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ROSS *v.* CLARK COUNTY.

Opinion delivered January 18, 1932.

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McMillan & McMillan, for appellant.

D. H. Crawford and *J. H. Lookadoo,* for appellee.

MEHAFFY, J. On October 22, 1930, the appellant, J. B. Ross, filed a claim in the county court of Clark County

for damages to his land and crop, caused by taking land for right-of-way, damage to land other than that taken, and damage to crops, totaling $13,000. The claim was disallowed by the court, and an appeal was taken by Ross to the circuit court, where judgment was rendered in favor of Ross for the sum of $187.50.

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

Prior to filing the claim in the county court, Ross, the appellant, had signed the following agreement, with other landowners:

"We and each of us agree to the following agreement, that if all fences are moved and replaced in the proper place necessary for the protection of our property caused by the building of the said highway at the expense of the county or State, and all houses in or immediately adjacent to the proposed right-of-way are moved at the expense of the State or county and located on the spot of ground selected by the owner, to be a reasonable distance from the present site and from the proposed right-of-way across our property, we will give the right-of-way across our property." (Signed by appellant and others.)

The evidence does not show when this agreement was signed, but the State Highway Commission filed a petition in the Clark County Court for changing and widening State highways, and on September 25, 1930, there was an order of the county court of Clark County granting the petition of the Highway Commission.

It was after the filing of the petition by the Highway Commission and the order of the county court thereon, that the appellant filed his claim in the county court of Clark County asking damages as above mentioned.

The evidence was in conflict as to the market value of the land taken and damaged, and was in conflict as to the amount of damages caused by the construction of the highway. It is not necessary to set out the evidence in this opinion.

The agreement set out above, which was signed by appellant, does not show either the location of the road or the width of the right-of-way donated, and it is impossible to tell from the record what changes were made, if any, through appellant's land, by the order of the county court. This, however, is immaterial. The evidence shows that the right-of-way mentioned in the agreement was to be 100 feet wide. It also shows that the county was to pay all the damages caused by the construction of the road, and that the county was to remove and rebuild the fences, and it is claimed that this was not done.

The evidence that the county agreed to remove and rebuild the fences is undisputed. Ross testifies positively that it was agreed at the time the agreement above set out was signed that the county would build the necessary fences, and, if any damages occurred, the county would pay for them and leave the land in just as good shape as they found it; that it would be necessary to build about one-half mile of fence on both sides. He also testified that it would cost from $100 to $150 to build the fences.

It is true the county judge testified that he made no agreement outside of the written agreement, but he admitted that he had a conversation with Mr. Ross in regard to the matter, and said, if Mr. Ross spoke to him about the fences, he did not have any recollection of it. He therefore does not dispute Ross' testimony, but simply says he does not remember it.

Wells testified that the right-of-way was to be 100 feet. This is not in the written agreement, and he therefore must have made some agreement in addition to what was written. The agreement to donate the land was never carried out.

At the request of the appellee, and over the objections of the appellant, the court gave the following instructions:

"No. 1. If you should find for the plaintiff, the measure of his damages is the fair market value of the

land actually taken for the roadway, other than the amount of land donated by the plaintiff to secure said roadway, plus the damages, if any, to the remaining land of plaintiff not taken, caused by the construction of the new highway, less the benefits to the land, if any, by reason of the construction of the new highway.

"No. 2. You are told that, in arriving at the amount of plaintiff's damages, it is your duty to consider the benefits which have accrued to his land by reason of the construction of the new highway, if you find that the land was benefited thereby, and that you should deduct said benefits, if any, from any damage you may find has been caused to plaintiff's lands by reason of the construction of said highway. And, if you find that the benefits derived equal or exceed the damages, you should find for the defendant Clark County."

These instructions were erroneous, and should not have been given, for the reason that the court told the jury that they could consider the market value of the land taken other than the amount donated, plus damages, if any, to the remaining land, not taken, caused by the construction of the road, less the benefits to the land, if any, by reason of the construction of the highway. The correct measure of damages is the market value of the land taken, including that donated, plus the damages, if any, to plaintiff's land not taken, less the special benefits, if any, by reason of the construction of the highway. In other words, the appellant was entitled to recover the market value of all land taken, and the damage done to land not actually taken, less the special benefits to appellant's land, if any, by reason of the construction of the highway.

The Constitution provides that private property shall not be taken for public use without compensation. It has, however, been settled by the decisions of this court that, in taking private property for public use, the benefits accruing to the owner's land may be taken into account in measuring his damages. *Holt* v. *Crawford County,* 169 Ark. 1069, 277 S. W. 520; *Hempstead County* v. *Huddles-*

ton, 182 Ark. 276, 31 S. W. (2d) 300; *Weidemeyer* v. *Little Rock,* 157 Ark. 5, 247 S. W. 62; *Cribbs* v. *Benedict,* 64 Ark. 555, 44 S. W. 707.

The benefits mentioned in the decisions mean special benefits.

This court said: "The view which seems to us to accord with reason, and which is supported by high authority, is that where the public use for which a portion of a man's land is taken, so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits. And the benefits which will be thus considered must be those which are local, peculiar, and special to the owner's land who has been required to yield a portion *pro bono publico.*" *Paragould* v. *Milner,* 114 Ark. 334, 170 S. W. 78.

The State or county or any other agency taking private property for public use has no claim against the owner of such property because the improvement benefited the owner. It is only permitted to set off the benefits against the damages to the owner's land. Where a public improvement is made by assessing benefits against property, of course the benefits may be set off against any damages, but when private property is taken for public use, under power of eminent domain, it must, under the provisions of our Constitution, be paid for. The owner must be compensated for the property taken or damaged, and he is not compensated by benefits which all other landowners receive without any payment therefor. The benefits therefore which may be set off against the damages are special benefits accruing to the land of the particular owner.

To hold that benefits that accrue to all landowners could be set off against the damages would not only be unjust, but it would violate the Constitution which prohibits the taking of private property for public use without compensation. The constitutional provision reads 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." Article 2, § 22, of the Constitution.

"And it has been held that the opinions of nonexperts who have had an opportunity of special observation are admissible in cases where the facts are stated and are such as to permit a nonexpert to reach an intelligent opinion, and it appears that the opinions derived therefrom are more valuable to the triers than those of scientific men personally unacquainted with the facts. To preclude nonexpert opinion in such cases would be to close a wide and important avenue to the truth." Jones on Evidence, vol. 3, 2294.

The general rule is that the opinion of a witness cannot be given—the witness relating the facts from which the jury form their opinion. The rule, however, is not universal. Where the witness has had the means of personal observation, and the facts and circumstances which lead the mind of a witness to a conclusion are incapable of being detailed or described so as to enable any one but the observer himself to form an intelligent conclusion from them, the witness is often allowed to add his opinion or the conclusion of his own mind. Lawson on Expert and Opinion Evidence, 2d ed. 509; *Fort* v. *State,* 52 Ark. 180, 11 S. W. 959; *Galveston H. & S. A. Ry. Co.* v. *Daniels,* 9 Tex. Civ. App. 253, 28 S. W. 548; *McLeod* v. *Lee,* 17 Nev. 103, 28 Pac. 124; 22 C. J. 531-561.

If there were crops growing on the land at the time it was taken or damaged, it would of course be proper to take into consideration the value of the crops destroyed or damaged.

We have not discussed the instructions requested because in another trial of the case the parties will be governed as to the measure of damages by the rule above announced.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

TAYLOR *v.* DERMOTT GROCERY & COMMISSION COMPANY.

Opinion delivered January 18, 1932.

Gillison & Gillison, for appellant.

John Baxter, for appellee.

McHANEY, J. On November 15, 1930, O. F. Townsend, being indebted to appellee in the sum of $86.29 and being a depositor with a checking account in the Chicot Trust Company, drew his check on the trust company in favor of appellee and delivered same to its agent. On the same date said agent took the check to the trust company, indorsed it, asked for and received a cashier's check payable to appellee for the same amount. This cashier's check was never paid because the trust company was never open for business again after November 15, and was placed in appellant's charge for liquidation on November 24. Appellee presented its claim to the chancery court for allowance as a preferred claim, which the Bank Commissioner disputed, and the matter was presented on an agreed statement of facts as above set out, and, in addition that appellee's agent was well known to the trust company, and the Townsend check would have been cashed if desired by him, but that he elected to take the cashier's check instead. Appellee carried no account with the trust company, its office being at Eudora, about sixteen miles from Lake Village, the home of the trust company. The claim was allowed as a preferred one, and the Bank Commissioner has appealed.

It is admitted by appellee that, unless authority for the classification of this claim as preferred is found in act 107, Acts 1927, p. 297, it is a general and not a prior

or preferred claim. Said act provides that "all creditors of a bank of which the Commissioner has taken charge are classifiable either as secured creditors, prior creditors or general creditors." The act then proceeds to define each class of creditors and there are seven subdivisions defining "prior creditors." Appellee relies upon the 6th subdivision as covering its case, which is as follows: "(6) the owner of the proceeds of a collection made by said bank and not remitted by it, or of which its remittance has not been paid, when such collection was made otherwise than by honoring a check or other order upon said bank or by a charge against the account of a depositor of said bank, and the said collection has had a distinctive identity in the hands of said bank, has actually increased its cash assets, and has not resulted in merely shifting its liability upon its books from one of its creditors to another or new creditor." Appellee's situation fails to fit this definition in any respect. The bank made no collection for appellee. Its own agent made the collection from Townsend, presented the check to the bank and asked to and did become its creditor by taking a cashier's check. Compare *Taylor* v. *Corning Bank & Trust Co.*, 183 Ark. 757, 38 S. W. (2d) 557. Also the bank honored the check of its depositor. No new funds were deposited in the bank, but the bank simply shifted its liability from one creditor, Townsend, to another creditor, appellee. Not being a collection made by the bank, the 6th subdivision of the act has no application. Nor does any other provision of the act defining prior creditors apply. The act further provides that "all creditors not in this section hereinabove classed as secured or prior creditors of said bank, including the State of Arkansas and any of its subdivisions, shall be general creditors thereof." Therefore, appellee is a general creditor, and the court erred in holding otherwise.

Reversed and remanded with directions to allow the claim as a general one.

DETROIT FIDELITY & SURETY COMPANY *v.* PRIDDY.

Opinion delivered January 18, 1932.

Horace Chamberlin, for appellant.

Bohlinger & Rollow, for appellee.

MCHANEY, J. Petitioner is a foreign corporation, organized under the laws of Michigan, engaged in the casualty, fidelity and corporate surety business, and is so engaged in this State in compliance with its laws, with a general agency in Little Rock. It has in compliance with the law designated the Insurance Commissioner of this State, domiciled in Little Rock, Pulaski County, as its agent for service of process. On June 26, 1931, Fred Burnett, Jr., filed a suit against it in the circuit court of Yell County, Arkansas, Dardanelle District, alleging

that prior to October 29, 1930, petitioner became surety for the completion of State Highway Project No. 4137 in Franklin County Arkansas; that subsequent to said date it took over the work of the principal, entered upon said work, became the principal contractor and completed same; that a part of the work to be done was the painting of a line down the middle of the highway constructed; that, after painting the line and in order to deflect traffic from the freshly painted line, it caused to be placed in the highway large rocks and neglected and failed to display warning lights for the safety of the public; that while riding along said highway as a guest in an automobile same was wrecked by coming in contact with one of said stones, and that he received painful injuries, for which he prayed damages in the sum of $2,990. Summons was issued on said complaint and service had on the Insurance Commissioner. On these facts petitioner alleges that the respondent as judge of the Yell Circuit Court has no jurisdiction to proceed in the premises for the reason that said court has no jurisdiction of the person of the petitioner and acquired none by service outside of Yell County. It states that it is not doing any business in Yell County, and that, it has no agent therein, and that, unless prohibited by this court, the respondent will proceed, assume jurisdiction of said cause, render judgment against it, and cause it irreparable injury, all in violation of the rights guaranteed to it by § 11 of article 12 of the State Constitution, and by the 14th Amendment to the Constitution of the United States wherein the equal protection of the laws are accorded it.

The respondent entered his appearance in this court, and agreed that he would take no action in the case pending in his court until this court passes upon this petition.

Petitioner did not appear in the Yell Circuit Court and object to the jurisdiction of the court, nor did it move to quash the service had upon it for lack of jurisdiction. The respondent, however, appears here and has filed a brief asserting his jurisdiction. The general rule is that objection to jurisdiction must be raised in

the lower court and overruled before the writ of prohibition will issue, but this rule is subject to certain exceptions. It has been held by this court that objection in the inferior court to its exercise of jurisdiction is not a jurisdictional fact upon which the power to issue the writ depends, but is discretionary and is not necessary where it would obviously be futile and would result in unnecessary or hurtful delay. *Monette Road Improvement District* v. *Dudley,* 144 Ark. 169, 222 S. W. 59. Also that where the respondent judge appears in response to the petition for prohibition and asserts jurisdiction of his court to proceed, it is unnecessary to await the making of formal objection in the court below. *Nissen* v. *Elliott,* 145 Ark. 540, 224 S. W. 958. See also *State* v. *Martineau,* 149 Ark. 237, 232 S. W. 609. We therefore follow these decisions and hold that it is unnecessary and would be futile to postpone the case for formal objection in respondent's court to the jurisdiction, since he now appears and asserts jurisdiction of his court to proceed.

The principal question to be decided is that of the jurisdiction of the Yell Circuit Court over the person of petitioner. The applicable statute is that relating to guaranty and surety companies. Section 6132, Crawford & Moses' Digest, provides that both domestic and foreign surety companies may transact a surety business in this State on compliance with this statute and not otherwise. Section 6133 provides: "No surety company incorporated under the authority of this State, or of any other State or foreign country shall, directly or indirectly, transact business in this State until it shall have first appointed in writing a duly authorized agent in this State to be the true and lawful agent of such company in and for the State, upon whom all lawful process in any action or proceeding against the company, which said action or proceeding may be instituted in the county in which the plaintiff resides or has its principal office if a corporation, may be served with the same effect as if the company existed in this State. Said appointment of agency

shall stipulate and agree on the part of the company that any lawful process against the company which is served on said agent shall be of the same legal force and validity as if served on the company; and that the authority shall continue in force so long as liability remains outstanding against the company in this State. * * * Service upon such agent shall be deemed sufficient service upon the principal."

Petitioner complied with the above statute, and has named the Insurance Commissioner as its agent for service, and service was had upon such agent. Was the service good? The plaintiff in the suit below is a resident of Yell County. It will be seen that the above statute makes no discrimination between foreign and domestic surety companies. Both are treated exactly alike. Neither can do any business in this State except upon compliance with said section. It therefore appears to us that this statute does not offend against § 11 of article 12 of our Constitution which provides that foreign corporations may do business in this State under such restrictions as may be provided by law, and, among other things, "as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State." Nor does it offend against the equal protection clause of the 14th Amendment to the Constitution of the United States. Instead it provides for the equal protection of all surety companies, both domestic and foreign, and this is a proper classification, one within the power of the Legislature to make, as foreign surety companies are placed in the same class with "like corporations of this State."

The case of *Power Manufacturing Company* v. *Saunders*, 274 U. S. 490, 47 S. W. 678, is relied upon by petitioner as supporting its contention. We think the rule announced in that case has no application here, for the reason that no discrimination is made under this statute in favor of domestic corporations. It is true that petitioner is not engaged in business in Yell County, and that the injury for which the suit was brought was received in

Franklin County while petitioner was engaged in completing a highway for a person for whom it was surety. This was an incident of its surety company business. It had the authority under its contract to take over the work and complete it. In doing so, if it was guilty of negligence causing injury to another, an action thereon may be said to grow out of its business as a surety company. The statute provides that lawful process may be had upon it "in any action or proceeding." We are therefore of the opinion that the action was properly brought in the county of the residence of the plaintiff, and that the service had does not violate any constitutional right of petitioner. Compare *Grand Court, etc.*, v. *Carter,* 184 Ark. 819, 43 S. W. 531.

The writ will be denied.

555 INCORPORATED *v.* LEMING.

Opinion delivered January 18, 1932.

Joe D. Shepherd and *Raymond Jones,* for appellant.

Bullock & Priddy and *Hays & Smallwood,* for appellee.

BUTLER, J. George Leming was engaged in business in Russellville in the name of Leming Drug Company and had been handling for a number of years to a greater or less extent Atwater Kent radios both before and after the appellant became the general distributing agent for these radios in the State of Arkansas. The contract involved in this litigation was entered into between the two on August 1, 1927, to continue to June 1, 1928, under the terms of which Leming agreed, among other things, to sell Atwater Kent radio equipment exclusively and agreed to handle, between the dates mentioned, radio speakers and furniture to the net value of $4,505. Among the provisions of the contract was one by which it was agreed that the contract might be terminated at the option of either party by written notice and when so terminated no claim for damages caused by the cancellation should be claimed or allowed by either party.

Pursuant to the contract, Leming purchased radio equipment from the appellant amounting, as he claimed, to about $3,000 up to December 1, 1927 and at that time he had a considerable amount of merchandise on hand unsold. No other radio equipment was purchased by Leming after December 1, and there remained a balance due on equipment already purchased the sum of $158.69. This sum not being paid the appellant brought suit to recover the same and Leming defended on the ground that the appellant had breached its contract by refusing to sell to him after December 1, 1927, and by selling to a local competitor, resulting in damage to him in a sum greatly in excess of the balance due appellant for merchandise purchased, and prayed judgment against the appellant for the amount of damage in excess of the balance due. On a trial of the case Leming recovered judgment on his cross-complaint, from which judgment is this appeal.

It is first contended by the appellant that it was entitled to a directed verdict in the amount sued for because, as it claims, the undisputed evidence shows that Leming had breached the contract by handling other

radio equipment than Atwater Kent in violation of his contract before it refused to make further sales to him and before it sold Atwater Kent radios to others in Russellville. The evidence on the part of appellant was to the effect that one Johnson, its travelling salesman, visited the store of Leming about December 1, 1927, for the purpose of soliciting an order for radios under the contract and was told by Leming that he would not buy any more and gave as a reason that he (Leming) could not sell them; that at this time Johnson discovered that Leming had in stock nine radios that were not Atwater Kents but which were known as Radiolas. Leming testified that at the time Johnson made the visit he had one Radiola on the floor—not over two—that these had been bought as special orders for customers who wanted electric radios and did not want the Atwater Kent, which at that time was a battery radio; that this happened before the appellant sold its radios to a competitor of Leming and before it refused to make further sales to him. Leming further testified, however, that these were the only Radiolas ever handled by him and that before purchasing these he called the manager of the appellant company telling him of the order and asking if they had any electric radios; that he was informed that the appellant did not handle any such and that they were not worth a damn, and it was then only that he bought the Radiolas; that he did not handle them regularly but purchased these for two customers who would not buy Atwater Kents and who wanted Radiolas; that Johnson was mistaken about seeing nine Radiolas in his stock. It is to be inferred from his testimony that those seen by Johnson were the ones ordered specially and that there was not more than one—perhaps two—in his store at the time, and that he did not refuse to purchase from Johnson on that occasion, but that Johnson turned and went out of the store when he saw the Radiolas. There was no written notice given by appellant that it had elected to cancel the contract.

We think the circumstances presented a question of fact for the jury as to whether or not the conduct of Leming was a breach of his agreement to handle Atwater Kent radio equipment exclusively within the spirit of the contract. The appellant was entitled to have that question submitted to the jury, and this was embodied in instruction No. 7 requested by the appellant and refused by the court. Instruction No. 7 is as follows: "The jury are instructed that if you find that the contract involved in this case contained a provision that the defendant would not handle any radios other than Atwater Kent and that the defendant, in violation of such provision, handled other radios, he must be chargeable with a breach of the contract in question and cannot recover on his cross-complaint without you find from a preponderance of the testimony that the plaintiff first breached the contract." It is argued by the appellee that the oral instructions given by the court, to which no exceptions were saved, covered every phase of the case and the one presented by instruction No. 7, *supra.* We have carefully examined the instructions given by the court and are unable to agree with the appellee that instruction No. 7 was covered by the instructions given and conclude that the refusal of the court to give instruction No. 7 was prejudicial error on account of which the judgment of the court below must be reversed.

Since there must be a new trial of this case, we call attention to the instruction given by the court on the measure of damages which we think is erroneous. At the close of oral instruction No. 2 given by the court, the following language is used: "If you find that the plaintiff breached the contract and the defendant was damaged, the measure of damages, or the items that go to make up the damage, or the things you may consider in arriving at the damages, are the amounts that the defendant expended in building up the trade in advertising, hiring of help and the other things, if any, that has been charged and proved by the testimony, and the reasonable profits that he would have made had the contract continued in by

both parties." In testifying regarding his damage, Leming stated that he had been dealing with appellant since 1924, and that Mark West had been handling the radios for him; that West was a good radio man, and that he paid him $125 a month; that after the execution of the contract of August 1, 1927, he paid $32 for a mailing list and introduced a receipted account of the newspaper for advertising from September 30, 1927, to December 1, following for $99.25, and stated that the majority of this was for advertising Atwater Kent radios that December is the best month for the sale of radios on account of the Christmas trade and that he had estimated his damage at $950 for money expended in advertising and for loss of profits.

We think the language used, "hiring of help, and the other things, if any, that has been charged and proved by the testimony and the reasonable profits that he would have made," is vague and gave the jury no proper rule but allowed them to indulge in speculation. It is well settled that, before recovery may be had for prospective profits, the evidence should be such as to establish the amount of profits expected with a reasonable degree of certainty and a mere estimate that so much profit would have been made, without facts shown upon which that estimate, is based is not sufficient. *S. W. Tel. etc., Co.* v. *Memphis Tel. Co.,* 111 Ark. 474; *Johnson* v. *Inman,* 134 Ark. 345; *Marvel Light, etc., Co.* v. *Gen. Electric Co.,* 162 Ark. 467.

Justices Smith, Kirby and McHaney do not agree with the conclusions herein stated, but are of the opinion that the evidence, fairly interpreted, discloses a proved state of case from which it follows as a matter of law that the contract was breached by the appellee in handling one or more Radiolas, and that the judgment should be reversed, and judgment entered here for the balance due on account about which there is no dispute. From the views entertained by the majority, however, it follows that the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

MORRIS *v.* LESSEL.

Opinion delivered January 25, 1932.

[redacted]

George E. Morris, for appellant.

Albert G. Sexton and *Claude V. Holloway,* for appellee.

McHANEY, J. Appellants and appellee entered into an oral agreement for the handling of cattle in February, 1930, by which appellants were to furnish money to buy cattle and the pasture land for grazing and fattening the cattle on, and appellee was to buy them, put them on the pasture, butcher and sell them as beef on the local market, all at his own expense, and turn the sale price over to appellants, until they were refunded the money paid out for cattle. Thereafter the sales were to be divided equally, and, on a termination of the agreement, no definite time for which being agreed upon, appellants and appellee were to divide the property on hand equally. Acting under this agreement, appellee purchased with funds supplied by appellants some sixty odd cattle, put them on the pasture, fattened, butchered and sold a sufficient amount by November, 1930, to repay appellants all the funds advanced and a small sum in addition thereto. A disagreement arose between them, because of an order appellants gave their agent not to let appellee butcher any more cattle or to remove same from the pasture without an order from them. Thereupon appellee demanded his half of the remaining cattle, which was refused, and this suit followed. A receiver was appointed to take charge of the property, which was by consent ordered sold, and the proceeds deposited in the registry of the court. On a trial the court found that the contract between them was a partnership contract, and that each was

entitled to one-half the proceeds of sales including hides, after appellants had been paid the sum advanced, and that each party was entitled to one-half the proceeds of the sale of the remaining cattle which the receiver was ordered to make, each party to pay one-half the costs in that court. Decree was accordingly entered.

For a reversal of the judgment, appellants first insist that the agreement did not constitute a partnership, but only a working agreement or employment of appellee by them, under the decisions of this court in *Rector* v. *Robbins,* 74 Ark. 437, 86 S. W. 667, and *Kent* v. *State,* 143 Ark. 439, 220 S. W. 814. We think it unnecessary to determine this question, as we are of the opinion that the case was correctly decided by the trial court, whether they were partners or not. All the parties agree that the above-mentioned agreement was entered into, and no time was fixed for the termination thereof. They did operate under it for about ten months during which time appellants were paid back all their investment in money. Thereafter each party had and owned a half interest in the property, and either could terminate the agreement on reasonable notice to the other and divide the remaining property. Whether the venture turned out to be profitable or otherwise is of no concern to the courts. Nor does it matter who first broke the contract, as either had the right to terminate it at any time.

In this view of the matter, it becomes unnecessary to determine whether the contract was one of partnership or employment, as in either case appellee is entitled to one-half the funds in the registry of the court.

Affirmed, with costs to appellee in this court.

HUFF *v.* HOT SPRINGS SAVINGS, TRUST AND GUARANTY COMPANY.

Opinion delivered January 25, 1932.

[redacted]

C. Floyd Huff, for appellant.

George P. Whittington, for appellee.

BUTLER, J. This case is presented on the record made in the probate court and in the circuit court on appeal, from which it appears that the Hot Springs Savings Trust & Guaranty Company was named as executor under the last will and testament of Miss Blanche Bell, who died prior to the 21st day of June, 1926, and that said company qualified and proceeded to act as such executor. At some time after the company began to function as executor, its attorney was informed by C. Floyd Huff, an attorney of Hot Springs, that he had in his possession some jewelry of the estimated

value of $691, as the agent of Margaret Huff, wife of C. Floyd Huff, Jr., which property had been given her by the testatrix in her lifetime; that the inheritance tax on this property would amount to $40, which Huff offered to give to the executor for use in the settlement of the inheritance tax due by the estate. Shortly after this a petition was filed in the probate court by the executor alleging that, after the filing by it of an inventory of the assets of the estate, it learned that C. Floyd Huff had in his possession certain property which was listed in the petition, and alleging that by the terms of the will all of the jewels belonging to the testatrix were bequeathed to Blanche Bell Washington and Edith Bell Alcorn. The petition further alleged that, from the estimated value of the property, an inheritance tax would be due the State amounting to $40, which sum the said Huff had tendered to the executor for payment to the State, but that he had refused to deliver the property to the executor. The prayer was for a citation upon the said Huff requiring him to submit himself to examination with respect to the possession, ownership and value of the property in question. This petition was filed on the 22d day of June, 1926, and the citation accordingly issued.

No further action was taken or pleading filed until the 25th day of May, 1927, when there was filed in said court the answer of C. Floyd Huff to the petition for citation, in which, among other things, he recited the facts heretofore stated with reference to the possession of the jewelry and alleged that he was in possession of the articles named in the petition which articles had been delivered to him by Margaret Huff in the lifetime of the testatrix, and that the said Margaret Huff was the owner of said jewelry, the circumstances on which her claim of ownership was based being set out in detail in the said answer. It was also alleged that the estate was making no claim to the jewelry, as under the terms of the will all of the jewelry of the executrix was bequeathed to

the before-named legatees who were claiming ownership of the same and were the real parties in interest.

