three masked men appeared at the Reynolds Drug Store in the northeast section of the town on Van Buren in an automobile. Two of these men entered the drug store, and the third, described by witnesses as a very tall man, stood on the outside near the curb where the car was parked. All three were armed with pistols and masked, and the two who entered the store proceeded to rob it. While the robbery was going on a young man named Brown, accompanied by a young lady, parked his car on the opposite side of the street from the drug store and, observing what was occurring, took his pistol from the pocket of the car and ran across the street in the direction of the drug store and opened fire upon the man standing on the outside. In an interchange of shots between the two Brown was killed. The two men in the drug store had completed the robbery, and the three immediately left and made their escape, the one on the outside leaving in the car, the other two on foot.

At the March term, 1931, of the Crawford Circuit Court following the robbery an indictment was returned by the grand jury charging the appellant, Percy Spear in common-law form with having, on the date aforesaid with malice aforethought and after deliberation and premeditation, killed Elmo Brown by shooting him with a gun, etc. When the case was called for trial, the defendant filed his motion for a change of venue on the ground that the minds of the inhabitants of Crawford County were so prejudiced against him that he could not get a

fair and impartial trial in said county. This petition was supported, by the affidavits of 15 or 16 persons. The motion was overruled by the court, and proper exceptions were saved to the action of the court. After a demurrer had been interposed to the indictment, which demurrer was overruled, the defendant was duly arrainged and the case tried before a jury, and the trial resulted in the conviction of the defendant for the crime of murder in the second degree, with punishment fixed at imprisonment in the State penitentiary for a period of twenty-one years.

■ It is first insisted on appeal that the court erred in overruling the motion for the change of venue, the contention being that the examination of those who signed the supporting affidavits disclosed the state of mind of the inhabitants of the county as alleged, and that their examination showed that they were credible persons within the meaning of the statute. After a careful consideration of the testimony of these affiants, we cannot say that the trial court abused its discretion in denying the petition. There were ten affiants examined at length, which testimony requires fifty-eight pages of the transcript to record it. It would be impracticable to set out this testimony, but we have carefully read, not only the examination of the affiants abstracted by the appellant, but that of the others as well, and we conclude that their opinion was based on insufficient information. It was formed largely from gossip on the streets of Van Buren and by the expression of opinion of a few persons from some of the outlying townships, and the prejudice, if any, existing in the minds of the people appears to have been more against the crime itself than the individual accused of having committed it. It naturally aroused great feeling and resentment in the minds of all who heard it and an earnest desire that the guilty person, whoever he might be, should be punished. Some of the prejudice appears to have been directed more against the sheriff than against any one else, but this seems to have been entertained by only a very few.

The county contained 37 townships and several thousand qualified electors, and none of the affiants testified as to any prejudice except in a few of these townships and as to a limited number of people. It was not shown that the jury was drawn from that part of the county where the prejudice existed, and we must indulge the presumption that the court endeavored to secure jurors who were unaffected by passion and without prejudice to the defendant. As is held in *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376, called to our attention by the appellant. "There is a presumption as to the credibility of supporting affiants which must be overcome before the affidavits can be disregarded." But in the conduct of a criminal case a wide latitude must necessarily be given the trial judge in passing upon questions of this kind, and it must always be assumed that his rulings are based upon a fair and impartial consideration of the questions before him, and his decision ought not to be disturbed unless it clearly appears that his action is arbitrary. He is not obliged to conform to the opinions of the affiants where it appears that those opinions are formed upon no substantial basis.

We have not overlooked the supplemental typewritten brief filed by the appellant or the suggestion that the original transcript fails to show the evidence of a number of persons at the hearing of the petition, nor the argument that, as the presumption of credibility attaches to the affiant, it must be presumed that these persons were credible within the meaning of the statute, and that therefore the prayer of the petition ought to have been granted. The answer to this is that the statute requires the supporting affidavit to be made by two credible persons having the requirements mentioned, and, while it is silent as to the number in excess of two who may affirm the truth of the petition, the court is not required to examine an indefinite number. Here ten were examined at length, and it was the privilege of the defendant to present those of the affiants whom he believed to be most thoroughly acquainted with the sentiment of the minds of

the inhabitants of the county for examination by the court, and the record should affirmatively show that these witnesses were presented and their examination refused. The mere suggestion that their examination was not incorporated in the transcript and impliedly that it was not made is not sufficient.

■ It is next urged that the court erred in refusing to excuse certain jurors for cause and excusing others. A juror, being examined as to his qualifications, in answer to questions stated, in effect, that, if the facts he had heard were true, it would tend to establish an opinion in his mind, and that at the time of the examination he had an opinion regarding the guilt or innocence of the defendant which it would take evidence to remove, if what he had heard was proved to be true. The question was, "You have an opinion," and the answer, "Yes, if what I heard is true, I have an opinion." Answering further a question of the court, he said that he thought he could disregard the opinion and try the man as fairly and impartially as if he had not heard of the case. From the record of his examination, it is obvious that this opinion was not formed from any statement he had heard made by witnesses in the case, but from newspaper accounts and general discussion. The opinion was therefore based upon rumor. Counsel for appellant say that under the authority of *McGough* v. *State*, 113 Ark. 301, 167 S. W. 857, this was a disqualification and ground for the excusal of the juror for cause. Counsel misinterpret the rule stated in that case. There the rule stated was that the entertainment of preconceived opinions about the merits of a criminal case renders a juror *prima facie* incompetent, but, where it is shown that the opinion was founded on rumor not of a nature to influence the verdict of the juror, he is qualified. It may happen that the examination of the juror will disclose a fixed opinion, although based upon rumor only. Then, of course, the prospective juror cannot be disinterested or unbiased, and is therefore disqualified. But where he is able to say that he can disregard the opinion, and give to the evidence a

fair consideration, and from that reach his conclusion as to the guilt or innocence of the defendant, he is not disqualified. We think this is the purport of the statement made by the juror, and that the court correctly held him qualified. It may be said, moreover, that no prejudice has been shown by the ruling of the court. The abstract does not show the disposition made of the juror, whether he was taken or peremptorily challenged by the defendant, or that he was forced to exhaust his challenges because of the court's action.

Two of the jurors were excused for cause by the court because they announced that they were opposed to capital punishment, and another because it appeared that he was one of the signers of the supporting affidavits on defendant's petition for change of venue, although the juror stated on his *voir dire* that he had no interest in the case and was unacquainted with the facts. We are committed to the rule that in the conduct of a trial the trial court is clothed with wide discretion, and necessarily so, for the proper and expeditious dispatch of its business, and that this court will not interfere with the action of the trial court where there is no violation of some mandatory provision of the law, or unless it is shown to have operated to the prejudice of the party complaining. *Mabry* v. *State,* 50 Ark. 492, 8 S. W. 823; *Pate* v. *State,* 152 Ark. 553, 239 S. W. 27; *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643. As is said in *Rose* v. *State,* 178 Ark. 980, 13 S. W. (2d) 25: "Appellant was not entitled to have any particular jury to try his case. It does not appear that he challenged any of the jurors for cause, nor does he make it appear that any of them were prejudiced against him. Hence he was in no attitude to complain of the manner in which the jurors necessary to complete the full panel were selected, in the absence of any showing that the members of the special panel were prejudiced against him." See also *Bennett* v. *State,* 161 Ark. 496, 257 S. W. 372.

The next assignment of error is that the court erred in admitting incompetent testimony and in refusing to admit other testimony which was competent. The testimony thought to be incompetent was a part of Mrs. Reynolds' testimony relating the facts connected with the robbery of the store where the shooting took place, and to the effect that the defendant and one Clifton Harback were about the same size as the two men who robbed the store. The objections to this testimony is that it varies from the charge of the indictment, to-wit: that the defendant murdered the deceased by shooting him with a gun with malice aforethought and after deliberation and premeditation. There was no error committed by the court in this regard, for reasons we shall state in our discussion of instruction No. 1, given at the request of the State, and to which objection was made. The same objection was made to the testimony of the witness Luke Smith, who testified about the same matters as did Mrs. Reynolds. Objection was also made to the testimony of a Mrs. Beavers, in which she stated that she had seen the defendant with Allan Taylor in Fort Smith on the day of the robbery. It is argued that this testimony was irrelevant and prejudicial because Allan Taylor was a man of bad reputation in that county, known to be such by the people of the county, and that the testimony was introduced only for the purpose of creating prejudice against the defendant. This testimony might have had but slight bearing on the question of defendant's guilt or innocence, but, when the remainder of the evidence is considered, it may have had some. It may be very true that Allan Taylor was a man of such reputation as would likely create prejudice against one who continually associated with him, but we cannot say that this was the purpose of the testimony, as we have been unable to find from the record any evidence relating to the reputation of Taylor.

Exception is taken to the action of the court in permitting Cons Wilson to testify regarding the actions of the defendant at the house of a Mrs. Brannon at about

nine o'clock on the evening of the robbery, and to relate his conduct in her house later on; also in permitting Wilson Reynolds to detail the story of what happened relating to the robbery, and as to what was taken by the robbers from the store, and to state that in his judgment the defendant was about the same size as one of the robbers; also in permitting a Mrs. High to testify that she had an automobile taken from her house between five and eight o'clock on that evening, and in permitting the witness Patterson to testify about finding the car the next day and relating what marks he discovered on the body of the car when found. Numerous other objections were taken to the testimony of other witnesses substantially the same as those before specifically mentioned and to testimony regarding a pistol having been found back of Mrs. Brannon's house. There was no error committed in the admission of this testimony as will appear when the evidence is hereafter summarized.

A. D. Maxie, the sheriff, testified as to his investigations during the night of the robbery and homicide, and was asked, "Did you receive any information as to the whereabouts of Percy Spear?" He answered: "We were out all night making investigations and the next day doing the same thing, and along late in the afternoon of the following day we got information that Percy Spear and two other boys were the ones that did it." It is argued that this testimony was hearsay. If this is true, appellant cannot now complain. While the record shows that the statement was objected to, that objection was not pressed upon the attention of the court, and no ruling asked or given, nor was the court requested to exclude it from the jury or to admonish the jury that it was incompetent and to disregard it, for, after the objection was interposed, counsel for the State interrupted, admonishing the witness to "just tell what you did." and the witness then proceeded to relate the discovery by him of the whereabouts of Spear and of his subsequent arrest. The failure to request a ruling on the objection, and that the jury be admonished to dis-

regard this testimony waived the objection. *St. Louis & S. F. Ry. Co.* v. *Brown,* 62 Ark. 254, 35 S. W. 225; *Whaley* v. *Vannatta,* 77 Ark. 238, 91 S. W. 191; *Roberts* v. *State,* 96 Ark. 58, 131 S. W. 60.

■ The principal ground urged for the reversal of the case is for the alleged error of the court in giving instruction No. 1 at the request of the State. This instruction is as follows:

"The court instructs the jury that if you find from the evidence beyond a reasonable doubt that the defendant, Percy Spear, in Crawford County, Arkansas, and within three years from the finding of this indictment, entered into a conspiracy with any other person or persons to rob the Reynolds Drug Store in the city of Van Buren, Arkansas, and that the defendant with such other person or persons with common intent to rob same did rob said Reynolds Drug Store with a common purpose, and you further find from the testimony beyond a reasonable doubt that by reason of such common conduct on their part and while carrying out such common purpose and intent, an altercation arose on account of the carrying out of such common conduct in which Elmore Brown was shot and killed by either one of the persons so engaged, the defendant, Percy Spear, being present aiding and abbetting in the acts and conduct aforesaid of his companion or companions, then each would be guilty of an unlawful homicide in some degree, and if the fatal injury was inflicted upon Elmore Brown with malice aforethought but without premeditation or deliberation, then the defendant would be guilty of murder in the second degree, and if the fatal injury was inflicted on Elmore Brown with malice aforethought and after premeditation and deliberation by either one of the three, then the defendant, Percy Spear, would be guilty of murder in the first degree, and if the fatal injury was inflicted without malice and without deliberation, but upon a sudden heat of passion caused by provocation apparently sufficient to make the passion irresistible, then the defendant would be guilty of manslaughter."

It is insisted that, as the indictment did not charge murder committed in the perpetration of robbery under § 2343 of Crawford & Moses' Digest, but charged in common-law language the commission of murder by killing done with malice aforethought, deliberation and premeditation, the instruction was erroneous under the rule announced in *Rayburn* v. *State,* 69 Ark. 177, 63 S. W. 359, and in *Shepherd* v. *State,* 120 Ark. 160, 179 S. W. 168. In those cases the indictments, as in this case, charged the commission of murder at common-law, and the instructions held to be erroneous in those cases were as follows: "If you find from the evidence beyond a reasonable doubt that defendant, in perpetration of, or in the attempt to perpetrate, the robbery * * *, shot and killed (deceased), then defendant is guilty of murder in the first degree and you will so find." The decision reached by the majority of the court in the Rayburn case appears to have been based upon the reasoning of the court in the case of *Cannon* v. *State,* 60 Ark. 564, 31 S, W, 150; 32 S. W. 128. In the Rayburn case it was held that the indictment charged one crime and the instruction stated another and different one, and that, as a defendant could not lawfully be convicted of a crime with which he was not charged, the instruction was erroneous. But that part of instruction No. 1 in the case at bar urged as error is not at all like the instruction in the Rayburn case. It simply told the jury that if the defendant entered into a conspiracy with other persons to commit a robbery and if, while in the prosecution of the common design, Brown was killed by either one of the persons, defendant being present aiding and abetting in the acts of his companion or companions, then each would be guilty of an unlawful homicide in the same degree. This is the law. The general rule is that all who join in a common design to commit an unlawful act, the natural and probable consequence of which involves the contingency of taking life, are responsible for a homicide committed by one of them while acting in pursuance or furtherance of the common design, although the homicide

might not have been in contemplation of the parties when they conspired to commit the unlawful act, and although the actual perpetrator is not identified. This rule was recognized in *Carr* v. *State,* 43 Ark. 101. In that case reference is made with approval to the case of *Stephens* v. *State,* 42 Ohio St. 150, where the indictment appears to have been one which charged the offense of murder at common law. The trial court gave the following instruction: "That if Luke Jones, William Jones and Laban Stephens entered into a conspiracy to commit a robbery on the person of Anderson Lackey and that the evidence also shows that the attempt to perpetrate such robbery, under all the circumstances, would naturally, reasonably and probably involve the taking of the life of Lackey, and then from the evidence that in attempting to perpetrate such robbery that one of the co-conspirators of defendant unlawfully and maliciously assaulted and shot Anderson Lackey with the intent to take his life and that by such assault and shooting gave him a mortal wound, * * * then the defendant is equally guilty in law * * * as if done with his own hand, whether he was present when the assault and shooting were done or not." The Supreme Court, in approving this instruction, said: "If several are associated together to commit a robbery and one of them, while all were engaged in the common design, intentionally kills the person they are attempting to rob in furtherance of the common purpose, all are equally guilty, though the others had not previously consented to the killing, where such killing was done in the execution of the common purpose and was a natural and probable result of the attempt to rob. * * * Each is presumed to have intended to authorize the other to kill if in perpetrating the robbery it became a necessary means to its consummation."

In *Brista* v. *State,* 126 Ark. 565, 191 S. W. 7, the appellant was indicted for murder in the first degree, the indictment in apt words charging him with that crime, committed by killing one Sweetie Statcher. The facts were that appellant, after having had a fight with a negro

man, started out with some companions looking for him. They reached a house, the door of which was closed, and in which several negroes then were. It was thought that the negro they were seeking was one of these inside the house. They were told by those within that the negro they sought was not there. They demanded that the door be opened, and, no one answering, the companions of appellant began shooting through the door, one of the shots striking a child and killing it. The court held that under these facts the appellant, although he did not fire the fatal shot, was guilty of murder. In the late case of *Boone* v. *State,* 176 Ark. 1003, 5 S. W. (2d) 322, this rule was expressly approved.

It will be observed that the jury are merely told that, if the killing was done by one of a number while engaged in the perpetration of a felony, the defendant would be guilty of some degree of unlawful homicide, and not that he would be guilty of murder in the first degree; and the instruction further told the jury that the degree of homicide would depend upon whether it was committed with malice aforethought only (for then it would be murder in the second degree), or if with malice aforethought, deliberation and premeditation by either one of the three, it would be murder in the first degree, and that if the homicide was committed without malice, but upon a sudden heat of passion, etc., the crime would be manslaughter. We think this instruction was responsive to the indictment and not subject to the objection urged.

Instruction No. 2, said by appellant to be erroneous, first recites the indictment and, continuing, informs the jury that it is competent under the indictment, if the proof justifies it, to convict the defendant of murder in the first or second degree, or of manslaughter, or to acquit him outright. Instructions similar to this have been many times given and approved, and are not subject to the criticism made.

Objections were made to the instructions of the court given on its own motion. These dealt with the law of self-defense. We agree with the appellant that these

instructions were improperly given, but it is an error of which he may not complain, as they were more favorable to him than he could ask. The proof shows that the killing occurred while the slayer was engaged in the perpetration of a robbery. It is well settled that one who, while in the actual perpetration of a felony by violence, kills another person who is attempting to prevent the felony, cannot plead self-defense. 30 C. J. 49. This would be true even though the person attempting to prevent the felony and who was killed began firing first. *State* v. *Hart,* 292 Mo. 74, 237 S. W. 473.

■ It is lastly and strenuously urged that the evidence failed to connect the appellant with the commission of the crime, and that the court should have directed a verdict of not guilty as requested by appellant. It follows from what we have already said that the evidence of the robbery and its attendant circumstances was competent. It disclosed that the two who entered the store were masked so that their features could not be identified, but they were about the same height and weight, and the proprietor of the drug store, who was the first to come in contact with the two robbers, stated that they were armed with automatic pistols, one of which was nickel-plated, and that the defendant Spear corresponded in size to them. Spear had been seen in Van Buren about two days before the robbery, and again he was seen at the house of a Mrs. Brannon at about seven o'clock on the evening of the robbery. He came there on that occasion in an automobile, a description of which witnesses could not give. Late in the afternoon of that day or early in the evening a Buick coupe belonging to Mrs. High was taken from in front of her house and was discovered in the town the next day with a mark on the fender similar to that which might be made by the impact of a bullet. Spear stayed at Mrs. Brannon's only a short time after he arrived there about seven o'clock, but returned again about nine o'clock and not in an automobile. He was under the influence of intoxicating liquor and had some with him which he offered to some of the per-

sons at Mrs. Brannon's. He was observed to go to the back part of the house, from which he returned after a time and appeared to be restless. He had a quantity of small change, which he emptied out before him and offered to, and did, exchange $1.25 of this for a $1 bill. On being asked how he happened to have so much small change, he said that he had won it in a crap game over the river. At about this time some one came to Mrs. Brannon's and told of the robbery, and in the course of the conversation Spear stated that he had driven to Mrs. Brannon's in a Chevrolet car. An investigation was made that night by the officers, and Spear and one Clifton Harbach were suspected of implication in the commission of the crime, and the officers visited Mrs. Brannon's house inquiring for Spear. The next morning they returned, and in the course of their investigation found an automatic .32 calibre revolver hidden near the back of the premises under a piece of tin. Two or three days later Spear was discovered in Little Rock living under an assumed name.

The appellant interposed the defense of an alibi, and there were a number of witnesses who testified in positive terms that before and at the time of the robbery, appellant was on the opposite side of the Arkansas River from the drugstore. It must be conceded that the evidence tending to connect Spear with the commission of the crime is wholly circumstantial, and some of the circumstances have but slight probative value, but, when considered together with the inferences reasonably deducible therefrom, we think the evidence tending to establish his guilt is of a substantial nature. The probative value of circumstantial evidence is discussed in the case of *Scott* v. *State*, 180 Ark. 408, 21 S. W. (2d) 186, where the declaration is made that "there is no difference in the effect between circumstantial evidence and direct evidence. In either case it is a question for the jury to determine, and if the jury believes from the circumstances introduced in evidence beyond a reasonable doubt that the defendant is guilty, it is the duty of the jury to

find him guilty, just as it would be if the evidence was direct. 'There is no greater degree of certainty in proof required where the evidence is circumstantial than where it is direct, for in either case the jury must be convinced of the guilt of the defendant beyond a reasonable doubt.''

The jury had before it the witnesses who testified as to the alibi, and it has found that they were unworthy of belief. The jury is the exclusive judge of that question and its verdict is binding on us. From the evidence in the whole case the jury was satisfied that the defendant was guilty, and we cannot say that it was mistaken. Learned counsel for appellant has ably argued the errors assigned, but we are of the opinion that no prejudicial error was committed by the trial court, and that the testimony was reasonably sufficient to sustain the verdict of the jury.

The judgment is affirmed.

[redacted]

DAVIS *v.* STATE.

Opinion delivered January 11, 1932.

[redacted]

Arthur L. Jones, for appellant.

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

HART, C. J. The only issue raised by this appeal is whether or not appellant is barred by limitation of his right to appeal from a judgment and sentence for disturbing the peace, rendered in the Little Rock Municipal Court on the 11th day of June, 1931.

The record shows that appellant, T. H. Davis, was tried in the Little Rock Municipal Court for disturbing the peace and was convicted and sentenced to serve six months in the county jail and pay a fine of $300. After the judgment of conviction and sentence was passed upon him, it was ordered by the municipal court that the execution of the sentence be suspended. On the 12th day of September, 1931, the municipal court set aside its order suspending execution of sentence, and on the same day appellant prayed an appeal to the circuit court.

The act creating the municipal court of Little Rock prescribed that all appeals from it must be taken and the transcript lodged in the office of the circuit clerk within thirty days after judgment had been rendered and not thereafter. Acts of 1915, No. 87 § 8, page 346.