Thereafter a petition was filed in the name of the said legatees in which the jewelry was described in detail, and, as in the petition first filed by the executor, that the allegation that the jewelry was in the possession of Margaret Huff who was concealing the same and refusing to deliver it to the executor. There was a prayer for a citation against Margaret Huff requiring her to appear in court and for an order requiring her to deliver the said property to the executor. This citation was duly served on Margaret Huff on the 31st day of May, 1927. It seems that Margaret Huff filed no written response to this petition, but on the 7th day of June, 1927, as shown by the order and judgment of the probate court, she appeared therein in person and by her attorney. The record recites that the executor also appeared by its president and attorney, and "this cause is submitted to the court on the original citation issued herein against the said Margaret Huff, the answer of the said Margaret Huff thereto in which she claims ownership of the personal property involved, oral testimony taken in open court, and the argument of counsel," etc. The order further recited the description of the jewelry and found "that it was the property of the testatrix prior to her death and is claimed by Margaret Huff as a gift from the deceased during her lifetime, and that there is no evidence submitted to the court to sustain the alleged gift except the testimony of the said Margaret Huff who claims the same, and that the said Margaret Huff is not a competent witness, being prohibited under the Constitution of the State of Arkansas from testifying, and the alleged gift has not been established by legal evidence." The court thereupon adjudged "that the claim of the said Margaret Huff to the aforementioned personal property is denied, that said personal property is a part of the assets of the estate of the deceased, and the said Margaret Huff be, and she is hereby,

ordered to deliver the said personal property to the executor," etc. In the same order is a recital that "Margaret Huff filed her motion and affidavit for appeal to the Garland Circuit Court, and the appeal is granted."

On June 28, following, C. Floyd Huff and Margaret Huff filed their motion in the court to set aside its findings and order of June 7, 1927, directing that respondents then deliver possession of the jewelry to the executor, and as ground for the motion alleged "that this court was without jurisdiction to try the issue raised by the pleadings in this case as to the ownership of the articles in dispute, and that this court was without jurisdiction to make any order or render any judgment finding the ownership of the articles involved in this controversy." No further action was taken by the court or any of the parties to the proceeding until the 12th day of July, 1927, when the exceptions of the legatees were filed to the final account of the executor, in which they excepted to the approval of the account and the closing of the estate, assigning as a reason that the executor had not collected all of the estate left by the deceased, and that "there is now a claim of one Margaret Huff against the estate which has not been finally disposed of," etc.

The record discloses no further action by the court or parties to the proceeding until August 6, 1929, when the legatees filed a petition reciting the order of the court of June 7, 1927, and alleging that no appeal was taken from said order within the time prescribed by law, and that Margaret Huff had failed and refused to deliver the personal property to the executor, and that the petitioners (legatees) under the terms of the will were entitled to receive the property in her possession, and they prayed for an order citing Margaret Huff and C. Floyd Huff, Sr., to appear in court and show cause why they should not deliver the personal property to the executor or be adjudged in contempt for failure to do so. Following this petition appears the indorsement

of the judge of the court directing Margaret Huff to comply with the order of the court of June 7, 1927, and to deliver the personal property mentioned in said order to the executor, and upon this order a writ was issued under the hand and seal of the clerk of the court addressed to C. Floyd Huff, Sr., reciting the order made as of the 13th day of August, 1929, and directing him to deliver to the executor the jewelry in controversy. On this order was indorsed service made on the person named on August 13, 1929.

No action of the court appears to have been taken on the motion to set aside the judgment of June 7, 1927, filed June 22, 1927, until August 6, 1929, when a memorandum was entered on the docket of the judge of the probate court in which said motion was denied, but this order seems never to have been entered at length on the record of the probate court. On August 6, 1929, Margaret Huff and C. Floyd Huff filed "motion, prayer and affidavit for appeal" in which they prayed an appeal from the order of the court overruling their motion to set aside the order and judgment of June 7, 1927, and also from an order of the court of August 6, 1929, directing the respondent, Margaret Huff, to deliver to the executor the jewelry in controversy. The affidavit was made by C. Floyd Huff, and the appeal was lodged in the circuit court on September 21, 1929. Some other orders appear to have been made in the probate court which are not mentioned in the above recital, as they seem to be duplication of orders already made.

On June 20, 1931, the matter being reached on the call of the docket in the circuit court, a motion was filed to dismiss the appeal, and at the hearing the court found in substance the facts as above recited and dismissed the appeal as prayed "for the reason that the appeal from the original order and judgment of the probate court was not lodged and perfected in the time provided by law, and that said appeal be, and the same is hereby, dismissed, and that the said Margaret Huff and the said

C. Floyd Huff be, and they are hereby, ordered and directed to carry out the judgment of the probate court and deliver to the Hot Springs Savings Trust & Guaranty Company, executor of the estate of Blanche Bell, deceased, the subject-matter of this suit, etc.," from which order the Huffs have appealed to this court.

It will be seen from the dates of the various pleadings and orders hereinbefore recited that the cause was prosecuted with but little diligence by either party in the probate court, but, for some reason unknown to us, was suffered to drag along for more than two years. It is clear, however, that from the time of the response of C. Floyd Huff to the citation first issued there was a controversy as to the ownership of the jewelry, and there seems never to have been any real reason for his being cited to show what property was in his possession as he had already disclosed that fact, of which the executor was well aware at the time of the filing of the original petition. So, from the first there was but a controversy between C. Floyd Huff and Margaret Huff on the one hand and the executor and legatees on the other as to who was the owner of the jewels which Margaret Huff alleged were her property by reason of a gift to her made by the testatrix in her lifetime. The probate court, therefore, had no jurisdiction of the subject-matter or to hear and determine this controversy, and its order made on June 7, 1927, was *coram non judice* and void, as were also all the orders made subsequent thereto in furtherance of, and based upon, the order first made.

The case of *Moss* v. *Sandefur*, 15 Ark. 381, began in the probate court by the filing by the executor of a petition alleging that Moss had in his possession and had concealed money belonging to the estate of his decedent and prayed for a discovery by Moss of the property in his possession. Moss answered admitting that he had in his possession a certain sum of money for safekeeping which he then held for the use of any one

to whom it might belong, but denied that it belonged to, or was owned by, the decedent at the time of his death. On the hearing the probate court found that the money belonged to the estate of the decedent and adjudged that the executor recover from Moss the said sum. In that case the court found that by the statutes and Constitution then in force probate courts were clothed with authority to compel the attendance of persons charged with concealing or embezzling any effects of the estate of a deceased person and to force them to make discovery on oath, and to order their delivery to the executor or administrator entitled to receive the same. The court held that these provisions were salutary, but could not be extended so as to turn "into probate courts from their accustomed channels a great stream of litigation touching contested rights to personal chattels, which these courts from their Constitution are so little calculated to sustain." In summing up the facts in the case, the court said: "In the case before us, the discovery that was required shows the money in question to be in such an equivocal attitude as to be reasonably a subject of litigation between the executor or administrator or distributees of James Moss, deceased, predicated upon the ownership of the slave, who deposited it, for safekeeping, in the hands of the respondent, and the executor of Dunn, who claims that it had been derived from his testator in his lifetime, or had been abstracted from his estate since his death, in some manner that did not divest his right to it. The case then, shown by the discovery, was not of either class to which the authority of the probate court to make the order of delivery, extended."

The case of *Fancher* v. *Kenner,* 110 Ark. 117, 161 S. W. 166, was a case in which the executor alleged the possession of another of money and personal property belonging to the estate of the testator which was concealed and withheld from the petitioner and with the prayer that discovery be made of the property belonging to the estate and that it be required to be delivered to

the executor. The person in possession of the property claimed that the same had been given to him by his mother, the executor's testatrix, and on a trial in the probate court the court found under the facts that the property belonged to the estate. There was an appeal to the circuit court where without objection the cause was submitted to a jury, and the verdict was in favor of the person in possession as to all the articles claimed except one, and as to that the verdict was in favor of the executor. The court rendered judgment responsive to the verdict and assessed each litigant with one-half the costs. On appeal this court said: "This court, in passing upon the provisions of the Revised Statutes, in *Moss* v. *Sandefur,* 15 Ark. 381, said that, their purpose was 'not to invest the probate court with jurisdiction of contested rights, and matters of litigation, as to the title to property, between the executor or administrator and others.' The sections of the Revised Statutes construed by the court in *Moss* v. *Sandefur, supra,* were enacted under the Constitution of 1836, giving to the probate court such jurisdiction in matters relative to the estates of deceased persons as might be prescribed by law. Constitution of 1836, art. 6, § 10. At the time when above case was decided the Legislature had not conferred upon probate courts jurisdiction to hear contests as to the title of property between executors and administrators and others claiming title to property as against the estate of deceased persons. They had no such jurisdiction then, nor do they have it under the present Constitution. Constitution of Arkansas, art. 7, § 34; Kirby's Digest, § 1340. The court, under the statute, had jurisdiction only to compel the appellee to disclose what personal property he had in his possession belonging to the estate of Margaret Kenner, and to cause him to deliver the same to the executor."

In that case, however, the court found that the procedure in the probate court and in the circuit court on appeal was acquiesced in, which resulted in the incur-

ring of costs incident to the trial of the rights of the property which might have been prevented by timely objection to the procedure, and the judgment of the lower court adjudging the controverted rights and one-half the costs to each of the litigants was not disturbed, on the theory that the same had been caused unnecessarily by the party complaining and had been acquiesced in.

If we give full effect to the conclusions last reached in *Fancher* v. *Fenner, supra,* it would have no application in the instant case, for the reason that at no time did the appellants acquiesce in or recognize the jurisdiction of the probate court, as appears from the motion filed in June, 1927, to vacate the order of the court on the allegation made that it had no jurisdiction to hear the controversy or to make the order directing the delivery of the jewelry to the executor.

In *Lewis* v. *Rutherford,* 71 Ark. 218, 72 S. W. 373, we held that probate courts have only such special 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. The Constitution of 1874 did not enlarge the jurisdiction of probate courts, and, since these are courts of limited and special jurisdiction, the jurisdiction would not be extended beyond the constitutional limits. *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39. Indeed, it is the general rule that probate courts have no jurisdiction as to any subject except that expressly or by necessary implication given by the Constitution and statutes.

"But extensive and important as this jurisdiction (that of probate courts) is, it is very different from that of courts of really general law and equity jurisdiction, which it is said is 'undefined, general, like space, ending nowhere, and embracing all that is.' It is limited in its general scope, as to subject-matter, to the undisputed property of decedents and of wards, and, as to persons, to those interested in such property as equitably or

legally entitled to some distributive share therein, or in the residue, and to creditors who voluntarily, upon general notice and without special citation, present their claims. All controversies between executors, administrators or guardians, or those interested in the particular estate, and other persons not interested in it, must be settled in another forum." Section 23, p. 20, Gary's Probate Law (3d ed.).

"From all the cases it would seem that the rule as to jurisdiction of subject-matter is substantially as stated in Massachusetts by Chief Justice PARSONS nearly a century ago: 'When the question before a judge of probate is only as to the manner of exercising his jurisdiction on a subject of which some court of probate has jurisdiction, then, if he mistakes, the means of correcting such mistake is by appeal. But when the question is whether the court of probate has jurisdiction of the subject or not, he must decide it, but at his own peril. If he errs by assuming a jurisdiction which does not belong to the probate court, his acts are void'." Section 34, p. 28, Gary's Probate Law. *Mobley* v. *Andrews,* 55 Ark. 222, 17 S. W. 805; *Stewart* v. *Lohr,* 1 Wash. 341, 25 Pac. 457; In re *Woolford,* 10 Kan. App. 283, 62 Pac. 731; *Bolander's Estate,* 38 Ore. 490, 63 Pac. 689; *Falke* v. *Terry,* 32 Col. 85, 75 Pac. 425; Works on Courts and Their Jurisdiction, p. 440.

In the recent case of *Moss* v. *Moose,* 184 Ark. 798, 44 S. W. (2d) 825, the principles announced were recognized and reaffirmed.

■ It is the contention of the appellant that the time for taking the appeal ran from the order of August 6, 1929, whereas it is the contention of the appellee, and was upheld by the circuit court, that the time for taking the appeal was limited to six months after June 7, 1927. The argument of appellant is that the order of June 7, 1927, did not become final until its motion to vacate the same for want of jurisdiction had been acted upon, and, as this was not done until August 6, they had six months

from that date in which to perfect the appeal. We think that the ruling of the circuit court on this question was correct, but, as we have seen, the judgment of the probate court being void, the circuit court on appeal erred in directing the appellant to carry out the judgment of the probate court and to deliver to the executor the subject-matter of the suit, but should have treated the proceedings as an application in the nature of certiorari and have quashed the void order. For this error the judgment must be reversed, but, since a remand for further proceedings would serve no useful purpose, the order of the probate court being one the appellants are not bound to obey, we feel justified in treating the appeal as if it had been a petition for certiorari, as it brought up for the inspection of the circuit court the entire record, from which want of jurisdiction clearly appeared and which would entitle the appellants to an order quashing the judgment of the probate court. We have held that where a writ of certiorari is improperly brought but within the time in which an appeal would be allowed, the petition would be treated as an appeal on the principle that the law regards substance rather than form, and also because certiorari will lie to quash a void judgment, even though the judgment might have been vacated and set aside on appeal. *Browning* v. *Waldrip*, 169 Ark. 261, 273 S. W. 1032; *Williamson* v. *Mitchell Auto Co.*, 181 Ark. 693, 27 S. W. (2d) 96.

The judgment of the trial court is therefore reversed, and the cause is remanded with directions to treat the appeal as a proceeding by certiorari, and that it enter an order for certification to the probate court quashing the orders of that court rendered on June 7, 1927, and those made with relation thereto.

KIRBY, J., dissents.

ARKANSAS TAX COMMISSION *v.* TURLEY.

Opinion delivered February 1, 1932.

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

Mann & Mann, for appellee, Turley,

John C. Sheffield and *Bevens & Mundt,* for appellee, Fielder.

SMITH, J. The two appeals here consolidated question the validity of the real estate assessments in St. Francis and Phillips counties, respectively, for the year 1931. The facts in both cases are substantially identical, and a statement of the facts in one case will suffice to present also the question for decision in the other.

The equalization board of St. Francis County organized in the time and manner provided by law. Numerous conferences were held by the members of the board in regard to the real estate assessments, and certain property was inspected. The board reached the conclusion that, owing to the general depression, there had been a considerable deflation in all values, and in the value of real estate in particular, especially as compared with the valuations existing at the time of the assessment for the year 1929 was made. After considering each parcel of city property and real estate separately, the board reached the conclusion that a separate and several reduction of the assessed value of each city lot and tract of

land in the entire county of 25 per cent. should be made, and the county clerk was directed to extend the assessed valuations against each city lot and tract of land upon the tax books, in accordance with this decision.

Having reached this conclusion, the board of equalization made the following order:

"The assessment of all real estate in St. Francis County, including lands and town lots located in said county, and which is assessed by the assessor for St. Francis County, is hereby ordered to be reduced twenty-five per cent. (25%) from the assessment as determined by the tax assessor and equalization of such assessment as heretofore made, and the clerk of the county court is hereby ordered and directed to place opposite each parcel or tract of land in St. Francis County, after the assessment against said land, town or city lot, a sum equal to seventy-five per cent. (75%) of the assessment as now extended on said assessor's book, and that the assessment so reduced be copied into the tax books when the same is made up for the use of the collector of the revenue for St. Francis County for the year 1931.

"This order has no application to any property under the jurisdiction of the State Tax Commission for assessment."

Upon being furnished a copy of this order in the manner provided by law, the Arkansas Tax Commission made an order relating thereto. This order recited the action of the board of equalization, and contained the following direction to the county clerk:

"Wherefore, premises considered, said order of St. Francis County Equalization Board is held for naught, and it is hereby ordered and directed that the St. Francis county clerk ignore said order of said St. Francis County equalization board, as filed with said clerk under date of September 18, 1931, and that said St. Francis County clerk extend taxes on all real estate in said county for the year 1931, upon such valuations as returned by the assessor and adjusted by said county equalization board before having ordered said 25 per cent. blanket reduction,

unless otherwise ordered and directed by the State Equalization Board or a court of competent jurisdiction, and

"It is further ordered and directed that a certified copy of this order be immediately transmitted to the St. Francis county clerk, and copies be transmitted to the equalization board, county judge and county assessor.

"Done this the 21st day of September, 1931, under authority of § 12 of act No. 129, of the Acts of the General Assembly of 1927."

The county clerk announced his intention not to comply with the order of the Tax Commission, whereupon that body filed a petition in the St. Francis Circuit Court for a writ of mandamus requiring that officer to comply with its order, and similar action was taken in regard to the assessments in Phillips County.

Upon hearing the petition in each case, the circuit court denied the prayer thereof, and these appeals are from those judgments.

It is first insisted for the reversal of the judgments of the circuit courts that the orders of the boards of equalization were void under the authority of the case of *Summers* v. *Brown,* 157 Ark. 509, 248 S. W. 571. In that case the quorum court had, at the instance of the board of equalization, entered a "blanket reduction of the assessed valuation of the lands in the county." The equalization board had not in that case made an equalization and reduction of the separate assessments of each piece of real property in the county, but had made an order reducing the assessments of all real estate in the county. We held that neither the equalization board nor the quorum court had the power to make this blanket reduction. We held, however, that the property owners were not prejudiced by this order, as it had been made for their benefit.

Here, however, the facts are that the equalization boards did not make a single order applicable to the entire county, but found and directed that the assessment of each particular tract of real property, both urban and rural, be reduced 25 per cent. The question for decision is therefore whether the Tax Commission had the right

to review this action of the equalization boards and to order its rescission.

We think the answer to this question is found in act No. 129 of the Acts of 1927 (Acts 1927, page 400) and act No. 172 of the Acts of 1929 (vol. 2, Acts 1929, page 841).

By the act of 1929 it is provided that real property, situated within the boundaries of any city or town, shall be assessed biennially, beginning in 1929, in the odd-numbered years, and that other real estate, beginning in 1930, shall be assessed biennially in the even numbered years. The assessments here under review, having been made in an odd numbered year, there was no assessment of real property except that within the boundaries of the cities and towns to be equalized, and the equalization board had therefore no function to perform in regard to the assessment of other real estate. It was said in the case of *Summers* v. *Brown, supra,* that the equalization board had no power to equalize assessments except for the year in which they were made.

The act of 1929 does make provision for the assessment of both urban and rural property, in either odd or even numbered years, in certain cases. By § 4 of this act, § 9918, Crawford & Moses' Digest, is amended to permit the assessment each year of forfeited lands that have been redeemed, and lands previously exempt from taxation which have become subject to taxation, all new improvements exceeding one hundred dollars in value, all acreage lands that have been platted as city or town lots, and all real estate or improvements thereon which have been damaged by fire, flood, tornado or other act of God. But it is not contended that the action of the equalization board in either county is related to or derived from this power of special assessments. Nor is it contended that the deflated values of either county was caused by any other condition peculiar to those counties. The depression about which the members of the equalization board testified, which had caused the deflation in values and which induced their action, prevails throughout the State, and is not confined to its boundaries.

The Constitution (§ 5, article 16) provides that "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."

While it is required by the Constitution and the statutes enacted pursuant thereto that each particular parcel of real estate shall be separately assessed, it is also contemplated that there shall be uniformity in the assessment of these values so far as practical, and, to accomplish this end, the Arkansas Tax Commission was created by act No. 129 of the Acts of 1927, *supra*. Section 12 of this act defines the numerous powers conferred upon the State Tax Commission, and the order to the county clerk here involved was made pursuant to the authority therein conferred.

Subdivision (a) of this section provides that the commission shall have and exercise general and complete supervision and control over the valuation, assessment and equalization of all property; the collection of taxes and enforcement of the tax laws of the State, and over the several county assessors, county boards of review and equalization, tax collectors and other officers charged with the assessment or equalization of property or the collection of taxes throughout the State, to the end that all assessments on property in the State shall be made in relative proportion to the just and true value thereof, in substantial compliance with law.

Subdivision (d) of the same section confers upon the State Tax Commission the power "to confer with, advise and direct all assessors, county boards of review and equalization, county judges, county clerks and collectors of State and county taxes, concerning their duty with respect to the revenue laws of this State."

Subdivision (s) of the same section confers on the Tax Commission the power "to require any county board of equalization * * * to make such orders as the commission shall determine are just and necessary, and to direct and order such county boards of equalization to raise or

lower the valuation of the property, real or personal, in any township, district or city, and to raise or lower the valuation of the property of any person, company or corporation; and to order and direct any county board of equalization to raise or lower the valuation of any class or classes of property; and, generally, to do and perform any act or to make any order or direction to any county board of equalization, or any local assessor, as to the valuation of any property, or any class of property in any township, district, city or county which, in the judgment of the commission, may seem just and necessary, to the end that all property shall be valued and assessed in the same manner and upon the same basis as any and all other taxable property, real or personal, wherever situated throughout the State."

A number of the subdivisions of this § 12 of the act of 1927 were reviewed in the case of *State ex rel., Attorney General* v. *Standard Oil Co. of La.*, 179 Ark. 280, 16 S. W. (2d) 581, in a consideration of the general powers of the Tax Commission, and it was there said that "it was evidently the intention of the Legislature to place upon the Tax Commission the full responsibility for the enforcement of our tax laws."

We conclude therefore that the Tax Commission had the power and authority to make the orders which the county clerks have refused to obey, and that it was the duty of these clerks to obey those orders.

The judgment of the circuit court in each case is therefore reversed, and writs of mandamus will be issued as prayed.

DE SOTO TRUST COMPANY *v.* AMERICAN SOUTHERN TRUST COMPANY.

Opinion delivered February 1, 1932.

C. O. Raley and *F. G. Taylor,* for appellant.

G. B. Oliver, for appellee.

HUMPHREYS, J. This suit was brought in the chancery court of Clay County, Western District, by appellees, on the 17th day of December, 1928, for the purpose of having a deed, executed by W. D. Polk and J. D. Polk to certain trustees for the benefit of their unsecured creditors declared a mortgage, and for the appointment of a receiver to take charge of the property described in the deed. Certain creditors, among them Henry Lepp, filed claims and were treated as interveners in the action. The court found that the interveners had a lien upon the property, ordered same sold, and appointed a master to take evidence and report on the claims of the several interveners. Henry Lepp died, and his claim was revived in the name of De Soto Trust Company, executor of the estate of Henry Lepp, deceased, the appellant herein. The master took evidence and filed a report allowing appellant's claim along with others. Exceptions were filed to the report of the master allowing appellant's claim, which were submitted to the court upon the evidence heard by the master, resulting in a decree disallowing appellant's claim, from which is this appeal.

The theory upon which the court dismissed appellant's complaint is that Henry Lepp was a secured creditor of the Polks on the date they executed the trust deed to certain trustees for the benefit of their unsecured creditors, and hence not a beneficiary under its terms. Appellant's claim consisted of three notes executed by J. M.

Sherwood to Polk, and by him indorsed to Lepp. At the time of the execution of the trust deed, this note was secured by a second lien upon land evidenced by a mortgage by J. M. Sherwood to Polk. Another of the notes was a joint obligation of the Polk brothers, Lynn S. Polk, W. D. Polk, and W. Earl Polk. The third note was executed by W. D. Polk to Henry Lepp. At the time of the execution of the trust deed, all three notes were secured by a pledge of four notes of R. B. Thurman, in the aggregate sum of $12,000, which twelve thousand dollar note was secured by a second lien on a large tract of land.

In order for appellant to have brought himself within the terms of the trust deed, he must have shown that the securities he had for his several notes were worthless, or that they were worth some amount less than the face of the notes on the date of the execution of the trust deeds. This he failed to do. Having failed to do so, appellant's claim was properly rejected by the court.

No error appearing, the decree is affirmed.

CONQUEROR TRUST COMPANY *v.* COXSEY.

Opinion delivered February 1, 1932.

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L. S. Dewey, for appellant.

Festus O. Butt, for appellee.

KIRBY, J., (after stating the facts). Our statutes provide the procedure for the removal of property of a nonresident ward from this State, where the guardian and ward are both nonresidents. Sections 5054-5057, Crawford & Moses' Digest. The first of said sections provides that, "on producing satisfactory proofs to the court of probate of the proper county according to law that he has given bond or security in the State in which he and his ward reside, in double the amount of the value of the property as guardian, then such guardian may demand or sue for and remove any such property to the place of residence of himself and ward." The undisputed testimony in this case shows that the appellant company had given bond on its appointment as curator by the probate court of Jasper County, Missouri, where it was appointed, in the amount of 125 per cent. of the estimated value of the ward's estate, the amount required given by the laws of Missouri; and also the value of the assets of the appellant trust company were shown to be about $8,000,000. It was contended, however, that it had not given bond or security in the State in which it and its ward reside "in double the amount of the value of the property," as our statute requires should be done before

application of removal of a ward's estate from this State is granted.

The testimony relative to the improvident management and loss of some of her own estate by the ward's mother by her management of it could not have effect to show that the Missouri curator would not control, conserve and manage the estate of the ward properly, in accordance with the laws of the State of its appointment and the minor ward's residence, and this testimony should not have been admitted.

Since, however, bond in the amount required by our statute was not made by appellant curator upon its appointment, its application for removal of the ward's property from this State to her residence in Missouri was properly rejected by the court, and, even though the bond had been regularly made, the court's refusal to make the order of removal could not be held to be arbitrary and not made because the court was not satisfied that it was for the best interest of the ward that such removal should not take place, the law allowing the court such discretion, and there appearing to be no abuse of this discretion. Section 5056, Crawford & Moses' Digest.

We find no error in the record, and the judgment must be affirmed. It is so ordered.

East Arkansas Lumber Company *v.* Gerald.

Opinion delivered February 1, 1932.

Huddleston & Hughes, for appellant.

D. G. Beauchamp, for appellee.

MEHAFFY, J. The appellant, on January 25, 1927, filed suit in the Greene Chancery Court against Mrs. J. F. Gerald and J. B. Walker & Sons, contractors, for material and lumber sold and delivered to the premises of Mrs. J. F. Gerald for the construction of a dwelling house. The house was built for Mrs. Gerald by the contractors, J. B. Walker & Sons.

The appellant alleged that between May 18, 1926, and November 1, 1926, it sold and delivered to the contractors various materials, consisting of lumber, hardware and other materials, and attached to the complaint was an itemized and verified statement, showing the amount due of $1,422.29. It alleged that Mrs. J. F. Gerald had entered into a contract with J. B. Walker & Sons for the construction of the building, and that the material furnished by it was used in the construction of the building which was located on lot 6, block 15, West End Addition to the city of Paragould, Arkansas.

Judgment was asked against the contractors for the sum above mentioned, and for a lien upon the property described, for sale of the property, and for all other and proper relief.

Answers were filed by the contractors and Mrs. Gerald denying the material allegations in the complaint.

The building was completed on September 15, and Mrs. Gerald moved in about October 1, 1926. She accepted the building and paid the contractors the contract price.

The appellant alleged that thereafter on November 1 it furnished other materials amounting to 30 cents, and that their time in which to file a lien began to run from November 1, and not September 15, because they say this 30 cents worth of material was a part of the original contract.

The evidence offered on the part of the appellant tends to show that material was furnished on November

1, which consisted of two or three sash lifts. The appellant's evidence also shows that the last item before that was furnished on September 17.