Inasmuch as more than thirty days elapsed from the date of the judgment and sentence of conviction before an appeal was prayed, the question is presented whether or not the execution of the sentence could be suspended by the municipal court after it had duly rendered a judgment of conviction and had sentenced the defendant. Where there has been a judgment of conviction, we have recognized the power of courts of record to suspend the sentence for a reasonable time, and that, in the absence of statutory requirement, this need not be at the same term of court at which the verdict was found. The reason is that such an order is not equivalent to a final judgment but is a mere suspension of active proceedings in the case for a limited time. *Thurman* v. *State,* 54 Ark. 120, 15 S. W. 84; and *Davis* v. *State,* 169 Ark. 932, 277 S. W. 5.

In the latter case, however, it was expressly decided that, in the absence of a statute conferring the power, a judgment and sentence of conviction is a final judgment, and exhausts the power of the court rendering it ex-

cept to set aside the judgment and sentence at the term at which it was rendered.

Here the record shows that the court made no attempt to set aside its judgment and sentence of conviction. It merely attempted to suspend the execution of the sentence. The court exhausted its power in rendering the judgment of conviction and in passing sentence. It then undertook to exercise an entirely different power for which it had no warrant at the common law or under our statute.

In the case of *Davis* v. *State, supra,* the court recognized that the Legislature of 1923 passed an act authorizing certain judges to suspend sentence upon certain conditions and that the act was valid. Acts of 1923, No. 96, page 41.

The Legislature of 1929 gave municipal courts the same power to postpone or suspend sentence in misdemeanor cases as is conferred upon the circuit judges of this State. Acts of 1929, No. 14, page 20.

As we have already seen, the court in the present case did not attempt to suspend the sentence but undertook to suspend the execution of the sentence after it had been duly passed. This it had no power to do, and the case is controlled by that of *Ketchum* v. *Van Sickle,* 171 Ark. 784, 286 S. W. 948, where it was held that where the circuit court, without authority, suspended the execution of a sentence for one year in the penitentiary, to which suspension the defendant consented, the court had authority, more than a year later, to direct that the suspended sentence be enforced.

In the present case, if the defendant wished to avail himself of his right of appeal, he should have done so within the time prescribed by statute, and the action of the court in attempting to suspend the execution of his sentence could not have denied him that right. We therefore hold that the sentence and the commitment of the defendant were legal, and, because he did not appeal to the circuit court within the time prescribed by law, the judgment of that court be affirmed.

BANK OF HOXIE *v.* GRAHAM.

Opinion delivered January 11, 1932.

G. M. Gibson, for appellant.

W. P. Smith and *O. C. Blackford,* for appellee.

HART, C. J., (after stating the facts). At the outset, it may be stated that it is the settled law of this State that creditors cannot attack as fraudulent the conveyance of a homestead as made without a consideration and in bad faith as to them. The reason is that, under

our Constitution and statutes, the homestead is not subject to the lien of a judgment or to a sale under execution except in certain specified instances. It is conceded that appellant, Bank of Hoxie, does not fall within the excepted class of creditors. *Bogan* v. *Cleveland,* 52 Ark. 101, 12 S. W. 159, 20 Am. St. Rep. 158; *Davis* v. *Day,* 56 Ark. 146, 19 S. W. 502; *Fluke* v. *Sharum,* 118 Ark. 229, 176 S. W. 684; *Dean* v. *Cole,* 141 Ark. 177, 216 S. W. 308; and *Starr* v. *City National Bank,* 159 Ark. 409, 252 S. W. 356.

This is conceded to be the settled law in this State, but it is earnestly insisted that there has been no selecting or setting apart of the 80 acres of land as a homestead, and that the value of the whole tract amounts to much more than $2,500. Under our Constitution, the homestead outside any city, town, or village, owned and occupied as a residence, shall consist of not exceeding 160 acres of land with the improvements thereon to be selected by the owner; provided, the same shall not exceed in value the sum of $2,500, and in no event shall the homestead be reduced to less than 80 acres, without regard to value. Constitution, art. 9, § 4. The claim that the 80 acres of land was not selected as a homestead is not tenable. It contains the home of the family and was occupied by them as a residence from the time J. M. Graham purchased it in 1914 until his death in 1928, and since that time it has been occupied by the widow and those of the children who live with her. From the beginning, constitutional and statutory provisions relating to homestead exemptions have been liberally construed in this State in the interest of the family home.

In the early case of *Tumlinson* v. *Swinney,* 22 Ark. 400, 76 Am. Dec. 432, the term "homestead" has been designated as the place of a house or home, that part of a man's landed property which lies about and contiguous to his dwelling house with the inprovements and appurtenances. The same definition of a homestead has been recognized and applied by the court in interpreting all our Constitutions on this subject. *Williams* v. *Dorris,* 31 Ark.

468; *McCloy* v. *Arnett,* 47 Ark. 453, 2 S. W. 71; *McCrosky* v. *Walker,* 55 Ark. 303, 18 S. W. 169; *Flowers* v. *United States Fidelity & Guaranty Company,* 89 Ark. 506, 117 S. W. 547; and *Pulse* v. *McGregor,* 179 Ark. 712, 17 S. W. (2d) 888.

In 13 R. C. L., § 53, p. 588, it is said that in a majority of the States occupancy of a place by a family is presumptive evidence of its appropriation as a homestead, and is notice to all the world of that fact, it being furthermore the rule that the purchase of a home with the intention to occupy it as a homestead, followed by actual occupancy within a reasonable time, impresses it, *ab initio,* with the homestead character and inviolability. Among the cases cited is *Tumlinson* v. *Swinney,* 22 Ark. 400.

In that case the court quoted with approval from *Cook* v. *McChristian,* 4 Cal. 26, construing the homestead act of California, the following:

"The statute does not require any record of the selection of the homestead, and points out no mode in which the intention to dedicate property as a homestead shall be made known. In this particular the statute is lame, and it will be observed, from reading the whole act, that the Legislature by accident has omitted this necessary provision. In the absence of any statute regulating the subject, the filing of notice in the recorder's office of the county could have no legal verity, and would not be conclusive on purchasers or creditors. The homestead is the dwelling place of the family, where they permanently reside. By the common law such residence would raise the presumption that the premises so held were the homestead, and every one would be bound to take notice of the character of the occupant's claim, as occupation is *prima facie* evidence of title. There is no dispute in this case that the plaintiffs knew of the defendant's possession. Such possession, taken in connection with other circumstances in the case, was properly submitted to the jury, from which to find the fact of the dedication of the premises as a homestead."

In the present case, the evidence shows that the land upon which the dwelling house is situated, and the contiguous land, not exceeding eighty acres, was in a reasonable, compact and convenient form and constituted Graham's homestead. J. M. Graham resided on the land from the time he purchased it in 1914 until he conveyed it to his wife in December, 1928. No other selection of his homestead was necessary. *Delisha* v. *Minneapolis, St. Paul, Rochester & Debuque Electric Traction Company,* 110 Minn. 518, 126 N. W. 276, 27 L. R. A. (N. S.) 963.

It is next insisted that the court erred in not setting aside the deed as to the remaining sixteen acres and ordering it sold for the payment of the debts to appellant bank. We do not think the court erred in so holding. There was a valid mortgage on the whole homestead with nearly $1,000 balance due on it. The great preponderance of the evidence shows that the remaining 16 acres of land was not worth more than $250. Hence no useful purpose could have been served in setting aside the conveyance as to the 16 acres and ordering them sold, provided appellees had the right to have them first sold in satisfaction of the mortgage indebtedness to the exclusion of the homestead.

In the case of *Grimes* v. *Luster,* 73 Ark. 266, 84 S. W. 223, Am. St. Rep. 34, the court in discussing a similar and kindred question of law said:

"In *Littell* v. *Jones,* 56 Ark. 130, [19 S. W. 497] an action was brought by next friend of minors to select and set apart to them a homestead in a tract of 240 acres, and to require a creditor holding a mortgage upon the whole to be limited to the part not selected as homestead. The selection was held proper to be made, and the mortgage, which was subject to their rights, enforced only against the surplus over the homestead. The principal of selecting one of two homesteads is not different from segregating a homestead out of an area larger than the homestead limit. The rule allowing a debtor to select a homestead has long been in force in this State."

As we have already seen, the whole theory of our homestead laws is based upon the idea of giving a family home to debtors, which is exempt from the liens of judgments and executions levied upon them except in certain specified cases. The policy of the statute is to preserve the home to the family, and we think the interpretation put upon the case of *Littell* v. *Jones,* 56 Ark. 139, 19 S. W. 497, in the later case of *Grimes* v. *Luster, supra,* is applicable to this case, and should govern.

Therefore the decree will be affirmed.

MILLER *v.* JOHNSON.

Opinion delivered December 21, 1931.

Joseph Morrison, for appellant.

John W. Moncrief and *Sam T.,* and *Donald Poe,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists for reversal that the evidence was not legally sufficient to support the verdict; that the court erred in not granting him a new trial because of newly-discovered evidence; and also in allowing appellee to take a nonsuit as against the alleged operator of the motordrome.

The evidence is undisputed that the appellant, the holder of the exclusive concession for furnishing amusements to the fair, permitted Puryear, for 25 per cent. of

the gross receipts, to bring his amusement contrivance, the motordrome owned and operated by him, into the grounds with the other features and attractions of appellant's shows, devices and contrivances for affording amusement to the public, all advertised as the Ralph R. Miller Shows, and the operators in the grounds, as well as the performers, wore uniforms with the words Ralph R. Miller Shows on the back. That the tickets for admission to this device were furnished by the Ralph R. Miller Shows and had the name printed thereon.

That appellee, a patron of the show, stepped on the platform and was standing thereon watching the performance within the motordrome when the plank broke, because of the defect or knot near the end thereof, allowing her to fall to the pavement 10 or 12 feet below, a young man falling through striking her, resulting in painful and severe injuries. There was no opportunity afforded appellee to discover the defective condition of the plank, which was painted on the top side and put into the platform upon which the patrons were to stand in order to observe the performance inside the drome. The defective condition could easily have been discovered by the employees in charge of the erection of the platform, the plank not being painted on the under side, and no care whatever was shown to have been exercised by appellant, whose duty it was to use ordinary care to see that the device or contrivance, which he had employed from the owner, was reasonably safe for the patrons invited by him to use it.

It is insisted by appellant that he had no proprietary interest in the motordrome, and had nothing to do with the manner of its operation, and that therefore he was under no duty to those who patronized the attraction, and that Puryear, the owner of the contrivance, was an independent contractor for whose negligence he should not be held responsible. He allowed the owner of this contrivance, however, to erect and operate it for 25 per cent. of the gross receipts among the other contrivances, attractions and amusement devices upon the grounds for

which he held the exclusive concession for furnishing amusements to the people visiting the fair, inviting the patrons to make use of this device the same as the others exhibited and of which he was the owner, and he was bound to the exercise of ordinary care to see that the devices operated were reasonably safe for the purpose for which the public was invited to use them. *Hartman* v. *Tenn. State Fair Assn,* 134 Tenn. 149, 183 S. W. 733, Ann. Cas. 1917D, 931.

In 22 A. L. R., page 620, the annotation states: "The weight of authority is to the effect that the proprietor or manager of a place of amusement owes a duty to the public who are invited there to exercise reasonable care to see that the premises are safe and are kept in a safe condition, and that, if he does not discharge the duty, he may be held liable for injury to a patron, although the exhibition, or performance, or act which resulted in the injury is that of a concessioner, independent contractor, or other third person."

The injury occurred in Oklahoma, and the actionable quality of the acts causing it is to be determined by reference to the *lex loci,* rather than the *lex fori.* 5 R. C. L. 1038, § 129; *Tulsa Entertainment Co.* v. *Greenlees,* 85 Okla. 13, 205 Pac. 179, 22 A. L. R. 602.

The injury here was not caused by the *personal* negligence of the owner or independent contractor, but resulted from the defective condition of the amusement apparatus. Appellant, having the exclusive right to furnish amusements on the grounds and the selection of the kinds of attractions and their operators, cannot excuse himself from liability for failure to exercise ordinary care to have and keep the equipment or apparatus operated for amusement purposes reasonably safe for the patrons and visitors by contending that the device belonged to an independent contractor who alone was responsible for negligence in supplying and operating the device or contrivance.

Appellant made no application for a continuance upon discovery that Puryear, the owner of the motor-

drome who had been sued along with him, was not present at the trial, and he necessarily knew at the time of going to trial what the testimony, now claimed to be newly discovered, would be, since he testified of the facts himself relating to said witness being an independent contractor. This testimony would have been only cumulative in any event, and the court did not abuse its discretion in denying the motion for a new trial on account of alleged newly-discovered evidence.

In our view of the law, appellee could recover of appellant herein without regard to any rights and liabilities existing between appellant and his codefendant, and, since he asked no relief by cross complaint against his codefendant, the plaintiff, appellee could dismiss his action against Puryear, as was done herein, and the court did not err in allowing it to be done.

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

MISSOURI PACIFIC RAILROAD COMPANY *v.* ARMSTRONG.

Opinion delivered January 11, 1932.

R. E. Wiley and *Henry Donham,* for Mo. Pac. Rd. Co. and *McRae & Tompkins* for Prescott & N. W. Rd. Co., appellants.

Bush & Bush, for appellee.

SMITH, J. The controlling facts out of which this case arose are undisputed and are as follows. Appellee is the proprietor of a small nursery about five miles from Prescott, at which city G. A. Hayes was the station and freight agent during the months of November and December, 1928, for both the Missouri Pacific and the Prescott & Northwestern railroads. Both railroads used the same depot, freight offices and employees.

On November 22, 1928, appellee ordered twenty bushels of peach seed to be shipped him from Concord, Georgia, and on the same day he called on Mr. Hayes, the railway agent, and advised him of the order and told him that it was getting late and an early delivery of the seed was essential for their planting and germination, and Hayes was told the damage which would result in delay, and he advised appellee that, unless there was delay in transit, the seed would arrive in eight or ten days. Appellee also advised the railway agent of a similar order of peach seed from Tokio, Arkansas, a station on the Prescott & Northwestern Railroad, of which road Hayes was also the agent, and that this shipment of seed would come over that road.

The seed from Georgia were shipped on November 27, 1928, and were delivered in Prescott on December 8th thereafter. The order from Tokio arrived about the same time. Mr. Hayes did not advise appellee of the arrival of the seed, and they remained in the freight house until December 28th, when appellee was advised by the Agricultural Agent of the Prescott & Northwestern Railroad that the seed were at the freight house. Appellee imme-

diately called for and received the seed and planted them in the usual manner, but on account of the delay in their receipt, and the consequent delay in planting, the seed did not germinate in time for budding, this being the use for which Hayes, as agent, had been advised the seed were intended. The seed were planted, and in May such of the sprouts as had come up were plowed under and the land was planted in cotton.

On March 1, 1930, suit was brought against the Prescott & Northwestern road, and on March 8, 1930, an amendment to the complaint was filed making the Missouri Pacific Railroad Company a party defendant. On the.....day of April, 1930, the Missouri Pacific filed a petition to sever and to remove to the Federal court, whereupon the cause was dismissed as to that defendant. At the October, 1930, term of the court the case against the Prescott & Northwestern road was tried, and there was a verdict for the plaintiff on account of the Tokio shipment and a directed verdict for the railroad as to the Georgia shipment. Upon motions for a new trial being filed, both verdicts were set aside, and on November 3, 1930, an amended and substituted complaint was filed against both railroad companies, alleging damages in the sum of $3,000 as to the Georgia shipment and $700 as to the Tokio shipment. There was a trial with verdict and judgment against the Prescott & Northwestern Company for $50 on account of the Tokio shipment and against both railroads for $500 on account of the Georgia shipment, and this appeal is from that judgment.

A number of questions have been raised for the reversal of the judgment which we find it unnecessary to discuss, for the reason that the cause of action was barred when the suit was filed from which this appeal comes.

This cause of action is predicated upon the failure of the railroad agent to give the consignee notice of the arrival of the seed. No claim is made that the shipment was delayed in transit or that the seed were damaged, but there was a failure of the railroad agent to notify the consignee of the arrival of the shipments.

A cause of action for a failure to give notice of the arrival of a shipment is conferred by § 897, Crawford & Moses' Digest, which provides that railroad companies shall, within twenty-four hours after the arrival of a shipment, give notice, by mail or otherwise, to the consignee of the arrival of the shipment, with the weight and the amount of freight charges due thereon. *Spears* v. *Mo. Pac. Rd. Co.*, 183 Ark. 945, 39 S. W. (2d) 727.

This section of Crawford & Moses' Digest is § 3 of act 193 of the Acts of 1907 (acts 1907, p. 453) which was an act entitled "An Act to regulate freight transportation by railroad companies doing business in the State of Arkansas."

By § 21 of this act, which appears as § 913, Crawford & Moses' Digest, it is provided that if any railroad company shall violate any of the provisions thereof, and "shall not do or permit to be done any act, matter or thing in this act required to be done," such railroad company shall be held to pay to the person injured thereby the actual amount of damages so sustained. But the section further provides: "No action aforesaid shall be sustained unless brought within one year after the cause of action accrued, or within one year after the party complaining shall have come to the knowledge of his or her right of action. Provided that no action shall be brought after two years from time right of action accrues, and as many causes of action as may have accrued within the year to any one person, firm or corporation, including damages, forfeitures, demurrage, etc., may be joined in the suit or complaint."

The plain meaning of the language quoted is that a person having a cause of action conferred by this act 193 shall institute suit to enforce it "within one year after the party complaining shall have come to the knowledge of his or her right of action," and within two years in any event.

The plaintiff's cause of action accrued not later than December 28, 1928, the date on which the seed were actually delivered. The plaintiff knew then, if not before, that

the shipments had been received and that no notice thereof had been given.

We had occasion to construe this limitation upon the time within which suit might be brought for noncompliance with the provisions of the act of 1907, *supra,* in the case of *St. L. I. M. & S. R. Co.* v. *Paul,* 118 Ark. 375, 176 S. W. 327. There a demand had been made in writing upon a carrier to furnish cars for the shipment of stave bolts, but the suit was not commenced until more than a year after the damage had occurred and the shipper's cause of action had accrued by reason of the carrier's failure to furnish cars as demanded. It was there said that, in the absence of legislation limiting the period within which such suit might be brought, the period of limitations thereon would be three years, but that the Legislature had by this act 193 passed a comprehensive act to regulate freight transportation by railroads in this State, and that the right of the State to enact appropriate legislation regulating the business of common carriers had been often recognized in the decisions of this and other courts, and was a right which had been freely exercised. We said of such legislation that some of it was declarative of the common-law duties of common carriers, while much of it imposed additional duties, "and, when the rights and duties of carriers are defined by statute, such statutes must govern, not only in ascertaining what the rights and duties of such carriers are, but also in their enforcement, when the legislation undertakes to provide remedies for their enforcement." It was there further said of this act 193: "After enacting various provisions in this behalf, § 21 of the act, among other things, provides a time within which suit must be brought" to recover damages for failure on the part of the carrier to comply with the act, and that it was there provided that no action shall be sustained unless brought within one year after the cause of action accrued, or within one year after the party complaining shall have come to the knowledge of his right of action, with a proviso that no action shall be brought after two years from the time the right of

action accrues. And it was further said that the two-year proviso had no application to the facts of that case, if the act applied at all. Nor does the two-year proviso apply to the instant case, if the act applies at all, because the plaintiff had come to the knowledge of his right of action when the shipment was delivered to him.

It was insisted in the Paul case, as it is here, that the plaintiff had a cause of action independent of the act 193, and that the limitation thereof as to the time when suit should be brought did not therefore apply. But we answered that contention by saying: "We think the act should be held applicable to suits growing out of a railroad's failure to furnish cars. The Legislature has by this act imposed several additional burdens on railroads, and, having done so, has seen fit to limit the time within which suits may be instituted to recover damages for failure to perform these duties. A study of the act gives no support to the position that the Legislature intended there should be a difference between the time within which suit should be instituted when the failure to furnish cars was such that a common-law action would lie therefor, and the case where the cause of action was a failure to comply with the statute requiring cars to be furnished shippers. There are cogent reasons why the Legislature should limit to the period of a year the time within which suits may be instituted for failure to furnish cars, and we think the act in question accomplished that result."

Here the plaintiff's cause of action is predicated upon the failure of the carrier to give notice of the arrival of the shipments, and this duty is of statutory creation, being imposed by the act 193. It is true that the instant suit was brought within a year after the dismissal of the first suit, but it is true also that, upon the expiration of the year, there was no suit pending, and the running of the statute was not arrested by the prior suit, which was not pending when the year expired.

The case of *Anthony* v. *St. Louis, I. M. & S. R. Co.*, 108 Ark. 219, 157 S. W. 394, is conclusive of this question. That was a suit by minors against a railroad for the

death of their father caused by the negligence of the railroad in the operation of one of its trains. The father of the plaintiffs was killed in 1909, and the suit was not begun until 1912. It was there said that the cause of action was conferred by § 6290 of Kirby's Digest, commonly known as Lord Campbell's Act, (§ 1075, Crawford & Moses' Digest) which contains the proviso that "every such action shall be commenced within two years after the death of such person."

It was there insisted, however, that the limitation did not apply because § 5075 of Kirby's Digest (§ 6961, Crawford & Moses' Digest) provides that persons under disability may bring suit in a cause of action within three years after their disability was removed, and the suit had been brought within that time. That contention was overruled, it being held that, inasmuch as the statute created no saving clause for the benefit of persons under disability, the infancy of the plaintiffs at the time the cause of action accrued did not postpone the running of the statute, and further that, "inasmuch as the act which creates the limitation also creates the action to which it applies, the limitation is not merely of the remedy, but is of the right of action itself."