One of appellant's witnesses testified that his record did not show who delivered the material to the premises, but that he knew, from his own personal knowledge, that the material was delivered to the premises by employees of the East Arkansas Lumber Company. No receipt was taken when the material was delivered.

Another witness for appellant, a carpenter, testified that he remembered about the item of the value of 30 cents furnished on November 1. He also testified that Mrs. Gerald was living in the house at the time, but does not know how long she had lived there; and, continuing to testify, he says that he does not know the date when this material was delivered, but that Mrs. Gerald was present at the time they were put in place.

Mrs. Gerald testifies that the contractors completed the building under the contract about September 15. They notified her it was completed, and she went through the building making an examination. They sent her the key, and she accepted it. She says it appeared to her to comply with all the terms and plans and specifications; that she accepted the building at that time, and moved in about October 1, and has lived there ever since. She paid all of the contract price to Walker at the time she accepted the building. She testified that no further work was done under the contract after the house was turned over to her on September 15. She accepted the windows as completed and the sashes installed. She does not remember any men doing any work around the house about November 1. They did not install any window lifts under her instructions.

T. L. Huddleston, local manager for appellant, was recalled, and testified that he knew of but one contract, and did not know that the house was turned over by Walker & Sons, and had no notice that it had been turned over. This witness had charge of the affairs of the East Arkansas Lumber Company in Paragould.

The undisputed evidence shows that Horace J. Whitsitt was the owner of the lot on which the building described was erected; that Whitsitt died October 12, 1918; that Horace W. Whitsitt, one of the appellees, was about six years old when his father died; that the house in which they lived during Whitsitt's lifetime, and which was the homestead of the Whitsitt family, was torn down for the purpose of erecting the building upon which the lien is sought.

The widow of Horace J. Whitsitt married J. F. Gerald, and still occupied the place as a homestead. Mrs. Gerald, without getting permission of any court or any other person, tore down the original and made the contract with Walker & Sons for the present building. Horace Whitsitt, the appellee, was about 14 years old at the time the contract was made.

On January 27, 1931, appellant filed an amendment to its complaint, alleging the death of Horace Whitsitt, the owner of the homestead; that he died intestate, and left as his only heir a son, Horace Whitsitt, a minor, who owned the premises, and that his mother, Mrs. J. F. Gerald, owned a life estate, and that it was necessary to make said minor, Horace Whitsitt, a defendant.

Summons was served on the minor January 28, 1931, and answer was filed for him, in which he claimed to be the owner of the property; alleged that at the time of his father's death there was a good and substantial residence on said premises; that it was the homestead of his father at the time of his death, and has been his homestead ever since the death of his father; that the residence was illegally and wrongfully torn down, and the house now on the premises erected; that there could be no lien for materials and labor without proper authority; that no authority was given by Horace Whitsitt, and that his property was not subject to any lien; that he did not contract for the construction of any house, and no one had authority to contract for him, and he denied appellant's right to a lien; and stated that no lien was attempted to be filed within the time allowed by law.

We do not deem it necessary to decide the questions of Mrs. Gerald's right to contract for the construction of the building, or the right of appellant to create a lien on the property of the minor, because we have reached the conclusion that appellant's claim for a lien was not filed within the time allowed by law.

The chancery court entered a decree in favor of the appellees, Mrs. J. F. Gerald and Horace Whitsitt, and, as to them, dismissed the complaint of appellant for want of equity. As to the other defendants, the court made no finding for the reason stated in the decree that the plaintiff seemed to have abandoned its cause of action therein. The case is here on appeal.

The statute provides: "It shall be the duty of every person who wishes to avail himself of this act to file with the clerk of the circuit court of the county in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after the things aforesaid shall have been furnished or the work or labor done or performed, a just and true account of the demand due or owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit." Section 6922, Crawford & Moses' Digest.

The undisputed proof shows that the house was completed about September 15, and Mrs. Gerald moved into it October 1. She paid the contractors in full, made an examination of the house, and decided that it was finished according to contract. But, assuming that appellant's testimony is correct, that they furnished some of the material on the 17th of September, the lien was not filed in time. It must have been filed within 90 days after September 17th, unless the 30 cents worth of material alleged to have been purchased about November 1, was a part of the original contract and authorized the filing of a lien for the whole amount within ninety days thereafter.

We do not think it can be considered a part of the contract, for the reason that Mrs. Gerald testifies that the contract was completed on September 15, she accepted

it as complete, paid the contractors, and no material was thereafter furnished with her knowledge or consent. We do not think that the delivery of a trifling item like thirty cents' worth of material, a month or two after she had accepted the contract, and furnished without her knowledge or consent, would extend the time allowed by law for filing the lien for the whole amount.

Moreover, the real owner of the building was not notified or served until January 28, 1931, four years after it is claimed the material was furnished.

Appellant's claim for lien not having been filed within the time allowed by law, its right to a lien, if any existed at all, was barred.

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

MISSOURI PACIFIC RAILROAD COMPANY *v.* HARVILLE.

Opinion delivered February 1, 1932.

Thos. B. Pryor and *Harvey G. Combs,* for appellant.

R. W. Robins and *Walter A. Isgrig,* for appellee.

McHaney, J. Appellee sued appellant for personal injuries sustained by him while in its employ, and recovered a verdict and judgment for $7,500. The case was brought under the Federal Employers' Liability Act, and no question is raised as to its applicability.

The principal assignment of error relied on for a reversal is that the evidence is insufficient to support the verdict and judgment, and that the court should have directed a verdict in appellant's favor at its request.

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, when viewed in this light, it must be sustained. Briefly so stated, the evidence is to the effect that appellee was working as a section hand in an extra gang repairing the main line tracks of appellant some four or five miles north of Knobel, Arkansas. The foreman and crew had quit work for the day, and started back to Knobel where the foreman and a number of the crew desired to catch a train to Little Rock. The foreman was in a hurry. They were traveling on a motor car, sometimes referred to as a speeder, to which was attached a trailer. The motor car was operated by a two cylinder gasoline engine, without a starter, and had to be pushed along the track a distance until the gas in the engine was ignited, and then the pushers would jump on. At the time appellee was injured, they had some trouble getting the engine started, and the foreman, who was in charge of the engine and operating it, directed appellee and others to get off the car and push, which they did. Appellee was pushing on the left side near the rear of the motor car and in front of the trailer, when the engine "caught" or fired, it gave an unusual lurch or jump forward, because the foreman had given it too much gas, and appellee's leg was caught by the running board on the side

of the trailer which threw his foot under the wheel causing him severe, painful and permanent injuries to his foot and leg. The negligence relied on is the act of the foreman in giving the engine too much gas, causing the car to make an unusual and unexpected jump when the gas ignited, and but for such jump appellee would not have been injured. Appellant had a rule providing that such cars should be pushed and boarded from the rear, but appellee had no knowledge of the rule, and it was habitually violated by all the men and the foreman. There were thirteen men pushing, three from behind and the others on both sides. Appellee had been working for appellant about twenty years, and was familiar with the operation of such cars.

On the above facts appellant insists that it was guilty of no negligence, but that, if it were, appellee assumed the risk. It is conceded that, under the Federal Employers' Liability Act, contributory negligence is not a defense, except to reduce the damages. We think the evidence was sufficient to take the case to the jury on the question of the negligence of appellant through its foreman in giving the engine too much gas, causing it to make a sudden, unexpected and unusual jump forward. By its verdict the jury has found that appellant's foreman was negligent in the manner stated, and, this finding being supported by substantial evidence, under the settled rule of this court, it must be permitted to stand.

On the question of assumed risk, we can not say as a matter of law that appellee assumed the risk. We think it was a question to be submitted to the jury, which the court did under instructions that are not complained of. It is well settled that under the Federal Employers' Liability Act a servant is not deemed to have assumed the risk of the negligence of the master or that of a fellow-servant unless the consequent danger is so open and obvious that an ordinarily careful and prudent person in his situation would have observed the one and appreciated the other. Nor does he assume an extraordinary risk caused by the negligence of the master or of his

fellow-servant. *St. L.-S. F. R. Co.* v. *Blevins,* 160 Ark. 362, 254 S. W. 671; *Mo. Pac. Rd. Co.* v. *Hall,* 161 Ark. 122, 255 S. W. 707; *St. L. S. W. Ry. Co.* v. *Harrell,* 162 Ark. 575, 259 S. W. 739; *St. L.-S. F. R. Co.* v. *Miller,* 173 Ark. 597, 292 S. W. 986. It was a question for the jury, therefore, as to whether appellee assumed the risk.

It is finally insisted that the court erred in refusing to give appellant's requested instruction No. 9, as follows: "You are instructed that appellee assumed the risk in pushing from the side and attempting to get on the motor car from the side in violation of a rule promulgated for his safety, and your verdict will be for the defendant." What we have already said disposes of this contention adversely to appellant. Appellee and others testified that, if appellant had such a rule requiring them to push and get on the car from the rear, they knew nothing about it, had never heard of it, had not been instructed by the foreman or any one else not to push or board the car from the side, and that, if there were such a rule, it was constantly violated by all the men, including the foreman. It is well settled that an employee cannot be held to have assumed the risk in violating a rule of which he had no knowledge. We find no error, and the judgment is affirmed.

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

Opinion delivered February 1, 1932.

Wm. M. Hall and *Lamb & Adams,* for appellant.

Wm. F. Kirsch, for appellee.

BUTLER, J. Rev. Joseph Froitzheim was insured by the appellant company against accidental bodily injuries, fatal or non-fatal, and, while the policy was in full force and effect, suffered a sunstroke from which he died. It was alleged in the complaint brought to recover on the policy "that, while not making undue exertion or effort at some time during the afternoon of said day, the insured accidentally suffered a sunstroke at his home in Pocahontas in Randolph County, Arkansas, as a result of and from the effects of which he, at the same place at about 7:30 o'clock in the evening of the same, died."

A general demurrer was filed to the complaint which was overruled by the court, and, the defendant electing to stand upon the demurrer, the court on the same day rendered final judgment in favor of the plaintiff in the amount sued for.

The sole question presented is whether or not recovery may be had for death from sunstroke suffered by the insured while not making any undue exertion or effort and engaged in his customary activities, without intervening injury, under the terms of the policy sued on. By sub-paragraph No. 1, the policy insured the deceased against "accidental bodily injuries, fatal or non-fatal, being hereinafter referred to as 'such injury'." Under Schedule 2, titled Special Indemnity, is the following provision: "Blood poisoning, sunstroke, freezing, hydrophobia or asphyxiation due solely to such injury (excluding suicide, sane or insane, or any attempt thereat) shall be considered as covered by this policy."

It is the contention of the appellant that a proper construction of the policy limits liability for sunstroke to only those cases where it is the result of some ante-

cedent mishap or injury, and that this is clearly indicated by the words in Schedule No 2, "due solely to such injury."

The contention is made that this is the holding of the court in the case of *Southern Surety Co. v. Penzel,* 164 Ark. 365, 261 S. W. 920, in construing a policy worded identically as the policy sued on. In that case the court did not pass upon the question presented in the case at bar. The blood poison in that case developed at a date subsequent to the happening of the injury, but within thirty days thereafter. The policy provided for a certain indemnity to be paid for total disability commencing on the date of the accident and for one-half of that amount where the injury did not, from the date of the accident, wholly disable the insured but should do so within thirty days thereafter. Another provision in the policy was to the effect that blood poison, sunstroke, freezing, etc., due solely to such injury (excluding suicide, sane or insane) should be considered as covered by the policy. It was contended that the paragraph including blood poisoning and the other things mentioned therein in a class to themselves exempted them from the conditions of the policy above referred to providing for indemnity in a certain amount where total disability occurs on the date of the accident and for half that amount where the total disability occurs thereafter and within thirty days. In that case the court held: "The whole policy must be construed together, and there is nothing whatever to indicate that blood poisoning, etc., are exempt from the conditions specified. * * * When infection enters through the wound produced by the original accident, some time will elapse before blood poisoning develops, and the object of this clause of the policy is to bring blood poisoning, sunstroke, freezing, hydrophobia or asphyxiation within the terms of the policy and to impose liability upon the insurance company when any one of these things results as the effects of the original injury * * *. Therefore, the court erred in finding for the plaintiff for total disability. The plaintiff was

injured on the 6th day of January, 1921, and the blood poisoning did not develop until the 9th day of January, following, which could not be considered from the date of the accident.'' Counsel mistakenly contend that the policy in that case was worded identically as the policy sued on in the case before us. In the Penzel case the policy insured against injuries ''the effects resulting exclusively of all other causes from bodily injury sustained * * * solely through external, violent and accidental means, said bodily injury so sustained being hereinafter referred to as 'such injury','' whereas, as we have seen, the insuring clause in the policy under consideration here insures against ''accidental bodily injuries, fatal or non-fatal, hereinafter referred to as 'such injury'.'' It is therefore evident that the court in the Penzel case did not attempt to construe the special clause relating to blood poisoning, sunstroke, etc., in connection with the insuring clause, for, in the case of *Continental Casualty Co.* v. *Bruden,* 178 Ark. 683, 11 S. W. (2d) 493, the court, in a unanimous opinion, held that sunstroke itself was the original injury, and it and its effects are both the cause and the consequence of the original injury. In that case recovery was sought under a policy for the accidental death of the insured caused by ''heat prostration.'' The policy provided that ''the insurance given by this policy is against loss of life * * * resulting from a personal bodily injury which is effected solely and independently of all other causes by the happening of an external, violent and purely accidental event.'' In that case it was held that the authorities are united in treating heat prostration and sunstroke as meaning the same thing, and, after reviewing a number of cases, the court accepted the view which appears to be supported by the greatest weight of authority and the better reason that death or injury occasioned by sunstroke was an accidental bodily injury: Sunstroke is a casualty the cause of which is not well understood and happens unexpectedly under circumstances where ordinarily a sunstroke will not oc-

cur, so that it may be said to be an unusual event not according to the usual course of things and not to be ordinarily expected. It therefore comes within the meaning of the term "accidental," as used in its popular sense, and the court in the Bruden case, *supra,* concluded "that a sunstroke suffered by one unexpectedly is within the protection of an accident policy insuring against bodily injuries sustained through external, violent and accidental means."

It is insisted that the provisions of the policy in the case before us are different from those in the policy considered in the Bruden case. This is true, but we are of the opinion that it is more liberal and comprehensive, and, when we consider that sunstroke itself is an accidental injury, the specific provision of Schedule No. 3, referring to sunstroke, does not add to or limit the liability under the general insuring clause. Therefore death from sunstroke is covered by the policy sued on, and the court properly overruled the demurrer, and entered judgment in favor of the plaintiff.

The appellee has cited a number of cases announcing a contrary doctrine, but these cases were examined in the case of *Continental Casualty Co.* v. *Bruden, supra,* and in the cases therein referred to. A number of other cases have been cited by the appellee to support the construction adopted in the Bruden case, but we deem it unnecessary to discuss these as our own decisions have settled this question, and under their authority the judgment of the trial court is correct and must therefore be affirmed. It is so ordered.

CHRISTIAN *v.* PEOPLE'S TRUST COMPANY.

Opinion delivered February 1, 1932.

Chas. A. Walls, for appellant.

Cockrill & Armistead, for appellee.

BUTLER, J. The executors of the estate of J. E. Hicks, deceased, in the early part of 1930, had no cash on hand or personal property out of which anything might be realized to pay the inheritance tax due on the estate of their testate amounting to $9,021.54, or with which to pay the State and county and improvement taxes amounting to $3,617.15. They also deemed it necessary to continue the policies of fire insurance on the improvements, the premiums on the same amounting to $1,203.73. This situation was presented to the Lonoke County Probate Court, in which court the will was probated, and the executors were authorized by an order of that court to borrow the above sum from the People's Trust Company, empowering them to execute their note as executors with interest at the rate of six per cent. per annum from date until paid. On April 29, 1930, the executors secured a loan from the trust company for $12,638.69, which was applied to the payment of the taxes and a note evidencing this transaction was signed by the said

executors. The note becoming due and remaining unpaid, this suit was instituted to recover a judgment against the estate.

It was alleged in the complaint that the executors had no money and no personal property belonging to the estate of any value except stock in a bank which was in the process of liquidation, the value of which stock was so small and uncertain that nothing could be secured by sale of it or otherwise. It was further alleged that the executors had no power under the will to sell any of the real estate to pay plaintiff's claim; that the executors were entitled to a lien for the money used in paying taxes on the real estate paramount to all other claims and were subrogated to the liens of the State, county, and improvement districts for the taxes discharged by them because they were proper expenses of administration, and that the trust company, in lending the money to the executors for the purpose of enabling them to discharge the tax liens, was subrogated to the liens of the executors and trustees. The prayer of the complaint was for judgment for the sums named with interest, and that it be declared a lien on the real estate belonging to the estate prior and superior to the rights, etc., of any of the defendants, and for sale, etc.

The executors of the estate, the heirs of the decedent, and the beneficiaries under the will were named as defendants, all of whom are *sui juris* except the appellants, who are minors. In addition to the heirs and beneficiaries, certain other persons who it was thought might have a claim to some interest in the estate were made parties, and within apt time a guardian *ad litem* was duly appointed for the minor defendants. Certain of the defendants did not file any answer or other plea, and as to them judgment was rendered by default. All of the other adult defendants answered specifically admitting the allegations of the complaint and joining in its prayer. An answer was filed by the guardian *ad litem* specifically denying each allegation of the complaint and

praying that the complaint be dismissed. The cause came on to be heard in the Lonoke Chancery Court, and the court heard the testimony of witnesses and rendered a decree granting the relief prayed. The court found that due service of process was had upon all of the defendants and specifically against the minors for the time and in the manner prescribed by law, and made special findings of fact in detail that each of the allegations of fact made in the complaint were true, and also made special findings of law and found that the executors and trustees had a lien on all of the real estate for expenses incurred and money advanced in paying the taxes; that the money was properly borrowed and expended as expenses of administration, and was necessary to save and preserve said estate; and that the lien was prior and paramount to all of the rights and interest of all of the parties to the suit and to any creditors of the estate or to any attorney's fees or other expenses of administration; that they were subrogated to the liens of the State, county and improvement districts to which said taxes and assessments were paid, and that plaintiff bank, in lending the money to be used for those purposes, became subrogated in turn to the liens of the executors and trustees.

The court further found that by the order of the probate court the executors were duly and legally empowered to borrow the money to pay the liens aforesaid and to incumber the said real estate for that purpose, and to execute the note sued on, and that said note constituted an equitable lien on the real estate. The court decreed that the plaintiff was entitled to foreclose its liens and to sell any part of the real estate to satisfy them, and that, if the sums adjudged due were not paid within twenty days from the date of the decree, the commissioner named should proceed to make sale on certain terms and in a certain manner. From this decree the guardian *ad litem* of the minor defendants has appealed, but it is obvious that it is only for the purpose of com-

plying with the legal and moral obligations due them and to submit to the court of last resort the findings of law made by the chancellor.

The testimony was undisputed and amply sustains the findings of fact. The debt sued for is admittedly just, and the method adopted in the order of the court is conceded to be most advantageous to the minors; the attorney and guardian for the minors submitting only the question as to whether or not the plaintiffs are entitled to a lien under the doctrine of subrogation or otherwise as decreed by the court. He suggests that in lending the money the appellee bank was a volunteer and not entitled to subrogation under the doctrine announced in *Hughes Co.* v. *Callahan*, 181 Ark. 733, 27 S. W. (2d) 509. The suggestion is further made that the order of the probate court does not entitle the appellee to a lien because the probate court did not authorize, nor did the executors execute, any mortgage as provided in act 195 of the Acts of 1927. It is shown that the estate consisted almost exclusively of real estate in several counties, a large part of which being farm lands and some city property, and there were valuable improvements on the property, the estimated value of the property as improved at the time the proceeding was instituted being $125,000. Most of the property was located in Lonoke County. There was no personal property of any value, and the income from the property had been so depleted by drouth and reduced values of farm products that the executors had no income with which to discharge the taxes due; that, with the exception of these taxes, there were no other debts due by the estate, and it was necessary that the taxes be paid in order to prevent a forfeiture and sale of the property for delinquent taxes. With this situation confronting them and after having secured the authority of the probate court, the executors borrowed money in the manner above described.

It is clear that the chancery court had jurisdiction, because, as suggested by counsel for the appellee, the case involves the foreclosure of a lien and the exercise of

the equitable doctrine of subrogation, and, as it was proved that the executors had no personal property belonging to the estate of any value in their possession, and that there was no income from the property, it was entirely proper for the court to make an order for a sale of the property, as this was necessary to the execution of the purposes of the trust and protection of the estate and beneficiaries thereunder. The executors and trustees were under a duty to pay the taxes to prevent forfeitures and tax sales, and the payment of these taxes was an expense of administration for which the executors were entitled to reimbursement. Section 10,053 Crawford & Moses' Digest; 39 Cyc. 337-45. As stated by counsel for the appellee, it is the general rule where one lends money to an executor which money is applied to pay debts or otherwise for the benefit of the estate, he takes the place of the executor in so far as his right to be subrogated to the representative's lien and to his right of reimbursement from the estate. 24 C. J. 71; *Stoops* v. *Bank of Brinkley,* 146 Ark. 127, 225 S. W. 593. The facts in the case show that the appellee in lending the money to the executors did not act as a volunteer. It was understood between the representative of the appellee and the executors that the money was loaned for the purpose of paying the taxes, and that it was to be subrogated to all the rights and liens that the executors had in paying the taxes, and to evidence this the appellee required the physical delivery of the tax receipts to it for the purpose of attaching them to the note.

In *Hughes* v. *Callahan, supra,* cited by the appellants, a mortgage debt was paid off at the request of the mortgagor, the court holding that under these circumstances the one paying the debt was not a volunteer, and that he was entitled to be subrogated to the mortgage lien. In *Rodman* v. *Sanders,* 44 Ark. 504, 507, cited by appellee, the court adopted the principles stated in Sheldon on Subrogation, §§ 243-247, to the effect that one who pays a debt at the instance of the debtor is not a volun-

teer, and if, when he makes the payment, he manifests an intention to keep the prior lien alive for his protection, he will be deemed in equity a purchaser of the incumbrance. And in *Stephenson* v. *Grant*, 168 Ark. 927-931, 271 S. W. 974, the rule is stated as follows: "One who advances money to pay off an incumbrance on realty at the instance either of the owner of the property or the holder of the incumbrance either on the express understanding or under circumstances from which an understanding will be implied that the advance made is to be secured by a first lien on the property, is not a mere volunteer." See also *Davis* v. *Pugh*, 81 Ark. 253, 99 S. W. 78; *Stoops* v. *Bank, supra.*

We are of the opinion, therefore, that the trial court properly decreed that the appellee was subrogated to the tax liens and that the same were prior and paramount to all other claims against the estate and it was entitled to have the said liens fixed upon the lands of the estate and that the same be sold to satisfy said liens.

It is unnecessary to decide the legal effect of the order of the probate court, and the action taken pursuant thereto, as the appellee is entitled to the relief prayed under the general rule and independent of the statute.

The decree is affirmed.

GLEN FALLS INSURANCE COMPANY *v.* BASSETT.

Opinion delivered January 18, 1932.

Verne McMillen, for appellant.

C. A. Holland and *George W. Clark,* for appellee.

SMITH, J. This is a suit by appellee upon a fire insurance policy issued to him by the appellant insurance company to recover damages to compensate a partial destruction of the building covered by the policy.

An unsuccessful attempt was made to adjust the loss on the basis of the cost of restoration, and all the testimony in the case was devoted to the development of the question of the cost of this repair, and a number of building contractors testified on that subject. No one of them appears to have testified as to the difference in value between the building in its condition before the fire and its value after its restoration. Indeed, the estimates of cost of restoration were based upon plans which would have put the building in as good condition as it was before the fire.

The property was purchased by appellee in 1928 for $3,000, and, as the building was old, he made repairs costing about $300, which put it in good condition. Appellee admitted the property was more valuable at the time of its purchase than it was at the time of the fire, and the undisputed testimony is to the effect that the two lots upon which the building stands are worth not less than $1,000.

There was a verdict and judgment for $2,750, from which is this appeal, and it is earnestly insisted for its reversal that it is grossly excessive. We dispose of this feature of the case, however, by saying that, while it appears to be very liberal and to be based upon estimates of the complete restoration of the building to its condition before the fire, we are unable to say that it is not supported by sufficient testimony.

The policy sued on contained the following clause: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or

estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality."

As has been said, the testimony was devoted to the question of the cost of the restoration of the building to its condition before the fire. Upon this issue the court gave, over the objection and exception of the defendant company, an instruction numbered 1, which reads as follows: "The court instructs the jury that, in determining the cost of restoring the building and the measure of the plaintiff's damage, you have a right to take into consideration the difference in the value of a patched-up or restored building and a building built at one time without patches and repairs."

We think this instruction was erroneous. As has been said, the building was not a new one, yet this instruction permits the recovery, not only of the restoration cost, but also the difference in value between the restored building and a new one, that is, "a building built at one time without patches and repairs."

The provision of the policy above quoted does not contemplate, under the facts of this case, the erection of a new building, but only the restoration of the damaged one to a condition as good as that existing at the time of the fire. It contemplates, of course, that material, workmanship and finish shall be of equal quality with that of the old building; in other words, the building must be restored to its condition before the fire, but this does not mean that its value was then to be equal to a new building or one "built at one time."

The obligation of the insurer under a contract of insurance similar to the one here sued on, where the option to repair and replace has been asserted, was declared in the case of *Hartford Fire Ins. Co.* v. *Peebles' Hotel Co.*, 82 Fed. 546. This was a case heard by the Circuit Court of Appeals of the Sixth Circuit, in which Judges Taft and Lurton sat, the opinion being delivered

by the latter. It was there held that, after election by an insurer under such a policy to repair or rebuild, the measure of damages is the cost of repairing or rebuilding where there has been a total failure, or the difference between the work as done and its value if done according to the standard of that existing before the fire, and that, upon such election by the insurer, the contract becomes one for rebuilding or repairing, and is governed by the principles applicable to engagements of that kind where the consideration has been paid in advance. It was said further in this opinion that the option to rebuild or repair affords the insurer a mode of adjustment whereby all extravagant claim of loss may be avoided, and that, when once resorted to, the whole character of the contract is changed, and the original contract of indemnity becomes, in effect, a building contract.

The case of *National Union Fire Ins. Co.* v. *Harrower,* 170 Ark. 694, 280 S. W. 656, is cited as sustaining the instruction set out above. But such is not its effect. There was no election of the option to repair in that case, and the issue decided was the amount of damage to the building occasioned by the wind against which the policyholder had been indemnified.

The testimony offered by both parties at the trial from which this appeal comes related to the cost of repair, and the case was developed on that theory, and became, in effect, therefore one for a breach of the contract to repair which the insurer had elected to assume but had not performed. Its liability under the issue joined is identical with that of a builder, who, for a consideration paid in advance, has failed to perform the contract to repair. *Hartford Fire Ins. Co.* v. *Peebles' Hotel Co., supra; Commonwealth Ins. Co.* v. *Sennett,* 37 Pa. 205, 78 Am. Dec. 418; Cooley's Briefs on Insurance, vol. 7, p. 6568.