This case was cited and applied in the case of *Western Coal & Min. Co.* v. *Hise,* 216 Fed. 338. There a suit was brought under § 6290 of Kirby's Digest on October 19, 1910, upon which a voluntary nonsuit was taken on June 19, 1912. On December 5, 1912, which was more than two years after the death of the intestate, a second suit was filed. The Federal District Court refused to sustain a demurrer to the complaint, which demurrer had raised the question that the suit had not been brought within the time limited by the act which created the cause of action. In reversing the judgment of the district court, which had refused to sustain the demurrer, the Court of Appeals for the Eighth Circuit, in an opinion by Judge Trieber, quoted from the prior decision of the Court of Appeals for the Eighth Circuit in the case of *Partee* v. *Railroad Co.,* 204 Fed. 970, 123 C. C. A. 292, as follows:

"The statute, which in itself creates a new liability, and creates an action to enforce it unknown to the common-law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action, within the time it fixes, is an indispensible condition to the liability and of the action which it permits."

It is insisted, however, that, although the cause of action as to the intrastate shipment from Tokio to Prescott may be barred by act 193, that act does not apply to the shipment from Georgia, which was an interstate shipment.

A similar contention was made in the case of *Louisiana & Western R. R. Co.* v. *Gardiner,* 273 U. S. 280, 47 S. Ct. 386, 71 Law Ed. 644. That was a suit for damages to an interstate shipment of goods which was brought in a district court in the State of Louisiana. The trial court held that the suit had not been brought within the time required by the laws of Louisiana. This judgment was reversed by the Court of Appeals of that State, which held that the State statute did not apply. Upon the remand, judgment was rendered on the second trial for the full amount claimed, which was reduced by the Court of Appeals to the extent of the carrier's claim for an undercharge and the war tax, and the Supreme Court of the State refused a writ of certiorari from which action an appeal was prosecuted to the Supreme Court of the United States.

In reversing that judgment, it was held by the Supreme Court of the United States (to quote the headnote in that case) that "Neither the provisions of the Cummins Amendment to the Act to Regulate Commerce, nor that of the Transportation Act, making it unlawful for a carrier to contract for less than the prescribed period for institution of suits, is a statute of limitations, and therefore, the statute of the State where a cause of action arises against the carrier may apply."

The reasoning of the court was that the State in which the suit was brought had the power to fix the lim-

itation of time within which action might be brought for damages growing out of an interstate shipment where there was no federal statute of limitations applicable. As was said by the court: "Although the rights of the parties depended upon instruments the meaning and effect of which must be determined according to rules approved by the federal courts, there was no federal statute of limitations and the local one applied."

Our attention has not been called to any federal statute of limitations applicable to this case in conflict with act 193, and the limitation upon the right to sue appearing in that act must be applied.

It is finally insisted for the affirmance of the judgment that the act 193 permitted the plaintiff to delay his suit, not only for one year after he had knowledge of his right of action, but also until he knew the extent of his damage, and that this damage could not be known until the consignee knew whether the seed would germinate, and, if not, what the damage would be on that account.

This argument, however, would lead to the conclusion that the damages were speculative and conjectural, and therefore not recoverable at all. The damages could be such only as in the contemplation of the parties would reasonably and probably result from the failure to give notice promptly of the arrival of the shipment of the seed. The plaintiff's cause of action accrued as of the time when it came to his knowledge that he had not been notified, as the statute required that he should be, of the arrival of his seed. The cause of action arose out of this failure, and the damages were assessable as of the time of this failure.

The law of this phase of the case is considered in a very extensive note to the case of *Aachen & Munich Fire Ins. Co.* v. *Morton,* 13 Ann. Cas. 692. The opinion in the case annotated was delivered by Judge Lurton (later justice of the Supreme Court of the United States) for the Circuit Court of Appeals for the Sixth Circuit, 156 Fed. 654. In this opinion he said: "If an act occur, whether it be a breach of contract or duty which one

owes another or the happening of a wrong, whether wilful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. That nominal damages would be recoverable for the breach or for the wrong is enough. The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. The act itself, which is the ground of the action, cannot be legally separated from its consequences. Were this so, successive actions might be brought in many cases of contract and tort as the damages developed, although all the consequential injuries had one common root in the single original breach or wrong."

The annotator says in his note to this case (13 Ann. Cas. 696) that the occurrence of an act or omission, whether it is a breach of contract or of duty, whereby one sustains a direct injury, however slight, starts the statute of limitations running against the right to maintain an action, and among the large number of cases cited in support of this statement of the law are a number from this court.

Inasmuch as the plaintiff's cause of action accrued in December, 1928, and the suit from which this appeal comes was not filed until much more than one year thereafter, it was barred when brought. The judgment must therefore be reversed, and the cause will be dismissed. It is so ordered.

PARKER *v.* NIXON.

Opinion delivered January 11, 1932.

June P. Wooten and *Troy W. Lewis,* for appellant.

Roberts & Stubblefield, for appellee.

SMITH, J. This appeal is a continuation of the case of *Arkansas Mineral Products Company* v. *Creel,* found reported in 181 Ark. 722, 27 S. W. (2d) 1003.

As appears from the facts there stated, S. H. Creel owned a tract of land in Saline County which contained a valuable clay deposit, which land he conveyed to a cor-

poration known as the Arkansas Mineral Products Company, which was organized to develop the land. The conveyance was made to the corporation subject to a mortgage, which the corporation assumed but failed to pay, and the land was sold under a decree of foreclosure. Creel died, and his widow, as sole devisee under his will, redeemed the land by paying the mortgage debt. Mrs. Creel then brought suit in the Pulaski Chancery Court for the money thus paid, and, in connection with this suit, she prayed the cancellation of certain deeds based upon the sale of the land under the execution which had issued on the judgment in favor of Ben F. Reinberger for services rendered the corporation, it being alleged that the judgment had been obtained by fraud. The relief prayed was granted by the decree of the Pulaski Chancery Court, and that decree was reversed in part in the opinion above referred to upon the ground that the suit, which was one, in effect, to compel a reconveyance of the land, was a local action and was maintainable only in the county where the land was situated under § 1164, Crawford & Moses' Digest. The judgment for the debt resulting from the redemption of the land by Mrs. Creel was, however, affirmed.

This opinion was delivered May 5, 1930, and thereafter, to-wit, on July 28, 1930, the receiver who, under the orders of the Pulaski Chancery Court, had taken charge of the assets of the corporation, filed a pleading, which was denominated a petition to vacate the judgment under which the execution had issued and under which the land had been sold. A summons was issued and duly served upon Reinberger, the judgment plaintiff, and testimony was heard in support of and in opposition to the prayer of the petition. The court in which the judgment in favor of Reinberger had been rendered made the following findings of fact:

"In this case, the court finds that the Arkansas Mineral Products Company acquired the land of the petitioner, Creel, subject to a mortgage of $500; that none of the stockholders actually purchased or paid for the stock,

but that the equity in the land was given a fictitious value to support the stock issue. By the terms of the contract, J. M. Ensor was to loan the company the funds which he might thereafter advance. This amounted to $200. It was not a payment of stock, but a loan to the company. This company employed the plaintiff, Ben F. Reinberger, to procure a permit from the Blue Sky Department for the sale of its stock. Under this contract, the plaintiff, Ben F. Reinberger, was to receive $500 face value of the stock. The work was performed, and the stock was never issued to Ben F. Reinberger according to this contract. At the time suit was filed, J. M. Ensor was president and A. W. Hall was secretary. Demand was made of these gentlemen for the issuance of the stock, but, instead of issuing the stock, which was known at the time to all parties to be worthless, the president and secretary of the Company chose to violate the contract and to confess judgment for $500 in money. There was no meeting of the board of directors in the confession of this judgment, but the answer was prepared by the plaintiff, and the appearance of the defendant entered in violation of the contract, and judgment was confessed in violation of the contract, and the effect of this judgment was to divest all the assets of the company, when, according to the terms of the contract, the stock could and should have been issued, in which event the stockholders would have participated with the remainder of the stockholders in the assets of the corporation. From these facts, this court concludes that the conduct on the part of the officials of the corporation and the plaintiff amounted to a legal fraud on the court in obtaining the judgment in the case. For this reason, the motion to set aside said judgment should be and is hereby granted.

"It is contended that the lapse of time precludes the petitioner from obtaining the relief he seeks. It appears from the testimony that there was no material lapse of time, but that the petitioner asserted his rights in the chancery court of Saline County and in the chancery

court of Pulaski County with due diligence on discovery of the fraud of which he complains. The petition for setting aside said judgment will be granted, and the judgment will be set aside for the reasons indicated."

Upon these findings of fact the court rendered judgment vacating and annulling the original judgment rendered in Reinberger's favor on June 25, 1925, and this appeal is from that judgment.

We will not review the testimony upon which the findings were made that the judgment had been procured by fraud practiced upon the court in its rendition, but, having considered this testimony, we announce our conclusion that it is legally sufficient to sustain the findings made; and we are also of the opinion that upon these findings the plaintiff was entitled to the relief prayed and granted.

This appeal is from the judgment of the court setting aside the judgment in Reinberger's favor, and its reversal is urged upon several grounds which we now proceed to consider.

The proceeding was brought under the authority of the fourth subdivision of § 6290, Crawford & Moses' Digest, wherein it is provided that the court in which a judgment has been rendered shall have power, after the expiration of the term at which it was rendered, to vacate or modify the judgment "* * * for fraud practiced by the successful party in the obtaining of the judgment or order." Section 6292, Crawford & Moses' Digest provides that the proceeding to vacate a judgment under the provisions of § 6290, *supra,* shall be by complaint verified by affidavit "setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action if the party applying was defendant," and that on the complaint a summons shall issue and be served and other proceedings had as in an action by proceedings at law.

It is earnestly insisted that the pleading filed was insufficient, and that the receiver had no authority to proceed at all. We think, however, the pleading was suf-

ficient to comply with the statute, and that the receiver had the authority to maintain the action. It is true this pleading was denominated a petition, and not a complaint, but this designation was unimportant, as the petition was in the nature of a complaint and contained all the allegations required by the statute. It was therefore properly treated by the court as a complaint.

It was held in the case of *Driver* v. *Treadway,* 175 Ark. 1028, 1 S. W. (2d) 84, that a motion for a new trial, which was not filed as such within the time limited by law, should have been treated as a motion to set aside the judgment, and that that relief should have been granted upon this motion, a proper case for this relief being made. It is a settled rule of practice with us that a pleading is to be treated according to what its substance shows it to be, regardless of what it is called. *Merritt* v. *School District,* 54 Ark. 468, 16 S. W. 287.

It appears that the pleading was not verified as the statute requires; but that question does not appear to have been raised in the court below. We have a statute (§ 1246, Crawford & Moses' Digest) which provides that no objection shall be taken after judgment rendered to a lack of verification of the pleading upon which the judgment was rendered. However, the petition was heard on the sworn testimony of numerous witnesses, and the judgment was not rendered by default upon an unverified pleading. The purpose of the statute was to prevent this from being done, and it was not done. *Coleman* v. *Bercher,* 94 Ark. 345, 126 S. W. 1070; *Randall* v. *Sanders,* 71 Ark. 609, 77 S. W. 56.

As to the authority of the receiver to maintain the action, it may be said that the corporation was the original defendant, and this suit was brought by its receiver. He had the authority, therefore, to maintain the action. The receiver was appointed by the authority of the Pulaski Chancery Court, and neither the propriety nor the necessity for this appointment can be questioned in this collateral proceeding. *Lowenstein* v. *Finney,* 54 Ark. 124, 15 S. W. 153.

It is said there is a defect of parties. But we do not think so. The plaintiff in the original judgment was made a party by summons served upon him, and the receiver represents the other party, the original defendant corporation.

It is also insisted that no sufficient grounds were alleged to vacate the judgment, and that no defense to the original action was shown. The findings of the court, set out above, which, as we have said, were sustained by sufficient testimony, answer these objections.

It was found by the court that the contract was to recover, not $500 in money, but $500 worth of the corporate stock, which was worth much less than $500 in money.

The testimony shows that the answer of the corporation was prepared by the plaintiff himself, and instead of pleading the contract under which the services sued for had been rendered, an answer was filed in which liability was admitted for $500 in money. Upon this answer judgment was rendered, and execution was issued, and the land, which constituted the entire assets of the corporation was sold. At this sale the plaintiff became the purchaser, and upon receiving the execution deed he conveyed to his own wife an undivided half interest and the other half interest was conveyed to the wife of the president of the corporation, who had entered the appearance of the corporation in the suit and who had caused the answer to be filed upon which the judgment was rendered.

It was held in the case of *Williams* v. *Alexander,* 90 Ark. 591, 119 S. W. 1130, that where an attorney having no authority, express or implied, to consent to a decree against his client, consents to a decree which is prejudicial to his client, such consent decree amounts to a fraud upon the court and the client and will be set aside. That principle applies here. The fraud, of course, must have been practiced upon the court in the procurement of the judgment, but the case of *Williams* v. *Alexander, supra,* is authority for holding that the action of the president of the corporation in filing, without the authority of the cor-

poration, an answer admitting a liability which did not exist was a fraud upon the court.

It is insisted that the motion to vacate the judgment was not filed in apt time, and that, inasmuch as more than five years had elapsed after the rendition of the judgment before this proceeding was filed, it was barred by laches if not by limitations.

It was held in the case of *Foohs* v. *Bilby,* 95 Ark. 302, 129 S. W. 1104, that there is no statute limiting the time within which an application to vacate a judgment may be made under § 4431, Kirby's Digest, which is identical with § 6290, Crawford & Moses' Digest, under which this proceeding was brought, and that holding was reaffirmed in the case of *Wade* v. *Saffell,* 177 Ark. 1186, 9 S. W. (2d) 803.

Nor do we think the action was barred by laches. The case of *Arkansas Mineral Products Company* v. *Creel, supra,* sought, in effect, the relief here prayed and granted. This relief was granted by the Pulaski Chancery Court in that case upon the same findings of fact here made, to-wit, that the judgment had been procured by fraud, and the decree of the Pulaski Chancery Court was reversed by this court, not upon the ground that the testimony did not support the decree of the court, but upon the ground that the action was a local one and had not been brought in the county where the land was situated. A prosecution of this suit to a favorable decree, which was reversed on the question of jurisdiction, refutes the imputation of acquiescence in the judgment for such length of time as to constitute laches.

It is finally insisted that the reversal of the decision of the Pulaski Chancery Court in the former appeal (*Arkansas Mineral Products Co.* v. *Creel, supra*) is conclusive of the present case. But such was not the effect of that decision. Certainly the receiver was not discharged, as is here insisted, by the reversal of that decree, nor is there any element of estoppel in the judgment of this court on the former appeal.

In the chapter on Judgments, 15 R. C. L., page 973, § 450, it is said that " * * * it is well settled that the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined, * * *." Numerous annotated cases are cited in the note to support the text quoted.

As has been said, it was not decided on the former appeal that the plaintiff was not entitled to the relief prayed, but it was decided only that owing to the local nature of that action the court was without jurisdiction to award the relief prayed and granted. The present proceeding is a statutory one to vacate a judgment, and was brought in the court which rendered the judgment, and no showing was made that the situation of the parties in relation to the judgment had become such that the parties were precluded or estopped from instituting proceedings, as is here insisted. *Sanders* v. *Flenniken,* 180 Ark. 303, 21 S. W. (2d) 1847.

No error appears in the judgment here appealed from, and it must therefore be affirmed, and it is so ordered.

GARNER *v.* STATE.

Opinion delivered January 11, 1932.

Wils Davis and *A. B. Shafer,* for appellant.

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

HUMPHREYS, J. This is an appeal from a judgment of conviction in the circuit court of Crittenden County for the crime of transporting liquor.

Three alleged errors in the trial of the cause are assigned as grounds for a reversal of the judgment, as follows:

First, because the liquor being transported was seized by the officers of the law without a search warrant.

Second, because the prosecuting attorney interrogated the appellant in an effort to show that he had purchased the license for his automobile under the name of Gaston Whitmore.

Third, because the verdict was excessive.

(1) The officers overtook appellant on a highway, arrested him, searched his car, and found two five gallon cans of whiskey therein in gunney sacks. Their evidence was admitted over appellant's objection. In cases of this character evidence procured without a search warrant is admissible. *Knight* v. *State,* 171 Ark. 882, 286 S. W. 1013.

(2) Objection was not made to the questions propounded by the prosecuting attorney relative to the name under which appellant bought a license for his car, nor was this matter incorporated in his motion for a new trial in the circuit court. Under the well-settled rule of this court, the question presented cannot be considered as a cause for the reversal of the judgment. *Maroney* v. *State,* 177 Ark. 355, 6 S. W. (2d) 290.

(3) A fine of $750 and ninety days in the county jail was imposed upon appellant as a punishment for the crime. The jury did not exceed the maximum punishment fixed by the statute, so this court cannot reduce the penalty. That matter was within the peculiar province of the jury. *Cox* v. *State,* 164 Ark. 133, 261 S. W. 303.

No error appearing, the judgment is affirmed.

DETROIT FIDELITY & SURETY COMPANY *v.* YAFFE IRON & METAL CO., INC.

Opinion delivered January 11, 1932.

Ira D. Oglesby, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

KIRBY, J. This is an action by the appellee company against the contractor and the appellant company, surety on the contractor's bond for the construction of a part of State Highway No. 64, for the purchase price of some iron pipe and similar materials sold by appellee to the contractor and used in connection with the construction of the State Highway near Ozark in Franklin County.

The construction company had been awarded the contract by the State Highway Commission, and it ordered from the appellee the materials for the purchase price of which the suit was brought and used the same in connection with building the road. The construction company gave bond with appellant company as surety as required by act 368 of 1929 for the use and benefit of all persons performing labor or furnishing materials for use in the construction of the road.

There is no dispute about the amount of the claim included in the original suit, it being admitted that the construction company bought the materials from appellee at the prices for which suit was brought and also the execution of the contractor's bond. Suit was brought

within a few weeks after the completion of the contract, but the construction company moved from the State before summons could be served on it. While the suit was pending, appellee, in accordance with an agreement with the man in charge of the material, took back a part of the pipe giving the defendant proper credit thereon. This credit was given by an amendment to the pleadings.

Appellant claims that, after the work was completed, it took a bill of sale for all the pipe together with all other property owned by the construction company in the State, which was probably done for collateral security upon its obligation under the bond, since it is not claimed by the bonding company that the construction company was indebted to it for any amount other than the liability that might have been incurred on the bond, nor was it shown that the surety company had paid out any money for the construction company under its bond.

The appellant's answer admitted the correctness of the account, but denied liability on the ground that the material purchased was part of the construction company's equipment and not covered by the terms of the bond. Proof shows that the material, pipe, joints and things of this kind, was bought by the construction company for use on this particular work and job, and delivered by appellee at the site of the work. The construction company had been engaged in similar work for 10 years, but needed special size pipe for bringing water to its concrete mixer and wetting down the concrete after it had been laid. After the completion of the job the construction company moved all the equipment and material to Ozark, and stacked up this pipe, for the value of which suit is brought, on a lot separate from all its other pipe and major equipment. Appellee, having a demand for pipe of the kind, sent its representative to Ozark to get the construction company to turn back part of the pipe and take credit on its account therefor. The man in charge of the pipe said it was all right to do this, and turned over to appellee about 2,700 feet of the pipe, for which credit was given.

Both parties asked peremptory instructions on the question of liability of the bonding company, and the court instructed the jury in behalf of appellee, submitting to the jury only the question of the value of the pipe repossessed or taken back by appellee during the pendency of the suit. The jury fixed the value, which was deducted from the claim, and the court gave judgment for appellee for the difference.

The only question, therefore, for determination here is whether the appellant company, surety on the contractor's bond, is liable to the payment for the materials furnished by appellee, the fact of the sale, purchase and use of the materials being undisputed. The statute requiring bonds of contractors for road construction, etc., made by surety companies authorized to do business in the State of Arkansas, provides:

"Section 1. That all bonds required by any commission or commissioners or board, or the agent or agents thereof, county courts or judges thereof, or any other public officer or officers for the construction of any public buildings, levee, sewer, drain, road, street, highway, bridge or other public buildings or works aforesaid, shall be liable for all claims for labor, material, camp equipment, fuel including oil and gasoline, food for men and feed for animals, labor and material expended in making repairs on machinery or equipment used in connection with the construction of said public buildings or works aforesaid, lumber and material used in making forms and supports and all other supplies or things entering into the construction, or necessary or incident thereto or used in the course of construction of said public buildings or public works; said bonds shall also be liable for rentals on machinery, equipment, mules and horses used in the construction of said public buildings or public works aforesaid, and all persons holding such claims shall have a right of action on said bonds." Act 368 of 1929.

Section 3 of said act requires the bond to specifically include liability for the things enumerated in § 1, but the failure to include said provisions in the bond shall not

prevent the holders or owners of claims as provided in said section from bringing suit and enforcing such claims against the bond.

The construction company had 5 miles of 2-inch pipe in its equipment, but found it necessary to use 2½-inch pipe for the furnishing of water to the concrete mixer and wetting down the concrete after it was laid and bought this pipe from appellee company and used it for that purpose in the construction and completion of this road work under the contract.

Appellant's only contention is that the pipe purchased by the contractor, for the value of which the suit is brought, is part of the major equipment of the construction company, which could be used in the construction of other work of a like kind, and that there was no liability on the part of the surety company under the bond for the payment thereof, and that the court erred in not so directing the jury.

This statute requiring the giving of bond by contractors for the construction of public works, roads, etc., was intended for the protection of furnishers of labor and materials used in or incident to the construction of such works, and bonds given under it must be construed liberally in order to effectuate the purpose of the Legislature as declared in its terms, and as our courts had been giving a limited or narrow construction to bonds made by contractors for such work, this doubtless caused the enactment of the present statute. The law requiring the bond to be executed to cover liabilities in accordance with the terms of the statute, the principal and surety, even by express terms of the bond, could not limit or restrict their liability by employing or omitting to include therein the terms of the statute.

The undisputed testimony shows that this pipe was purchased from appellee company and was necessary to the construction of this particular piece of work or road, and was used in such construction as necessary or incident thereto for supplying water to the concrete mixer

and wetting down the concrete on the road surface after it was laid; and payment of the purchase price thereof comes within the provisions of the statute and bond, without regard to whether the materials or pipe could be used on other construction work thereafter by the contractor. It makes no difference whether it was called major equipment in the bond, as a fair construction of the statute includes within its terms the purchase and use of the materials sued for as certainly incident to the construction of the public work, and the contractor and surety were liable to the payment thereof under the statute and bond, and the court did not err in directing the verdict for appellee. The jury found the value of the pipe that was returned to appellee company under proper instructions, and the court properly gave credit to appellant for the value thereof as found upon the amount otherwise due appellee for furnishing the pipe.

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

PERRY *v.* GILL.

Opinion delivered January 11, 1932.

Alexander & Cooper and *T. J. Crowder,* for appellant.

Jesse Taylor and *W. Leon Smith,* for appellee.

KIRBY, J. This appeal is prosecuted from a judgment of the circuit court affirming and approving the order of the county board of education consolidating School Districts No. 23 and No. 44 of Mississippi County.

One hundred and sixty-three petitioners filed with the board of education a petition praying the creation of a new school district to be formed out of the territory theretofore embraced in School Districts Nos. 23 and 44. Forty-five of the petitioners were residents of School District No. 44, and one hundred and eighteen of School District No. 23. It was stipulated that the petitions contained a majority of the qualified electors of both districts, Nos. 23 and 44, residing in the entire territory, although it did not contain a majority of the qualified electors in said School District No. 44. The two school districts adjoined each other, and State Highway No. 18 runs practically through the center of them. The school building in said District No. 23 is situated in the town of Dell, and is a modern two-story brick building costing about $30,000. The town of Dell is located on State Highway No. 18. The school house in District No. 44 is a small frame building located about 3½ miles west of Dell and about 1¼ miles south of said hard surface road. Neither school district was financially able to maintain more than a grammar school, and the purpose of the consolidation and creation of a new school district was to make a larger unit, in order that the pupils of both districts might have the benefits of a junior high school. Eighty-one electors from District No. 44 signed a remonstrance before the County Board of Education against the creation of the new district.

It is contended by appellants that the petition was insufficient, not being signed by a majority of qualified electors in each of such districts. The law only requires, however, that such petition be signed by a majority of the qualified electors in both districts sought to be consolidated, and not that it contain a majority of the quali-

fied electors in each of said districts, as held in the case of *Beard* v. *Albritton,* 182 Ark. 588, 31 S. W. (2d) 959.

The discretion to form such new districts is vested in the several boards of education. *Bledsoe* v. *McKeowan,* 181 Ark. 584, 26 S. W. (2d) 900.

The testimony is ample to show that the law requiring a certain number of notices to be posted in the territory to be consolidated was complied with and that the form of these notices was sufficient. It is true that the copy of the notices posted in the districts of application for the consolidation thereof had been lost after the hearing before the board of education and could not be introduced at the trial on the appeal in circuit court, but it was shown by testimony of witnesses that they were made on blank forms of notices supplied by the State Board of Education for use in such cases, and it was conceded that they gave the correct numbers of the districts, the territory of which was to be consolidated, with a correct description also of the limits and boundaries of the lands to be included in the consolidated district. The notice having been lost or mislaid, proof of its contents could be supplied by witnesses who had knowledge of it, and no error was committed by the court in allowing the introduction of such testimony, notwithstanding the insistence that it was not to the best interest of the children of School District No. 44 to have it included in the consolidated district because it was shown that such district had revenue sufficient to take care of the educational needs of the children residing therein and that the schools were adjusted to their accommodation by sessions being held in the summer and winter, allowing the pupils time to assist in the making of the regular crops produced in the territory. The districts were sought to be consolidated, however, for the purpose of furnishing the pupils of both districts the advantages of a junior high school, which could not be carried on or conducted by either of said districts by itself.

It was shown that the pupils of District No. 44 could easily reach the school in the consolidated district, and the order of the county board of education consolidating the old districts is not to be disturbed on appeal unless it appears that such order is arbitrary or unreasonable as held in *Bledsoe* v. *McKeowan, supra,* and no such showing is made against the order of consolidation herein, which both the board of education and the court on appeal found to be for the best interest of all parties affected.

We find no error in the record, and the judgment must be affirmed. It is so ordered.

GREER *v.* STILWELL.

Opinion delivered January 11, 1932.

Ira J. Mack and *Culbert L. Pearce,* for appellant.

Brundidge & Neelly, for appellee.

MEHAFFY, J. Appellee, J. S. Stilwell and Carrie Bosley were married October 16, 1889 and lived together as husband and wife until her death on November 30, 1929.

The appellee is a dentist, and Mrs. Carrie Bosley Stilwell, wife of the appellee, had a stroke of paralysis some time in May or June, 1929. On the 2nd of June, she was taken to Trinity Hospital in Little Rock, where she remained for two weeks, and was then carried back home.

After Mrs. Stilwell's death, the appellant was appointed administrator of the estate of Mrs. Stilwell. She had no children, father or mother, and she left surviving her her husband, J. S. Stilwell, and a half-brother, T. W. Wells, two nieces and one nephew who were the children of her sister, Mrs. John Love.

It was alleged in the complaint that Mrs. Stilwell was the owner of diamonds worth $28,500 and forty shares of the capital stock of People's Bank, which was alleged to be worth $4,000, and other assets consisting of money and securities. The People's Bank was made defendant, and it was charged that appellee, Stilwell, was a director in the bank, and had access to its files and that the property mentioned in plaintiff's complaint was on deposit with and in safety deposit boxes of the bank at the time of the death of Carrie B. Stilwell.

It was further alleged that Carrie B. Stilwell for six or seven months before her death was incapable of transacting business of any kind on account of illness and disease which affected her mental powers and rendered her mentally incompetent.

The People's Bank filed separate answer denying all allegations in the complaint with reference to it, and alleged that forty shares of stock were transferred by Carrie B. Stilwell to J. S. Stilwell several months prior to her death, and that the transfer was made in the usual way.

J. S. Stilwell filed separate answer denying that Carrie B. Stilwell at the time of her death was the owner of the diamond rings and jewelry described in the complaint. He denied that she was the owner of the forty shares of capital stock of People's Bank and other assets consisting of money, etc. He also denied that he was

wrongfully claiming any of her property, and denied all the material allegations in the complaint.

The court found in favor of the People's Bank and from this finding there is no appeal. The court also found that J. S. Stilwell was the owner of the forty shares of capital stock of the People's Bank and the proceeds of the bank's check of $100 issued by it to Carrie B. Stilwell on June 29th for dividends on capital stock. The court also found that J. S. Stilwell was the owner of the proceeds of a personal check dated July 23, 1929, for $849.47. There was also a finding that appellant and J. S. Stilwell were each the owners of one-half interest in the diamonds belonging to said Carrie B. Stilwell. The case is here on appeal.

The appellant appeals from that part of the decree which gave the forty shares of capital stock, proceeds of the dividend check and the proceeds of the personal check to J. S. Stilwell. The appellee prosecutes a cross-appeal from that part of the decree which gave one-half interest in the diamonds to appellant.

The undisputed evidence shows that Carrie B. Stilwell, deceased, was the owner in her lifetime of the diamonds involved in this suit. Under act 149 of the Acts of 1925, if she owned the diamonds at the time of her death, one-half of them would go to J. S. Stilwell, her husband.

It is contended by the appellee, however, that the diamonds belonged to him; that this property was given to him by his wife before she died. He testified that she gave him the certificate of stock and the diamonds on April 4, 1929.

Appellant's first contention is that the testimony of Dr. Stilwell is incompetent under § 2 of the schedule of the Constitution. That section provides, among other things: "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."

The testimony therefore of Dr. Stilwell, as to any transactions with or statements of the intestate, was incompetent.

Chancery cases are tried here, however, *de novo,* and we consider only such testimony as is competent. *Lasker-Morris Bank & Trust Co.* v. *Gans,* 132 Ark. 402, 200 S. W. 1029; *Newsom* v. *Reed,* 177 Ark. 177, 6 S. W. (2d) 10; *Harrell* v. *Southwest Mortgage Co.,* 180 Ark. 620, 22 S. W. (2d) 167.

There was therefore no competent testimony tending to show that Mrs. Stilwell had given her diamonds to her husband, and the court's finding that Dr. Stilwell was entitled to one-half of this property is correct.

It is also contended by the appellant that Mrs. Stilwell did not transfer the checks and certificate of capital stock to Dr. Stilwell, but that, if she did, she was mentally incompetent at the time of the transaction.

There is considerable conflict in the evidence on these questions, but the chancellor found that she made the transfers, and that she was at the time mentally competent to do so. Several witnesses testified on the question of Mrs. Stilwell's mental condition, but there was ample evidence to sustain the chancellor's finding that at the time she made the transfers of the stock and indorsed the checks, she had mental capacity to do so.

Mr. J. H. Deener testified that he had been connected with the People's Bank for 30 years, and that during that time he had served as cashier and is now vice-president; that he had had experience with signatures, and that in his opinion Mrs. Stilwell signed her name on the stock certificate introduced in evidence.

There was other evidence tending to show that the signature on the assignment of the stock certificate and on the checks was the signature of Mrs. Stilwell, and while there was conflict in this evidence, we do not think the chancellor's finding was against the preponderance of the evidence.

As we have said, this court tries chancery cases *de novo* upon appeal, and the findings of fact of the chancery court will not be disturbed unless they are clearly against the weight of the evidence. *Hale* v. *Hale,* 179 Ark. 763, 18 S. W. (2d) 341; *Lynn* v. *Quillen,* 178 Ark. 1150, 13 S. W. (2d) 624.

We think therefore that the evidence is sufficient to support the chancellor's finding as to the stock and checks.

It is next contended by the appellant that there is no evidence except Dr. Stilwell's that Mrs. Stilwell intended to deliver and did deliver the things mentioned as a gift. We think the fact that Mrs. Stilwell signed the stock certificate and the checks some months before her death, and that these instruments with her signature were presented to the bank, whose officials were familiar with her signature, and that her signatures were recognized and acted on by the bank, was sufficient evidence to justify the finding that they had been delivered to Dr. Stilwell.

In addition to this, the evidence shows that she had no children; that she and Dr. Stilwell had lived together for 40 years as man and wife; and it would be the natural thing for her to do to give this property to him.

The evidence being in conflict, we do not deem it necessary to set it out in detail, but we think it sufficient to say that the finding of the chancellor on the facts submitted to him was not against the preponderance of the evidence.

Appellee contends that the decree of the chancery court should be reversed and states that if the stock was a valid gift, it must follow that the gift of the diamonds was a valid gift because both grew out of the same transaction; the gift of the stock and diamonds being made at the same time. As we have already said, there is no evidence of the gift of the diamonds except the evidence of J. S. Stilwell, which was incompetent. Moreover, if this evidence had been competent, other witnesses testified that they had seen Mrs. Stilwell in possession of the diamonds after the time that Stilwell claimed that they had

been given to him, and the finding of fact on this issue is not against the preponderance of the testimony.

The decree of the chancery court is therefore affirmed, both on appeal and cross-appeal.

SWAIM *v.* STATE.

Opinion delivered January 11, 1932.

Reed & Beard, for appellant.

O. E. Williams and *Joe P. Melton,* for appellee.

McHANEY, J. The only question presented by this appeal is the constitutionality of our bastardy statute, §§ 772-785, Crawford & Moses' Digest, as amended by act 111 of the Acts of 1927. It is argued that this statute is unconstitutional, for the reason that it denies the right of trial by a jury on the question of the amount to be adjudged against the putative father for lying-in expenses of the mother and the monthly sum to be paid for the support of the child. Section 776 provides that, if the accused denies being the father of the child and demands a jury, one shall be impaneled to try this issue. In this case a jury was demanded and a trial resulted in a verdict against appellant, that is, that he is the father of the child. Thereupon the court entered judgment against him for $40 lying-in expenses and $5 per month from the date of birth of the child until it shall be 14

years old, although the act of 1927 provides for a minimum of $10 per month.

We think appellant's contention untenable. This is an old statute, enacted in 1875 (Acts 1875, No. 24), and slightly amended in 1879 (Acts 1879, No. 72) and in 1927 (Acts 1925, No. 111). Many cases have been prosecuted under it and its validity inferentially sustained in many cases. It should not therefore be held invalid except for very cogent reasons and on the attack of one injuriously affected thereby.

The act of 1927 provides for judgment against the putative father for a minimum of $25 for lying-in expenses and $10 per month for the support of the child. Since the court rendered judgment on the verdict of the jury, finding appellant to be the father, for $40 for lying-in expenses and only $5 per month, it is difficult to perceive how appellant has been injuriously affected by the judgment, as a jury could not have found less than the minimum fixed by statute. He is therefore in no position to question the validity of the statute on the ground mentioned, that is, that it does not provide for a jury to fix the amount to be paid.

What we have said makes it unnecessary to determine the constitutionality of the statute, although we have no doubt as to its validity. The circuit court sustained a demurrer to the petition for certiorari to the county court and dismissed it. That judgment is correct, and is accordingly affirmed.

GIBSON *v.* MINTURN.

Opinion delivered January 11, 1932.

G. M. Gibson, for appellant.

W. P. Smith, for appellee.

McHaney, J. Appellant brought this action against appellee to recover judgment on a warrant issued to him by appellee in the sum of $200, which warrant provided it was given to appellant "to grade and rock road from the end of Rock Road No. 4 in the town of Minturn to the north railroad crossing in the town of Minturn, Arkansas," issued to him on the 10th day of February, 1928.

He alleged in his complaint that he had graded and rocked the road as provided in the warrant prior to the date thereof and had done so for an agreed consideration of $200, for which amount he prayed judgment. Appellee answered and denied that appellant had performed any work for it prior to the issuance of said warrant, and stated that he had agreed to do the work mentioned in the warrant which he had wholly failed to do. Prior to the introduction of evidence, appellee admitted the execution of the warrant, and that its defense was that the work was not done. Thereupon, counsel for appellant stated that appellant had done part of the work and stood ready to fulfill his contract, but that appellee found that a concrete road was going over this street and that the grading and rocking contemplated by the contract was not needed. Thereupon appellee assumed the burden of proof, and its witnesses testified very positively that appellant did not do any work upon the street except to fill up some holes with rock where his trucks had bogged down in the street in attempting to haul rock to a road he was constructing for the State Highway Department. Appellant testified that he did perform the work or a major portion of it, and stood ready to complete his contract, but was prevented from doing so by appellee. At the conclusion of the testimony, appellant requested the court to instruct the jury that, if they believed from the evidence that when he was ready to finish gravelling the road he was told by the members of the town council that a concrete road was going to be built through Minturn, and that on that account they did not desire any

more gravel placed on the road, and not to put any more on it, then he would be excused from further performance of his contract. The court refused to give that instruction. The court did instruct the jury that the issue was whether appellant had done the work agreed to be done, and that, since appellee admitted the execution and delivery of the warrant, the burden was upon it to show by a preponderance of the testimony that the work contracted to be done by appellant was not done and performed, and that, if the jury believed from a preponderance of the evidence that appellant had failed to comply with his contract by grading and rocking the road, it would be their duty to find for appellee; otherwise, to find for appellant. The jury found for appellee, upon which judgment was entered, and this appeal followed.

The only error assigned for a reversal of the case is the refusal of the court to give his requested instruction No. 1 above set forth. We think the court correctly refused to give this instruction, as the issue was not whether appellant was ready, willing and able to do the work contracted, but whether he had done it. He alleged that he had done so in his complaint, and the answer denied this allegation, and this made the issue to be submitted to the jury, which the court did under proper instructions.

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

TUDOR *v.* BANK OF LINCOLN.

Opinion delivered January 11, 1932.

E. D. Chastain, for appellant.

W. A. Dickson and *Price Dickson,* for appellee.

BUTLER, J. Negotiations were begun between P. C. Miller, acting for T. E. Maxwell and wife, and G. C. Tudor, for the purchase by the latter of a tract of land belonging to the Maxwells. On January 2, 1931, the negotiations had proceeded to the point that Tudor deposited $200 of the agreed purchase price in the Bank of Lincoln, and on January 3 an abstract of title to the land, certified to December 30, 1930, was delivered to Tudor for examination by his attorney. On January 5, 1931, the attorney rendered an opinion on the title specifying eighteen particulars in which it was his opinion the title as shown by the abstract was defective and calling particular attention at the foot of his opinion to some of the objections set out.

On January 6 Tudor and his attorney met with Miller, the agent of the Maxwells, and T. L. McCulloch, the cashier of the Bank of Lincoln, when the objections were discussed, and, according to Miller and McCulloch, the objections to the title were waived except the satisfaction of a certain mortgage and the recording of the power of attorney, and on that date a written agreement was entered into between the parties, which is as follows:

"This agreement, made and entered into on this the 6th day of January, 1931, by and among P. C. Miller, as agent for T. E. and Addie Maxwell, G. C. Tudor, and T. L. McCulloch, for himself and for Bank of Lincoln, as its cashier;

"Witnesseth, That the said G. C. Tudor, having placed in said Bank of Lincoln, Lincoln, Arkansas, as and for full consideration of purchase price of the following described real estate situated in Washington County, Arkansas, to-wit:

"Part of the northwest quarter of southeast quarter, section 23, township 15, range 33, more fully described as follows: Beginning at northeast corner there-

of, extending west 40 rods, south 60 rods, east 40 rods, thence north to place of beginning 60 rods, containing 15 acres.

"The said sum so deposited being $1,300, and the said bank and its cashier hereby agrees to retain safely the said money to be returned to the said Tudor upon failure to furnish satisfactory abstract to said land in a reasonable time, specifically, ten days. And I, the said P. C. Miller, as such agent, do hereby agree with the said Tudor that I will so furnish a satisfactory abstract for said premises within a reasonable time, otherwise this sale to the said Tudor of the said land is to be canceled, and his said money refunded to him by said bank and said T. L. McCulloch."

Miller attempted to comply with the requirements regarding the title and returned the abstract to Tudor's attorney for further examination. On the 14th of January the attorney returned the abstract with the additional requirements, and on the 16th Tudor demanded of the bank the return of $1,284 which he had deposited with the bank, that being the amount of the purchase price less the taxes for the current year. Payment was refused by the bank, and suit was brought at law by Tudor to recover same. The Maxwells intervened and asked for a specific performance of the contract, and the case was transferred to the chancery court, where, upon a hearing, the chancellor found the issues in favor of the interveners and decreed the specific performance of the contract.

The words in the contract, "specifically, ten days," as interpreted by the appellant, related to the provision by which the bank was to return the money and not to the time in which the abstract should be examined and objections to the title met. This seems to be what the parties intended, *i. e.*, that, if it should finally be determined that the abstract was not acceptable at the expiration of ten days from that time, the bank should return to Tudor the money he had deposited. The court construed the language of the contract, "a satisfactory abstract for said premises within a reasonable time," to mean a mar-

ketable title or good title. The authorities are not in accord as to the effect to be given to a provision in a contract for the sale and purchase of land that there should be "a satisfactory abstract furnished" or language of similar import, but the weight of authority appears to sustain the view taken by the trial judge, and which we think is supported by the better reason. A sufficiency of the title disclosed ought not to be, and is not left, to the exclusive judgment of the examiner, but means that the title disclosed need only be a merchantable title within the rule announced in *Tupy* v. *Kocureck,* 66 Ark. 433, 51 S. W. 69, and *Griffith* v. *Maxfield,* 63 Ark. 551, 39 S. W. 852, 27 R. C. L. 487, § 204; *Mott* v. *Business Men's Invest. Assn.,* 157 N. Y. 201, 52 N. E. 1; *Hogg* v. *Herman,* 71 Mont. 10, 227 Pac. 476.

The testimony in the case tended to show that the appellees were endeavoring in good faith and with reasonable diligence to meet the objections to the title pointed out by the attorney of the appellant and to conform to his requirements, but that within two days after the last requirements were made the appellant disavowed the contract and demanded the return of his deposit. The chancellor found that the appellees furnished an abstract within a reasonable time under the facts and circumstances, showing a merchantable title. It is obvious that the appellees were the owners of the land contracted to be sold under a title free from any liens or incumbrances, and that they were proceeding in a reasonable way to complete the abstract in conformity with the requirements made, but before they could do so the appellant arbitrarily disavowed the contract. It is also apparent, and the chancellor found, that the abstract was finally perfected so as to show a merchantable title in the vendors. The evidence justified the finding of the chancellor that the appellees had perfected the abstract within a reasonable time, and that it discloses a merchantable title in the vendors, such as they contracted to convey, and the appellant was bound to accept.

The decree is correct, and it is therefore affirmed.

WELLS *v.* HENRY.

Opinion delivered January 11, 1932.

[redacted]

Aubert Martin and *J. R. Wilson,* for appellant.

D. A. Bradham, for appellee.

MEHAFFY, J. J. T. Beard of Bradley County, Arkansas, on the 6th day of August, 1921, made a will, giving all of his property to his two children, Rossie Wells and Rufus Beard. The will provided for the sale of the property, giving one-half to the daughter, Rossie Wells, absolutely, and the other half to be put upon interest to be paid annually to Rufus Beard, the son. The will provided for paying Rossie Wells her one-half interest and placing the other half in some institution and paying interest annually to Rufus Beard.

The will was filed for probate, and it was agreed between Rossie Wells and Rufus Beard, the only heirs at law of J. T. Beard, that the will should be probated, and that the property should be divided according to the provision of the will, but that the property should not be sold.