The court gave an instruction at the request of the defendant insurance company which stated the measure of damages as herein declared, but that did not cure the error of instruction numbered 1, set out above. The con-

flict in the instructions left the jury without a clear and definite rule with which to measure the damages.

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

GROSSMAN *v.* TAYLOR.

Opinion delivered January 18, 1932.

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Charles Frierson, Jr., and *Chas. D. Frierson,* for appellant.

Sam Rorex and *Lamb & Adams,* for appellee.

KIRBY, J., (after stating the facts). The law designates all creditors of a failed bank, of which the bank commissioner has taken charge, as either "secured creditors, prior creditors or general creditors;" and in act 107 of 1927, § 1, defines a prior creditor as follows:

"(5) The beneficiary of an express trust, as distinguished from a constructive trust, a resulting trust, or a trust *ex-maleficio,* of which the said bank was the trustee, and which was evidenced by a writing signed by said bank at the time thereof." The instrument creating the express trust of the funds deposited in the bank and naming the American Trust Company as trustee, defining its powers and duties as such, was accepted in writing by said American Trust Company in accordance with the terms thereof, and the bank's record of the transaction shows it as a trust fund, and that the trust was being executed by the trustee in accordance with the terms of the instrument creating it.

It is true the amount of money set aside for this trust was already in the bank at the time of the execution of the agreement creating the trust duly accepted by the bank, but the instrument was as effectual to create an express trust as though the money had been checked out and redeposited. It is likewise true that this trust fund was not a special deposit within the meaning of the provisions of said act classifying creditors entitled to a preference, but neither was it required to be such in order to entitle the beneficiaries to a prior claim, since the express trust constituting the bank trustee was evidenced by a writing signed by the bank at the time prescribing the duties of such trustee.

Taylor v. *Street Improvement District,* 183 Ark. 526, 37 S. W. (2d) 84, furnishes no authority for holding otherwise, that case being easily distinguishable from the instant case. There the money was placed in the bank to its credit as treasurer of the districts, the districts being allowed to check it out without restrictions, and the districts were not entitled to priority in payment of their claims because no express trust in writing was

created at the time, and neither was any special deposit of the funds made within the meaning of the act; the chancellor there having found that they were entitled to such priority because the funds were trust funds of which special deposit was made.

The act provides all prior creditors as defined in the act, not specified in the exception, "shall have such priority to the extent that they, respectively, may specifically identify their property in its original or traceable form into the hands of the Commissioner, and, if unable so to identify such property, to the extent that the assets in the hands of the Commissioner, in the form of the lowest amount of cash on hand, exclusive of deposits in other banks and all other assets, remaining in said bank continuously after their said respective priorities arose, where necessarily increased by such property, such cash on hand being deemed to have been so increased to the extent of any priorities which may be acquired under classification number (7) as hereinabove set forth, and if such cash on hand is not sufficient to pay all such prior creditors in full the same shall be prorated among them." The balance of any such claims that can not be so paid in full to be paid as the claims of general creditors of the bank. Act 107 of 1927, p. 301.

The trust fund was not a special deposit, the actual cash being used by the bank as other funds regularly deposited therein, and could not be specifically identified in the hands of the Commissioner, and is to be paid along with the claims of such other prior creditors out of the fund as designated in the statute, and the balance, if said fund is not sufficient to pay all such claims, to be paid as the claims of the general creditors of such bank.

It necessarily follows that the court erred in holding otherwise, and the decree is reversed and the cause remanded with directions to enter a decree in accordance with this opinion holding said claims entitled to priority of payment along with such other prior claims or creditors under the terms of said act.

WEST HELENA *v.* PATRICK.

Opinion delivered January 25, 1932.

John C. Sheffield, for appellant.

Peter A. Diesch, for appellee.

HUMPHREYS, J. Appellee brought suit on September 27, 1930, against appellant in the circuit court of Phillips County for $1,775, alleged to be due him for salary as chief of police of said city for eleven months and twenty-five days, at the rate of $150 per month. Appellant filed an answer, denying that it was indebted to him in the sum of $1,775, or in any other sum for salary as chief of police. The cause was submitted to the court upon the pleadings and an agreed statement of facts, which resulted in a judgment against appellant in the amount sued for, from which is this appeal.

The agreed statement of facts is as follows:

"Agreed Statement of Facts.

"It is agreed by and between the plaintiff and the defendant that this case may be tried on the laws and the following statement of facts:

"1. The city of West Helena is a city of first class.

"2. L. H. Kessler was elected mayor of West Helena at the regular biennial election on April 2, 1929, and entered upon his duties as mayor on the following Monday night, at the regular monthly meeting of the city council.

"3. Ordinance No. 66 of the city of West Helena, approved March 15, 1920, reads as follows: 'Section 9. That, at the first regular meeting held by the city of West Helena city council after the annual election in

April, or as soon thereafter as practicable, the mayor shall appoint a competent man of good moral character to be chief of police, who shall hold his office for the term of one year, or until his successor shall have been appointed and qualified, and the salary is fixed at the sum of $150 a month.'

"4. Pursuant to ordinance No. 66, at the first meeting of the city council in regular session, or on the same date the mayor was qualified as mayor, as per paragraph 2, L. H. Kessler, mayor, with the advice and consent of the council, appointed the plaintiff, Lee Patrick, as chief of police on April 9, 1929, and he served as such chief of police until April 15, 1930.

"5. At the first regular council meeting held after the city election, same being the regular election, or on April 15, 1930, John J. Johnson was appointed by Mayor Kessler, with the advice and consent of the council, to succeed the plaintiff, Lee Patrick, as chief of police, and on the same date John J. Johnson qualified as said chief of police, and has since that time served as chief of police. Lee Patrick was paid the sum of $150 every month by the city of West Helena up to the time of Johnson's appointment, April 15, 1930, when Johnson was appointed and qualified.

Signed: "Peter A. Deisch,
"Attorney for Plaintiff.
"John C. Sheffield,
"Attorney for Defendant."

Under the agreed statement of facts, appellee was appointed chief of police of the city of West Helena for the term of one year or until his successor was appointed, accepted his appointment and served until April 15, 1930, at which time his successor, John J. Johnson, was appointed and qualified without objection or protest on his (appellee's) part. He accepted pay for the time he served, and allowed his successor to accept the salary thereafter without objection or protest. Having been appointed pursuant to the terms of the ordinance, and having retired pursuant to the terms thereof, he cannot

now be heard to say that the part of the ordinance fixing his term at one year was in conflict with the State statute fixing his term at two years, and therefore void. He is clearly estopped to plead the invalidity of the ordinance in that respect. His acquiescence in the appointment of his successor and his successor's service and acceptance of salary amounted to a resignation and refusal to serve on his part, and he is bound by his acts. Otherwise, where all parties acted in good faith, his silence would place the burden on appellant city of paying two salaries, one to the party who actually served in the capacity of chief of police and earned it and the other to a chief of police who did not serve or offer to serve, but who willingly walked away without protest and allowed another to do his work. Even though the ordinance was void in fixing a one-year instead of a two-year term for chief of police, appellee's act precluded him from recovering the balance of the salary attached to the unexpired term.

On account of the error indicated, the judgment is reversed, and the cause of action is dismissed.

GREEN *v.* STATE.

Opinion delivered January 25, 1932.

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

KIRBY, J. This appeal is prosecuted from a judgment of conviction of appellant for carnal knowledge of a girl under 16 years of age named in the indictment.

No brief has been filed for appellant. It is alleged in the motion for a new trial that the court erred in the admission and exclusion of certain testimony as designated, and in the failure to give appellant's requested instruction No. 1, and that the testimony is not sufficient to support the conviction.

The first assignment is that the court erred in refusing to allow Cleda Bowling to answer on direct examination the question: "Did she say (the prosecuting witness) why they (her parents) were cruel to her?" Without regard to whether this was material, the record does not show what the witness' answer would have been, had she been permitted to make one, and the assignment of error is therefore unavailable. *Dunham* v. *State,* 169 Ark. 257, 275 S. W. 325.

The next assignment is that the court erred in refusing to permit the defendant to recall the prosecuting witness, Thelma McCleary, for further cross-examination. This request was made after the witness had been thoroughly cross-examined by counsel for the defense, after she had testified as a witness in behalf of the State, and no abuse of discretion was shown in the court's refusal to permit further re-cross examination. Section 4190, Crawford & Moses' Digest; *Murphy* v. *State,* 169 Ark. 275, 273 S. W. 718; Underhill, Criminal Evidence, p. 509, § 358.

Neither was error committed in the court's refusal to permit the introduction of a letter in evidence, part of which was admittedly written by the prosecuting witness for the purposes of impeachment only. The witness testified, however, that she did not write all the letter, calling attention to the part of it that had been changed after it was written, and an examination of the entire contents of the letter shows that it did not contain any statement relevant or material to the trial of the issue in the case. After witness was excused, counsel for appellant attempted to have her recalled for further cross-examination about the letter, and, upon objection that it was not proper cross-examination, the court refused to allow it to be done, stating, however, that counsel could make the witness his own and examine her as fully about any relevant matters as he cared to, but counsel refused to do this.

The next assignment is that the court erred in refusing to give appellant's requested instruction No. 1. This instruction told the jury that the burden was on the State to prove beyond a reasonable doubt that the prosecuting witness was under the age of 16 years at the time of the alleged intercourse, but the court had already given instruction No. 7, in virtually the same language of the refused instruction requested, and it was not necessary to give the requested instruction, even though it was correct, it being fully covered by the court's charge.

The testimony is amply sufficient to sustain the jury's verdict. It showed that the appellant went away from home with the girl under the age of consent and kept her away from home about 20 days, traveling about with her into two other States. It was not denied that the intercourse had occurred in the county where the indictment was found, the chief question of the case being whether the girl was under the age of 16 years at the time. Her mother and father and one of the other witnesses testified, giving her birth date, that she was under 16 years of age at the time; and the main insistence of appellant, who did not testify, was an attempt to show

that some of the witnesses had made contradictory statements about the girl's age, indicating that she was over the age of consent at the time of the intercourse. The whole evidence discloses, however, that appellant had manifested no interest in or curiosity about the age of the prosecutrix until after he was indicted.

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

MISSISSIPPI VALLEY POWER COMPANY *v.* BOARD OF IMPROVEMENT, WATER WORKS DISTRICT NO. 1.

Opinion delivered January 25, 1932.

[redacted]

Hill, Fitzhugh & Brizzolara, for appellant.

Jones, Hocker, Sullivan & Angert and *Partain & Agee* and *Coleman & Riddick,* for appellee.

KIRBY, J., (after stating the facts). Appellant contends that the conduct of the parties, the power company continuing to furnish power to the district and charge and receive for the service the same rates or compensation as paid under the contract, amounted to an extension of the terms of the contract for another five-year period, without regard to whether any notice of such desired extension was given in accordance with the terms of the contract. That the provisions about the written notice were for its benefit and could be waived by it. The undisputed testimony shows that no such written notice of desire to extend the contract for an additional period of five years was given, or attempted to be given, in accordance with the terms of the contract before its expiration; nor did the appellant company make any claim or insist-

ance that such conduct and so-called waiver of notice amounted to an extension before the meeting of the parties to discuss the contemplated action of the waterworks district for purchasing the Deisel engines from Fairbanks-Morse & Company, which would necessarily dispense with the use of the power furnished by appellant company. The district could have complied with the terms of the contract by giving the written notice required for its extension, but certainly the power company could not, by any waiver of such notice, express or otherwise, extend the provisions thereof; and the continuation of the service at the same rates, as under the terms of the old contract, could not have had effect to extend it for another term. Appellant argues otherwise, saying that, without such notice, the company on the 5th day of October, 1928, was at perfect liberty to cut off the current, and refuse further service, but such is not the case, as the company is a public service corporation, and as such was bound to furnish to appellee district, so long as it desired it to be done, current for its use at a reasonable rate, and, by an attempted waiver of such notice of the extension of the terms of the contract charging the old rates provided therein, it could not acquire any other rights under the law than to furnish the desired power at reasonable rates. *Clear Creek Oil & Gas Co.* v. *Ft. Smith Spelter Company,* 161 Ark. 12, 255 S. W. 903. The appellee district could continue taking the power furnished by appellant company at the rates provided in the old contract without an extension of same, and without being bound or estopped in any way to claim a reduction to reasonable rates in accordance with the law providing therefor.

Appellee did not hold over any property of appellant company after the expiration of the lease as contended by appellant. It is presumed, of course, that appellant was fully compensated for the extra service and expenses for service in furnishing the power by the rates allowed to be charged and collected under the terms of the contract. All of the parties appeared to have

understood their rights as disclosed by the meeting held for determination of whether the district could not save much expense by the installation of its own power plant, instead of the continued use of power furnished by appellant, the appellant at such meeting agreeing to reduce its rates 25 per cent. if power were used according to the "off peak" schedule. The appellant company had no contract with the waterworks district for furnishing power for any particular term or time, when it sought to enjoin the district from installing a power plant of its own, with which it could supply water to the district at a saving of about 3 cents per thousand gallons, and from such savings pay for the installation of the new power plant in a period of seven years, leaving in the savings fund more than $4,000, and no error was committed in dismissing the appellant's complaint for want of equity.

Neither does appellant company have any standing as a taxpayer to resist or prevent the purchase of the new power plant by the appellee district. Sections 14 and 15 of act 64 of 1929 provided for the creation of improvement districts for installing waterworks, electric light plants, and sewers, and making repairs, improvements or extensions thereon, "when they are in funds"; and, when such district has to borrow money for such purposes, the exercise of the power is conditioned on a petition of the majority in value of the property owners of the district, the adoption of an ordinance by the council authorizing the commissioners to proceed with the work, the assessment of benefits and the levying of a tax to raise funds to repay the money borrowed. The appellant contends that the district is not authorized to purchase the Deisel engines for the new power plant except by procuring the money in the manner provided for borrowing in said statute. This contention is not warranted, however, since the contract expressly provides that the purchase price of the engines is to be paid for only out of the savings in the cost of pumping water, and the agreement provides: "shall never be held to create any liability or general obligation upon the district, and no taxes, general

or special, shall ever be levied upon the real estate or other property in the district, or hereafter within the limits of the district, to pay all or any part of the said sum of $23,560, or interest thereon." It also provides that no part of the purchase price shall ever be paid from other funds of the district, except funds on hand representing the savings in the cost of pumping water, and that the credit of the district is in no manner pledged for payment of the monthly installments evidenced by writing, providing it is not a general obligation of the improvement district, but a special obligation, "payable only from that part of the income of the waterworks plant of the said district set aside by the terms of the contract between the waterworks district No. 1 of Van Buren, Arkansas, and Fairbanks-Morse & Company, as applicable to payment hereof, and, by reference to said contract, the terms thereof are, so far as regards payment hereof, incorporated herein." The district is in funds, of course, if there is money enough in the "savings fund" available to make the payments as they become due, but it necessarily would be in funds to discharge such obligations, because under the contract there is no obligation unless the fund for its discharge is on hand, and, when there are no such funds, there is no obligation that can be made a charge or levied as a benefit or assessment against the property of the district, as said in a Massachusetts case:

"It is, in effect, a cash transaction, where the payments are to be made *pari passu* with the accumulation of the fund, and the only fund, out of which they are to come." *Smith* v. *Town of Dedham,* 144 Mass. 177, 10 N. E. 782. Appellant insists, however, that, notwithstanding the notes or instruments are payable out of the "savings fund," they are none the less a debt, bearing interest, and are purchase-money notes for machinery, of which title is retained until their payment. The courts have held, however, that contracts of this character did not create debts within the purview of constitutional or statutory prohibitions against incurring debts as the only

recourse in the contract which the selling company has in the case of the failure to pay the purchase price is to retake the machinery. It is a contingent liability only, for which a general tax cannot be levied, and does not constitute a lien upon the power plant, nor its revenues. It can be paid only on the contingency that the district derives enough net revenues from the consumers of water and lights furnished by the plant to pay such notes after payment of all expenses of operation, and, as said in *Bell* v. *Fayette,* 325 Mo. 75, 28 S. W. (2d) 356: "There is no aspect to that situation which could make the agreement to pay in the manner provided a debt of the city. It is a contingent purchase, the property to be paid for only out of the net earnings which it produces; the seller takes a chance on that contingency." See also *Lang* v. *Cavalier,* 59 N. D. 75, 228 N. W. 828; *Barnes* v. *Lehi City,* 74 Utah 71, 279 Pac. 878; *Johnson* v. *Stuart,* Iowa 226 N. W. 164. Other authorities sustaining the principle are *State* v. *Neosho,* 203 Mo. 40, 101 S. W. 99; *Shields* v. *Loveland,* 74 Col. 27, 218 Pac. 913; *Franklin Trust Co.* v. *Loveland,* 3 Fed. (2d) 114; *Twichell* v. *Seattle,* 106 Wash. 32, 179 Pac. 127; *Bowling Green* v. *Kirby,* 220 Ky. 829, 295 S. W. 1004; *Searle* v. *Haxton,* 84 Col. 494, 271 Pac. 629; *Carr* v. *Fernstermacher,* 119 Neb. 172, 225 N. W. 114; *Butler* v. *Ashland,* 113 Ore. 174, 232 Pac. 655; and *Ward* v. *Chicago,* 342 Ill. 167, 173 N. E. 810.

Appellant attempted to make a showing in the meeting, held for the consideration of the purchase by the district of the machinery for the power plant, that the waterworks district could use electricity furnished by the appellant company in pumping its water as cheaply as it could be done with the plant contemplated being purchased, and some of the estimates made by the power company's experts tended to sustain the contention; the other estimates introduced by experts showing overwhelmingly to the contrary, and that in six years the district would be able to supply its own water with the plant proposed to be purchased, paying the entire purchase

price of the engines and have remaining over some $5,500 in money; and also that the life of the engines was more than 20 years. The proposed purchase and contract was not an improvident one, could not be, and the contract was within the power of the district to make, not being prohibited by said §§ 14 and 15 of act 64 of 1929. The contract being valid, and the agreement or obligation to pay being such that it did not constitute a debt against the district, nor impose general liability thereon, no tax could be levied to raise funds for the payment thereof, the credit of the district not being pledged for the payment of the installments, nor the funds of the district, except the "savings fund," the contract of purchase could not affect the taxpayer's private interests, and he has no case of equitable interposition nor right to an injunction to prevent its consummation, even though the contract were invalid and it may be challenged by the State. *Jones* v. *Mayor,* 25 Ark. 301; *Henry* v. *Steel,* 28 Ark. 465.

The court did not err therefore in dismissing appellant's complaint for want of equity, and the decree must be affirmed. It is so ordered.

AUSTIN *v.* J. R. WATKINS COMPANY.

Opinion delivered January 25, 1932.

Rice & Rice, for appellant.

J. T. McGill, for appellee.

BUTLER, J. The appellant, W. H. Austin, and J. W. McAllister, entered into a contract with the J. R. Wat-

kins Company which was indorsed on the back of a contract entered into between the Watkins Company and one Hayes who had agreed to handle the goods of the company. The contract made by Austin and McAllister, in so far as is material to an understanding of the issues raised, is as follows:

"In consideration of one dollar to us in hand paid by the J. R. Watkins Company, receipt whereof is hereby acknowledged, and the execution of the foregoing agreement, which we have read or heard read and hereby agree and assent to, and the sale and delivery by it to the party of the second part, as vendee, of goods and other articles as therein provided, we, the undersigned sureties, do hereby waive notice of the acceptance of this agreement, notice of default or non-payment, and diligence in bringing action against said second party, and jointly, severally and unconditionally promise, agree and guarantee to pay for said goods and other articles, and the prepaid freight, express, or postal charges thereon, at the time and place, and in the manner in said agreement provided."

Hayes made default in the payment of sums due the company amounting to $437.10, with interest amounting to $483.67, for which the Watkins Company brought suit against Austin and McAllister. There was no controversy as to the amount due. After suit was brought McAllister paid the company $200, and the following written instrument was executed and delivered by the company to him:

"Whereas, J. R. Watkins Company, a corporation, has entered suit in the circuit court of Benton County, Arkansas, v. W. H. Austin and J. W. McAllister, defendants, seeking judgments against said defendants in the sum of $483.67, as sureties upon a certain bond that it is alleged that said defendants executed to plaintiff in behalf of Ernest Chester Hayes on October 4, 1927; and,

"Whereas, plaintiff and defendant McAllister have agreed upon full settlement of said suit, so far as the defendant McAllister is concerned,

"Now, therefore, the undersigned J. R. Watkins Company, in consideration of payment to it of the sum of $200 by the said J. W. McAllister, the receipt of which is hereby acknowledged, do hereby accept said sum in complete and full settlement of any and all claims that Watkins Company now have or claim by reason of the suit and bond herein mentioned, as against J. W. McAllister and agree to dismiss said suit as against this defendant with prejudice."

At the conclusion of the introduction of testimony in the case, the defendant Austin requested, and the court refused, to charge the jury that a discharge by the creditor of one surety discharges all, and that, if the jury should find that McAllister and Austin were co-sureties and that the plaintiff received $200 from McAllister in consideration of which he was discharged, then a verdict should be rendered in favor of Austin. The court, on the contrary, instructed the jury that the plaintiff had a right to release McAllister upon the payment of $200, and that in doing so did not release the defendant, Austin, from his obligation to pay one-half the amount due, if otherwise liable.

The case was submitted to the jury on the question of whether Austin did or did not cancel his contract with the company before the goods were shipped to Hayes. The evidence on this question was conflicting, and the instructions given by the court on that issue appear to have been correct. The jury found in favor of the plaintiff in the sum of $200.

In appellee's motion for a new trial, a number of errors are assigned, but none are urged in his brief except the alleged error of the court in refusing to give at his request, and giving at the request of plaintiff, the instructions heretofore mentioned, by which the effect of the release given McAllister was submitted. Therefore all grounds of objections except the one relating to the effect of the release must be treated as abandoned. *Shawmutt Lbr. Co.* v. *Waits,* 122 Ark. 224, 182 S. W. 907;

Fitzhugh v. *Leonard,* 179 Ark. 816, 19 S. W. (2d) 1010; *Roath* v. *North Little Rock,* 181 Ark. 1146, 28 S. W. (2d) 67.

We are of the opinion that the trial court correctly interpreted the effect of the release given McAllister, and it only exonerated Austin to the extent of one-half of the debt. This was the holding of the court in *Gordon* v. *Moore,* 44 Ark. 349, and *Lashbrooke* v. *Cole,* 124 Ark. 48, 186 S. W. 317. We find nothing in the cases cited by the appellant announcing a contrary doctrine. Therefore, on the authority of these cases we hold that there was no error committed by the trial court which has been urged upon our attention.

The judgment is affirmed.

[redacted]

SOUTHWESTERN LIFE INSURANCE COMPANY *v.* HILLSON.

Opinion delivered February 1, 1932.

[redacted]

Willis B. Smith, for appellant.

T. S. Clark and *T. B. Vance,* for appellee.

KIRBY, J. Appellee brought this suit upon a $500 insurance policy upon the life of her husband issued by appellant company in which she was named beneficiary.

The complaint alleged that the policy was in full force when the insured died, that proof of death was duly furnished, and that demand had been made for one-half the face of the policy, the amount due under its terms, and that payment had been refused.

The insurance company denied indebtedness upon the policy, pleaded a compromise settlement, and ex-

hibited a release signed by the beneficiary, the consideration of the same being the sum of $62.50. It alleged that the release was obtained from appellee, the beneficiary, on the 6th day of May, 1930, and, before the company could issue a check in that amount in fulfillment of the compromise, it was notified by Talbert, the father of the insured, that he was claiming the money due under the policy on the life of his son.

Upon the trial in the municipal court the appellant company tendered the beneficiary in the policy, appellee, the sum of $62.50 in fulfillment of the compromise agreement, which said sum was refused. Judgment was rendered in the municipal court for $250 with penalty and attorney's fee, and the case was appealed to the circuit court.

There the appellant again tendered the beneficiary in open court the sum of $62.50, "in fulfillment of their previous compromise with said beneficiary," which was again declined. Upon the trial of the case in the circuit court the judge instructed a verdict for appellee in the sum of $250 with 12 per cent. penalty and $50 attorney's fee; and this appeal is from that judgment.

The undisputed testimony showed that the release pleaded in bar of the suit was executed by appellee, but also that the money agreed to be paid therefor had not been paid to appellee. It is true that appellant tried to explain as a reason for its nonpayment that other claimants to the insurance had developed and tendered the amount of the consideration for the release to appellee, both in the municipal and circuit courts, where it was declined. This was more than five months, however, after the release was procured, and certainly such instrument could not be binding on appellee nor a bar to her suit on the policy, since it was procured without payment of the money agreed to be paid therefor, as shown by the undisputed testimony. Appellant concedes this to be true, but appears to think its failure to comply with the terms of the agreement for the release was excused by demand of another claimant to the insurance due under the policy,

and that it had the right later to tender the money and complete the satisfaction of the new agreement. This, of course, could not be done. It admitted that it had not paid the consideration, under which the purported release was obtained, and there was no question for determination by the jury. There are other questions that need not be determined in view of this holding.

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

FORSGREN *v.* MASSEY.

Opinion delivered February 1, 1932.

Schoonover & Schoonover, Buzbee, Pugh & Harrison and *Walter L. Pope,* for appellant.

W. P. Smith, A. J. Cole and *Jackson & Blackford,* for appellee.

McHaney, J. Cases Nos. 2291 and 2363 have been consolidated here as they refer to the same controversy. The former is an appeal from a judgment for personal injuries in the sum of $12,500, while the latter is an appeal from an order overruling a motion for a new trial on account of newly discovered evidence.

A reversal of the judgment in 2291 is sought on several grounds: that the court erred in not directing a verdict in appellant's favor at his request, and that error was committed in giving certain instructions requested by appellee and in refusing to give certain others requested by him. In view of the disposition we make of the case in 2363, we think it unimportant to discuss in detail the errors assigned and relied on for a reversal in 2291. Suffice it to say that the evidence, in our judgment, was sufficient to take the question of the negligence of appellant to the jury, and that the court fully and fairly instructed the jury on the questions at issue. We therefore pretermit a further discussion of the alleged errors in case No. 2291. The recovery was based on allegation and proof of an injury to appellee's left hip and back which caused a paralytic condition of the left leg to such an extent that he had totally and permanently lost the use of it; that the nerves therein were dead, and that it was insensible to pain. He appeared in court and in public generally on crutches, dragging his left leg, and both his physicians, and those of appellant who made an examination of appellee during the trial, testified that his leg, in their opinion, was paralyzed and useless, those for appellee stating it was their opinion such condition was permanent, while those for appellant thought nature would gradually restore the nerve structure, both motor and sensory, and that he would eventually recover. There was no testimony contradicting the nature and extent of his injury.