The agreement entered into provides for a complete inventory of the estate and an equal division of the assets, and then provides for the sale of the property by the commissioners, the part allotted to Rossie Wells to be sold to her and deeds executed to her for the same, and the part allotted to Rufus Beard to be sold to him and a deed executed and held in escrow, he to have the entire revenue derived as rents, incomes, profits, or in any other way from same. In other words, they agreed on a division of the property, and agreed that one-half of it should be deeded to Rossie Wells, and delivered to her, and that the other half should be deeded to Rufus Beard, but that the deed should be held in escrow, and that he should receive the income from his half of the property.

The will, as we have said, was dated August 6, 1921, and J. T. Beard died on December 11, 1924. After the division of the property as above mentioned, Rossie Wells took possession of the property deeded to her, and Rufus Beard took possession of the property deeded to him for the purpose of receiving the income from said property.

After the death of J. T. Beard, and after the division of the property, improvement districts were formed and assessments made on the property deeded to Rufus Beard. These assessments were not paid by him and the property was sold for the assessments and State and county taxes, and purchased by H. T. Henry and others.

Rossie Wells brought suit in the chancery court alleging, among other things, that Rufus Beard owned a life estate only, and that he had made contracts with H. T. Henry and others under the terms of which his property was to be sold for taxes and purchased by the persons who rented said property, and that the purpose was to enable Beard to get title to the property.

A portion of the property was sold to the State for nonpayment of taxes for the year 1927, and the same property was sold for the nonpayment of paving taxes in December, 1928. It is unnecessary to recite the sales of the property other than that purchased by Henry, be-

cause all the other property was redeemed by Rossie Wells, and the only controversy here is between H. T. Henry and the appellant, Rossie Wells.

After the suit was brought Rufus Beard died, and the property then became the property of Rossie Wells, she being the only heir at law of Rufus Beard.

On August 24, 1927, Rufus Beard and H. T. Henry entered into a lease contract under the terms of which Henry was to pay Beard $15 a month for what was known as the Neeley store lot on West Pine Street in the city of Warren for a period of five years from and after September 1, 1927. The lease provided for the removal of a store building and for Henry placing such improvements on the lot as he might desire, and said improvements to remain the personal property of said Henry, with the right to remove said property within a reasonable time after the expiration of the lease. The lease, by its terms, will expire September 1, 1932.

Henry, on August 18, 1930, leased the property to the Standard Oil Company for two years, said term to begin August 24, 1930, and ending August 23, 1932.

When the property of Beard was sold for nonpayment of taxes, Henry purchased not only the property that he occupied as lessee, but also the adjoining property.

The chancery court entered a decree reciting among other things that, upon the death of J. T. Beard, all property of which he died seized and possessed passed by devise, share and share alike, to Mrs. Wells and Rufus Beard, in fee to Mrs. Wells, but with life estate only to Rufus Beard with remainder over to Mrs. Wells; that the agreement executed by Mrs. Wells and Rufus Beard, at the time the will was probated, did not change the intention of the testator with reference to the class of title willed; that, through failure of the executors to act, the estate was never partitioned, but was left intact at the date of the death of Rufus Beard; that the property, not having been partitioned, the burden of support and maintenance of Rufus Beard was imposed upon the

whole property, and that the lease executed by Rufus Beard to Henry merely subjected a moiety of the estate to the use for which part or all of the estate was subjected under the terms of this will; that the terms of the lease were reasonable, and that Henry, having bought the property for delinquent improvement taxes, to protect his lease, was between the time of purchase and redemption entitled to the use and profits of the property so bought; that he was entitled to recover the amount expended in paying taxes without deduction on account of rents; that Henry had a right to remove his property from the lot leased by him, but must restore the property to a condition such as it was before he took possession; that Mrs. Wells had a right to redeem upon paying the amounts paid out by Henry with interest and penalty.

Mrs. Wells objected to the decree of the court and prosecutes this appeal to reverse said decree.

The appellee did not object to the decree of the court, but states in his brief: "Henry has never claimed that Rufus Beard had no right of redemption, and he does not now claim that appellant has no right of redemption; he always wanted it redeemed, as he needed the money he had tied up in taxes. All he wants is his money back with interest and costs as provided by law.".

Therefore the only questions are, what appellant is required to pay to redeem the property, and whether appellee was entitled to the rents and profits after the purchase, as claimed by him.

Appellee claims that he paid out to equip this property $657.03, and that he paid out other sums at tax sales amounting to a total of $1,325.39. It is wholly immaterial what the appellee paid out to equip the property. When he entered into the lease contract with Rufus Beard, he expressly agreed to equip the property with the right to remove it at the expiration of the lease. He would therefore in no event be entitled to any amount expended for equipping the property for his use.

Appellee calls attention to § 5642 and § 5644 of Crawford & Moses' Digest. Section 5642 provides that

the purchaser in possession shall not be accountable for rents upon redemption, and § 5644 provides for redemption by one in possession under color of title. Neither of these sections has application here.

The purchase at tax sales by the appellee and the agreement made between him and Rufus Beard amounted to merely a redemption from the tax sale.

It was the duty of the life tenant to pay the taxes. Henry occupied the lands under a lease from the life tenant. Neither Beard nor Henry could acquire title to the property by purchasing it at tax sale while occupying it and receiving the rents and profits. The record in this case clearly shows that the purchase at tax sale by Henry was merely a redemption.

Henry himself says in his testimony: "I went and talked to Rufus after I bought it in. He was boarding over there in this little house Mrs. Cotton lives in, and I said, 'Rufus, you are boarding over there, and I understand are getting your board for the rent of the house,' and he said, 'I am.' 'Well,' I said, 'I want to act fair with you. You go ahead and keep that up, and I won't have anything to do with the big house, and also this other house here, you collect the rent on it and pay the paving tax next year, and I won't have anything to do with it,' and he said he would."

He then testified that when Rufus did not pay the paving taxes next time he collected the rent himself.

We said in a recent case: "One cannot occupy and enjoy the use of premises and at the same time acquire a valid tax title by permitting the lands to be sold for taxes, purchasing at the sale, or purchasing from one who has purchased at the tax sale, based upon a tax forfeiture during the time he was so occupying and enjoying the premises." *Roberts* v. *Miller,* 173 Ark. 38, 291 S. W. 814; *Sanders* v. *Ellis,* 42 Ark. 215.

This court said in speaking of the duty of the life tenants to pay taxes: "It was held that it was the duty of the life tenants to pay the taxes, and that the reconveyance to them by the purchaser at the tax sale amounted to a

redemption of the land by the widow and heir at law, and extinguished the tax title of the purchaser." *Lefevers* v. *Dierks Lumber & Coal Co.*, 161 Ark. 67, 255 S. W. 554.

In the instant case, Henry was occupying the premises under a lease from the life tenant paying $15 a month rent. He purchased at the tax sale not only the property, but adjacent property, and agreed, according to his own testimony, with Beard that Beard should continue to receive the rents of this other property. Thereafter, when Beard did not pay the next improvement tax, Henry occupied the entire premises, receiving the rents and profits. According to Henry's own testimony, there was some sort of an agreement between him and Beard.

This court quoted with approval the following: "Where a cotenant entered into negotiations with a third person by which such third person agrees to bid in the property at the tax sale and after the period of redemption expires to transfer it to the cotenant, or where, after a third person has bid in the property at a tax sale a cotenant, by collusion with him, secretly redeemed the property, and after the period of redemption has expired takes a deed from the purchaser, the transaction is fraudulent and the purchasing tenant acquires no title as against his co-tenants." *Inman* v. *Quirey*, 128 Ark. 605, 194 S. W. 858.

But, whether there was a fraudulent agreement between Henry and Beard or not, Beard was a life tenant. Henry occupied under a lease from Beard. Henry purchased at tax sale and received the rents and profits from the property purchased at tax sale, and it would be unjust and inequitable to permit him to recover the amount of money paid in taxes and keep the rents of the property.

Counsel have discussed many authorities which we do not deem it necessary to review, because, under the circumstances in this case, we think it clearly appears that Henry's purchase at a tax sale was a redemption which inured to the benefit of the owner.

The chancery court held that the appellant had a right to redeem, and there is no appeal from this finding, and, as we have already said, appellee agrees that she has a right to redeem.

Appellant calls attention to authorities holding that the improvement district taxes should be apportioned between the life tenant and owner of the fee. We do not think these authorities have any application here for the reason that, whether the taxes should have been paid by the life tenant or the owner of the fee, Henry is entitled to receive the money which he paid for taxes, less the rental value of the property during the time he held it.

The decree of the chancery court is reversed, and the cause remanded with directions to ascertain the rental value of the property during the time it was held by Henry, and deduct this sum from the amount of taxes paid by him, and the balance will be the amount Mrs. Wells will be required to pay in order to redeem.

[redacted]

DUPREE *v.* STATE.

Opinion delivered January 11, 1932.

[redacted]

Sam M. Levine and *L. DeWoody Lyle,* for appellant.

E. W. Brockman, Prosecuting Attorney, for appellee.

BUTLER, J. This case raises the question of the constitutionality of act No. 297 of the Acts of the General Assembly of 1931. The appellant was prosecuted and convicted of unlawfully killing a squirrel under § 5 of

act 160 of the Acts of the General Assembly of 1927, by which it was made unlawful to kill squirrels in any county in this State except between the dates of May 15th to June 15th, both inclusive, and October 1st to January 1st, both inclusive. The defendant defended on the ground that the act of 1927 had been superseded by act 143 of the Acts of 1929 as amended by act No. 297 of the Acts of 1931.

Act No. 143 of the Acts of 1929 provided for an open season for killing squirrels between the dates of July 1st to January 1st in fifty-seven of the seventy-five counties of the State. It provided for an open season between October 1st to January 1st in fourteen counties and in three counties two open seasons were provided—May 15 to June 15 and October 1st to January 1st—and as to one county it was provided that there should be no closed season at all. Act No. 297 of the Acts of 1931, as act No. 143, *supra,* made it unlawful to kill squirrels except in open season, which was fixed generally at July 1 to January 1. Jefferson County was included in this open season. In other counties the open season was fixed at other and different dates with the following proviso: "Provided that there shall be no closed season for hunting, killing and possessing squirrels in Marion, Madison, Searcy, Logan, Carroll, Baxter, Newton, Boone, Fulton, Izard and Sharp Counties." It will be observed therefore that the act of 1931 made it unlawful to kill squirrels within certain named dates in all the counties of the State except those named in the proviso, and in those counties there was no closed season and squirrels might be lawfully hunted in those counties throughout the year.

Amendment No. 14 to the Constitution provides: "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 case of *Webb* v. *Adams,* 180 Ark. 714, 23 S. W. (2d) 617, the inhibition of that amendment was applied to an act of the General Assembly which provided for an optional county unit or a consolidated school

system for the State operating equally throughout the State except in two counties, which, by proviso, were excluded from the provisions of the act. The court said: "The exclusion of a single county from the operation of the law makes it local, and it cannot be both a general and a local statute * * *. A local law is one that applies to any subdivision or subdivisions of the State less than the whole. 3 Words & Phrases, Second Series, p. 172. A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some person, place or thing from those upon which, but for such separation, it would operate."

In the act of 1929 and that of 1931 the Legislature exempted certain counties from the operation of the law. This arbitrarily places these counties in a separate class and leaves them outside the provisions of the law. As was said in the opinion on rehearing in *Webb* v. *Adams, supra*: "This would amount to allowing the Legislature to wholly disregard the constitutional amendment and leave the Legislature at its own will to say whether or not the law shall apply throughout the whole territorial limits of the State or whether its operation should be restricted to certain counties. While proper classification is allowed, it must stand upon some reason and have regard to the character of the legislation and cannot be arbitrarily used by the Legislature." See also the recent case of *Simpson* v. *Matthews, ante* p. 213.

It necessarily follows from what is said in the cases last cited that the acts of 1929 and 1931, *supra,* fall within the inhibition of the Constitution and are therefore void, and leave act No. 160 of the Acts of 1927 in force, and, as July 16 was a time under that act when it was unlawful to kill squirrels, the appellant was properly found to be guilty, and the judgment of the circuit court is affirmed.

RAILWAY EXPRESS AGENCY, INC. *v.* J. W. MYERS COMMISSION COMPANY.

Opinion delivered January 18, 1932.

[redacted]

A. M. Hartung and *Warner & Warner,* for appellant.

D. H. Howell, for appellee.

HART, C. J., (after stating the facts). This is not a case where the common-law presumption against carriers who have received perishable commodities in good condition and have delivered them in damaged condition is applicable, as was the case in *Chicago, Rock Island & Pacific Railway Company* v. *George E. Shelton Produce Company,* 172 Ark. 1017, 291 S. W. 428, and *Railway Express Agency, Inc.,* v. *S. L. Robinson & Co., ante* p. 660. In cases like those, when the goods are damaged in the hands of the carrier, the burden of proof is upon it to show that its negligence did not contribute to the damage. The reason is that the goods are exclusively in its custody during transit, and it alone would know whether or not it had been guilty of negligence in handling the goods in transit.

The shipment involved is an interstate one, and it is settled that the rights and liabilities in respect to damage depend upon acts of Congress, and upon the common-law principles expressed in the federal courts. *Chicago & Northwestern Railway Company* v. *C. C. Whitnack Produce Company,* 258 U. S. 371, 42 S. Ct. 328; *St. Louis-San Francisco Railway Company* v. *H. Rouw Company,* 174 Ark. 1, 294 S. W. 414; *St. Louis-San Francisco Railway Company* v. *Burford,* 180 Ark. 562, 22 S. W. (2d) 328; *St. Louis-San Francisco Railway Company* v. *Greig,* 182 Ark. 262, 31 S. W. (2d) 290; *Missouri Pacific Railroad Company* v. *Fine,* 183 Ark. 13, 34 S. W. (2d) 755; and *American Railway Express Company* v. *Cole, ante* p. 485. In these cases, it is held that, where specific acts of negligence are alleged as a right to recover by plaintiff, he must rely thereon and make proof thereof in order to recover. In such cases, he will not be permitted to recover under the common-law doctrine that a carrier must account for the deteriorating condition of commodities received by it in good condition and delivered in bad condition.

The first ground of negligence relied upon in the present case is that the carrier did not furnish a properly equipped refrigerator car. There is no evidence on the part of the plaintiff at all to sustain this allegation of negligence. On the part of the defendant, it was shown by evidence of witnesses, which was consistent in itself and uncontradicted, that the car was of the latest modern type and was properly equipped in every respect without any defect in it.

The next allegation of negligence is that the car was not properly iced in transit, and that this caused the damage to the peaches. On this branch of the case, the defendant introduced witnesses who had iced the car at the point of shipment and en route from Heavener, Oklahoma, to St. Louis, Missouri. The testimony shows that the bunkers were kept filled to capacity and the ice was tamped down. The drains were left open, and there was no negligence whatever on the part of the express com-

pany in handling the peaches. The train which carried the peaches arrived at its destination in St. Louis on schedule time, and was promptly placed on the side track for unloading. When inspected there, they were found to contain brown rot, which is a progressive disease. Peaches may be loaded in a car in apparently good condition, and brown rot may develop in them to the extent that was discovered while in transit. According to the evidence for the defendant, the damage to the peaches in question was caused by brown rot, a field disease, and not by any negligence whatever of the defendant.

It is insisted, however, that the evidence for the plaintiff is to the contrary and establishes negligence in failing to properly ice the car in transit. We do not so regard the effect of the evidence. The most that can be said of the evidence for the plaintiff on this branch of the case is that brown rot will develop more rapidly in peaches when the refrigerator car in which they were carried is not properly iced. On this point, the son of the plaintiff testified that he inspected the peaches when they were loaded and that the ice was down six inches. In the very nature of things, ice will melt, but the testimony of the defendant, which is uncontradicted, tends to show that the initial icing was completed at 3:15 P. M. and that the car was reiced eight and a half hours afterwards. The plaintiff loaded the peaches into the car through its agent, 300 crates of peaches being taken out of cold storage and the balance from sheds at the loading point. According to the testimony of J. W. Myers, the only thing that could cause development of brown rot in peaches loaded at Heavener in sound condition and arriving at St. Louis with as high as twenty-five per cent. decay is improper refrigeration. It is apparent from reading his testimony that brown rot is a field disease, and that peaches are often sprayed in the fields to control it. He only states that, if the peaches had had brown rot when put in the car, good refrigeration would have checked the brown rot. The uncontradicted proof shows that the peaches had the disease called brown rot, and

that this was a disease which originated in the fields. The condition in which the peaches were found in the car when it arrived at its destination showed that there had been no improper handling of the peaches. The decayed condition of the peaches was due solely to a field disease which was not caused by any negligence on the part of the defendant. The disease originated in the peaches before they were delivered to the carrier, and the undisputed evidence shows that the disease is frequently not apparent at the beginning. Here the uncontradicted proof shows that the decay in the peaches was due to this field disease called brown rot, and not to any negligence of the defendant in handling the peaches in transit.

Therefore the court should have directed a verdict in favor of the defendant as requested by it. For its failure to do so, the judgment must be reversed; and, inasmuch as the cause of action seems to have been fully developed, it will be dismissed here. It is so ordered.

INTER-OCEAN CASUALTY COMPANY *v.* HUDDLESTON.

Opinion delivered January 18, 1932.

A. R. Cooper, for appellant.

R. W. Wilson, for appellee.

HUMPHREYS, J. The judgment appealed from in this case was obtained in the circuit court of Jefferson County under sections G and H in a health insurance policy executed by appellant on February 9, 1930, to appellee pursuant to her application, which sections are as follows:

"Section G — Monthly Sickness Benefits.—If the insured is totally disabled, necessarily and continuously confined in the home and therein treated by a doctor (satisfactory to the company) at least once each seven days, due to disease or illness that originates more than thirty (30) days after this policy is issued, or more than thirty (30) days from date of any reinstatement, benefits will be paid at the rate of $75 per month or $2.50 per day.

"Section H — Non-confining Sickness. — If immediately following total disability and house confinement, as defined in section G, and for the period of time during which the insured shall be totally disabled from performing his or her duties, although not confined in the house, but receiving regular treatments from the physician at his office at least once each seven days, benefits shall be paid at one-half the amount provided in section G hereof for a period of time not exceeding three consecutive months."

It was alleged in the complaint that appellee was sick, confined to her bed, and obliged to have the services of a physician between July 6 and September 9, 1930, and entitled under section G, on account of said illness to $160; between September 9 and December 9, 1930, was sick, totally disabled, and received regular treatment from a physician at least once a week and entitled, under section H, to $100; that, by reason of appellant's fail-

ure to pay said sums, she was entitled to a 12 per cent. statutory penalty and a reasonable attorney's fee.

In addition to denying the material allegations of the complaint, appellant pleaded in bar of a recovery that in appellee's application she made the following false warranty:

"I am free from all injury. I am not subject to, do not now have, nor have I ever had, fits of any kind, vertigo, hernia, paresis, or rheumatism, nor any other disease or infirmity, mental, physical, nervous, venereal, chronic or inherited, except as follows: No exceptions.

"I have not been disabled nor had medical treatment during the past three years except as follows: No exceptions.

"I understand and agree that I have made the above statements as material representations to induce the issuance of the policy applied for, and I hereby represent them all to be true, full, and complete."

Upon the trial of the cause, the court sitting as a jury, the following findings were made:

"The statements in the application for said insurance were mere representations and not warranties. They were not made by plaintiff knowingly and wilfully, and with the intent to defraud, and further finds that said representations were not of such a nature as to affect the health of the applicant in 1930, nor was the illness in 1929 in any way dependent on, or connected with any illness in 1930, and that said statements, if false, were not material and not a defense to plaintiff's right to recover herein."

Based upon the finding, judgment was rendered for the full amount claimed under the terms of the policy and an additional amount for the statutory penalty of $30 and an attorney's fee of $50, from which is this appeal.

The main contention of appellant for a reversal of the judgment is that the excerpts quoted above from the policy constituted a warranty. Under the rules reiterated and reannounced in the recent case of *Modern Woodmen of America* v. *Whitaker,* 173 Ark. 935, 293 S. W. 1045,

that govern and distinguish between warranties and mere representations in insurance policies, the language used in the instant policy is clearly a representation only. The language itself is not sufficiently specific to constitute a warranty. A representation merely, though untrue, will not invalidate a contract of insurance unless material. It is insisted that because appellee admitted, and her physician testified, that she was treated for malaria in 1929, or within three years from the date of the policy, the representation was material and necessarily avoided the contract. This is not true because appellee's physician testified that she was cured of the disease and discharged by him in 1929, and that the malaria for which she was treated in 1930, after the issuance of the policy, was not a continuation of the malaria she had in 1929, but was the result of a new infection. There was no relation whatever between the two attacks of malaria, but they were due to separate bites of mosquitoes, so the first was not material to the second.

Appellant also contends for a reversal of the judgment because appellee's illness was chronic within the meaning of her representation. The word "chronic" used in the representation carried the meaning of a disease of long standing. The evidence failed to show that the diseases for which she had been treated were of long standing, so there is no merit in this contention.

Appellant also contends for a reduction of the judgment because appellee was not treated by a physician at least once a week, either in his office or at her home, after September 9, 1930. The testimony shows that after that date she went to her father's home in New Edinburg at the instance of her physician, and that she was thereafter treated by him, either at his office or through the mail, at New Edinburg once a week until December 9, 1930. Treatment by sending medicine or prescriptions through the mail constitute regular treatment by a physician within the meaning of section H of the policy.

No error appearing, the judgment is affirmed.

LERNER *v.* LUTES.

Opinion delivered January 18, 1932.

A. A. Hornsby and *Lowell W. Taylor,* for appellant.

Reid, Evrard & Henderson, for appellee.

HUMPHREYS, J. This appeal from the circuit court of Mississippi County involves a question of priority between appellants as garnishers and certain appellees and subsequent garnishers of a fund of $2,305 paid to the clerk of the court by the garnishee, Liverpool & London & Globe Insurance Company of Liverpool, England, under the allegations and answers joining the issue of priority and the following stipulation in substance:

On May 20, 1931, a stipulation was filed by all parties to the effect that appellants obtained a judgment in the circuit court of said county on January 31, 1930, against Henry Lutes for $1,302.40; Lutes had an insurance policy with said insurance company in the sum of $2,500 on a building which was destroyed by fire; that on January 28, 1930, appellants caused a writ of garnishment to be served on said insurance company; that intervener, Arkansas Grocery Company, brought suit against Henry Lutes in the circuit court of Mississippi County on December 2, 1930, for $1,080.50, and caused a writ of garnishment to be served on said insurance company; that the other interveners subsequently brought suit in the common pleas court of said county, against Henry Lutes,

and caused writs of garnishment to be served on said insurance company. It was further stipulated that a compromise had been reached between Henry Lutes and said insurance company by which the insurance claim had been settled for $2,305; that upon payment of said sum to the circuit clerk of Mississippi County, said insurance company would be discharged of all liability; that R. L. Gaines, clerk of the circuit court of Mississippi County, be substituted as garnishee in place of said insurance company, as of the day and date of the service of the respective writs of garnishment on said insurance company, and that the rights of the respective plaintiffs to the said settlement be determined by the court just as though said moneys were in the hands of said clerk, on the date of the service of the respective writs of garnishment, and the same as though the writs of garnishment had been served on him on said dates, and that the rights of the respective plaintiffs to said money be determined by the court just as though said insurance company had not been released from liability and such settlement had not been made.

The several appellees who obtained writs of garnishment against said insurance company subsequent to the writ of garnishment by appellants alleged that their garnishments created paramount and prior liens on said fund to the lien obtained by appellants because they each filed allegations and interrogatories required by § 4910 of Crawford & Moses' Digest at the times their several writs of garnishment were sued out, and that appellants failed to do so, and, by reason of such failure, acquired no lien on or right to the fund.

Appellants filed an answer denying that their failure to file allegations and interrogatories required by the statute prevented them from acquiring a lien on the fund prior to the lien of said appellees.

The statute relied upon by appellees to establish their alleged priority to said fund is as follows:

"The plaintiff shall, on the day on which he sues out his writ of garnishment, prepare and file all the allega-

tions and interrogatories, in writing, with the clerk or justice issuing such writ, upon which he may be desirous of obtaining the answer of such garnishee touching the goods and chattels, moneys, credits and effects of the said defendant, and the value thereof, in his hands and possession, at the time of the service of such writ, or at any time thereafter." Crawford & Moses' Dig., § 4910.

This section of the statute was under construction in the case of *Little Rock Traction & Elec. Co.* v. *Wilson,* 66 Ark. 582, 53 S. W. 43, wherein the court ruled that judgments against garnishees without allegations and interrogatories were irregular but not void. It is manifest that the statute was passed for the benefit of the garnishee, and not as a prerequisite to acquiring a lien on funds in the hands of third parties belonging to the defendant. Attention is called by appellees to the case of *Wilson* v. *Overturf,* 157 Ark. 385, 248 S. W. 898, in support of their contention that allegations and interrogatories are necessary prerequisites to the validity of judgments against garnishees. All that the court held in that case was that no default judgment could be taken against a garnishee without sufficient allegations and interrogatories first being filed. A default judgment against the garnishee had not been rendered when appellees intervened and sought to have their garnishment liens declared prior and paramount to the supposed lien of appellants. No default judgment could have been rendered against the garnishee because the substituted garnishee answered, admitting the indebtedness of the original garnishee to Henry Lutes, against whom appellants obtained judgments upon which writs of garnishment were issued.

Appellants' writs of garnishment were issued and served upon the garnishee prior in time to the writs of garnishment of appellees, and hence were prior and paramount liens upon the funds deposited with the substituted garnishee.

The judgment is reversed, and the cause is remanded with directions to the trial court to so declare.

HARGIS *v.* JORDAN.

Opinion delivered January 18, 1932.

[redacted]

E. D. Chastain, for appellant.

J. B. Perrymore and *Starbird & Starbird,* for appellee.

KIRBY, J. This appeal is prosecuted from an order quashing an execution alleged to have been improvidently issued after the judgment had been paid.

On the first appeal of the cause, judgment was affirmed by this court on January 8, 1923, in *Jordan* v. *Hargis,* 156 Ark. 408, 246 S. W. 476. On March 16, 1925, a judgment on the mandate was entered against Jordan, and on April 10, 1931, an execution was issued thereon and levied upon 80 acres of land belonging to him on the 9th day of May, 1931. Jordan filed a motion to quash the execution, alleging it was improvidently issued after the judgment had been paid. A temporary order was entered staying the execution, and the case continued for a hearing until the 3d of July, and, on the 8th of July, an order was made quashing the execution and directing the judgment to be satisfied on the record. The motion to quash alleged that the judgment was paid or satisfied soon after rendition of the judgment in the case by the Supreme Court in 1923.

S. M. Jordan testified that he had paid the judgment to Mr. J. E. London, attorney of record for plaintiff, about "strawberry time" in 1923. Paid about $260 or 65 in Van Buren, and that he was given a receipt showing the fact, but that the receipt had been misplaced or lost.

Judge J. L. Smith, a former county judge, brother-in-law of defendant Jordan, testified that Jordan showed the receipt of London for money in payment of the indebtedness to him; that he was thoroughly acquainted with London's signature, and that he was sure that the receipt was signed by London, and it was for about the amount Mr. Jordan claimed was paid. Witness said that he had been engaged in the abstract and title business; that the receipt was shown to him sometime in 1923, and he told Jordan that he ought to have the judgment satisfied on the record as he might lose the receipt. He also said that the receipt had been lost.

It was shown that, after the death of Mr. J. E. London, his unfinished business was turned over to appellant's attorney, and that no attempt had been made by London to collect the judgment.

The court found the judgment had been paid, and ordered the execution quashed, and the appeal is from that order.

Appellant waived the verification of the petition for quashing the execution by not objecting thereto before the final hearing thereon. The question of payment and satisfaction of the judgment was one of fact, and questions of fact arising on motions to quash an execution are tried by the court and not by a jury, and on such questions of fact the circuit court's findings are as conclusive on appeal as the verdict of a jury. *Woolum* v. *Kelton,* 52 Ark. 445, 13 S. W. 78; *Little River County* v. *Buron,* 165 Ark. 540, 265 S. W. 61.

The testimony is amply sufficient to sustain the finding that the judgment for which the execution quashed was issued had already been paid.

The judgment is affirmed.

ARKANSAS STATE LIFE INSURANCE COMPANY *v.* PERRY.

Opinion delivered January 18, 1932.

[redacted]

Appellant *pro se.*

W. P. Strait, for appellee.

MEHAFFY, J. The appellant, Arkansas State Life Insurance Company, issued its policy to Mary Perry, who was the wife of the appellee, Robert Perry. Robert Perry was the beneficiary. The amount to be paid upon the death of the insured was $250. All premiums were payable on or before the first day of each month, and in default of such payment, after five days of grace allowed, the policy became ineffective.

The policy further provided that if the company accepted past-due premiums, such acceptance would reinstate the contract, but only to cover accidental injuries thereafter received, and such sickness as may begin more than twenty days after the date of such acceptance.

The premium due August 1 was not paid until August 22. On September 13, 1929, sick claim was made by Mary Perry, the attending physician certifying that her illness had been contracted five days prior to his examination at the time he made the certificate. The physician's report stated the nature of her illness to be chills, fever, prostration.

On October 19, the physician made another report on the illness of Mary Perry and stated that she had pellagra, and in his opinion that had been contracted thirty

days prior to his examination. The same physician also made a report of disability on November 12, in which he stated the illness that he then reported had been contracted three or four days before his examination. She was then suffering with malaria and pellagra.

On December 23, the same physician made another report of illness and disability in which he stated that her illness was influenza and bronchitis, and she had been suffering with this for six or eight days. The same physician again, on January 12, reported to the company that Mary Perry had influenza and bronchitis and had had for fourteen or fifteen days.

On January 24, the physician reported that she had acute tuberculosis, following influenza, and that she had contracted this illness fourteen or fifteen days prior to the examination.

On February 20, 1930, the same physician made a certificate in proof of the death of Mary Perry in which he stated that death was caused by acute pulmonary tuberculosis, contributing influenza; that she had been affected by this disease two months. She died on February 17, 1930.

Proof of death was made and shortly thereafter a representative of appellant called on the appellee, Robert Perry, at his home near Morrilton, for the purpose of settling the claim.

Mr. E. J. Johnson, one of the officers of the appellant, was the adjuster who called on appellee. The attorney for the appellant was with Johnson, but was not with him for the purpose of seeing Perry, or taking any part in the discussion or adjustment of the claim, and he did not take any part.

Johnson told appellee that the company was not due him anything; that the premiums were due on or before the first of the month, and he explained to Perry that the August premium was not paid until the 22d, and that he could not allow him anything for the death claim. They discussed the funeral expenses and the premiums

which had been paid, which amounted to $19.80 and then he told Perry that he would pay him $50.

The appellee is an ignorant negro, 38 years old, and testified that he knew nothing about insurance; he thought that Mr. Johnson knew about it, and that Mr. Johnson told him the policy was dead, and that they did not owe him anything, and told him the reason that they did not owe him anything was that the policy was lapsed. The appellee did not have an opportunity to discuss the matter with any one else, and, believing what the agent of the insurance company told him, he agreed to a settlement and accepted check for the $50.

At the time the settlement was made, Perry signed a receipt in full on the policy and surrendered the policy and took the check, but Perry and Johnson both testified that Johnson, the agent, told Perry that, if he was not satisfied with the settlement, to give him, Johnson, back the check, and he would give Perry the policy. This was on March 12, 1930.

Two or three days after the settlement was made, Perry went to the office of Mr. Strait, stated the facts to him, and Mr. Strait immediately wrote to the company and shortly thereafter received a letter from the attorney for the company, who claimed that the policy had lapsed, and that they did not owe the appellee anything, giving as a reason, that Mary Perry died on February 17, 1930, from tuberculosis which had its inception prior to September 22, 1929.

There is no claim that the policy was void for any reason except the failure to pay the August premium on time, and it is contended that the ailment which caused Mary Perry's death had its inception within 20 days after August 22, the time the August premium was paid.

All premiums had been paid prior to that time, and all the monthly premiums subsequent to August, 1929, including the premium due in February, 1930. It was paid on the first of February, and Mary Perry died on the 17th of February.

After the company refused to make any further settlement, the appellee, through his attorney, brought suit in the chancery court of Conway County, asking that the settlement be set aside as fraudulent, and that he have judgment against the appellant for $250, 12 per cent. damages, and attorney's fees.

Before bringing the suit, the attorney wrote the company that the check had not been cashed, and that he held it subject to the order of appellant. The check was never cashed.

The court held that the settlement and release were procured by fraud and misrepresentation, and were not binding, and set them aside, and gave judgment for $250, 12 per cent. damages and attorney's fees.

We think it unnecessary to determine whether the settlement and release were procured by fraud, for the reason that the undisputed proof shows that Perry was induced to believe, and did believe, that if the settlement was not satisfactory, he would not be bound by it. As soon as he could get to the attorney's office at Morrilton, he took the check to the attorney, stated the facts, and immediately thereafter the attorney wrote the insurance company advising it that the settlement was not satisfactory and offering to return the check.

The appellee never tried to cash the check, but, as soon as he could do so, procured advice as to his rights under the policy, and notified the insurance company that he would not accept the check and demanded payment of the amount he claimed to be due him under the policy.

We think under the facts, as testified to by both parties, the release and settlement were conditional, and that Perry was entitled to a reasonable time to consult with somebody who could advise him.

There is practically no conflict in the evidence. There is no evidence as to what caused Mary Perry's death except the statement of the physician, which was introduced by appellant. There is no evidence about how long she had suffered with the disease which caused her death except the statement of the physician, and his statement

shows that she died of tuberculosis, and that in his opinion she had been affected with the disease that caused death two months. She died on the 17th of February, 1930, and, if she had been affected with the disease which caused her death two months, she must have contracted it about December 17, 1929.

Mary Perry became ill the first time, so far as the record shows, September 13, 1929, but she recovered from this ailment, and thereafter, until the time of her death, the evidence of Perry shows that she was up and down.

The insurance company had all of the reports made by the physician in its possession. The evidence does not show that the appellee knew anything about the reports of the physician. Appellant, having these reports in its possession, knew that the disease that caused her death was not contracted within twenty days after the payment of the August premium. It does not claim that it had any information about her illness, when it was contracted, and what caused her death, except the information contained in the physician's reports.

Of course, if she contracted the first illness on the 13th of September, this would have been more than 20 days after the payment of the August premium, but while the physician visited her only once, and this was on the 13th of September, his report states that in his opinion she had contracted the illness about five days before his examination. But the reports received by the company clearly showed that the disease that caused her death was not the ailment for which she was treated the 13th of September, and the insurance company had received these reports as made by the physician, knew the facts therein, and continued to receive the monthly premiums up to and including February 1, 1930, which was 16 days before her death.

According to the undisputed proof, the policy was not lapsed, and appellee is entitled to recover. The decree of the chancery court is affirmed.

PRICE-SNAPP-JONES COMPANY *v.* BROWN.

Opinion delivered January 18, 1932.

Raymond Jones, for appellant.

Walter A. Isgrig, for appellee.

HART, C. J., (after stating the facts). The only error argued for a reversal of the judgment is that the action of the court in overruling the motion for a new trial brings the case within the rule announced in *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851, and later cases following the rule there announced. In that case it was held that, when the trial court is convinced that a verdict is not sustained by the preponderance of the evidence, then

it is his duty to set aside the verdict; and if the trial court finds and announces that the verdict of a jury is against the preponderance of the evidence on a material issue of fact, then he must set the verdict aside. Numerous cases might be cited to the effect that it is the duty of the trial court, where it is of the opinion that the verdict of the jury is contrary to the weight of the evidence, to set it aside. This is a matter to be addressed to the trial court, and furnishes no ground for reversal in this court where there is substantial evidence to support the verdict. *St. Louis Southwestern Railway Company* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768; and *Louisiana & Arkansas Railway Company* v. *Muldrow,* 181 Ark. 674, 27 S. W. (2d) 516.

It is earnestly insisted by counsel for appellant that the record in the case affirmatively shows that the trial court found and announced that the verdict of the jury was against the preponderance of the evidence, and that it therefore erred in not setting it aside. We do not so construe the verdict. We have copied the verdict in our statement of facts, and it shows that there was a question mark or interrogation point after the amount found by the jury due the plaintiff. Written instructions were given by the court to the jury, and among them was the form of the verdict. It is immaterial to determine whether the interrogation point indicated was placed there by the stenographer who transcribed the written instruction of the court or whether it was placed there by the jury, as indicating some doubt as to the exact amount due the plaintiff. The record shows that the verdict was returned into court and delivered to the clerk and was announced by him. The court asked the jury if the verdict read by the clerk was their verdict, and the jury replied that it was. The clerk, in reading the verdict, did not call attention to the question mark. This was not discovered until after the jury had been discharged.

In arguing the matter before the court upon the presentation of the motion for a new trial, we quote from the record the following:

"Court: Well, I think the questions in dispute were questions for the jury to pass on absolutely. I think the clerk properly wrote up the judgment on that verdict. The motion for a new trial will be overruled."

There is nothing whatever in the remarks of the court that it was of the opinion, or intended to announce it as the opinion of the court, that the verdict of the jury was contrary to the preponderance of the evidence. Hence the case at bar does not fall within the principles announced in the cases cited above and relied upon by counsel for appellant for a reversal of the judgment in this case.

Under our Code of Civil Procedure, it is provided that the verdict shall be written, signed by the foreman, and read by the clerk of the court to the jury, and the inquiry made whether it is their verdict. Then, if no disagreement is expressed and neither party requires the jury to be polled, the verdict is complete, and the jury is discharged from the case. Crawford & Moses' Digest, § 1300. This section of the statute was explicitly followed in the present case.

As said by the trial court, the meaning of the jury was clearly shown by the verdict, and is not to be set aside because it was uncertain or indefinite. There being no expression of the court that would indicate that the verdict of the jury was contrary to the weight of the evidence, his finding that the motion for a new trial should be overruled is binding upon us upon appeal, for it is the settled rule of this court not to disturb a verdict upon appeal where there is any substantial testimony to support it, and the testimony of the plaintiff warranted the jury in finding a verdict in his favor for the amount claimed to be due under the contract. Therefore the judgment will be affirmed.

SOUTHEAST ARKANSAS LEVEE DISTRICT *v.* TURNER.

Opinion delivered January 18, 1932.

Streett & Burnside, for appellant.

Golden & Golden and *Poff & Smith,* for appellee.

SMITH, J. Appellees are landowners in the Southeast Arkansas Levee District, hereinafter referred to as the district, and they brought this suit to enjoin the collection of an alleged excessive assessment against their property.

The district was created by act 83 of the Acts of the General Assembly of 1917, which was amended in 1919, and further amended by act 139 of the Acts of 1923 (Special Acts 1923, page 261).

Section 8 of the original act of 1917 contained a legislative finding as to the extent of the betterments to be assessed against the property of the district, and, pursuant to the authority of this section of the act, the assessment against the lands was made on an acreage basis, whereas it was provided that real estate in said district, "within the limits of any town" in the district, should be taxed on the basis of the assessed value thereof "as the same appears assessed for State and county taxes."

This § 8, which had been amended by the act of 1919, was further amended by § 1 of act 139 of the Acts of 1923, *supra,* and, as thus amended, the portions thereof relevant to this case read as follows:

"It is hereby ascertained and declared that all real estate subject to overflow in said district (except the real estate included in the limits of any town or city in said district) is benefited annually to the extent of thirty cents (30c) per acre; and there is hereby levied and assessed against each and every acre of such real estate in the district, outside the limits of any town or city and subject to overflow, a tax of thirty cents (30c) per year.

"That each and all of the parcels of real estate subject to overflow included in the limits of any town or city in said levee district is benefited annually not less than thirty (30) mills on the dollar of the assessed value thereof, as the same is assessed for State and county taxes; and there is hereby levied and assessed against each and all of such parcels of real estate in said district within the limits of any city or town, annually, a tax of thirty (30) mills on the dollar of the assessed value thereof, as the same appears assessed for State and county taxes."

The question involved in this case is the one of fact, whether the lands of appellees are "real estate included in the limits of any town or city in said district." Upon this issue of fact, testimony was heard by the court, and this testimony was summarized by the court in a finding of fact made a part of the decree, which we accept as correct, and such facts as we find necessary to state are taken from this finding or from the stipulations of fact filed in the case.

The court found that the property in question was situated in Friedman & Willoughby Additions Nos. 1, 2, 3 and 4 to the city of McGehee, but that no part of any of these additions were within the corporate limits of the city, and that the city of McGehee as a municipality exercises no control over these additions in the way of taxation or otherwise, and that the owners of these additions who reside therein have no vote in the government of the city of McGehee.

Additions 1, 2 and 4 are platted into five-acre tracts which were designated as lots, the plat of the survey

thereof being duly recorded, and addition 3 is platted into lots and blocks of five acres to the lot, and the survey and plat of this addition was also duly recorded. The lots in all these additions are contiguous, and, "but for a bayou and a road which traverses the property and streets as shown on the plats and maps, the four several platted additions comprise one solid body of land," bounded by the outer lines of the several additions.

The plats of the additions 1 and 2 were filed for record in March, 1921; that of addition 3 on November 11, 1924, and of addition 4 on October 6, 1927, and the respective additions, after the plats thereof had been filed for record, were assessed for general taxes as town lots and as additions to the city of McGehee.

It appears from a map of the city of McGehee and the plats of the additions thereto and the stipulations of counsel concerning them that all the territory in said four additions is bounded by the outer lines of said additions, and that the northwest corner of the tract of land thus divided into additions is directly south of the southeast corner of the city of McGehee and separated therefrom only by the right-of-way of the Missouri Pacific Railroad. The map further shows that the Arkansas & Louisiana highway, which is the main artery of travel and commerce into and through the city, is a concrete pavement 14 feet wide and is a continuation south and east of the main street of the city and passes between additions 1 and 2, and the lots of said two additions front thereon. A branch of this pavement running south to Dermott forms the street upon which certain lots of the 2nd addition and the western part of all the lots in the 4th addition front, thus connecting up and giving easy access to all parts of the city of McGehee to the residents within said four additions.

Addition 1 is divided into 16 lots and contains 19 residences, a public garage and one store building; the 2nd addition contains 13 lots, upon which there are 16 residences. There are 6 residences in the 3rd addition,

and only 1 in the 4th addition, but that addition contains only 4 lots.

There appears therefore to be 42 residences with the usual improvements on the four additions. Some of these residents have truck patches, orchards, gardens, or chicken farms, and most of these residents are engaged in pursuits related to and carried on in the city of McGehee. The residences are of a permanent and substantial character, and the occupants thereof are furnished with gas, water, electricity and telephone service from the city of McGehee.

The court found the fact to be that none of these additions had been platted when the original act of 1917 was passed, and that additions 3 and 4 were platted subsequent to the passage of the act of 1923. We regard these facts as unimportant, for the reason that all the assessments here in question were made subsequent to the passage of the act of 1923. This act was, of course, prospective in its nature, and was intended to govern all assessments thereafter made, and to apply to the conditions then existing. Section 24, chapter "Statutes," 25 R. C. L., page 778; *Nations* v. *State,* 64 Ark. 469.

The question for decision is therefore whether the lots in the four additions are real estate included in the limits of any town in said district within the meaning of the act of 1923. The chancellor found in an able opinion that they were not, and that "in the instant case the Legislature had used the word 'town' in its popular sense, and that it was the legislative intention to recognize that towns, as ordinarily understood, had limits within which it exercised local government," and that the Legislature intended to embrace for assessment purposes as town property only such real estate as was actually situated within the corporate limits of a town.