The trial occurred at the January, 1931, term of the court, motion for a new trial was filed and overruled, and thereafter on May 26, 1931, appellant filed an additional motion for a new trial under the seventh subdivision of § 1311 of Crawford & Moses' Digest, which provides that the court may grant a new trial for "Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence have discovered and produced at the trial." See also §§ 1315 and 1316, Crawford & Moses' Digest, for necessary requirements and procedure. The petition or motion complied with these requirements. It alleged that subsequent to the trial two witnesses, Bill Cockrum and his wife, Edith Cockrum, had disclosed to W. J. Schoonover, one of appellant's attorneys, that appellee had not received a serious or permanent injury; that his leg was not paralyzed; that he had been faking such an injury by appearing in public on crutches and dragging his leg as if he had no use of it, whereas, in the privacy of his own home, he discarded his crutches and had the use of said leg the same as if he had never been injured; that said witnesses lived in the same house appellee lived in, they on one side thereof and appellee and his wife on the other, and were in daily contact with him; and that both before and after the trial appellee was able to use said leg to walk, run, drive a car, stand upon it and move about without any perceptible limp.

It was further alleged that said evidence was not available to appellant at the trial nor at any time during the trial or at the January term of court, and could not have been discovered with reasonable diligence, that same was material for appellant in the trial of said cause, and was not cumulative in any sense. It was further alleged that the evidence was discovered when said Bill Cockrum approached said Schoonover at his home after nightfall sometime after the trial, stating that he had been sent by appellee to try to effect a settlement of his judgment for about one-tenth thereof in an attempt to defraud his attorneys; that said Schoonover declined

to make any settlement in the absence of said attorneys, began questioning said Cockrum and elicited from him the above information relative to appellee's condition. Cockrum's affidavit was taken, and later that of Mrs. Cockrum, both of whom stated they would not have disclosed the facts detailed above before the trial to any one. These affidavits, as also that of Mr. Schoonover as to how he obtained the information, were attached to the petition or motion for a new trial, which was filed, docketed as a new case, summons issued, response filed and the case set for trial and was tried at the next term of court. On the trial the deponents above named testified to substantially the same facts herein related, and appellee produced witnesses who testified to the contrary. The court found "that the petitioner has not proved due diligence in the procurement of the newly discovered evidence forming the basis for the petition for new trial, and that said petition should be overruled and denied."

This court has many times held that motions for a new trial on account of newly discovered evidence are addressed to the sound discretion of the trial court, and that this court will not reverse for failure to grant unless an abuse of such discretion is shown. Nor where the newly discovered evidence is cumulative merely. It must be relevant and material to the issue involved in the original case, and of such a character and cogency that might probably change the result, and due diligence must be shown. *Killion* v. *Killion,* 98 Ark. 15, 135 S. W. 452; *Medlock* v. *Jones,* 152 Ark. 57, 237 S. W. 438; *Connor* v. *Bowers,* 184 Ark. 102, 41 S. W. (2d) 977. There can be no question about the relevancy and materiality of this evidence, and it is also true that it is such as might probably change the result. Nor is it cumulative, as contended by appellee. There was no evidence to contradict appellee and the physician witnesses as to the nature and extent of his injuries. In an action for damages for personal injuries there must be both actionable negligence and injury. Appellee's injury was therefore a vital question in the case, as upon it depended the amount

of the recovery. This evidence therefore was highly important, as "it tended to break down the evidence of appellee" as to the nature and extent of his injury. *Medlock* v. *Jones, supra.*

The court overruled the motion on the ground that reasonable diligence had not been shown. In this we think the court erred. All that the statute requires is "reasonable diligence." Both witnesses testify they would not have disclosed this evidence before the trial if inquiry had been made of them. No one connected with the case for appellant knew of the existence of these persons or that they lived in the same house with appellee or that they might so testify. No person had any reason to suspect that appellee was a malingerer, and, therefore, had no occasion to inquire of those close to him whether he was faking an injury. On this point we think the case is ruled by *Medlock* v. *Jones, supra.*

Reversed and remanded for a new trial.

MEHAFFY, J., dissents.

BREWER *v.* WILSON.

Opinion delivered February 8, 1932.

W. K. Ruddell and *Coleman & Reeder,* for appellant.

T. A. Gray and *J. J. McCaleb,* for appellee.

SMITH, J. J. T. Wilson was survived at the time of his death on June 8, 1911, by his widow and seven children. He owned at the time of his death a quarter section of land, upon which he resided as a homestead, and the personal property usually found on a farm of that size.

G. W. Brewer, who had married one of Mr. Wilson's daughters, resided on this farm, and he claims to have rendered personal services to Mr. Wilson, who was an invalid for several years prior to his death, for which he should receive compensation of $1 per day, amounting to $1,269.

There was no administration on Mr. Wilson's estate until about a year after the death of his widow in March, 1928, at which time Brewer took out letters of administration, so that about eighteen years elapsed after the death of the intestate before letters of administration had issued.

The court below was of opinion that this lapse of time barred Brewer's right as a creditor to administer upon the estate, and, on this theory, reversed the judgment of the probate court, which had allowed the claim in part. The correctness of this ruling is the point for decision.

The excuse given for the delay in having an administration was the existence of the widow's right of homestead and dower, and it is asserted that an administration was had within a reasonable time after the termination of those estates.

We think the excuse offered for the delay was insufficient, and that the circuit court correctly held that Brewer's claim was barred by the delay.

In the case of *James* v. *Gibson*, 73 Ark. 440, 84 S. W. 485, it was said: "The rule is well established in this State that real estate is assets in the hands of the executor or administrator for the payment of the debts, as far as needed for that purpose, after the personal property has been exhausted; yet the right of creditors to enforce payment out of the lands must be exercised within a reasonable time. (Citing cases.) It has been held that seven years' delay, without reasonable excuse, is sufficient to bar the right, and it is immaterial whether the delay occurred before or after the administration commenced. *Roth* v. *Holland*, [56 Ark. 633, 20 S. W. 521, 35 Am. St. Rep. 126] *supra*."

In the case of *Roth* v. *Holland,* just referred to, 56 Ark. 601, 56 Ark. 633, 20 S. W. 521, Mr. Justice HEMINGWAY stated the reasons which induced the court to hold that a delay of more than seven years on the part of a creditor in procuring letters of administration to be issued upon the estate of his debtor is such delay as will defeat the application of the administrator for an order to sell the lands of the estate. It was said of this holding in the case of *James* v. *Gibson, supra,* that "The rule is not an application, strictly, of the equitable doctrine of laches, for it lacks some of the elements of that doctrine, nor of the statute of limitation, though it is applied in cases at law as well as in equity, but it is *sui generis,* rather an application of the statutory period of limitation to the equitable doctrine of laches in part, so as to prevent the abuse by creditors of the right to enforce demands against the lands of a decedent after unreasonable delay."

The case of *Turner Heirs* v. *Turner,* 141 Ark. 48, 216 S. W. 44, is cited to sustain the contention that there has been no such delay as to bar the allowance of Brewer's claim, inasmuch as the land of the intestate constituted his homestead, and was not subject to sale to pay his debts until the expiration of the widow's homestead and dower estates.

That and the instant case are not otherwise similar. In the former case the intestate died in 1894, and, while the date of the letters of his administrator is not recited in the opinion, it is stated that the claims against the estate were presented and allowed in 1895 and 1896. The personal estate appears to have been exhausted in the course of the administration. There appears to have been no delay in probating the claims against the estate in that case, and the opinion recites that the administration was still pending at the time of its rendition. There was no petition in the probate court until after the death of the intestate's widow in 1918, for an order to sell the homestead and a small adjacent tract of land, which was said to have been valueless if sold apart from the

homestead. Inasmuch as the homestead could not have been sold in payment of the intestate's debts during the continuance of the homestead estate of the widow, it was held that there was no laches or delay in waiting until the homestead estate had expired before asking the probate court for an order to sell.

The delay in the instant case consisted in not having an administration upon the estate. The claim could have been probated in any event, and the right so to do was not affected by the fact that all the land belonging to the intestate was embraced in the homestead. As was said by Justice HEMINGWAY, in the case of *Roth* v. *Holland, supra*: "Delay in taking out letters, and delay in applying to sell after they are taken out, alike keep alive uncertainty in the tenure of the heir, and are alike due to the non-action of the creditor. For, although letters are issued upon application of the administrator, it is within the power of creditors to compel administration after thirty days from the debtor's death, and, if it is delayed, it is as much due to them as is the delay in applying for leave to sell. Our conclusion, therefore, is that the right to sell is lost by delay in administering, whenever a like delay after administering, in proceedings to sell, would forfeit it. [Citing cases.]"

We conclude therefore that the circuit court was correct in holding that the delay in causing the estate to be administered upon—about eighteen years—was unreasonable, and barred the right of the appellant creditor to proceed against the estate. *Lester* v. *Kirtley,* 83 Ark. 554, 104 S. W. 213; *Field* v. *Tyner,* 163 Ark. 373, 261 S. W. 35; *Backes* v. *Reidmiller,* 157 Ark. 569, 249 S. W. 10; *Mayo* v. *Mayo,* 79 Ark. 570, 96 S. W. 165; *Black* v. *Robinson,* 70 Ark. 85, 68 S. W. 489; *Stokes* v. *Pillow,* 64 Ark. 1, 40 S. W. 580; *Brogan* v. *Brogan,* 63 Ark. 405, 39 S. W. 58; 58 Am. St. Rep. 124; *Abramson* v. *Rogers,* 97 Ark. 189, 133 S. W. 836.

The judgment of the court below must therefore be affirmed, and it is so ordered.

NORSWORTHY *v.* SEARAN.

Opinion delivered February 8, 1932.

[redacted]

George E. Pike, for appellant.

W. A. Leach and *M. F. Elms,* for appellee.

SMITH, J. The immediate question in this case is, What is the compensation to which jurors, grand and petit, are entitled in Arkansas County? The answer to this question depends on the constitutionality of act 299 of the Acts of 1931 (Acts 1931, page 1032).

This act 299 is entitled, "An act fixing the fees and salaries of certain county officers and creating the office of collector in counties having a population between twenty-two thousand and twenty-two thousand five hundred." By this act the offices of sheriff and collector are separated, and certain duties are imposed on the collector in regard to visiting each incorporated town in the county. All the county officers are put on salaries, and provision is made for deputies and clerical assistance. Section 18 contains the following provision in regard to the compensation of jurors: "That, from and after the passage of this act, the grand jurors and petit jurors of the circuit court of such county shall receive as their compensation three dollars fifty cents ($3.50), and they shall be allowed the same mileage as now allowed by law."

Other sections of the act provide the fees to be paid upon suits filed in both the circuit and chancery courts, and for making transcripts upon appeals to the Supreme Court.

It is provided in the act, however, that "the provisions of this act shall apply to all counties which had,

according to the last Federal census, a population between twenty-two thousand and twenty-two thousand five hundred."

By the last or 1930 Federal census, Arkansas County had a population of twenty-two thousand three hundred, and was the only county in the State whose population exceeded twenty-two thousand and was less than twenty-two thousand five hundred. It is therefore apparent and certain that the act can apply only to that county, and its operation is as definitely limited to Arkansas County as if it had been made to apply to that county by name and to no other. As the act is not prospective, but applies only to the counties "which had, according to the last Federal census," the designated population, it cannot ever apply to any county except Arkansas County. The act is therefore a local one within the inhibition of the constitutional amendment against local legislation.

There has been confusion as to the number of this and certain other amendments. The Local Bill Amendment to the Constitution is designated in Applegate's Constitution of Arkansas, Annotated (page 231), as amendment No. 12, and we have used that number in referring to it. This is the amendment which provides that "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts." The Secretary of State has had printed the Constitution with the amendments thereto, in which he has designated the Local Bill Amendment as amendment No. 14, and we therefore employ the same number in referring to it.

The instant case cannot be distinguished from the recent case of *Cannon* v. *May,* 183 Ark. 107, 35 S. W. (2d) 70, and is controlled by it, and, upon the authority of that case, it must be held—and we do hold—that act 299 of the Acts of 1931 is void, as having been enacted contrary to Constitutional Amendment No. 14, above referred to. There is therefore no valid act fixing a different or special compensation for jurors in Arkansas County, and

they must therefore be paid the same compensation as is allowed by the general laws of the State.

The decree of the chancery court, from which this appeal comes, conformed to this view, and it is therefore affirmed.

ALTMAN-RODGERS COMPANY *v.* SMITH.

Opinion delivered February 8, 1932.

Buzbee, Pugh & Harrison, for appellant.

Tom W. Campbell, for appellee.

HUMPHREYS, J. Appellee brought suit against the Southwestern Bell Telephone Company, appellant, and others to recover damages in the sum of $30,000 for an injury received by him from a telephone wire stretched across State Highway No. 67 near Beebe, which struck and threw him from a load of hay on which he was riding. It was alleged that appellants and the other defendants had moved the wire, and in replacing it had negligently lowered its position, thereby causing the injury.

A separate answer was filed by appellant and two other defendants, denying the material allegations of the complaint, and later appellant filed an amendment to its answer, pleading in bar of the cause of action against it that a settlement and compromise of the cause of action had been made by appellee with one of its codefendants, Southwestern Bell Telephone Company.

No pleadings were filed by the other defendants, and the cause was tried to the jury, resulting in a verdict and judgment against appellant for $8,000, from which is this appeal.

Appellant's sole contention for a reversal of the judgment is, that under the evidence it was entitled either

to an instructed verdict in its favor or else to have the issue of whether there was a settlement of the cause with appellant's codefendant submitted to the jury.

It requested a peremptory instruction, and, when refused, it requested the court to give instruction No. 9, also refused, which is as follows:

"You are instructed that if you find from the evidence in this case that the plaintiff entered into an agreement of settlement with the defendant, Southwestern Bell Telephone Company, that bars his action against the defendant, Altman-Rodgers Company, and your verdict must be for that company."

Both requests were based upon the following eleven questions propounded to appellee, and his answers thereto:

"Q. Mr. Smith, when this suit was filed, you included as one of the defendants here the Southwestern Bell Telephone Company, or the Bell Telephone Company, and that suit, I understand, has been dismissed?" "A. Well, I don't know anything about that." "Q. I will ask you, have you made a settlement with the telephone company?" "A. I haven't." "Q. Do you know whether Mr. Campbell, your attorney, has?" "A. I don't know." "Q. Hasn't he informed you that he made a settlement with the telephone company?" "A. He never said anything to me about it." "Q. You don't know why suit has been dismissed as to them?" "A. Mr. Campbell knows that; I don't know." "Q. Did you hear him make a statement here to counsel for the defendant this morning that he had dismissed as to them?" "A. No, sir." "Q. Didn't you sign an agreement with the Southwestern Bell Telephone Company not to sue in consideration of them paying you $500?" "A. I signed a receipt or something that Mr. Campbell wrote out there." "Q. Didn't you understand the consideration for you signing that was five hundred dollars?" "A. I didn't see no five hundred dollars." "Q. You didn't see the five hundred dollars?" "A. I signed a receipt or something; I didn't read nothing, and he didn't tell me nothing. He give me his personal check

for $250." "Q. He retained half of it as his fee; you had an understanding to that effect?" "A. We never said nothing about that." "Q. You signed a paper agreeing not to sue the telephone company any further?" "A. I couldn't say what it was."

Appellant argues that the application of the rule of law announced by this court in the case of *Coleman* v. *Refining Company of Louisiana,* 172 Ark. 428, 289 S. W. 2, to the facts detailed above entitles it to a reversal of the judgment and a dismissal of the cause of action against it. The rule of law referred to is as follows:

"Where the concurrent negligence of two persons was responsible for an injury to a third person, a settlement by the latter of an action for such injury will bar an action against the other, although the defendants in the respective actions were not joint tort-feasors."

The rule invoked is not applicable because the evidence relied upon does not show a settlement of the cause of action between appellee and the Southwestern Bell Telephone Company. The most it shows, and the most the jury could have found it shows, is that appellee agreed for a consideration not to sue the Southwestern Bell Telephone Company.

This court is committed to the doctrine that a covenant not to sue one of two joint tort-feasors does not operate as a release of the other from liability. *Texarkana Telephone Company* v. *Pemberton,* 86 Ark. 329, 111 S. W. 257; *Dardanelle & Russellville Railway Company* v. *Brigham,* 98 Ark. 169, 98 S. W. 969; *Mahaffey* v. *Glover,* 184 Ark. 1159, 45 S. W. 521.

No error appearing, the judgment is affirmed.

SMALLEY *v.* PEGG.

Opinion delivered February 8, 1932.

[redacted]

Daily & Woods, for appellant.

Partain & Agee, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellants in the chancery court of Crawford County to enjoin them from taking an additional strip of land, twenty feet wide by four hundred feet long, belonging to her for the purpose of widening a portion of State Highway No. 71 in said county, commonly known as the Mountainburg-Winslow road, under the provisions of § 5249 of Crawford & Moses' Digest. The injunction was sought upon the ground that, in a condemnation proceeding under the provisions of said section of Crawford & Moses' Digest, initiated on petition of the State Highway Commission on the 8th day of May, 1928, against appellee and others, an agreement was entered into between said Highway Commission and appellee to the effect that, in consideration of $300 paid to her, the Highway Commission would appropriate for use in the construction of the road certain lands belonging to her, accurately designated on the drawing or plat, and no more, and that this agreement was incorporated in a judgment entered by the county court of Crawford County awarding damages in the sum of $300 to appellee for said land, which was paid to her by the county.

Appellant filed an answer, denying that the settlement in the original condemnation proceeding and the order entered by the county court of Crawford County incorporating same provided that no more of appellee's

land should thereafter be condemned and appropriated for the purpose of widening said highway, but, on the contrary, that the settlement and order simply fixed the amount to be paid for the land particularly described therein and the injury resulting to the entire tract owned by her by reason of taking same.

The cause was submitted upon the pleadings and testimony adduced, from which the court found that the settlement between the parties and order entered by the Crawford County court in conformity therewith constituted an agreement by which no more land of appellee should ever be condemned for widening said highway, and thereupon permanently enjoined appellants from going upon, taking, injuring, or damaging any land or property of appellee save and except the land described in the county court order of March 3, 1930, from which is this appeal.

The language relied upon by appellee as constituting an agreement never to condemn any more of her land for the purpose of widening said highway is contained in a letter written by her attorneys to appellants' attorneys and their reply thereto in negotiating the settlement in the original condemnation proceeding, together with language used in the order entered by the county court of date March 3, 1930, pursuant to said agreement or settlement. The material portions of the letter written by appellee's attorneys to appellants' attorneys are as follows:

"In regard to settlement of claim of Mrs. Pegg v. Crawford County: We have taken your proposition of settlement for the sum of $300 up with Mrs. Pegg, and have finally received her permission to make settlement for that amount with the following conditions understood:

"1. That the route is to go as shown by the drawing submitted to us, and no more land is to be taken than that shown, and at the points shown."

The material portion of the letter in response thereto is as follows:

"Mr. W. T. Barry, district highway engineer, has written Judge Smalley a letter advising him that the route is exactly as set forth in section one of your letter, and that no land will be taken except as shown on the drawing heretofore submitted to you."

The material language used in the order of the county court is as follows:

"No additional land shall be taken except as shown in green and yellow on said plat, as above set forth, and the proposed or new right-of-way lines for said road shall be as shown on said plat.

"The plaintiff, Mary B. Pegg, is to have and receive the sum of $300 as her damages for such land so taken, and the damage to the balance of her land by reason of such taking, it being expressly agreed and understood that no more land is to be taken than that shown in green and yellow on said plat, and that same is to be taken at the places shown on said plat."

The language used in the letters and in the order as quoted above referred to the land that was then being paid for and which had been previously condemned, and had no relation whatever to lands which might be condemned for highway purposes in future condemnation proceedings. We are unable to discern anything in the language indicating that the State of Arkansas had surrendered its sovereign power to ever thereafter condemn any more of appellee's land if needed for the construction of highways.

The decree is therefore reversed, and the cause is dismissed.

MEASLES *v.* OWENS.

Opinion delivered February 8, 1932.

[redacted]

Searcy & Searcy, for appellant.

Atkins & Stewart, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment upon a petition for certiorari for review of an order of the county superintendent revoking appellee's license to teach in the public schools. The court sustained the petition, overruling the demurrer, and holding that the license to teach was wrongfully revoked by the superintendent, and set his order aside.

It is contended here that error was committed by the superintendent upon the hearing in refusing to disqualify himself, because of interest in the matter, and because of his testifying at the hearing of the proceedings.

Appellee was charged with not possessing the requisite moral character to teach, and cited for re-examina-

tion to show cause why his license should not be revoked. Upon the hearing, the license was revoked, and a petition for certiorari was filed in the circuit court asking a review of the proceedings, and alleging that the license was erroneously revoked, and that the superintendent was disqualified to hear and determine the matter, because he was an interested party and prejudiced against the petitioner, and further because he erred in testifying in the hearing in regard to admissions of immorality made by appellee to him. A demurrer was interposed to this petition, and a temporary order overruling the demurrer was made, and finally the order of the superintendent canceling the license was revoked, from which order this appeal is prosecuted.

Our statute provides for revocation of a license to teach by the county superintendent upon a citation for re-examination of the person holding such license upon his being satisfied by such re-examination that such person does not sustain a good moral character, etc. Section 8897, Crawford & Moses' Digest.

The statute clothes the county superintendent with special powers, and charges him with certain duties, giving him exclusive authority to hear and determine these matters and makes no provision for a hearing before any other agency or tribunal; and no error was committed therefore in overruling the objection to the competency of the examiner to conduct the hearing and make the proper order of revocation of the license upon his determination that it should be done.

Neither was error committed in the examiner being a witness in the hearing and testifying about the matter. He was only a ministerial officer, and not clothed with judicial power within the meaning of our statutes relative to disqualification of a judge called as a witness in matters before this court, and besides no objection was made to the introduction of this testimony. *Hall* v. *Bledsoe*, 126 Ark. 125, 189 S. W. 1041; 24 R. C. L., § 70, page 615; *Lee* v. *Huff*, 61 Ark. 949, 33 S. W. 846; *Stone* v. *Fritts*, 169 Ind. 361, 82 S. W. 792, 15 L. R. A. (N. S.) 1147, citing

Doyle v. *Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148; *Smith* v. *Farmers' Bank of Newport*, 125 Ark. 549, 188 S. W. 1167.

The county superintendent being given exclusive jurisdiction of the matter, the allegations of the petition relative to his bias and interest and want of judicial capacity are without force. He must answer, of course, to the body responsible for his election for the manner in which he discharges his duties, so long as he keeps within his legitimate sphere, and his arbitrary and unwarranted actions are subject to review and correction upon certiorari.

The demurrer to the petition for certiorari should have been sustained, and, there appearing to be substantial testimony in support of the superintendent's finding, his decision and order revoking the license of appellee should not have been canceled and revoked by the lower court upon the certiorari, and its judgment is erroneous, and must be reversed, and the case dismissed. It is so ordered.

BALTIMORE & OHIO RAILROAD COMPANY *v.* MCGILL BROTHERS RICE MILL.

Opinion delivered February 8, 1932.

Carter, Jones & Turney, Morrison R. Waite, Wm. A. Eggers, Frank H. Cole, Jr., N. F. Lamb and *Arthur L. Adams,* for appellants.

A. G. Meehan and *John W. Moncrief,* for appellees.

MEHAFFY, J. On May 15, 1929, the appellees, McGill Brothers, delivered a shipment of rice to the St. Louis Southwestern Railway Company at Stuttgart, Arkansas. The shipment was consigned to the order of McGill Brothers Rice Mill, Cincinnati, Ohio, with directions to notify the American Diamalt Company.

The St. Louis Southwestern Railway Company delivered the shipment to the Baltimore & Ohio Railroad Company, which company transported it to Cincinnati. When the rice was shipped the McGill Brothers drew a draft for the amount of the shipment, $1,106.85, which draft, with the bill of lading attached, was sent to the Provident Savings Bank & Trust Company of Cincinnati, Ohio. The draft was drawn on the American Diamalt Company, payable to the First National Bank of Stuttgart, Arkansas.

When the shipment reached Cincinnati, the American Diamalt Company secured the bill of lading from the Provident Savings Bank & Trust Company, and the draft

was marked "Paid." The bill of lading delivered to the railroad company was canceled.

On July 5, 1930, A. U. McGill and H. T. McGill, doing business as McGill Brothers Rice Mill, and the First National Bank of Stuttgart filed suit in the Arkansas Circuit Court against the St. Louis Southwestern Railway Company.

The complaint alleged the delivery of the rice to the railway company; that the shipment was consigned under shipper's order bill of lading with draft attached. The bill of lading provided for the notification to the American Diamalt Company, Cincinnati, Ohio, and the complaint alleged that the defendant undertook to transport said rice under the terms of said bill of lading; that the bill of lading was duly indorsed and a draft for $1,106.85 drawn on the American Diamalt Company was attached; that the draft with the bill of lading attached was delivered to the First National Bank of Stuttgart, and by it forwarded to the Provident Savings Bank & Trust Company of Cincinnati; that the American Diamalt Company paid the draft to the Provident Savings Bank & Trust Company and the bank delivered the bill of lading and draft to the American Diamalt Company, and it indorsed said bill of lading and presented it to the agent of the connecting carrier, the Baltimore & Ohio Railroad Company; that the railroad company marked the bill of lading canceled, and delivered the shipment of the rice to the consignee who accepted said shipment; that thereafter the Baltimore & Ohio Railroad Company wrongfully surrendered and delivered back to the American Diamalt Company the bill of lading and received back into its possession the shipment of rice.

It alleged a conspiracy between the Baltimore & Ohio Railroad Company and the American Diamalt Company, by which the draft was returned and the money refunded.

It was also alleged that the St. Louis Southwestern Railway Company with knowledge consented to the action of the Baltimore & Ohio Railroad Company and Ameri-

can Diamalt Company, and that the Baltimore & Ohio Railroad Company wrongfully took back the shipment of rice and held and disposed of it; that the rice was of the grade and quality agreed to be sold, and was of the value of $1,106.85, and that the McGill Brothers Rice Mill was damaged in this amount.

The St. Louis Southwestern Railway Company filed answer, admitting the delivery of the rice, the indorsement of said bill of lading by McGill Brothers, and that the draft was attached. It denied any knowledge of receiving and accepting back by the Baltimore & Ohio Railroad Company, and denied any knowledge of the grade or quality of the rice.

On February 17, 1931, an amendment to the complaint was filed alleging that the defendant and its connecting carrier, after making surrender and delivery, surrendered back the bill of lading and assumed possession and control of the shipment, and demanded that the plaintiffs pay freight, demurrage and storage, and that they thereafter sold said rice.

The complaint alleged that the defendant and its connecting carrier made false entries showing that no delivery had been made, and no acceptance of the shipment.

Thereupon the St. Louis Southwestern Railway Company filed motion to make amendment more specific, which motion was by the court overruled.

The cause was then continued until the August, 1931, term of court. On June 25, 1931, another amendment was filed joining the appellant, the Baltimore & Ohio Railroad Company, as defendant, and the Chicago, Rock Island & Pacific Railway Company as garnishee, alleging that the Baltimore & Ohio Railroad Company was liable under its complaint, and that the Chicago, Rock Island & Pacific Railway Company was indebted to the Baltimore & Ohio Railroad Company in the sum of $2,000, and prayed for a writ of attachment and garnishment. Affidavit and bond were filed, warning order was issued and published, and attorney *ad litem* appointed for the Baltimore & Ohio Railroad Company.

On July 31, 1931, another amendment was filed to the complaint alleging bankruptcy of McGill Brothers, and that Charles G. Miller and Virgil C. Pettie were receivers, and joining them as plaintiffs.

It also alleged in an amendment that Charles G. Miller, Virgil C. Pettie and R. B. Westbrook were duly elected trustees in bankruptcy, and joining them as parties plaintiff.

There was a motion filed by the St. Louis Southwestern Railway Company, asking the dismissal of the complaint as to the First National Bank of Stuttgart.

On August 3, 1931, the Baltimore & Ohio Railroad Company, after filing a motion to dismiss as to the First National Bank of Stuttgart, filed its answer denying all the material allegations in plaintiff's complaint, and also filed a cross-complaint praying judgment for expenses in the sale of the rice and other charges amounting, after deducting the price the rice sold for, to $475.86.

A reply was filed to the cross-complaint, and then on August 4, 1931, the Baltimore & Ohio Railroad Company filed a motion for continuance, on the ground that it had no knowledge of any claim against it until a few days before that time; that its witnesses lived in several States, none of them living in Arkansas, and on the same day it filed an amendment to its motion for continuance and amendment thereto. These motions gave the names of the witnesses, where they lived, and what their evidence would be if present.

The attorneys for plaintiffs announced in open court that they would concede that each and all of the witnesses would testify, if present, as stated in the motion, and the court thereupon overruled said motion for continuance.

When the case was called for trial on August 5, 1931, the Baltimore & Ohio Railroad Company announced that, since the filing of the motion for continuance and amendment thereto, it had learned that J. B. Brodberger was a necessary witness, and set out what he would testify to if present. The motion for continuance as amended was overruled and exceptions saved.

There was a jury trial, and a verdict for appellees against the Baltimore & Ohio Railroad Company for the amount sued for. Motion for a new trial was filed and overruled, and the case is here on appeal.

Appellant first contends that the case should be reversed because the court overruled its motions for continuance. When the motion was filed, appellees admitted that, if the witnesses were present, they would testify to the statements contained in the application for continuance.

The section of the Digest governing continuances reads as follows: "A motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it; and, if it be for an absent witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, that the affiant himself believes them to be true, and that the witness is not absent by the consent, connivance, or procurement of the party asking the postponement. If thereupon 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. Provided the opposite party may controvert the statement so set forth in the said motion for continuance by evidence." Section 1270, Crawford & Moses' Digest.

The warning order was issued on July 24, 1931, and the appellant filed its answer on August 3, 1931. It was not required to answer until 30 days, but it did file answer on August 3rd, and the case was therefore ready for trial, except for the absence of appellant's witnesses. If the case had been postponed, appellant says that it would have taken the depositions of witnesses because most of them were not in its employ. It had all the advantages that it would have had by taking depositions, because the statements of the witnesses were read to the jury as evi-

dence. If depositions had been taken, the appellees would have had an opportunity to cross-examine the witnesses. In order to get a trial, however, they admitted that the witnesses, if present, would testify to the statements prepared by the attorneys for appellant.

They not only had no opportunity to cross-examine them, but the statements prepared were doubtless as favorable to appellant as the attorneys thought the facts would justify, and the statute was strictly complied with by permitting appellant to introduce these statements in evidence.

There was no claim made by appellant that it would have the witnesses present in court to testify; on the contrary, it said that their depositions would be taken, most of them not being in its employ.

Appellant calls attention to a number of cases decided by this court, all of which hold that it is within the sound discretion of the court to grant or overrule a motion for continuance, and that the granting or overruling a motion for continuance will not be disturbed unless the trial court abused its discretion to the injury of the party presenting the motion.

The earlier cases to which attention is called by the appellant were under a statute very different from the present statute. The statute as to continuances that was in force prior to the section of Crawford & Moses' Digest above quoted provided that the adverse party might prevent the postponement of a trial by admitting that the statements which the party claimed the witnesses would testify to were true. Civil Code, page 112.

Under the former statute, if one admitted that the witnesses would testify as stated by the party making the motion, he must also admit that the statements were true. They could not be contradicted at the trial. For this reason the party generally could not get a postponement of the trial, because he could not afford to admit that the things set up in the motion were true. The earlier cases were therefore decided on the statements in the motion alone.

But this court has uniformly held that the granting or refusing a motion for continuance is in the sound discretion of the trial court, and this court will not interfere with the exercise of this discretion, unless the action of the trial court is plainly erroneous, and is a clear abuse of its discretion. *Bankers' Fire Ins. Co.* v. *Williams,* 176 Ark. 1189, 5 S. W. (2d) 916; *Missouri Pac. Rd. Co.* v. *Sloan,* 176 Ark. 179, 2 S. W. (2d) 15.

It is true, as stated by appellant, that it had never been made a party until June 25th, but it is also true that it knew several months prior to this time that the appellees claimed that appellant was liable to them because it had delivered the shipment to the consignee and had received back the bill of lading and thereafter repossessed itself of the property, returning the bill of lading with some altered indorsement to the consignee.

It therefore appears that it knew what the claim of the appellees was, and it does not appear that it would have had any other or different testimony from what it was permitted to introduce, or what it might have introduced.

It is next contended by appellant that there is no proof of adjudication in bankruptcy, or the appointment and qualifications of trustees, or their authority to maintain the suit, and it calls attention to numerous authorities as sustaining its contention. First, it calls attention to subdivision b of § 11 of the Bankruptcy Act of 1898, 11 USCA, § 29 (b). That simply provides that the court may order the trustee to enter his appearance and defend any impending suit against the bankrupt. This was not a suit against the bankrupt, but a suit begun by McGill Brothers, who afterwards went into bankruptcy, and we know of no provision of the Bankruptcy Act that prohibits trustees in bankruptcy from being substituted or joined as parties plaintiff.

One of the cases referred to by appellant is *Callahan* v. *Israel,* 186 Mass. 283, 71 N. E. 812. In that case the court expressly stated: "It was not the intention of Congress that a trustee could not make a demand for payment, re-

ceive money offered him in payment, or take any of the usual means to collect and reduce to money the estate, the title of which had vested in him, without some specific direction so to do. That clause was merely intended to give to the court power to direct the proceedings of its trustees if occasion for such direction should arise in any specific instance, and not to place upon the court the burden of giving constant directions as to the reducing of the property to money. The title to the estate is vested in the trustee. * * * There is no reason to hold that he has not the right of an owner to bring suit to collect his property, save as it is clearly expressly limited by the act."

The act, as we have already said, has reference to suits against the bankrupt.

Appellant also calls attention to the case of In re *Price,* 92 Fed. 987. The court held in that case that it could make no order requiring the receiver in a State court to transfer assets to the trustee in bankruptcy. It was said the receiver is an officer of the State court, and the court held that, while the title to the property was in the trustee, this did not authorize one court to interfere with the property lawfully in the possession of another, and what the court in the last-mentioned case with reference to its order said was that an order might be made authorizing the trustee to apply to the State court for an order directing the receiver to transfer property, and to that end the trustee may be substituted as plaintiff.

In another case referred to by appellant, *Western Star Lodge No. 24, F. & A. M.,* v. *Burkes Construction Co.,* 267 Fed. 550, the court said: "We do not understand that any one can make himself a party plaintiff or defendant in an equity case by simply filing a paper therein asking to be made a party. It takes the judicial action of the court."

That means the court where the cause is pending. It requires the permission of the court to be made a party. But, as to the right of the trustees to be made

parties, and also as to their election and qualification, the appellant cannot complain. After they had been made parties, appellant filed a cross-complaint against all the plaintiffs, which included the trustees in bankruptcy, and it cannot now be heard to say that they were not qualified trustees or that they had no right to appear as plaintiffs.

It is finally contended that the evidence is insufficient to support the verdict. It is stated by appellant that the majority rule holds a delivery complete when notice has been given to the consignee of the arrival of the goods, and a reasonable time after such notice for removal of the goods has elapsed.

The evidence as to what took place is in conflict, and it was therefore a question for the jury.

A. U. McGill testified that the bill of lading, the original of which was introduced, shows a cancellation stamp placed on it by the cashier of the Baltimore & Ohio Railroad Company under date of May 22d. The car was delivered to the initial carrier May 15th. There was also indorsed on the bill of lading "No. 1238, date delivered, May 22, 1929." McGill testified that the bill of lading shows that the shipment was delivered and bill of lading canceled on May 22d, and then shows, by indorsement not dated, that it was returned to the American Diamalt Company after examination. He also testified that the bill of lading shows that it was handled through the Provident Savings Bank & Trust Company of Cincinnati, and that it bears the indorsement of the American Diamalt Company, by its auditor. He also testified that it was customary and necessary for the consignee to indorse the bill of lading to obtain delivery.

The draft and invoice were introduced in evidence, and it was shown that the draft was for the amount of the selling price, less the freight. McGill examined the draft when it came back to the Bank of Stuttgart, and it showed that it had been marked "Paid" by the Provident Savings Bank & Trust Company of Cincinnati. He also said that it showed an erasure.

The evidence therefore on the part of the appellee was sufficient to submit to the jury the question of whether there had been a complete delivery to the American Diamalt Company and a payment of the draft. If there had been, neither the railroad company nor the consignee could change the relation of the parties, and if the appellant, after the shipment had been delivered to the consignee and paid for, repossessed itself of the property, it did what it had no lawful right to do.

The evidence offered by the appellant contradicted the evidence offered by appellee, not only as to what was done as to delivery and payment, but as to the quality and value of the rice. These, however, were questions of fact, and the jury's finding is conclusive. This court cannot pass on the credibility of the witnesses, nor the weight to be given their testimony.

The appellant complains about the instruction given at the request of the appellee. It is a lengthy instruction, and appellant's objection is, first, that it fails to present the issues, and does not mention or indicate the defenses. The instruction would not be erroneous for this reason. It simply told the jury that the questions at issue, naming them, were all questions of fact for them to determine, and that the burden of proof was on the appellees.

The next objection is that it unduly emphasizes the evidence and theory of the plaintiffs. We do not agree with appellant in this contention. The instruction merely recites the facts pleaded by the appellee, telling the jury what is claimed by the plaintiff, but does not emphasize the evidence in any way.

It is next contended that the instruction in effect quotes the theory of the plaintiffs, and nowhere states the theory of the defense. It is not usual in requesting instructions by either party to state the theory of the opposing party, and in this case the theory of the appellant was stated in a number of instructions and so plainly that the jury could not have been misled.

It is next stated that the instruction is abstract, and finally that the measure of damages stated is inconsistent with the later instruction on damages. The jury were told in the instruction complained of that the appellee must prove by a preponderance of the testimony, among other things, that appellees had suffered a loss of $1,106.85, but, in giving the jury the form of a verdict, the amount of the recovery, if they found for the plaintiff, was left blank.

The court instructed the jury at appellant's request that, if they found the shipment was tendered to consignee under the terms and provisions of the bill of lading, and was rejected for no cause occurring or happening in transit, they would find for the defendants.

They were also told at the request of the appellant that, if they found from the testimony that only such inspection took place at Cincinnati as was customary and usual under consignment shipments allowing inspection, then they would find in favor of the defendants, regardless of who had possession of the bill of lading during the period of such inspection.

The jury also were instructed that a delivery is not made until notice has been given the consignee, and a reasonable time allowed for its unloading or rejection, and, if the jury found that within a reasonable time the consignee rejected the shipment, they must find for the defendant.

They were also told in an instruction requested by appellant that the measure of damages was the fair market value of the rice at destination point.

There is no conflict between this instruction and the one given at request of appellees.

There was no error in the instructions, and the judgment of the circuit court is affirmed.

STANFIELD *v.* KINCANNON.

Opinion delivered February 8, 1932.

[redacted]

Evans & Evans, for appellants.

Rhyne & Shaw and *Hays & Smallwood,* for appellees.

Cochran & Arnett, for interveners.

Trieber & Lasley, amici curiae.

McHANEY, J. This is an appeal from a judgment of the circuit court of Logan County awarding a writ of mandamus on the petition of the county judge and Fred Stacy against Joe Z. Stanfield, county treasurer of said county, by which the treasurer was ordered and directed to pay, from the funds in his hands arising under the provisions of act 63 of the Acts of 1931, the warrant of the petitioner, Fred Stacy, drawn on a fund in the county treasury resulting from the turnback from the State Highway Fund in the State Treasury to the credit of the county highway fund. This judgment also approved and confirmed the order of the county court of Logan County made and entered on August 6, 1931, hereinafter mentioned, and dismissed the interventions of the First National Bank and other interveners.

In 1930 a large number of warrants were issued against the county highway fund of Logan County for right-of-way, materials, supplies, and labor payable in 1931, and in 1931 a large number of the same kind of

warrants were issued against said fund payable in 1932, all of which are still outstanding and aggregate more than $35,000. On August 6, 1931, there was on deposit in the county treasury, to the credit of the county highway fund, $3,000, and the county judge made an order creating what was designated as "County Road Fund Special under act 63," and it was ordered that the funds already on hand and all funds thereafter to be received by the treasurer under the provisions of said act 63 of 1931 be credited to said fund, and directed the clerk to charge the county treasurer with all funds on hand and which were thereafter to be received from the State Treasurer to said special fund. The order further designated certain county roads as "farm-to-market roads." The clerk was further ordered and directed to receive and file all claims properly presented against said "County Road Fund Special under act 63," and, when ordered paid by the court from said fund, to issue his warrant upon the treasurer against said fund, and that the treasurer should pay same from said fund only. The effect of the order was to create a new fund out of which warrants thereafter to be issued should be paid, and was virtually a repudiation of the warrants then outstanding in the hands of the interveners and others in the amount of more than $35,000, as aforesaid. It appears that only the funds received from the State Treasurer and commonly referred to as turnback from the State Highway Fund go into the county treasury to the credit of the county highway fund, and that there is no money in said fund arising from taxes or otherwise in Logan County in said county highway fund. The three-mill road tax of Logan County does not get into that fund, as it is prorated to the several road districts in the county and spent under the direction of the county judge through road overseers. Thereafter appellee Stacy filed a claim with the county clerk in the sum of $88 for road work done by him which was presented to the county court and allowed against the newly created fund. The court directed the clerk to issue his warrant in Stacy's favor

for said sum, and directed the treasurer to pay same out of the new fund so created, which the treasurer declined to do. The treasurer also refused to obey the order of the court to transfer the money then on hand to the credit of the new fund, and refused to pay the Stacy warrant because of the warrants already issued and outstanding in the hands of interveners and others, which had been issued against the county highway fund prior to the date of Stacy's warrant. The treasurer and interveners appealed from the order of August 6th to the circuit court, and that case, as also that for the petition for mandamus, were heard together in the circuit court with the result heretofore stated. This appeal challenges the correctness of that judgment.

We think the judgment of the circuit court awarding the writ of mandamus against the treasurer, in dismissing the interventions, and in approving the order of the county court of August 6, 1931, was erroneous and must be reversed on the authority of *Anderson* v. *American State Bank,* 178 Ark. 652, 11 S. W. (2d) 444; *Burke* v. *Gullege,* 184 Ark. 366, 42 S. W. (2d) 397; and *Hastings* v. *Pfeiffer,* 184 Ark. 952, 43 S. W. (2d) 1073. In the last-mentioned case we said: "We are of the opinion that it is immaterial by what name the fund was called, where it is shown 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." Both the cases of *Burke* v. *Gullege* and *Hastings* v. *Pfeiffer* were dealing with the turnback fund under act 63 of 1931. This act is the authority relied upon by the county judge in the instant case to support his order of August 6th. As already stated, the county highway fund of Logan County, depends entirely for its revenue on act 63 of 1931, and the effect of the order was thereafter to make it impossible for the outstanding warrants against the county highway fund ever to be paid, and we think the county court had no authority to make such order. It is regrettable, of course, that a county judge would issue warrants on the

county highway fund in excess of the revenue accruing to said fund during the current year, and especially to make them payable during the term of a new administration, but this is a matter for legislative action and not for the courts. We held in the case of *Anderson* v. *American Bank, supra,* that the fund in the county treasury received from the State as turnback is not county revenue, but State revenue, and that the provisions of the amendment to the Constitution prohibiting counties from going in debt had no application to this fund. By act 63 of 1931 a tax of 6 cents a gallon is levied on gasoline, and it is also provided that, after deducting the refund on gasoline used for other than road purposes, the fund shall be divided and deposited in the State Treasury, five-sixths to the credit of the State Highway Fund and one-sixth to the credit of a fund to be known as "county highway fund," and a further fund of 12½ per cent. of the net proceeds derived from the sale and delivery of State highway notes or bonds for the years 1931 and 1932, except such as are sold to pay off short-term notes, shall be deposited in the State Treasury to the credit of the county highway fund. And the act further provides for a distribution of the funds in the treasury to the credit of the county highway fund to the counties on a basis therein fixed. The possibility of treating this county highway fund so raised as county revenue and thereafter subject to the provisions of amendment No. 10 has suggested itself to us, but we have reached the conclusion that this result does not follow in view of our decisions in the Burke and Hastings cases, and this view is strengthened by the provisions of § 6 of said act 63 of 1931, which provides "that, should the revenue produced under act 65 of the Acts of 1929 be less than $7,500,000 for any year, then, and in that event, such deficit shall be taken from the county highway fund for such year, before an allotment to the counties is made as provided for in this act. It being expressly understood that all funds derived from the operation of this act or

from the operation of said act 65 of the Acts of 1929, shall be applied first to the payment of State highway notes or bonds and coupons issued by the State of Arkansas under the provisions of act 11 of the Acts of 1927, and under the provisions of act 65 of the Acts of 1929." Therefore the conclusion is irresistible that the fund thus created for the benefit of the counties is in fact a State fund which may be taken and used by the State in the payment of its outstanding obligations. In this view, said fund continues to be a gratuity provided by the State for the benefit of its subdivisions.

The next question for decision is the order in which the outstanding warrants may be redeemed. The court ordered the payment of Stacy's warrant out of the fund on hand without regard to the prior outstanding warrants in the hands of interveners and others. Section 2 of the act of December 17, 1846, digested as § 2007, Crawford & Moses' Digest, provides: "That all county scrip, and every warrant now issued, or which shall be hereafter issued, in cancellation of any county scrip, in any county of this State, according to the provisions of the forty-first chapter of the Rev. Statutes, headed, 'county treasurers,' shall be redeemed and paid by the county treasurer in the order of their number and date, and that no scrip or warrants shall be thus discharged in preference to any of older dates, or until all of a prior date are paid, provided the county treasurer upon whom said scrip and warrants are drawn shall not be able to meet all demands against him." This section applies in this case as the treasurer is not able to meet all demands against him drawn on the county highway fund. We think it applies in all such cases and not merely to warrants issued in cancellation of scrip or warrants previously issued. Otherwise injustice might, probably would, result on account of favoritism. This view is strengthened by a reading of § 3 of said act. It provides "that all county scrip or warrants * * * shall be received, irrespective of their number and date, in payment of all taxes, duties, fines, penalties and forfeitures, accruing

to said county." The necessary inference is that, except for the purposes named in § 3, all scrip or warrants shall be redeemed in the order of their number and date, if the treasurer is not able to meet all demands. No distinction is to be made between scrip and warrants, as the terms are used interchangeably in the act. This meaning of the act was recognized by this court in *Crudup* v. *Ramsey*, 54 Ark. 168, 15 S. W. 458, in an opinion by Judge HEMINGWAY, where he said, in reference to the act of 1846, now under consideration: "This is a part of an act which provided that warrants should be paid in the order of their number, and that no warrants should be paid until all of a prior date had been paid or provided for. * * * Its manifest purpose was to provide that warrants should be received in payment of taxes and dues to the county, even though there were prior warrants not paid or provided for." And the same meaning of the act was recognized in *Graham* v. *Parham*, 32 Ark. 677, 694, where Mr. Chief Justice ENGLISH used this language: "County warrants shall be redeemed and paid by the county treasurer in the order of their number and date, and no warrant shall be thus paid until all of a prior date are paid, provided the county treasurer upon whom the warrants are drawn shall not be able to meet all demands upon the treasury. Acts December 17, 1846, § 2; Gantt's Dig., § 1042." This cannot be avoided by making warrants payable in the future.

It appears therefore that the learned trial court erred in awarding the writ of mandamus against the treasurer, in dismissing the interventions, in ordering the Stacy warrant paid ahead of others, and in sustaining the order of the county court of August 6, 1931.

The judgment will be reversed, and the cause remanded with directions to dismiss the petition for mandamus, vacate and hold invalid the order of the county court of August 6, 1931, and to order the treasurer to pay all valid outstanding warrants on the county highway fund in the order of their number and date.

TREECE *v.* STATE.

Opinion delivered February 8, 1932.

[redacted]

Kenneth C. Koffelt, for appellant.

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

BUTLER, J. Ed Treece was tried and convicted on a charge of selling alcoholic liquor, and from the verdict and judgment is this appeal.

The testimony on the part of the State was to the effect that one Godbey, on the evening of Thanksgiving Day, 1930, was arrested for drunkenness, and a pint bottle of whisky was discovered in his possession. This bottle was taken by the officer who made the arrest and labeled for the purpose of identification, and by him given to another person in the mayor's office for safekeeping. It was again delivered to the officer, who exhibited it at the trial, over the objection of the defendant. Godbey testified that on the evening of Thanksgiving Day, 1930, he bought a half-gallon fruit jar of whisky from the defendant and paid him $4 for it; that it was on this liquor that he had become drunk when he was arrested; that a part of the liquor in the fruit jar had been drunk, and that he had poured what was left into a pint bottle, but did not remember where he got the bottle.

This testimony was corroborated by the testimony of other witnesses, all of which was denied by the defendant, who testified that Godbey and his companions had inquired of him where they could buy some liquor, and

that he informed them that he did not know; that he never sold any liquor to Godbey, and that Godbey had not entered his house. The defendant's daughter testified corroborating the testimony of defendant, stating that she was with her father on the occasion when Godbey came to their house, and that Godbey did not come into the house, and did not purchase any liquor.

The only ground urged for reversal of the judgment is for the alleged error of the trial court in permitting to be introduced in evidence the bottle of liquor taken from the person of Godbey by the officer, on the ground that the bottle of liquor was not identified as the same as that taken from Godbey. This objection is not tenable, for the reason that the evidence plainly shows that the bottle introduced in evidence was the same as that taken from the person of Godbey, who testified that it contained part of the liquor sold to him by the defendant. We are of the opinion that no prejudice could have resulted, for the reason that it was immaterial whether the liquor offered in evidence was the same as that taken from Godbey. There was no question as to whether it was alcoholic liquor or a different kind of beverage that was sold, and the introduction of the liquor could have served no useful purpose or have prejudiced defendant.

The only question in the case was whether or not Godbey had purchased alcoholic liquor from the defendant. Godbey and the other witnesses for the State testified that he did, while the defendant testified that he had sold Godbey no liquor or beverage of any kind. The evidence was amply sufficient to sustain the verdict of the jury, and the judgment will therefore be affirmed.

TAYLOR *v.* UNION TRUST COMPANY.

Opinion delivered February 8, 1932.

[redacted]

Sam Rorex and *Nat Hughes,* for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

BUTLER, J. Appeal from a decree allowing claim of intervener, appellee, as a prior claim.

The facts in this case, about which there is no dispute, are as follows: On November 15, 1930, appellee company was the owner of certain drafts with bills of lading attached aggregating the sum of $1,836.42, the drawees of which were all customers and depositors of the American Exchange Trust Company. On that date the appellee transmitted these drafts to the American Exchange Trust Company for collection and remittance, taking from the trust company a trust receipt therefor. During banking hours on that day the trust company collected all of the items and surrendered them to the respective drawee, together with the documents thereto attached. After banking hours on said day the trust company issued to the appellee a check drawn upon itself for the amount of the proceeds of said collections. The trust company would have paid the cash to the appellee had the same been demanded, but it was the custom of banks doing business in Little Rock to remit the proceeds of collections in the form of a check, as was done in this case. The check was delivered to the messenger of the appellee between 1 and 1:30 o'clock in the afternoon, and, by the messenger, delivered to the appellee about 1:30 the same afternoon. At that time the banks in Little Rock Closed on Saturdays at 1 o'clock. Be-

for opening time on the following Monday, November 17th, the American Exchange Trust Company suspended business, and, at the expiration of five days, the bank commissioner took charge of it on the ground of insolvency.

At the time of the foregoing transaction the appellee company did not maintain a deposit account with the trust company. It is admitted that the entire transaction was in the usual course of business, and that nothing was done or intended by either the trust company or the appellee company to do anything for the purpose of giving appellee preference in the assets of the trust company, but that each step in the transaction was made and accepted in entire good faith, and with no thought of giving or obtaining a preference.

It is the contention of the appellant that the action of appellee's messenger in accepting the check of the trust company, when the cash could have been demanded and received, created merely the relation of debtor and creditor between the two, that therefore the claim of appellee is only that of a general creditor, and, as authority for this, cites a number of decisions from the courts of other States and the recent decision of this court in the case of *Taylor* v. *First National Bank of DeQueen,* 184 Ark. 947, 43 S. W. (2d) 1078. The facts in that case bear no similarity to those presented in the case at bar. We there held that the transactions out of which the claim for preference arose created no preferential claim for the reason that the draft, the basis of the claim, did not represent the proceeds of a collection, but was in payment of checks received in the ordinary course of business and not for collection, and we stated that, if the checks received were for collection merely, then the bank handling them would have acquired no title to their proceeds, but would have held them in trust for the appellee. *Darragh* v. *Goodman,* 124 Ark. 532, 187 S. W. 673.

We agree with the contention of the appellee that the court properly adjudged its claim a prior one under

subdivision 7 of § 1 of act 107 of the Acts of 1927, and that we may look no further than to the statute itself for a justification of the decree of the trial court. That act defines the classes of creditors of an insolvent bank, among which is "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, * * *."

These are the conditions under subdivision 7 of § 1, *supra,* when a preference will arise, and these are the facts in the instant case except that the remittance was not presented for payment to the American Exchange Trust Company. This, however, would have been a futile act on the part of the appellee. It received the remittance after banking hours on Saturday, and, as the American Exchange Trust Company did not open for business thereafter, presentment for payment was impossible. Under the statute presentment was not necessary until within a reasonable time after the remitting bank opened again for business, so that, under any just and reasonable interpretation of the statute, under the facts in this case, the presentment for payment was not a necessary prerequisite to the claim for preference. That the cash would have been paid to the messenger had he demanded it does not change the right of appellee under the act above quoted. Nor did the acceptance

by him of the check create merely the relation of debtor and creditor, as claimed by the appellant. The proceeds of the collection were never the property of the collecting bank. It only held the same in trust for the appellee, and the check delivered to the messenger of the appellee was nothing more than the symbol of the cash so held, issued according to the custom of banks and accepted, not in lieu of the money, but only as a token of it, and by a presentation of which the cash might be obtained. In other words, it was the vehicle of the transfer of the cash spoken of in subdivision 7, *supra*, as "a remittance of the said bank," and as it represented the proceeds of a collection made by the collecting bank by charging the different items collected against the accounts of the depositors—drawees of the drafts—it created a preferred claim although the transaction did not increase its cash assets, because the drafts with the documents attached had been surrendered to the drawees upon their collection, and therefore could not be restored to the appellee and it be placed in the same condition with respect thereto as it had been before. As stated by the appellee, it is just this state of case where the security could not be restored that the Legislature gives as a substituted security a preference in the assets of the insolvent institution.