We concur in the view that the word "town" was employed in all the acts relating to the district in its popular sense. At the time of their enactment we had a statute defining the terms "town or city" as employed in our taxation statute. The General Assembly of 1883 passed

a comprehensive act "to revise and amend the revenue laws of Arkansas" (Acts 1883, page 199), and § 75 thereof defined the terms "town or city" as follows: "For the purposes of this chapter the terms town or city, and towns and cities, shall apply to all cities, or towns, incorporated or not incorporated; also, to all blocks or lots, or parts thereof, assessed for taxation as such, whether the same is situated in an incorporated city or town or not."

This section appears as § 9939, Crawford & Moses' Digest. This act of 1883 relates, of course, to the revenue laws of the State, and not to improvement district legislation, but it contains a legislative recognition of the fact that there were towns (as there still are) in the State not incorporated, and that the fact of incorporation was not the test as to whether a community was in fact a town.

We must assume that the General Assembly was familiar with this definition in the enactment of the legislation pursuant to which the district has assessed betterments against the property lying within the district, and none of these acts make any distinction between incorporated and unincorporated towns, but contain the direction that real estate be assessed as urban if it is within a town.

We are cited to numerous cases from various jurisdictions in which the word "town" has been defined, but we do not review them, as we think the word has been sufficiently defined in our own cases.

One of the latest is the case of *State* v. *Haynes,* 175 Ark. 645, 300 S. W. 380, which construed an act placing motor vehicles under the control of the Arkansas Railway Commission when operating between cities and towns. It became necessary to define the word "town," and this was done by adopting a definition from 38 Cyc. 596, and we there said: "Hence it may be said that the word 'town,' as used in the statute, is to be considered in its popular sense as an aggregation of houses so near one another that the inhabitants may fairly be said to dwell together." In a note to the text quoted from Cyc.,

supra, our own case of *Murray* v. *Menefee,* 20 Ark. 561, was cited as authority for the definition given.

This Arkansas case construed a statute relating to the granting of a ferry license, which provided that not more than one ferry permit should be granted except at or near cities or towns, and the court said: "In this country there seems to be no precise legal definition of the term 'town,' and we suppose it was used in the statute in its popular sense."

It is true the court held that the place there claimed to be a town was not a town, but that holding was made upon the facts there stated as follows: "In the case before us, the proof is substantially the following: The place claimed to be a town is designated 'Cadron,' situate on the Arkansas River, below the mouth of Cadron Creek; the courts for Conway County were held there from 1826 to 1828, but never afterwards; in the language of the witness, it was 'abandoned' in 1831, and continued 'abandoned' until 1845 or '6. In 1855—when the ferry was established—there was at 'Cadron' one store, which did business to the amount of about $4,000 per annum; dwelling houses for two families, and outhouses; the population consisted of two families, numbering in all, six persons; one warehouse, from which, in 1855, produce to the value of $200 was shipped, the trade of that year being injured in consequence of drouth and low water. In 1854—which was a favorable year—the exports amounted to the value of about $1,500. To call this a town, in any sense, would be an obvious misapplication of the term."

Here the facts are essentially different. We have here a compact community of 42 houses, occupied by persons who may fairly be said to dwell together, and who are separated from a city of the second class only by the city's incorporation line, and who have all the conveniences which proximity to the city affords, and whose property is assessed for general taxation as additions to this city.

In the case of *First National Bank of Owatonna* v. *Wilson,* 62 Ark. 140, 34 S. W. 544, Mr. Justice RIDDICK, speaking for this court, said: "On the other hand, there may be towns that have overgrown their corporate limits, so that one may dwell within the town, and still be outside the corporate limits."

The map of the city of McGehee which we have before us shows such to be the case here. The city of McGehee has grown in various directions, and is now, and was at the time the assessments in question were made, a larger town than its corporate limits indicate. In other words, many persons are residents of the town of McGehee within the popular meaning of the word "town" who do not reside within the corporate limits thereof. See also *Spaulding* v. *Haley,* 101 Ark. 299, 142 S. W. 172; *Rogers* v. *Galloway Female College,* 64 Ark. 635, 44 S. W. 454, 39 L. R. A. 636; *Clements* v. *Crawford County Bank,* 64 Ark. 7, 40 S. W. 132, 62 Am. St. Rep. 149.

We conclude therefore that the lots in each of the four additions to McGehee are within that town within the meaning of the act of 1923, or, in any event, that these additions themselves constituted a town, the people thereof dwelling together as residents of a community called McGehee, and therefore residents of a town within the meaning of the act of 1923.

The decree of the court below is therefore reversed, and the cause will be remanded with directions to enter a decree in conformity with this opinion. It is so ordered.

SOUTHWESTERN LOAN & FINANCE CORPORATION *v.* ARKANSAS TRANSPORTATION COMPANY.

Opinion delivered January 18, 1932.

[redacted]

Claude A. Rankin, O. A. Featherston and *Pinnix & Pinnix,* for appellant.

BUTLER, J. The appellant corporation was authorized by its license certificate from the Railroad Commission to operate an intrastate passenger bus line from Hot Springs, Arkansas, to Nashville, Arkansas, and return, over Highways Nos. 70 and 27. The appellee company was doing an interstate business of a like nature over the same route, but did not have any permit to do an intrastate business. The appellant brought suit in the Pike Chancery Court against the appellee company and secured a decree of that court enjoining the appellee company, its agents and employees, from operating or attempting to operate an intrastate passenger bus

line or business over the route of the appellant corporation. This decree was entered on October 15, 1930, which decree has not been superseded or any permit obtained thereafter by the appellee Company to do an intrastate business over said route.

The case here is an appeal from the decree of the chancery court on a citation for contempt of the defendant for a willful violation of the above said injunction, wherein it was adjudged that the facts established at the hearing on the citation for contempt did not constitute a willful violation of the injunction, and the relief prayed by the appellant corporation in the last proceeding was denied.

The petition alleged that the appellee company had violated the injunction and order of the court made on the 15th of October, 1930, by thereafter operating an intrastate passenger bus line over the same route as that used before the order restraining it from doing so was made. The preponderance of the testimony adduced at the hearing tended to show that, after the injunction order was made and entered and after the application of the appellee company for a permit to do an intrastate business had been denied by the Railroad Commission, the appellee company carried passengers from points between Hot Springs and Nashville to the latter town in the following manner: one would purchase a ticket from an intermediate point between Hot Springs and Nashville to a destination beyond Nashville when it was the purpose only to go to the town of Nashville and return and the fare charged and paid was from that point to Nashville; that the appellee company's agents knew that the passenger intended to go only as far as Nashville. The court found that this was not a violation of the injunction, and further found that the appellee company had permitted a "few people to ride its busses between Nashville and Hot Springs without pay since the rendition of the decree making the injunction perpetual," but held that "it does not constitute contempt for defendant's

servants and employees to invite guests to ride with them on the route between Nashville and Hot Springs."

The testimony of a witness, one J. C. Young, who had kept a memorandum of the names of parties who took passage from Glenwood, an intermediate point between Hot Springs and Nashville, to Nashville and Hot Springs during the months of December, 1930, and January and February, 1931, and to other intermediate points in the same months, was to the effect that these amounted to thirteen or fourteen persons. There were other witnesses who testified as to either themselves having been carried along the route enjoined by the appellee company or others that had been so carried. The appellee company had in its employ two drivers on this route, both of whom testified that they were authorized to haul anybody they pleased without charging any fare. Indeed, Mr. Mitchell, the president of appellee company, admitted that the drivers had been given this authority, and that any of appellee company's agents had the right to issue passes. He stated that these agents and drivers "generally always know who they are giving the passes to and what they are giving them for. They don't give them to everybody that comes along," but generally the passes were given to those who performed some service for the company. He testified that after the injunction he advised his drivers regarding taking on passengers between Hot Springs and Nashville and the agents about selling tickets, advising the agents not to sell any local tickets between Nashville and Hot Springs, and stated further, "I have not intentionally violated the injunction issued here by the court. In issuing passes I didn't think it was a violation of the injunction."

We are of the opinion that the only reasonable inference deducible from this testimony is that there was a persistent attempt made by the appellee company after the injunction order has been made to interfere with, and injure, the business of the appellant corporation, and

that this conduct was a violation both of the letter and spirit of the injunction.

It is a rule of universal application that, in determining whether there has been a violation of an injunction, the order for the injunction is to be construed with reference to the nature of the proceedings and the purposes of the injunction, and it is important to consider the objects for which relief is granted as well as the circumstances attending it. 32 C. J. 492, notes 33, 34 and 35.

Courts entertain proceedings for contempt for two purposes—one, to preserve the power and dignity of the court and to punish for disobedience of orders, and the other, to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. In holding that the conduct of the appellee company shown by the evidence was not a contempt of the order of the court, the learned chancellor doubtless had in view the first class of proceedings, and his judgment would, in that view, not be the subject of review unless the facts established showed such flagrant violation of the order as to suffer it would bring all courts in disrepute. But the proceeding in this case has to do with the second class of contempt proceedings and was instituted primarily, not to vindicate the dignity of the court, but to preserve the rights to which the court had found the appellant entitled in its decree of October 15, 1930. The act complained of was the unlawful interference with appellant's business by appellee company's operation of a bus line over the route of appellant, and this was the action restrained by the court. Therefore, any act on the part of the appellee company which would continue to interfere with or render less valuable the conduct of appellant's business, would be a breach of the injunction, and it is a violation of the injunction to do through subterfuge that which will produce the same effect and accomplish substantially that which it was

prohibited from doing. Ex parte *Miller,* 129 Ala. 130, 30 So. 611, 87 Am. St. 47; *Gibbs* v. *Morgan,* 39 N. J. Eq. 79.

The business of appellant corporation was that of carrying passengers for hire on its busses running between Hot Springs and Nashville, and the object of the order restraining the appellee company from conducting a like business between those points was to preserve the business of appellant corporation from the interference of the appellee. It is therefore immaterial whether the appellee derived a profit from carrying passengers or whether it carried them without pay. In either event the harm to appellant would be as great and the spirit of the injunction violated. The true test is not whether the unlicensed operator is deriving a profit, but whether his acts are necessarily a direct injury to the certificate holder. *Norris* v. *Farmers & Teamsters Co.,* 6 Cal. 590, 65 Am. Dec. 535; *Vallejo Ferry Co.* v. *Salano Aquatic Club,* 165 Cal. 255, 131 Pac. 864; *Davis & Banker Inc.* v. *Nickell,* 126 Wash. 421, 218 Pac. 198. It is very true, as concluded by the chancellor, that a private individual has the right to run his car over the highway and to invite guests to travel with him if he so chooses without charge, but it does not follow, as found by the chancellor, that, since a private person has such right, to deny such right to a corporation would deny its equal protection of the law. For in this case the rights of the corporation offending and of a private individual stand upon a different footing; the former has a right common to every one, but that right is in no sense the same to a corporation, a public carrier, who makes the highway his place of business and uses it for its private gain. The distinction is elementary and fundamental, and one of such universal recognition as to render the citation of authorities unnecessary.

In the instant case the preponderance of the evidence, indeed, the uncontradicted evidence, renders it apparent that the *ad libitum* authority given to the bus drivers to haul any one they might choose without exacting pay, the liberal use of passes, the selling of tickets to places beyond the prohibited points where it was

known the passenger only intended to travel to Nashville or Hot Springs, all indicate a mere subterfuge to evade the letter of the injunction and to continue the impairment of the business of appellant and to render it unprofitable.

Nor can it avail the appellee to say that it did not intend to violate the order of the court or that it instructed its agents not to sell tickets from intermediate points between Nashville and Hot Springs, for the other conduct which has been shown was to do indirectly that which it denied it was doing directly. "It is to be observed that the violation of the spirit of an order or writ, even though its strict letter may not have been disregarded, is a breach of the mandate of the court." *Weston* v. *John Roper Lumber Co.* 158 N. C. 270, 73 S. E. 799; *Baker* v. *Cordon,* 86 N. C. 116, 41 Am. Rep. 448.

It follows that the trial court erred in dismissing the citation for contempt for want of evidence to support it. The decree is therefore reversed, and the cause remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

MAHAFFEY *v.* GLOVER.

Opinion delivered January 25, 1932.

Raymond Jones and *W. C. Rodgers,* for appellant.
Floyd Terral, for appellee.

SMITH, J. Appellant, for her cause of action, alleged that an automobile owned by W. G. Glover and driven by his son, W. H. Glover, in which she was riding as an invited guest, was negligently driven into and against a truck owned by B. H. Sullivan, which was being driven by his son, Harold, and that, as a result of this collision, she sustained serious injuries. She brought this suit against the Glovers, and has alleged that the collision, and her consequent injury, was occasioned by the negligence of the driver of the car in which she was riding, and she prayed judgment for damages to compensate her injury. The complaint and the amendments subsequently filed thereto recite the particulars in which young Glover was negligent, and allege that this negligence was the sole cause of her injury.

In response to a motion filed by the Glovers, a certain writing was produced and offered in evidence, in which it was recited that, for and in consideration of the sum of $317.50, paid her by B. H. Sullivan for himself and for his son, Harold, the plaintiff had released them from any and all claims or demands for damages on account of the collision in which she had been injured. This instrument contained the following recital: "It is further understood and agreed that the acceptance of the aforesaid $317.50 by said O. E. Mahaffey (the father of the plaintiff) and Miss Mattie Mehaffey will not, in any way, operate as an accord and satisfaction of any claim which they, or either of them, may have or claim against W. H. Glover, the operator of the automobile in which Miss Mahaffey was riding at the time of the collision." Upon this writing being produced and offered in evidence, the defendants, Glover, father and son, moved to dismiss the cause of action upon the ground that the writing operated as a release to them also of any liability. In response to this motion, plaintiff offered testimony to the effect that the money received by herself and her father from Sullivan was voluntarily advanced, and was to be repaid if they became able to do so; that she did not at any time assert, and does not now allege,

that Sullivan was responsible for or had contributed to her injury, but that, on the contrary, the parties made defendants to this suit were solely responsible therefor.

The trial court was of the opinion that this testimony varied the legal effect of the writing, which he construed to be a release, and therefore declined to consider it. The motion to dismiss the cause of action was sustained upon the ground that it had been compromised and settled, and this appeal is from that judgment.

It may be first said that the question of the legal effect of the writing referred to as a release was not raised by the parties in whose favor it was executed. They are not parties to this suit. The plaintiff has alleged as her cause of action an injury occasioned solely by the negligence of the parties whom she had made defendants, and has also alleged that their negligence was the sole cause of her injury. She does not question that the paper writing would bar a suit against the Sullivans, if, indeed, she had had such a cause of action against them. She offered only to show that she had no cause of action against them nor any intention to sue upon any such supposed cause of action against them, and that the writing as against the Sullivans was nothing more than a covenant not to sue them.

We think the testimony was competent for this purpose. It was not offered to defeat the writing as a contract, and its binding effect between the parties thereto is not questioned. The rule that parol testimony may not be offered to vary the effect of a valid and sufficient written contract does not therefore apply and operate to exclude this testimony.

We are also of the opinion that the writing called a release is not such in fact, but is in legal effect a covenant not to sue the Sullivans.

In the recent case of *Magnolia Petroleum Co.* v. *McFall,* 178 Ark. 596, 12 S. W. (2d) 15, it was said that, "in the case of joint tort-feasors, the essential unity of the injury, and the fact that the injured party is entitled to but one compensation therefor, make it impossible for

the injured person to settle with one tort-feasor without discharging the other. Therefore it is held that a release of one tort-feasor releases all, for the reason that the cause of action is satisfied, and no longer exists."

In addition to a number of our own cases on the subject, we there cited the case of *Young* v. *Anderson,* 33 Idaho 522, 196 Pac. 193, which is annotated in 50 A. L. R. 1056. The annotation to this case is extensive and exhaustive.

It is stated in the annotator's note that, "by the great weight of authority, a covenant not to sue one joint tort-feasor is held not to amount to a release, and therefore such an agreement is held not to discharge the other tort-feasor." And among the numerous cases cited as sustaining what is said to be the majority rule as there announced are our own cases of *Dardanelle & R. Rd. Co.* v. *Brigham,* 98 Ark. 169, 135 S. W. 869, and *Texarkana Telephone Co.* v. *Pemberton,* 86 Ark. 329, 111 S. W. 257. These cases and other cases by this court therein cited sustain this rule.

One of the leading cases on this subject, and one which has been frequently cited, is that of *Carey* v. *Bilby,* 129 Fed. 203, 63 C. C. A. 361. This case recognizes the well-established rule, in an opinion by Circuit Judge Thayer, that the release of a cause of action as against one of two or more joint tort-feasors is a release of all, and that the rule is based upon the theory that, when one has received full compensation for a wrong, no matter from which wrongdoer or from what source, the law will not permit him to recover further damages.

After thus stating the general rule in regard to releases, the court proceeded to say: "Sometimes, however, as in the case in hand, a release executed in favor of one wrongdoer is accompanied with the reservation of the right to sue others who were jointly concerned in the wrong, and in such cases the question has frequently arisen, how shall such an instrument be interpreted? Shall the reservation of the right to sue others be ignored, and the instrument treated as raising a conclusive

presumption that full compensation for the wrong has been made, as though it were a technical release under seal, or shall the reservation of the right to sue others be taken to mean that full compensation has not been received by the injured party, and that he merely intended to agree with the released party not to pursue him further, but without releasing his cause of action against the other wrongdoers, or admitting that he has received full compensation for the injury? With reference to this question, the authorities are not in accord. Some courts are disposed to hold, and have held, that, when such an instrument contains apt words releasing one of the joint wrongdoers, it operates to release all, and that any clause inserted therein reserving a right to sue others after one has been released is repugnant to the release, in that it defeats, or attempts to defeat, the natural legal effect of the instrument; and that it should therefore be ignored. (Citing authorities.) Other courts hold, however, that such an instrument should be given effect according to the obvious intent of the person executing it, and that it should not be treated as a technical release operating to destroy his cause of action as against all of the joint tort-feasors, but rather as a covenant not to sue the party in whose favor the instrument runs. (Citing authorities.) We are of the opinion that the doctrine enunciated in the cases last cited is supported by the greater weight of authority, and is founded upon the better reasons. It has the merit of giving effect to the intention of the party who executes such an instrument, which should always be done when the intention is manifest and it can be given effect without violating any rule of law, morals, or public policy. Besides, we are not aware of any sufficient reasons which should preclude a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers, who desires to avoid litigation, to accept such sum by way of partial compensation for the injury as he may be willing to pay, and to discharge him from further liability without releasing his cause of action

as against the other wrongdoers. The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor. The release which was read in evidence in the case at bar plainly shows that the sum paid by Hysham was not accepted by the plaintiffs as full compensation for the injury which they had sustained; that it was not in fact full compensation for the injury; and that they had no intention of releasing their cause of action as against Carey. Why, then, should it be given an effect contrary to the intent of the one who executed it? We perceive no adequate reason for giving it such effect, and accordingly agree with the lower court that it did not release Carey."

This court has, in its opinions above referred to, approved the distinction stated by Judge Thayer between a release and a mere covenant not to sue one or more tort-feasors, and it is unnecessary therefore to further review the authorities.

The case of *Coleman* v. *Gulf Refining Co.*, 172 Ark. 428, 289 S. W. 2, is cited as sustaining the contrary view. But such is not its effect. In that case the plaintiff was injured through the concurring negligence of the servants of a railroad company and of another corporation, and, in a release executed by the plaintiff to the railroad company, it was recited that "the within settlement also includes every claim of every class or character, past, present and future, arising from or growing out of the above-mentioned accident; consideration $1,500," and no reservation was made of the right to sue the other tort-feasor, as was done in the instant case. We therefore held in the Coleman case, *supra,* that the writing was a release, and not a covenant not to sue the railroad company.

We conclude therefore that the trial court was in error in dismissing appellant's complaint, and that judgment will be reversed, and the cause will be remanded.

EAST END SCHOOL DISTRICT NO. 2 *v.* GAISER-HILL LUMBER COMPANY.

Opinion delivered January 25, 1932.

W. A. Utley, for appellant.

Tom Digby and *Malcolm Gannaway* and *McDaniel & Nall,* for appellees.

MEHAFFY, J. The appellant is a school district in Saline County, formed by the consolidation of three districts. It became necessary for the appellant to erect and equip a new school building, and arrangements were made for borrowing the money from the revolving loan fund. An election was had, and tax voted for the payment of the loan. The amount borrowed was $10,000.

The district undertook to purchase the material and have some person to supervise the work. The directors of appellant agreed with W. H. Rodgers that they would furnish the material and pay the labor, and allow him $55 per week for his services. This agreement was entered into on April 7, 1930.

Rodgers further agreed that he would complete the building in seventy-two working days, and that he would execute an acceptable bond as a guarantee that said building would not exceed in total cash the amount set and agreed to by party of the first part, the expense of said bond to be paid by party of the first part.

On the same date, April 7, 1930, the directors of the district signed the following instrument:

"April 7, 1930.

"We hereby, the parties of the first part, do here this day enter into an agreement with W. H. Rodgers, of the second part, to furnish all material which is to be used in said school building, subject to rejection if not delivered on job according to plans and specifications. Parties of the first part further agree to assist in buying all material that goes into said building, and also agree to furnish the necessary money each Saturday noon to pay off all employees which party of the second part shall have time and payroll made out. We further agree to pay party of the second part the sum of $55 per week, straight time, and to furnish gasoline and oils to be used for the purpose of transacting business for the parties of the first part.

(Signed) "W. B. Garner,
"W. W. White,
"J. T. Wilkerson,
"L. A. Ashley,
"T. R. Wells,
"W. M. Haynes."

Thereafter the directors of the district concluded that it would be necessary to advertise for bids and to let the contract to the lowest and best bidder. They advertised for bids, and Rodgers made a bid that was accepted, and executed a bond with the Home Accident Insurance Company as surety.