The conclusion reached finds support in the recent cases of *Taylor* v. *Corning Bank & Trust Co.*, 183 Ark. 757, 38 S. W. (2d) 557, and *Taylor* v. *Dermott Grocery & Commission Co.*, 184 Ark. 947, 45 S. W. (2d) 23, and the case of *Taylor* v. *First National Bank of DeQueen, supra.*

Let the decree be affirmed.

HOWARD *v.* STATE.

Opinion delivered February 15, 1932.

[redacted]

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

SMITH, J. This appeal is from a judgment sentencing appellant to a term in the penitentiary of two years on a charge of burglary and of one year on a charge of grand larceny. For the reversal of this judgment he assigns as error in his motion for a new trial that the verdict was contrary to the law and the evidence, and that the court erred in permitting the prosecuting attorney, over his objection, "to improperly argue the previous convictions of the defendant, to which action of the court the defendant at the time excepted."

But little need be said to dispose of this appeal. The testimony on the part of the State was to the following effect. On the night of June 17, 1931, a grocery store in the city of North Little Rock was broken into and 3,500 cigarettes, of the value of from $27 to $30, were taken therefrom. Entrance was gained by breaking the glass in the front door and the padlock on the door. The day following appellant offered to sell to a grocer in Little Rock some cigarettes at $1 a carton. This offer aroused the suspicion of the Little Rock grocer, who notified the Little Rock police headquarters. Two police officers went at once to the grocer's place of busi-

ness, which was near the end of the South Highland street car line. Appellant was there when the officers arrived, and he boarded a street car when he saw them. The officers took the same car, and saw appellant go to the rear end of the car and throw a package under the rear seat. The officers got the package and placed appellant under arrest. The cigarettes were shown to the North Little Rock grocer and were identified by him, the identification being made by his cancellation mark on the revenue stamps.

The chief of detectives of North Little Rock testified that appellant was delivered into his custody about eight hours after the burglary had been committed, and that he noticed at the time that appellant's right thumb was injured. He asked appellant about the cigarettes, and appellant told him that he found the cigarettes in a concrete basement at the north end of the Missouri Pacific bridge in North Little Rock. The officer found upon inspection that there was no basement at this point. One of the gloves found on appellant at the time of his arrest had fresh blood on it.

Appellant testified in his own behalf and admitted having the cigarettes in his possession. He stated that he had found them in Little Rock, and that the officer was mistaken in saying that he had said they had been found in North Little Rock. He further testified that he started to take the cigarettes to some "boys" in the penitentiary, and he admitted offering to sell them to the Little Rock grocer. When he saw the grocer go to the 'phone, he thought an officer was being called, and not wanting to get into trouble again he threw the package containing the cigarettes under the car seat. On his cross-examination he admitted that he had been twice sentenced to the Arkansas penitentiary and to the penitentiary in Atlanta once.

This testimony fully sustains the conviction. Appellant was found in possession of property very recently stolen, and the jury evidently disregarded the explana-

tion of his possession. *Yelvington* v. *State,* 169 Ark. 359, 275 S. W. 701.

As to the argument of the prosecuting attorney, it may be said that it does not appear from the bill of exceptions what the argument was, and we do not therefore know whether it was improper or not. *Neal* v. *State,* 156 Ark. 419, 246 S. W. 470. Appellant admitted on his cross-examination that he had been three times sentenced to the penitentiary, and it would not have been improper for the prosecuting attorney to discuss this fact in commenting upon appellant's credibility as a witness.

No error appears, and the judgment must be affirmed. It is so ordered.

WILLIAMSON *v.* KILLOUGH.

Opinion delivered February 15, 1932.

A. B. Shafer, Creed Caldwell, Williamson & Williamson, Sam Rorex and *W. S. Atkins,* for petitioners.

R. V. Wheeler, S. V. Neely and *Coleman & Riddick,* for respondents.

SMITH, J. A petition for certiorari has been filed in this court, from which, with the responses thereto, the following facts are made to appear. On December 21, 1931, the county court of Crittenden County made five separate orders changing the lines between certain townships in that county, and one of the effects of each of said orders was to move a Democratic county central committeeman from his township into another. The changes made by these orders were as follows. By one of them the residence of Joe Summerville was changed from Mississippi Township to Proctor Township. The residence of E. D. Gooden was changed from Mound City to Jasper Township; the residence of F. J. Hixon was changed from Fogleman to Wappanocca Township; the residence of Les A. Barton was changed from Black Oak to Fogleman Township; and the residence of J. R. Hood was transferred from Tyronza to Black Oak Township.

On the same day on which these orders were made by the county court, the Democratic county central committee convened in special session, at which meeting the chairman of the committee refused to recognize the five committeemen hereinabove named, for the reason that they, having been transferred out of the townships for which they had been elected, by the orders of the county court, were no longer members of the committee.

An appeal from this ruling of the chair was made, and nine committeemen, including the five sought to be disqualified, voted to sustain the appeal, and four committeemen voted to sustain the ruling of the chair. The chairman refused to recognize the right of the five committeemen above-named to vote, and declared their offices vacant, whereupon these five, with four others,

declared the office of chairman vacant, and by the same vote elected a new chairman, and the nine committeemen who voted to overrule the chair, including the old secretary of the committee, adjourned subject to the call of the new chairman. The old chairman and the four committeemen who voted to sustain his ruling remained in session and proceeded to elect successors to the five committeemen, whom they claimed had been ousted from office, together with a new secretary of the committee after which they sent a certified copy of their minutes showing such elections to the Democratic State Central Committee.

Thereafter these five committeemen whose residences had been changed from one to another township by the orders of the county court filed a petition in the circuit court for a writ of certiorari, praying that the orders of the county court be quashed. It was alleged by these petitioners that the purported orders of the county court were void for numerous reasons, among others that they were made by the county judge, and not by the county court.

On February 1, 1932, an application was made to one of the judges of the circuit of which Crittenden County is a part for a temporary order preserving the *status quo,* and an order was made by the circuit judge which recited that a *prima facie* showing had been made that the orders of the county court were void, and upon this finding it was ordered "that any and all persons are hereby restrained from recognizing any purported order of the Crittenden County Court purported to have been made on December 21, 1931, in the matter of changing township lines until the final hearing of this cause."

Another proceeding of similar nature was filed, which included additional parties, in which the circuit judge made an order restraining the county clerk from entering the orders changing the boundary lines of the townships until the further order of the circuit court.

Thereupon this proceeding was begun in this court in the name of the chairman and secretary of the State

Democratic Central Committee and the chairman and secretary of the Crittenden County Central Committee as reorganized, in which they prayed that a writ of certiorari issue directed to the clerk of the circuit court of Crittenden County commanding him to certify up to this court a certified transcript of all records in the Crittenden Circuit Court in the matter of changing township lines, and the two causes hereinabove referred to there pending, and "that, upon the coming in and inspection of said records, the orders therein made, to the extent they are beyond the jurisdiction of the circuit court as herein set out, be quashed, and that, pending the hearing upon such writ, a temporary restraining order issue prohibiting both the circuit judges of Crittenden County from proceeding further in either of said causes until the final order of this court, and for all other appropriate relief."

The records referred to have been brought up on certiorari and are now before us, and it is insisted that the orders of the circuit court staying all proceedings in the matter of the changed lines of the townships were void as being in excess of his jurisdiction.

In support of this contention, it is argued that the effect of the orders of the circuit court is to assume jurisdiction of a contest for places on the Democratic County Central Committee, a subject over which the committees of the party, State and county have exclusive jurisdiction, and over which the courts have no jurisdiction.

It is our opinion, however, that the circuit court has not acted without jurisdiction or in excess of its jurisdiction, as petitioners contend.

It must be remembered that the circuit court has appellate jurisdiction to review all orders of the county court, and, in the exercise of this jurisdiction, the power inheres to make such orders as appear to be appropriate. The circuit court has the jurisdiction, for instance, to decide whether the orders in regard to the township lines were void as not having in fact been made by the county

court, just as it has the jurisdiction to determine that these orders, even if made by the county court, were erroneous as being an abuse of the discretion vested in the county court in this behalf. The circuit court unquestionably has the jurisdiction, upon hearing the appeals which have been prosecuted from the orders of the county court, to vacate those orders and set them aside as being an abuse of the discretion of the county court, and pending the hearing of the appeal the circuit court has the jurisdiction to preserve the *status quo*.

These are, of course, elementary principles, which petitioners concede to be true, but which they say do not apply here for the reason that they are concerned only in the membership of the county central committee, which question they say is purely political, and one over which the courts have no jurisdiction whatever, and the case of *Tuck* v. *Cotton,* 175 Ark. 409, 299 S. W. 613, is cited to sustain this contention.

The case just cited was brought to contest the election of a township committeeman, and the suit was dismissed by this court on the ground that "the courts will not assume jurisdiction of contests for the offices of committeemen or delegates of a political party" to a convention of the party, for the reason that the law governing the primary election out of which the contest arose had not conferred jurisdiction on the courts to hear contests over an election for places on county committees.

The history of our primary election law is a matter of common knowledge. The case of *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C, 180, was one in which there was an attempt to contest in the courts of the State the nomination of the Democratic party for the office of Governor, and in that case we reversed the action of the Pulaski Chancery Court, which had assumed jurisdiction of the contest. The decree of the chancery court was reversed, for the reasons stated, that the question involved was political, and not juristic. However, an act was initiated and

adopted by the people, which is referred to as Initiative Act No. 1, which appears at page 2287 of vol. 2 of the Acts of 1917, which conferred jurisdiction upon the courts of the State to enforce the provisions of this initiated act.

The validity of this act is not questioned, and the jurisdiction there conferred has been frequently exercised by the courts of the State, as appears from the numerous reported cases by this court which arose under that act.

Section 12 of this act conferred the right to contest nominations in certain cases, and this § 12 of the initiated act appears as §§ 3772 and 3773, Crawford & Moses' Digest. Section 3772, Crawford & Moses' Digest, was construed in the case of *Tuck* v. *Cotton, supra,* and it was there held that § 3772, *supra,* which authorized contests of elections in certain cases, did not embrace committee places, for the reason that such places were not offices within the meaning of the law. It was said, however, that "the Legislature has the authority to give the courts jurisdiction in those matters," and that the courts would exercise such jurisdiction as had been conferred.

The case of *Tuck* v. *Cotton, supra,* does not apply here, for the reason that there is no contest over the election of these committeemen. That the committeemen were duly elected, and for a term of two years, and that their terms have not expired, are undisputed facts; and it is also undisputed that they are committeemen unless the orders of the county court removing them from one township into another have the effect of vacating their places.

The election law is not silent, however, upon the subject of vacancies in committee places. Section 8 of the act, which appears as § 3764, Crawford & Moses' Digest, deals with the subject of vacancies in delegations to conventions and in county committee memberships. It is made optional with the political party to avail itself of the provisions of the primary election

law. The party may employ this law or not in the selection of its candidates, but, when the option has been exercised to employ the law for the purposes intended, the act must be followed, and it governs in all situations to which its provisions are applicable. The case of *Tuck* v. *Cotton, supra,* expressly recognizes that the power inheres in the Legislature to enact legislation for such supervision and control.

It was contemplated by this act that vacancies might arise in delegations to conventions called pursuant to the act and in the membership of the county committees elected under the authority of the act.

The primary election law requires the election of the committeemen by the voters at an election, and provides that only names of those certified as required by the act shall be printed on the ballot, unless no name has been certified, and provides who shall be eligible to be voted for, and that the election of ineligible persons to those offices shall be void.

The opinion in the case of *Tuck* v. *Cotton, supra,* quoted with approval the statement of the law appearing in the chapter on Elections in 9 R. C. L., page 1088, § 98. In the preceding section of the same chapter it was said: "The dormant idea pervading the primary law is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot and thus be given effect, whether it is in accord with the wishes of the leader of his party or not, and so shall be put in effective operation in the primaries. In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards. And, in order to accomplish this end, not only is it necessary to protect the right of party members to vote at the primary as against unreasonable regulation, but also to protect the committeeman or other party officially elected thereat from being summarily ejected from his place in the party organization. So, where the primary law provides for party

committees and the election of party committeemen, membership may be gained in no way other than that provided by the statute, namely, by the suffrage of the party members at the primary election. The committee cannot remove the committeemen so elected, and it is the duty of the court to give full force and effect to the legislative intent so manifested."

As has been said, provision is found in the Initiated Act for filling vacancies, both in delegations to conventions and in committee memberships, and this provision is found in § 8 of the act, which appears as § 3764, Crawford & Moses' Digest, and reads as follows: "The county conventions shall at said time declare the result of said primary election and select delegates and alternates to all conventions. Provided, nothing in this act shall be construed to prohibit the State Central Committee from making any rules that it may think wise for the election of delegates to the National Convention, and said delegates may be elected before the primary election. No candidate for office, or office-holder, or deputy of an office-holder, shall be eligible to membership on county central committees, or as a delegate to county or district conventions, or as a judge or clerk of any primary election. The selection of ineligible persons shall be void, and the vacancy filled as other vacancies are herein provided to be filled. Vacancies in the delegation to a convention, arising from death, absence, resignation or ineligibility, shall be filled by the alternates in the order of their selection, and, in absence of alternates, by the remaining members of the delegation. Vacancies in the central committee shall be filled by the committee."

It thus appears that the statute has provided when vacancies can be said to exist and how they may be filled in either convention delegations or in committee memberships. There is no contention here that any vacancy has been created in the committee membership by death, absence, resignation or ineligibility. There has been only a change in the lines of the townships in which certain committee members resided at the time of their election, and no other question as to their eligibility is raised.

Under the statute the electors elect their committeemen, and they are elected for a definite time, and they have the right therefore to serve as such until, under the statute, conditions arise which constitute a vacancy. It is then and then only, that the central committee, as a body, is authorized to elect their successors.

While the members of the committee are elected in the township or city ward in which they reside, they become, upon their election, members of the county committee, and the authorities appear to be unanimous that after such election the right to discharge the functions of a committeeman is not affected by a subsequent change of boundary lines which would place the residence of the committeemen in another township or ward, and this change of lines does not automatically or otherwise affect the incumbent, but the committeeman, if he remains otherwise eligible, continues as such until his successor is elected pursuant to the provisions of the law regulating the election.

It is said that the changes of the township lines have removed certain justices of the peace, who are township officers, from the townships for which they were elected, into other townships, but this action did not operate to deprive them of their offices. Section 6395, Crawford & Moses' Digest, reads as follows: "When a township shall be divided, and any justice of the peace of the original township shall fall into the new township, he shall continue to discharge the duties of a justice of the peace until his commission expires, in the same manner as if such township had not been divided, only his process shall be in conformity with the name of the township in which he resides."

This statute, while applicable only to justices of the peace, is declarative of the principles of law which govern in the question here involved.

The case of *State ex rel. Norwood* v. *Holden,* 45 Minn. 313, 47 N. W. 971, arose under a statute of the State

of Minnesota which provided that the board of county commissioners should, after the Federal census of the population of the county, proceed to redistrict the county, and this action of the board, when taken, resulted in excluding certain commissioners from the districts of the county in which they had been elected as members of the county board before the census was taken. The question was raised whether the members who had been removed from the districts of the county in which they had been elected had ceased to be members of the board. In holding that these commissioners had not ceased to be members of the county board, the Supreme Court of Minnesota, speaking through Mr. Justice MITCHELL, said: "In our opinion, an order redistricting a county is merely prospective in its operation as to the election and qualification of members of the board of commissioners, and in no way affects the right to the office of those previously elected. There is nothing in the language of the statute to indicate that a redistricting is intended to have any retrospective operation. On the contrary, the language of § 94 favors the opposite view. The commissioner, it says, 'must at the time of his election be a resident of said district and shall reside therein during his continuance in office.' What this last clause has reference to is an actual change of residence, and not a change of district boundaries. The division of a county into districts is merely for election purposes. The duties of commissioners are not local, or to be performed in only a particular part of the county. On the contrary, they are merely members of an entire board which acts as such for the entire county. Any other construction would lead to the gravest abuses, and often entirely defeat the popular will as expressed at the polls. * * * It seems that it was assumed that if relators had, by reason of the redistricting, become disqualified from taking their seats on the board in January, this created vacancies which the chairman and the boards of town supervisors were authorized to fill. But this was a mistake, for it would not be one of

the events the happening of which would create a vacancy under the provisions of Gen. St. 1878, C. 9, § 2. * * * The practical result, then, of respondents' construction of the law is that it is in the power of a majority of the board of commissioners, by gerrymandering the county, to legislate out of office any two of their own number, or to keep out of office those who have been elected their successors, and hold onto the offices themselves for two years longer than the terms for which they were elected. There is nothing in the language of the statute which compels a construction leading to consequences so dangerous and unjust."

A late case on the subject is that of *Olsen* v. *Merrill,* 5 Pac. (2d) 226, where, after an extensive review of the authorities, it was held by the Supreme Court of Utah that members of the board of education of cities of the second class are entitled to serve as members of the board for the remainder of their terms, notwithstanding an ordinance redistricting the city placed them outside the boundaries of the municipal wards for which they were elected.

See also, *State* v. *Craig,* 132 Ind. 54, 32 Am. St. Reps. 237; *State ex rel. Atty. Gen.* v. *Board of Supervisors,* 21 Wis. 449; *State ex rel. O'Connell* v. *Nelson,* 7 Wash. 114, 34 Pac. 562; *People* v. *Markham,* 96 Cal. 262, 31 Pac. 102; *State* v. *Lake,* 16 R. I. 511, 17 Atl. 552; *State* v. *Swearingen,* 12 Ga. 23; *State* v. *George,* 23 Fla. 585, 3 So. 81; *State ex rel. Childs* v. *Marr,* 65 Minn. 243, 68 N. W. 8; *Standford* v. *Lynch,* 147 Ga. 518, 94 S. E. 1001; *State* v. *Craig,* 132 Ind. 54, 16 L. R. A. 688, 31 N. E. 352, 32 Am. St. Reps. 237; *Brungardt* v. *Leiker,* 42 Kan. 206, 21 Pac. 1065; *State ex rel. Connolly* v. *Haverly,* 62 Neb. 767, 87 N. W. 959.

It is true these are cases where officers were removed by changes in lines from the ward or district or township in which they were elected, whereas in the instant case the committeemen are not officers, but that fact does not affect the legal principles which control. The controlling legal principle is that the committeemen were

elected at an election made legal by the primary election law, and for a definite time not yet expired, and it is true also that upon their election they become county committeemen, although elected by townships or wards. Their functions are not confined to the township or ward in which they reside, but they, in conjunction with other committeemen similarly elected, are committeemen for the county, and changes in the lines of their townships or wards do not affect their eligibility, for the reason that such changes are prospective in their nature so far as the incumbents affected are concerned. We find no division in the authorities on this subject.

If, however, the rule were otherwise, the conclusion which we have reached would not be changed. It appears from the record before us that the circuit court found the fact to be, upon the applications for the orders preserving the *status quo,* that a *prima facie* showing had been made that the orders of the county court were void, and for that reason all proceedings thereunder should be stayed until the final determination of the validity of the orders on the appeals which have been prosecuted to the circuit court and which are there now pending and undisposed of. Certainly, if the county court had the authority to make the orders in question, the circuit court had the jurisdiction to review them. The circuit court has the same jurisdiction on appeal which the county court had originally, and the circuit court may make such orders as in its opinion the county court should originally have made. *Horn* v. *Baker,* 140 Ark. 168, 215 S. W. 600.

The appeals from the county court to the circuit court are now pending and are undisposed of, and the orders of the circuit court which the petitioners here seek to quash are interlocutory and not final, and the practice has long been settled that an appeal does not lie from such orders.

In the case of *Sanders* v. *Plunkett,* 40 Ark. 507, it was held, to quote a headnote, that "The order of a chancellor at chambers, dissolving an injunction issued by

him in vacation, is interlocutory and cannot be quashed by the Supreme Court on certiorari, nor appealed from until final judgment in the circuit court."

In the opinion in this case Mr. Justice EAKIN, for the court, said: "We cannot regard any mere interlocutory order of a judge at chambers, made in the cause, as final, in the sense of being subject to appeal. There must be a final order of the court itself upon the rights of the parties. Interlocutory orders are always subject to the control of the court, and remain so from term to term until a final adjudication upon the rights of the parties. Then the final order, perpetuating or dissolving them, becomes subject to appeal. The present application (for certiorari) is not an appeal." For these reasons the writ of certiorari there prayed was denied. See, also, *Mallett* v. *Hampton*, 94 Ark. 119, 126 S. W. 92.

The case of *Martin* v. *Hargrove,* 149 Ark. 383, 232 S. W. 596, is cited and relied upon by petitioners for the writ here applied for. That was a case in which the chancery court, on complaint of owners of land in an improvement district, had removed the commissioners, and had directed the receivers to take charge of the affairs of the district and discharge the duties imposed by law upon the commissioners. We quashed this order of the chancery court for the reason, there stated, that the court was without authority to remove the commissioners and appoint receivers in their stead. In other words, the order was void on its face.

We have here an entirely different situation. The circuit court has the undoubted jurisdiction to review the action of the county court, and this jurisdiction has not yet been exercised. It may transpire that, when this jurisdiction has been exercised, the circuit court will vacate and set aside the orders of the county court, in which event they will be as if they had never been made, and the entire subject-matter of this litigation would in that event be a mere moot question.

For the reasons stated the writ of certiorari prayed for will be denied, and the petition dismissed. It is so ordered.

WEAVER *v.* STATE.

Opinion delivered February 15, 1932.

U. C. May, for appellant.

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

HUMPHREYS, J. Appellant was indicted in the circuit court of Logan County, Southern District, jointly with Bill Shepherd and Minus Rankin for the crimes of burglary and grand larceny, and convicted on both counts in the indictment and adjudged to serve a term of two years for the burglary and one year for the larceny in the State Penitentiary, from which is this appeal.

The first assignment of error by appellant for a reversal of the judgment is that the court erred in overruling his motion for a continuance to obtain the testimony of Miron Wright to the effect that he (appellant) was not present and did not assist Bill Shepherd and

Minus Rankin burglarize the store of J. W. Hipp in September, 1931, and did not steal or receive any part of the stolen merchandise. The record does not dis lose that appellant requested the court to rule upon the motion nor that the court overruled same. Had the court overruled the motion, it would not have constituted reversible error because the appellant did not state therein that he believed the testimony of the absent witness to be true, which statement is required by §§ 1270 and 3130 of Crawford & Moses' Digest.

The next assignment of error is that the court erred in not continuing the cause because of the absence of other witnesses whose testimony would have shown that appellant was not in company with his co-defendants at the time they burglarized the store. A continuance was not requested by appellant on account of the absence of the witnesses referred to, and, having failed to ask a continuance on account of their absence, he is precluded from raising that question in this court for the first time. He should have raised the question before the trial court.

Appellant's next assignment of error for a reversal of the judgment is that the court overruled the demurrer to the indictment on the ground that one of the grand jurors who returned the indictment was ineligible because he had served on the petit jury within two years, which is prohibited by act 135 of the Acts of 1931. The failure of any of the grand jury to possess any of the qualifications required by law does not invalidate an indictment. Section 3030 of Crawford & Moses' Digest; *St. Clair* v. *State,* 160 Ark. 170, 254 S. W. 473.

The last assignment of error for a reversal of the judgment is that appellant was convicted on the uncorroborated evidence of his two accomplices. Bill Shepherd and Minus Rankin pleaded guilty, and, upon appellant's trial, testified that the three of them burglarized the store, and that appellant received a part of the merchandise. Witnesses who found the stolen goods testified that the tracks around the store and where the goods were found showed that three persons were en-

gaged in the burglary and grand larceny. The tracks were measured with a stick, and appellant's foot was measured with the same stick in the presence of the jury. Minus Rankin lived in appellant's home, and the three of them attended a musical and were drinking together the night the crimes were committed. The record also reflects that appellant had threatened to break into the store and had made plans to do so. The accomplices were sufficiently corroborated to support the verdict and judgment.

No error appearing, the judgment is affirmed.

CASEY *v.* SMITH.

Opinion delivered February 15, 1932.

Gentry & Gentry, Carrigan & Monroe, Lemley & Lemley, John P. Vesey and *W. S. Atkins,* for appellant.

O. A. Graves, for appellees.

MEHAFFY, J. Appellant, as a citizen and taxpayer, began this suit in the Hempstead Chancery Court against

the appellees, as directors of the Hope Special School District, praying that they be enjoined and restrained from incurring any further indebtedness or borrowing any money or issuing any warrants as directors of said district during the present fiscal year, except as may be necessary to pay the principal and semiannual interest payments, maturing on bonded indebtedness during the present fiscal year.

He alleged that on March 25, 1931, the bonded indebtedness of the district exceeded 7 per cent. of the total assessed valuation of all the real and personal property in said district, as shown by the last county assessment, and that said bonded indebtedness had been at all times since then, and is now, in excess of 7 per cent. of the assessed valuation of all property in said district. He alleged that the total non-bonded indebtedness, July 1, 1931, was $80,200, and that this was the maximum amount of said nonbonded indebtedness during said year, and all of this amount had been paid out of the year's revenue except $25,000.

He further alleged that the nonbonded indebtedness and the amount set aside to pay principal and interest on the bonded indebtedness, falling due the remainder of the fiscal year, is $63,000, and that the total revenues which will be received by said district during the remainder of the fiscal year will not exceed $63,000.

He alleged that the directors were still operating the schools and incurring further indebtedness, and that, in order to complete the school term, it would be necessary to incur further indebtedness, so that at the end of the present fiscal year, the nonbonded indebtedness of the district will aggregate $80,200 and that the directors proposed to continue the schools and incur other indebtedness until it aggregated $80,200, and, unless restrained, they would borrow from individuals and banks, or from next year's revenues, and issue warrants therefor, to the amount of $80,200; that this sum would be in excess of the revenues for the remainder of the present fiscal

year, and the next succeeding fiscal year, thereby causing plaintiff and other taxpayers to suffer great and irreparable loss, and that he has no adequate remedy at law.

He alleged that the district did not have power to do these things, and that the borrowing of money, as the directors proposed to do, was in direct violation of act 169 of the Acts of the General Assembly of 1931.

The appellees demurred to the complaint, stating: "First. The complaint does not state facts sufficient to constitute a cause of action.

"Second. The complaint does not state facts sufficient to entitle plaintiff to any of the relief prayed for therein."

The court sustained the demurrer, and appellant refused to plead further, and his complaint was dismissed. The case is here on appeal.

At the time act 169 was approved, the Hope Special School District had issued bonds, exclusive of interest, to the extent of 7 per cent. of the assessed valuation of the real and personal property in the district as shown by the last county assessment. The outstanding nonbonded indebtedness of the district was $80,200 on July 1, 1931. This sum was the maximum nonbonded indebtedness during the fiscal year preceding July 1, 1931.

The revenues of the district for 1931, 1932 were used by the district in the payment of the nonbonded indebtedness existing prior to July 1, 1931, reducing the nonbonded indebtedness to $25,000, and the schools had been operating by anticipating the revenues of 1932-1933.