Rodgers' bid was accepted, but no new contract was made with him. The bid was $8,229.73.

The bond was executed by Rodgers as principal and the Home Accident Insurance Company as surety, in the sum of $8,229.73.

The following statement is in the bond:

"Whereas, the principal has entered into written contract dated April 7, 1930, and amended by a supplemental agreement dated May 2, 1930, whereby the principal agrees to supervise the construction of a school building in East End School District No. 2 of Saline County, Arkansas, said district agreeing to furnish and pay for all material entering into the construction of said building, and to furnish the necessary funds each week to pay the labor employed on it, a copy of which is hereto annexed, and which contract is made a part hereof, as fully as if recited at length herein."

Before the work was completed Rodgers quit the job, left the country, and the building was completed by agreement between the directors and surety company.

Suit was filed in the Saline Chancery Court by Gaiser-Hill Lumber Company and M. J. Ketcher, trading as M. J. Ketcher & Company, against the school district, its directors, W. H. Rodgers, and the Home Accident Insurance Company.

The suits brought by Gaiser-Hill Lumber Company and M. J. Ketcher & Company were brought as separate suits, but were consolidated and tried together. There was also a suit brought by the Benton Supply Company, and this suit was by agreement consolidated here for the purpose of appellant's brief.

The facts and principles of law are the same in each case, and there is therefore no necessity for more than one opinion.

Each of the suits was for material furnished which entered into the construction of the building. There is but little dispute about the facts. It is not contended that the materials were not furnished, and there is no contention that the materials furnished did not go into the building.

The school district, in its answers, denied liability; alleged that the building was erected by Rodgers, and not by the school district; that Rodgers was not merely a supervising contractor. It says that the supplies were sold to Rodgers, and that the bond was a statutory bond, and that the building was a public building, and that appellees knew, or could have known, that it was a public improvement. It also alleged that all of the funds received from the revolving loan fund were expended by the district in accordance with the contract entered into between said district and Rodgers; that, if appellees had any claim for material furnished, it was a claim against the contractor and bonding company, and not against appellant.

The court entered a decree in favor of Gaiser-Hill Lumber Company for $676.96, together with 6 per cent. interest from July 26, 1930, and for costs. It also entered judgment in favor of M. J. Ketcher for the sum of $601.50, with interest at the rate of 6 per cent. per annum from July 10, 1930, and costs. There was a judgment entered in favor of the Benton Supply Company for $681.48.

The claim for lien upon the school building and land upon which it was located was denied in each case, and the complaints for liens dismissed for want of equity.

The district prosecutes an appeal in each case.

It is contended by the appellant that it is not liable for the payment of these claims, and that appellees should look either to the contractor or to the bonding company for payment, and appellant states that the correctness of the decision of the chancellor, holding the district liable, depends in a great measure on the construction of §§ 6913 and 6914 of Crawford & Moses' Digest. The sections referred to read as follows:

"Section 6913. *Public buildings.* Whenever any public officer shall, under the laws of this State, enter into a contract in any sum exceeding one hundred dollars, with any person or persons for the purpose of making any public improvements, or constructing any public

building, or making repairs on the same, such officer shall take from the party contracted with a bond with good and sufficient sureties to the State of Arkansas, in a sum not less than double the sum total of the contract, whose qualifications shall be verified, and such sureties shall be approved by the clerk of the circuit court in the county in which the property is situated, conditioned that such contractor or contractors shall pay all indebtedness for labor and material furnished in the construction of said public building, or in making said public improvements.

"Section 6914. *Bond.* Such bond shall be filed in the office of the clerk of the circuit court in the county in which said public improvement is to be made, or such public building is to be erected, and any person to whom there is due any sum for labor or material furnished, or his assigns, may bring an action on said bond for the recovery of said indebtedness; provided, that no action shall be brought on said bond after six months for the completion of said public improvement or buildings."

It is true that school directors are public officers and derive their powers from the statute.

"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." *American Exchange Trust Co.* v. *Trumann Special School Dist.*, 183 Ark. 1041, 40 S. W. (2d) 770; *A. H. Andrews Co.* v. *Delight Special School Dist.*, 95 Ark. 26, 128 S. W. 361.

School directors are expressly authorized by statute to build, hire, or purchase school houses, and to furnish the same with necessary seats, desks, furniture, fixtures, and fuel. Crawford & Moses' Dig., § 8942.

It is the contention of the appellant that the bond executed by Rodgers as principal and the Home Accident Insurance Company as surety is a statutory bond, and

that it is liable to persons who furnish materials or labor, and that the district is not liable.

Attention is called to the case of *Reiff* v. *Redfield School Dist.*, 126 Ark. 474, 191 S. W. 16: That was the first case where § 6913 of Crawford & Moses' Digest was construed. There have been a number of cases since that time construing this section.

In the case of *Reiff* v. *Redfield School Dist.*, 126 Ark. 474, 191 S. W. 16, it was held that, in the absence of a statute, the right to sue on a public contractor's bond is dependent entirely on the terms of the bond. It held that an action on such bond could not be maintained without some provision in the bond promising to pay laborers and materialmen. The bond involved in that case was made to the school district instead of the State of Arkansas, and the court held that a mistake in naming the obligee was not a fatal defect in a bond which is executed pursuant to the requirements of a statute in the interest of the public, when it clearly appears from the bond taken as a whole, that it was intended to be such a one as is required by the statute; but it was also said in that case that the undertaking of the bond follows the statute. It was filed in the office of the clerk of the circuit court in the county where the schoolhouse was to be erected, and was approved by the clerk. One of the conditions of the bond also was that the surety would pay for all the labor and material for the building, but there is no such undertaking in the bond in the instant case.

The bond in the instant case clearly shows that it was not intended as a statutory bond. It recites that the principal has entered into a written contract dated April 7, 1930, and amended by supplemental agreement dated May 2, 1930, whereby the principal agrees to supervise the construction of the building, said district agreeing to furnish and pay for all materials entering into the construction of the building, and to furnish the necessary funds to pay for labor.

After reciting the agreement that the contractor had entered into with the school district, the bond continues:

"Now therefore the condition of this obligation is such that, if the principal shall indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract, then this obligation shall be void; otherwise, to remain in full force and effect."

It will be observed that the undertaking was to indemnify the obligee, the school district, against any loss or damage by reason of the failure of the principal to perform the contract. But what contract was to be performed? Evidently the contract mentioned in the bond, showing that the principal was to supervise the construction of the building, and that the district was to pay for the material and labor. There is no provision in the bond anywhere for the payment for material or labor. On the contrary, it clearly appears that the district was to pay for the labor and material, and there is no undertaking on the part of the surety to pay for either labor or material. Moreover it is expressly provided in the bond that no right of action shall accrue upon or by reason hereof to or for the use and benefit of any one other than the obligee named in the bond.

The statute provides that the bond shall be conditioned that such contractor or contractors shall pay all indebtedness for labor and material furnished in the construction of said public building. When the bond itself recites that it will not be liable for the things mentioned in the statutes, this indicates that it was not intended to be a statutory bond.

Appellant calls attention to the case of *Blanchard* v. *Burns,* 110 Ark. 515, 162 S. W. 63, 49 L. R. A. (N. S.) 1199, which held that the statute provided that the bond be placed of record, so that all persons dealing with the contractor may know whether the bond has been executed, and that appellant was chargeable with notice whether or not the bond had been given. However, in that case it was sought to hold the directors liable. There was a demurrer interposed to the complaint, and the court held that the

allegations of the complaint must be taken as true for the purpose of testing the sufficiency of the demurrer.

It is also true that, in the case last mentioned, the directors had entered into a contract with the contractor, not to supervise the work, but to construct the building. That being a contract for a public building, the directors were held not liable for material furnished to a contractor.

In this case there was no contractor for the construction of the building, but the district, through its directors, expressly agreed that it would furnish material and labor. If the appellant and its directors had entered into a contract for the construction of the building, and had taken a bond as provided by statute, then the contractor and surety alone would have been liable.

It is also true that, if the board of directors had entered into a contract for the construction of a public building and had not given a bond, the contractor alone would have been liable. The directors would not have been personally liable, and, they having contracted with a contractor to construct the building, the contractor to furnish labor and material, there would, of course, be no liability of the directors or district where the material was sold to the contractor.

If the directors had entered into a contract for the construction of the building, it would then have been their duty to take a bond from the contractor, as required by § 6913. But they did not do this. It is true that, when they concluded they would have to let the contract to the lowest bidder, they took bids, but they never did enter into any contract with Rodgers except the one above mentioned, where they employed him at $55 per week to supervise the construction of the building.

Under the contract, the most that the directors would have been required to pay Rodgers was $660; $55 a week for not exceeding seventy-two working days, and the statute provides that, when they let a contract for the construction of a building, the bond shall be in a sum not less than double the sum total of the contract.

If they had entered into a contract for the construction of the building, the principles announced in *Blanchard* v. *Burns, supra,* would apply. But they had a right to make the contract they did make, and construct the building in that way, and, having decided not to let the contract for the construction, but to furnish the labor and material themselves, and hire some one to supervise it for them, they were not required under the statute to require any bond at all, and the principles of *Stewart-McGehee Co.* v. *Brewster,* 171 Ark. 197, 284 S. W. 53, apply. In that case it was said:

"It will be observed that it is not obligatory upon the owner of the improvement to require the principal contractor to execute a bond. He may do so or not, as he deems it to his interest. Likewise, the contractor is not required by virtue of the law to execute a bond. He may refuse to do so. It is entirely a matter between the contractor and the owner as to whether the bond required by statute shall be executed. But, where such bond is required by the owner and executed by the principal contractor, then the persons for whose use and benefit the bond is executed must look to the bond as their security for the payment of their claims, and not to a lien on the improvement."

In the instant case, if the bond had provided that the contractor should pay for labor and material, then the surety would be liable, but there is no such provision in this bond.

In the case of *Stewart-McGehee Construction Co.* v. *Brewster, supra,* the bond, by its express terms, bound the contractor and sureties for the use of material furnishers, and other persons having claims which might be the basis of liens, etc. The same is true of the bond in *Lena Lumber Co.* v. *Brickhouse,* 173 Ark. 348, 292 S. W. 1007.

In the case of *Ætna Casualty & Surety Co.* v. *Big Rock Stone & Material Co.,* 180 Ark. 1, 20 S. W. (2d) 180, the condition of the bond was that the contractor should pay off and discharge claims for labor and material.

In the case of *Mansfield Lumber Co.* v. *National Surety Co.,* 176 Ark. 1035, 5 S. W. (2d) 294, the bond was not approved by the clerk nor filed as required by statute, but the bond contained the provision for satisfying all claims and demands, and the court said:

"While the bond is not a statutory bond, in that it was not executed in the manner provided by the statute, its provisions and conditions are broad enough to cover the liability imposed by the statute, had it been executed as the statute provides. We are of the opinion therefore that the bond was not executed for the sole benefit of the owner, but for the benefit of materialmen and laborers as well."

In the instant case, the bond does not provide for the payment of either labor or materials, but expressly states that it is made for the sole benefit of the obligee, the school district, and this court, in a recent case construing § 6913 of Crawford & Moses' Digest, said:

"Here the statute simply makes it the duty of the public officers to take a bond of a certain character, and does not impose any regulations whatever upon the contractor, and does not provide expressly or impliedly that the parties shall not enter into any bond except pursuant to the statute, or which would, in any way, modify or annul any provisions of the statute." *Fidelity & Deposit Co. of Maryland* v. *Crane Co.,* 178 Ark. 676, 12 S. W. (2d) 872.

The bond in the instant case does not contain any provision showing that it was intended to be executed in obedience to the provisions of the statute, but, on the contrary, expressly negatives that idea.

It is next argued by appellant that a contract entered into beyond the powers conferred by statute is null and void. The statute, however, as we have already said, expressly authorizes school directors to build schoolhouses and equip the same.

The decree of the chancery court in each case is correct, and is therefore affirmed.

DEANS *v.* LEGG.

Opinion delivered January 25, 1932.

Rice & Rice, for appellant.

Earl Blansett, for appellee.

MEHAFFY, J. The appellee brought suit in replevin in the justice of the peace court of Roller's Ridge Township, Benton County, Arkansas, alleging that appellant had possession of six head of cattle belonging to him; that he was entitled to the immediate possession, and that the value of the cattle was $300. He filed the regular affidavit to obtain delivery, and also filed bond. An order of delivery and summons were issued.

The appellant filed an affidavit for change of venue, and the case was transferred to an adjoining township. After the case was transferred, the appellant filed an independent suit against appellee in the justice of the peace court, to which the former case had been transferred.

The appellant alleged in his complaint that there was in effect a stock law in the township where appellant's suit was brought and where both parties lived, forbidding cattle to run at large; that he had on his farm two acres of tomatoes; that the appellee permitted six head of cattle belonging to him to go upon the premises of appellant and destroy said tomatoes; that he impounded said live stock and held same for fees; for taking up and impounding, $3; for feeding same two days, $6; for giving written notice to owner, $1; amounting to $10; and $125 for damages to his crop.

Appellee filed a motion to dismiss appellant's complaint, alleging that the damage sought was to real estate, and the justice had no jurisdiction.

The justice court rendered judgment against appellant in favor of appellee for $20. The appellant appealed to the circuit court, where appellee presented his motion to dismiss for want of jurisdiction. The circuit court sustained the motion and dismissed the cause for want of jurisdiction. The case is here on appeal from the circuit court.

The record does not show whether the replevin suit brought by appellee has ever been tried, and the only question for us to determine is whether the justice of the peace court had jurisdiction of the subject-matter of the suit brought by appellant. Both parties argue the question as to whether the justice of the peace had no jurisdiction because the suit involved trespassed-on land. We find it unnecessary to determine this question.

As to the jurisdiction of justice of the peace courts, the Constitution provides, among other things: "And in all matters of damage to personal property where the amount in controversy does not exceed the sum of $100." Article 7, § 40, of the Constitution.

Appellant states that there may be some question as to whether the tomato crop was within the jurisdiction of the justice of the peace court, but states that, if it was personal property, it could not be maintained in the justice court for damages exceeding $100. If it was trespass on real property, it is conceded that the justice court would have no jurisdiction.

An early case, probably the earliest one deciding this question, is *Hunton* v. *Luce,* 60 Ark. 146, 29 S. W. 151. 28 L. R. A. 221, 46 Am. St. Rep. 165. The court in that case held that a plaintiff might bring his action within the jurisdiction by remitting a portion of his claim, but stated that the amount claimed by plaintiff is the sum in controversy, and determines the jurisdiction.

This court again, in the case of *Kilgore Lumber Co.* v. *Thomas,* 95 Ark. 43, 128 S. W. 62, and in the case of

Barron-Fisher-Caudill Co. v. *Rhoda,* 126 Ark. 554, 191 S. W. 229, reached the same conclusion, approving the doctrine announced in *Hunton* v. *Luce.*

It is therefore settled by the decisions of this court that the justice of the peace has no jurisdiction where the suit is for damages to personal property, and the amount in controversy exceeds $100. Therefore, whether the suit was for damages to personal property or trespass to real estate, the justice of the peace had no jurisdiction.

Appellant, however, says that his complaint should not have been dismissed, because he also sued for cost and fees amounting to $10, which was within the jurisdiction of the justice of the peace. These items, however, were necessarily involved in the original suit brought by appellee, and could not, in the same court, be the basis of another and independent suit for these amounts.

The suit, being for $125 damages, was not within the jurisdiction of the justice of the peace court, and the judgment of the circuit court is therefore affirmed.

KEARNS *v.* STEINKAMP.

Opinion delivered January 25, 1932.

Leo P. McLaughlin and *Richard M. Ryan,* for appellant.

Murphy & Wood, for appellee.

McHaney, J. Appellant brought this action to recover damages from appellees for the injury and death of her son, Joe Kearns, which occurred on the 13th day of July, 1930, at a swimming pool and resort owned by appellees and known as Ozark Lithia Springs, near Hot Springs, Arkansas. Joe Kearns was a frequent visitor, and had been for some years prior to its purchase by appellees, to the swimming pool at Ozark Lithia Springs, and was well acquainted with said pool and its condition. On the above date, while swimming therein, he dived off the concrete wall, some 14 to 18 inches above the surface of the water, and struck his head on a raft provided by the owner for the amusement of his patrons and safety and convenience of inexperienced swimmers, breaking his neck, from which he died some hours later. Three grounds of negligence were alleged: (1) in not keeping the swimming pool free from obstructions, mak-

ing it a safe place for swimmers; (2) by permitting said wooden raft to be in the pool; and (3) in permitting the raft to become water-soaked causing it to sink below the surface of the water and not plainly visible to bathers in the pool. Appellees denied that they were guilty of any negligence, and stated that the injuries received by Joe Kearns which resulted in his death were caused by his own negligence in diving against said raft because it was plainly visible above the surface of the water and could have been seen by him if he had looked. They also pleaded that deceased assumed the risk. The case was tried on the theory that appellees permitted the raft to become water-soaked which caused it to be submerged below the surface of the water and not easily visible to swimmers in the pool, and that it was a dangerous instrumentality in this condition. The court instructed a verdict for appellee, Sophia Steinkamp, but submitted the liability of William Steinkamp to the jury. There was a verdict and a judgment for him, and the appellant has brought the case to this court for review, charging a number of errors of the trial court for a reversal.

The first argument made is that "the proof in the case preponderated that the Steinkamps were guilty of what we might deem gross negligence in this case. The verdict was wrong." We do not understand that appellant contends there was no substantial evidence on which to base the verdict, but only that it is against the preponderance of the evidence. Even though we might think that the verdict was against the preponderance of the evidence, this would be no cause for this court to reverse the judgment. The rule in this court is that the verdict of the jury will not be disturbed unless there is no substantial evidence to support it. A number of appellant's witnesses testified that the raft had become water-soaked and submerged so that it would not float above the surface of the water, and on the other hand, a similar number of appellees' witnesses testified exactly to the contrary—that the raft floated two or three inches above the surface of the water, was plainly visible, and being

four or five feet wide and ten or twelve feet long, would support several swimmers at the same time without sinking, and the undisputed proof is that when Joe Kearns dived against the raft he fell across one corner of it, and that it supported his body which was paralyzed from the arms down. This made a conflict in the evidence which the jury has settled against appellant, and under the settled rule of this court it must be permitted to stand.

Error is also assigned because the court directed a verdict in favor of Mrs. Steinkamp. The undisputed proof is that Mr. Steinkamp purchased the property and took the deed in their joint names creating an estate by the entirety, but that he was in the entire charge of operating the property, especially the swimming pool, with which she had nothing to do. There was no relation of master and servant or principal and agent subsisting between them, and therefore the doctrine of *respondeat superior* has no application, and the court correctly instructed a verdict in her favor.

Error is also assigned because the court did not excuse certain jurors in forming the petit jury to try the case. It is said that these jurors were incompetent to serve under the provision of act 135 of the Acts of 1931, which became effective June 20, 1931. This act provides in § 1 that no citizen shall be eligible to serve on grand and petit juries oftener than one regular term of the court every two years, and it is said that some of the jurors had served within the past two years. Appellant made no objection to any of these jurors for this or any other reason before the trial of the case, but raised it for the first time in the motion for a new trial. The objection therefore came too late. Litigants will not be permitted to thus speculate on the verdict of the jury. *Durben* v. *Montgomery,* 145 Ark. 368, 224 S. W. 729; *Mo. Pac. Rd. Co.* v. *Bushey,* 180 Ark. 19, 20 S. W. (2d) 614; *Fones Bros. Hdw. Co.* v. *Mears,* 182 Ark. 533, 32 S. W. (2d) 313.

Error is assigned because the court excluded the testimony offered by two witnesses relating to an injury to

the hand of one of them by coming in contact with the raft some time prior to the injury in question. We think the court properly excluded the testimony of these witnesses because it was not shown that the injury was caused by the water-soaked or submerged condition of the raft, and this is the ground the court excluded it on.

It is also argued that the court erred in refusing to permit appellant to prove by two witnesses that the raft was taken out of the pool after the accident and why. This testimony was not relative or material to the inquiry, as the negligence alleged and relied upon was whether appellant was negligent in keeping a water-soaked and submerged raft in the pool. Subsequent precautions taken to prevent a recurrence of an injury cannot be proved to establish negligence in the first place. *Prescott & N. W. Ry. Co.* v. *Smith,* 70 Ark. 179, 67 S. W. 865; *Ft. Smith L. & T. Co.* v. *Soard,* 79 Ark. 388, 96 S. W. 121; *Collison* v. *Curtner,* 141 Ark. 122, 216 S. W. 1059, 8 A. L. R. 760. Also Frank Eveland's testimony was properly admitted, as it was directed to the point in issue, that is the condition of the raft.

A number of objections are made to instructions given and instructions refused, all of which we have examined carefully and do not find them open to the objections made. As to the refusal to give appellant's No. 7, it was properly refused, as it assumed that the raft was water-soaked and submerged—the very question at issue in the case. We think the court fully and fairly instructed the jury on every question at issue, and that the instructions as a whole were correct. It would take too much space in the opinion to set them out and comment on them separately.

The objection made to the language used by one of the attorneys of appellee in his argument to the jury we think is without merit, and could have resulted in no possible prejudice. The language used was: "George Leatherman was out there when this happened. He is an officer of the county. He is human, and his sympathy would have been with the boy who lost his life." This

statement was made in connection with the failure of appellant to produce available witnesses, and we think was proper under the circumstances.

It is finally insisted that the court erred in failing to grant a new trial on account of newly discovered evidence. This newly discovered evidence appears to be cumulative merely, and the court did not err in refusing to grant a new trial on this ground, as it is well settled that the newly discovered evidence must be more than merely cumulative, and that due diligence must be shown in an effort to get the evidence before the trial. We find no error, and the judgment is affirmed.