The directors propose to continue the school for the term by borrowing from banks, individuals, or from next year's revenue, but not to exceed $80,200, maximum nonbonded indebtedness in the fiscal year ending July 1, 1931.

Act 169 provides that districts may borrow money and issue bonds 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 the act. Act 169, § 59, of the Acts of 1931.

Section 60 provides that: "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 7 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 7 per cent."

It is first contended by appellant that the board of directors has no authority to borrow money for the operation of the schools. He cites and relies on *Arkansas National Bank* v. *School District No. 99,* 152 Ark. 507, 238 S. W. 630, where the court said: "It is the settled rule in this State that school districts have and can exercise only such powers as are expressly granted, and such incidental ones as are necessary to make those powers available and effective."

Attention is called to some other cases, but it may be stated as the settled rule announced in all the cases, that school districts can exercise only such powers as are granted by the Legislature and such incidental powers as are necessary to the proper exercise of the powers granted. School districts derive all of their powers from the Legislature.

It is contended by the appellant that § 59 of act 169 of 1931 provides that the only power granted to borrow is for the things mentioned in said section, namely the building and equipment of school buildings, making additions thereto, purchasing sites therefor, and for funding any indebtedness created for any purpose and outstanding at the passage of the act. If this contention of appellant were correct, the board of directors would, of course, have no power to borrow money to operate the schools.

Section 97 of act 169, however, provides among other things: "Budgets for districts, having a city of 2,500

or more population, which employ a superintendent, shall be approved by the city superintendent and need not be submitted to the county board of education for approval, but shall be filed with the county superintendent for record, provided nothing in this provision shall prevent any school board from borrowing money from banks, individuals, or from next year's revenue, in order to provide funds in such amount that the maximum nonbonded indebtedness of their school district so incurred shall not be greater than the maximum nonbonded indebtedness of such districts was at any time during the preceding fiscal year."

To ascertain the intention of the Legislature, we must consider the whole act, and each part or section must be construed in connection with every other part or section, so as to produce a harmonious whole. The part of § 97 quoted must mean something, and another portion of § 97 provides that in case of an emergency the State Board of Education may grant special permission to a district to create a temporary current indebtedness.

It was evidently the intention of the Legislature, among other things, to prohibit school districts from increasing their indebtedness, and, as stated in the act, the districts should conduct their financial affairs, so that, as soon as possible, they may be on a cash basis.

It is therefore provided in the act that, if it should become apparent that the schools cannot be operated for the remainder of the school year, without incurring more indebtedness than that represented by outstanding bonds and those that may be issued for buildings and the equipment, purchasing sites and repairing buildings, or the improvement of sites, it shall be the duty of the school directors to close the school, and cease paying teachers for the remainder of the year.

However, following this provision of the statute is another we have already referred to, which authorizes the State Board of Education to permit a district to create temporary indebtedness. Evidently it was not the inten-

tion of the Legislature to close the schools if this could be avoided. It therefore provided that permission might be given the districts to create temporary indebtedness to keep the schools going.

As we have already said, in construing statutes it is the duty of courts to ascertain the intention of the Legislature and to give effect to every part and section of the law. *Miller* v. *Yell & Polk Bridge Dist.,* 175 Ark. 314, 299 S. W. 15; *Hall* v. *Cartwright,* 179 Ark. 1082, 20 S. W. (2d) 124; *McDaniel* v. *Ashworth,* 137 Ark. 280, 209 S. W. 646; *Manley* v. *Moon,* 177 Ark. 260, 6 S. W. (2d) 281; *Ark. Tax Commission* v. *Crittenden County,* 183 Ark. 738, 38 S. W. (2d) 318; *Gill* v. *Saunders,* 182 Ark. 453, 31 S. W. (2d) 748; *McIlroy* v. *Fugitt,* 182 Ark. 1017, 33 S. W. (2d) 719, 73 A. L. R. 723; *McGinnis* v. *Gailey,* 174 Ark. 1062, 298 S. W. 335; *Summers* v. *Road Imp. Dist. No. 16,* 160 Ark. 371, 254 S. W. 696; *Miller* v. *Witcher,* 160 Ark. 479, 254 S. W. 1063.

It is next contended by the appellant that the borrowing power of a district is limited to next year's revenue. We do not agree with appellant in this contention. The act expressly limits the borrowing power to the maximum nonbonded indebtedness at any time during the fiscal year. In the instant case the maximum amount was $80,200, and the power to borrow money under this provision of the statute is limited by this amount. The law provides that the district may borrow from next year's revenue or from individuals or from banks, but the amount the district is permitted to borrow is not limited by the amount it might be able to borrow from any individual, or a bank, or next year's revenue, but it is expressly limited to the maximum amount of the nonbonded indebtedness the preceding year.

The decree of the chancery court is affirmed.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* FODREA.

Opinion delivered February 15, 1932.

Allen May and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Sam T. Poe, Tom Poe and *McDonald Poe,* for appellees.

McHANEY, J. These separate appeals have been consolidated in this court, as they involve substantially the same questions for determination. In each case there was a verdict and a judgment for $2,000 with interest, 12 per cent. penalty and an attorney's fee of $500 on certificates of life insurance containing a clause providing that sum would be paid in case of total permanent disability of the insured before arriving at a certain age. In case 2366 the questions presented are (1) that the hypothetical question asked certain expert witnesses was improper; (2) that no penalty and attorney's fee should have been assessed; and (3) that the attorney's fee allowed was excessive. In case 2365, the questions argued are the same with the exception that no hypothetical question is involved. No question is raised as to the

sufficiency of the evidence to support the verdict nor as to any instruction. We will discuss the issues in the order above stated.

Relative to the hypothetical question propounded to the expert witnesses, several objections were made to it, some of which the court sustained, and others overruled. We think it unnecessary to copy the question in this opinion as it is lengthy. It recites a history of his physical condition and seeks the opinion of the expert witnesses as to the character of ailment from which appellee is suffering. In the history of the case recited in the question, the following was objected to: "That examining physician suspected plaintiff was suffering from toxic poison from some source, caused by an infected tooth, and suspected he suffered from myocarditis, and treated him for same, prescribing digitalis, a heart stimulant." This was based on the testimony of a non-expert physician, and was his diagnosis of the trouble. We think this not objectionable on the ground that it called for the opinion of the witness based on suspicions and conclusions of other witnesses or of other expert witnesses. Of course, it is not proper to incorporate in hypothetical questions the opinions of other expert witnesses, as facts and not opinions must be assumed in them. It is necessary to include the undisputed facts, and the facts assumed to have been established by the party propounding the question may be included, if relevant. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; *Newport Mfg. Co.* v. *Alton,* 130 Ark. 542, 198 S. W. 120. Dr. Atkinson testified to the above facts, but not as an expert. The experts were not asked to base their opinion on the opinion of Dr. Atkinson, but on the facts as related by him. We think the other objection relating to an examination of appellee in the Missouri Pacific Hospital in 1925 is without merit. This fact was established by evidence not objected to, and could not have been prejudicial because too remote. It does not appear from appellant's abstract that objection was made to the question on this ground, and, therefore, it is unavailing here. We

conclude that the objections made to the question were properly overruled.

■ It is contended in both cases that the 12 per cent. damages and attorney's fee were erroneously assessed, and that under § 6155, Crawford & Moses' Digest, no damages and attorney's fee should be assessed where defense is made in good faith and refusal to pay is based upon an honest and fairly debatable difference of opinion as to the law involved. It is conceded by appellant that this court has already taken a contrary view of the matter in *Security Ins. Co.* v. *Smith,* 183 Ark. 254, 35 S. W. (2d) 581, and, it is insisted, as thus construed, the above statute runs counter to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. We do not agree with appellant in this regard, and we think the Supreme Court of the United States has decided the question adversely to appellant's contention. *Fidelity Mutual Life Assn.* v. *Mettler,* 185 U. S. 308. 22 Sup. Ct. 662; *Iowa Life Ins. Co.* v. *Lewis,* 187 U. S. 335, 23 Sup. Ct. 126. Both of these cases construed the Texas statute, which is substantially the same as ours—requiring life and health insurance companies who shall default in payment of their policies to pay 12 per cent. damages, together with reasonable attorneys' fees, not to be in violation of the Fourteenth Amendment. In the latter case, Mr. Justice McKenna, speaking for the court, said: "Notwithstanding our decision in *Fidelity Mutual Life Assn.* v. *Mettler,* 185 U. S. 308, 46 L. Ed. 922, 22 Sup. Ct. 662, the plaintiff in error urges the unconstitutionality of the Texas statute, authorizing the recovery of damages and attorneys' fees for failure of life and health insurance companies to pay losses. We are, however, entirely satisfied with the case and its reasoning." See *Hartford Fire Ins. Co.* v. *Wilson & Toomer Fertilizer Co.,* 4 Fed. (2d) 835, certiorari denied 268 U. S. 704, 45 S. Ct. 639.

Moreover, this statute is a part of the insurance laws of this State and has been since 1905. It is one of the conditions under which insurance companies are author-

ized to do business in this State, and, by transacting business here, such companies impliedly at least agree to be bound by the act. *Fidelity Mutual Life Ins. Assn.* v. *Mettler, supra; American Fire Ins. Co.* v. *King Lbr. Co.,* 250 U. S. 2, 39 S. Ct. 431.

■ In case 2365 appellee prayed judgment for $2,000 and interest from April 18, 1930. There was a judgment for $2,000, and the court allowed interest from December 3, 1930. Appellant contends that, since the demand was for more than the recovery, no damages and attorney's fee should be assessed under the rule announced in *Pac. Mut. Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384, and numerous other cases since that time. We think the court correctly allowed the damages and fees in this case, as appellee recovered the full amount of the policy, the amount demanded, and the court determined the amount due as interest. Interest followed as a matter of law on the amount recovered from the date appellant should have paid.

■ We think the allowance of attorney's fees in both cases excessive when considered in comparison with allowances made in former similar cases. See *Mut. Life Ins. Co.* v. *Owen,* 111 Ark. 554, 164 S. W. 720; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310. Numerous other cases might be cited. The rule has been to allow about 10 per cent. of the amount of the recovery, but here there appears to have been considerable work done in the preparation and trial of the cases and we have reached the conclusion that 15 per cent. of the recovery, or $300 in each case, will be reasonable compensation.

We therefore modify the judgment in each case in this respect, and, as modified both will be affirmed.

LAVENUE *v.* LEWIS.

Opinion delivered February 15, 1932.

O. E. Williams, for appellants.

C. D. Atkinson and *Earl U. Hardin,* for appellees.

McHANEY, J. This lawsuit involves an attack on the will of the late B. F. Johnson, of Washington County (who died April 20, 1929,) on account of the alleged undue influence of his second wife, Mrs. Lydia Johnson, who predeceased her husband nearly four years, she having died December 25, 1925. By his first marriage B. F. Johnson had two children, J. O. Johnson and Vicie (Johnson) Arnett, both now deceased, and both leaving several children, appellant, Mrs. J. L. Lavenue being one of five children of J. O. Johnson the others being parties to this litigation. A paragraph in the testator's will reads as follows: "Item 6. I have heretofore made advancements out of my property to my sons Bert B. Johnson and to J. O. Johnson, now deceased, which advancements have been fully equal to their respective interests in all of my estate, and because of such advancements so made by me, neither the said

son, Bert B. Johnson, nor the heirs of the said J. O. Johnson, are to receive any interest in or share of my estate." Item 7 makes the same reference to the heirs of Hugh L. Johnson, another deceased son. Bert B. Johnson and Hugh L. Johnson were children of the testator by his second wife. At the conclusion of the testimony for appellants the court directed a verdict for appellees, upon which judgment was entered and this appeal followed.

The only question presented is whether the evidence was sufficient to take the case to the jury on the ground of undue influence of Mrs. Lydia Johnson. Mrs. Lavenue testified over objections that her father, J. O. Johnson, had received as advancements from her grandfather, the testator, only $1,000, and that he had not received his share of the estate. This evidence was incompetent under the rule stated in *LeFlore* v. *Handlin,* 153 Ark. 421, 240 S. W. 712. In that case similar testimony was held to be incompetent, the court stating: "The above testimony therefore was wholly incompetent, because it cannot be proved that the testatrix was mistaken in a fact which she clearly stated in the will for the purpose of showing that her intention was really different from that which her language plainly expresses. Nor is such proof competent for the purpose of showing that, but for the mistake of fact, her intention would have been different and expressed in a different manner."

"The first great rule in exposition of wills (to which all other rules must bend)" said Chief Justice MARSHALL, in *Smith* v. *Bell,* 31 U. S. 68, "is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law." Over and over again we have said the same thing in substance in cases too numerous to mention. "Every man," said Judge WOOD in *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405, "has the untrammeled right to dispose of his property by will as he pleases, with only such limitations as the statute may impose." So here, the testator had the right to disinherit the J. O. Johnson heirs for the reason as-

signed in the will, or for any other reason, or without assigning any reason.

Although the testator was about 90 years of age at the time the will was executed, it is conceded that he had the mental capacity to make it, and his testamentary capacity is not questioned. Only the undue influence of the wife is charged. In *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590, the rule in this regard is thus stated: "As we understand the rule, the fraud and undue influence which is required to avoid a will must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause deprives the testator of his free agency in the disposition of his property. And the influence must be specifically directed toward the object of procuring a will in favor of particular parties. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relation with them at the time of its execution." The above was quoted by Judge BATTLE in *Smith* v. *Boswell*, 93 Ark. 66, 124 S. W. 264, as was also the following from 3 Elliott on Evidence, § 2696: "The influence of the husband over the wife, that of the wife over the husband, of the parents over the children, and of the children over the parents, are legitimate, so long as they do not extend to positive dictation and control over the mind of the testator."

When considered in the light of these rules, the evidence wholly fails to show any undue influence of the kind the law recognizes. No doubt Mrs. Lydia Johnson had a great influence over her husband, the testator, and justly so. She had lived with him more than a half century at the time of her death, helped him to accumulate a fortune of nearly $100,000, bore him fourteen children, and, so far as this record discloses, made him a loving and lovable wife. Certainly she had an influence

over him, but not an "undue influence," within the meaning of that term in the law. There was nothing wicked or malign about it, but, on the contrary, was just and proper, springing from that holy relation of husband and wife. Even though it may be said the evidence tends to establish the fact that she preferred her own children to those by a former wife and sought to influence the testator's benevolence in their favor, still it fails to show that she accomplished this end, as two of her own children were placed in the same category with the appellants, and one of them appeared to be her favorite son. She was not present when the will was prepared by an eminent lawyer in Fayetteville, and there is nothing to show that she dictated its terms or had any control over the mind of the testator. Moreover, the testator made no change in the will after her death, although he lived and was mentally competent nearly four years thereafter.

We do not review the evidence as no useful purpose could be served thereby. The court properly directed a verdict for appellees, as there was no substantial evidence of undue influence in the making of this will.

Affirmed.

GRAVES *v.* HOLLAN.

Opinion delivered February 22, 1932.

Gaughan, Sifford, Godwin & Gaughan, for appellant.
Snodgress & Snodgress, for appellee.

SMITH, J. This suit was brought in equity by appellee, Hollan, against appellant, Graves, to require an accounting of the profits earned in the purchase and sale of certain oil leases.

Appellee was an automobile salesman at Camden when drilling for oil began in that vicinity, and he became interested in the purchase and sale of oil leases, but was without capital on which to operate. He gave the following account of the beginning of his relations with Graves. He had contracted to buy some oil leases, for which he was unable to pay, and the persons from whom he had contracted to purchase were demanding their money. He made Graves a proposition that he would buy and resell the leases, and Graves should advance the money to pay for them, and if a profit were made it should be divided equally. His profit was dependent upon the resale of such leases as he bought. He told Graves that he had a contract for the purchase of a lease from a man named Poindexter for the sum of a thousand dollars, and that he had a contract to resell a half interest in the lease for the same amount.

Graves borrowed a thousand dollars from a bank at Camden, and the loan was made on his credit, although he required Hollan to join with him in the execution of the note to the bank covering this loan. The thousand dollars thus borrowed was deposited in the bank, and four hundred dollars of it was used to purchase another lease, referred to by the parties as the Wilson lease. The thousand-dollar note to the bank was payable in sixty days, and when it matured it was renewed by Graves alone, and later paid by him. Graves made Hollan a personal loan of sixty dollars and, in addition, paid all the expenses incident to the purchase of the leases, including the cost of the abstracts and the fees of the attorney for their examination.

At the time these leases were purchased a well, known as the Cox well, was being drilled on land nearby, and it was the drilling of this well which gave the leases their value. The title to both the Poindexter and Wilson

leases was taken in the name of Graves alone, and Hollan said this was done because Graves and his wife were on the scene, whereas Hollan's wife lived in Little Rock, and in buying and selling leases time was a material element, and they wished to avoid any delay in making a resale.

The Cox well came in dry, and this fact destroyed the value of both the Poindexter and Wilson leases, and they remained valueless until 1929, when another well, known as the McDonald well, in that vicinity was brought in as a producing well. This gave value to the Poindexter lease, and it was sold for $3,200, and this suit was brought to recover a half interest in the profit earned in its sale.

Appellee left Camden, and Graves testified that he neither saw nor heard anything further from him until after the McDonald well had been brought in. Hollan testified that he applied to Graves in 1923 for a statement of their account and offered to pay one-half of Graves' loss. Graves denied this. He testified that in March, 1929, he again applied to Graves for a statement, and was corroborated in this respect by a witness named Banks. Graves denied this statement also.

The Poindexter lease was dated October 22, 1922. The Wilson lease was dated November 2, 1922. The sale of the Poindexter lease, out of which the profit was made, was executed on March 13, 1929. The testimony establishes the fact that Hollan was to buy and resell the leases, and he and Graves were to share in the net profits, and a decree was rendered in which it was held that Hollan was entitled to share in the net profits which arose from the sale of the Poindexter lease, and this appeal is from that decree.

We have concluded that this decree is erroneous and should be reversed for the following reasons. Hollan himself testified that time was an important element in the purchase and sale of oil leases, especially in unproved territory such as this was at the time the Cox well was being drilled. Both the Poindexter and Wilson leases had value while the Cox well was being drilled. Neither had value after that well came in dry, and they continued

to be valueless until the McDonald well came in as a producer nearly seven years later. In the meantime, the joint note of Hollan and Graves for a thousand dollars matured, and was renewed, and was later paid by Graves alone. Hollan appears not to have been called upon to pay any portion of the note. Indeed, his original contract did not contemplate that he should furnish the money. The money was borrowed on Graves' credit. It was Hollan's duty to resell the leases, and he did not do so except the undivided half interest in the Poindexter lease, the proceeds of which sale were used in the purchase of the Wilson lease. The balance was used in the part payment of the Poindexter lease. Nothing was coming to Hollan unless he sold the leases at a profit, and, except as stated, he did not resell either of them.

Graves paid the balance due the bank on the note and the expenses incurred in the purchase of the leases, including the cost of the abstracts and the attorney's fees, amounting to $714.66. Up to the time of the resale of the Poindexter lease, Graves had therefore a net loss in the transaction of $714.66. The parties differ as to whether Hollan agreed to share this loss, but we accept Graves' statement that he did not. We are led to this conclusion largely from a consideration of the fact that Hollan was under no legal obligation to do so under the terms of their original contract. Hollan's contract did not obligate him to furnish the purchase money, but did require him to resell the leases. It was necessarily contemplated that this should be done expeditiously, for the reason stated that the value of these leases changed very rapidly.

The facts, as we find them to be, are that, after the Cox well came in dry, appellee ceased to be connected with the transaction and left the scene, and returned only a few times, and then not on account of these leases. His purchases appeared to be without value or prospect of profit. He admits that he did not sell the leases, and he did not testify that he attempted to do so, but he testified that he and one Reynolds discussed the question of drilling on the Poindexter lease themselves. This ap-

pears, however, to have been a mere discussion, to which Graves was not a party, and nothing came of it. At any rate, Graves was under no obligation to make this additional investment.

The thousand-dollar joint note, the proceeds of which furnished the capital with which the first lease was purchased, matured, and was renewed by Graves alone, and was later paid by him, and had become barred by the statute of limitations when the McDonald well came in and the lease was sold. We conclude therefore that the demand of Hollan for a share in the profits is stale, and that it is now inequitable to enforce it. He did not perform his agreement to resell the leases, and left his associate to bear alone a loss of $714.66 which Graves said he considered he had sustained during all the six years which elapsed after he had paid the note before he sold the lease.

We conclude therefore that the decree of the court below should be reversed, and it is so ordered, and, as the cause appears to have been fully developed, it will be remanded with directions to dismiss it.

KIRBY, J., dissents.

PEKIN WOOD PRODUCTS COMPANY *v.* MASON.

Opinion delivered February 8, 1932.

Exby, Moriarty and *Pierce,* and *John C. Sheffield* and *W. G. Dinning,* for appellant.

Brewer & Cracraft, for appellee.

BUTLER, J. This suit was brought in the Phillips Circuit Court by the appellee, as administratrix of the estate of T. S. Mason, for the benefit of herself as widow and for the minor children to recover damages arising from the death of the intestate, which occurred while he was in the employ of appellant and while engaged in the performance of his duties. On a trial of the case the appellee recovered verdict in the sum of $25,000, and from the judgment entered in accordance with the verdict this appeal has been duly prosecuted.

The court gave nine instructions at the request of the plaintiff, the defendant (appellant) contenting itself with the request for a peremptory instruction. The principal ground urged for reversal and argued by the appellant is for the failure of the court to direct a verdict in its favor, the contention being that there was no substantial evidence to sustain the allegations of the complaint or to warrant the instructions given to the jury at the request of the plaintiff.

The following facts were either admitted or established by the undisputed testimony: T. S. Mason was a veterinary surgeon, 42 years old, living in Helena, where he had practiced his profession for a number of years until some time in 1930, when, owing to the general

business depression, his practice fell off so much that he was forced to do something else for a living. Before this time he had done a lucrative business, and for the seven years preceding 1930 his income from the practice of his profession had averaged in excess of $5,000 a year, all of which he contributed to his family except about $25 or $30 a month which he used for his personal expenses. Sometime in September, 1930, Dr. Mason secured employment with the appellant company as a helper to the night engineer in charge of the boiler room. Among other things it was his duty to keep the boilers properly supplied with fuel. This fuel consisted of sawdust and ground up shavings and refuse lumber accumulated from various parts of the plant and blown into a large cylindrical-shaped bin about fifty feet high, twenty-six feet in diameter at the bottom and twenty-two feet at the top. The bin terminated at the bottom in a hopper with the sides of the same sloping upward to where it met the cylinder at an angle of 45 degrees. This hopper was about eight feet square at the bottom. Seated in the bottom of the hopper were three troughs, in which large iron screws or augers revolved, which were about 12 inches in diameter and so arranged that the tops of the screws were about six inches above the floor of the hopper. These troughs and screws extended into another and larger trough, the top of which was covered, and in this top were two doors, which could be lifted up when occasion demanded, and were large enough for a man to enter. At one end of this large trough and right at the hopper was a fan. The other end of the trough extended beyond the bin to the furnace. The fuel accumulated from other parts of the mill was conveyed by large pipes to the top of the bin and blown into it. As it fell to the bottom of the hopper, the fan and screws were put in operation by electric power, the revolving screws carrying the sawdust into the larger trough, where the fan blew it with great force through the large trough to the furnace where it was burned to

create steam. At times, when the sawdust was damp and shavings which had not been ground up were conveyed into the bin, the fuel would stick to the sides of the bin and gradually increase in quantity until it would "arch" and prevent the sawdust coming in from the top from falling to the bottom of the hopper. Below this "arch" the fuel would fall and be conveyed out, so that frequently a cavity would occur between the fuel accumulated and clogged in the bin above and the floor of the hopper. In order to dislodge this fuel so that it might fall, several plans were adopted; one, to descend from the top of the bin by means of a chair attached to a rope and pulley and loosen the sawdust with a pole; another, to pound the outside of the bin with a hammer which would sometimes dislodge the sawdust; another, to push iron rods from the outside of the bin through small apertures made for that purpose into the sawdust; and still another, to enter the bin from below by raising the doors on the top of the fan trough, crawling in through that trough between the screws into the bottom of the hopper, and from that point to dislodge the sawdust from above by punching it with a pole. To loosen the sawdust by entry from the top of the hopper required two men—one to go down in the chair and the other to lower him by means of the rope and pulley.

On the night of October 26, 1930, the fuel in the bin ceased coming through the augers into the furnace, and to unclog the fuel so that it might fall and be conveyed out, Dr. Mason entered the bin from below. He was given a pole by the night engineer, and all of the fuel became dislodged, falling upon him and completely covering him. An alarm was given, and a rescue was attempted, but before he could be reached and uncovered he had died from suffocation. Dr. Mason had been workin about six weeks before this occurrence, and it was alleged and admitted that he had had no experience in that kind of work. It was also alleged that it had been the practice in dislodging the fuel from the bin to direct an employee to enter through the opening at the bottom

of the conveyor (or fan trough), and that this was so small that it could not be entered without assistance; that this method of dislodging the sawdust was more expeditious but was highly dangerous, and known to be so by the engineer in charge, but not known by Mason. It was alleged that on the night of his death Mason was directed by his superior, the night engineer, to enter through the small opening at the bottom of the bin to relieve the congestion of the fuel for the purpose of enabling it to be fed to the furnace, and that, relying upon the knowledge of his superior, and without appreciating the risk, he entered the bin; that, while inside the bin, he was caught in a slide of sawdust and killed; that his death was caused by the negligence of the defendant's servant, the night engineer and superior of the deceased, in failing to warn Mason of his danger in entering the hopper, that his death was caused thereby, and that defendant was further negligent in putting the screws and fan in operation while Mason was in the bin, causing them to revolve and grasp his left foot and trouser leg, crushing the foot and preventing him from escaping from the falling sawdust.

While admitting the tendency of the sawdust to become impacted and to "arch" in the bin, and that entry at the bottom of the bin was dangerous and known to be so by the night engineer, and that it was the duty of Mason to keep the fuel moving toward the furnace, the appellant denied that the deceased entered at the bottom at the invitation or direction of the night engineer or that the latter had put in motion the fan and screws, but contended that the deceased had been expressly warned of the dangers incident to his work, and had entered the bin from the bottom without the knowledge of the night engineer and in violation of the express command of his superiors, and that, therefore, his death was occasioned by his own negligence and not through any negligence of the appellant.

Ross Smith, appellant's chief engineer who had employed Mason, testified that he had explained in detail

the manner in which the fuel was to be fed to the furnace and the construction of the bin, and had instructed Mason that the congestion of the fuel in the bin was to be relieved only by entering from above in the chair; that he must not enter from below and had warned him of the danger.

John (Monty) Smith, the night engineer under whom Mason was working on the night of his death, testified that he had also warned Mason of the danger of entering the bin from below and had directed him not to do so; that he was not present when Mason entered the bin and did not know that he had done so until witness discovered him within the bin at the bottom just before the sawdust fell upon him.

The testimony of Ross Smith was corroborated by that of an employee of appellant who testified that he had heard the warning given by Smith to Mason regarding the danger attendant upon the bin.

To contradict this testimony and to establish her allegation, the plaintiff relied largely on circumstances proved. The settled rule, which has been many times approved by this court, is that a well connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence, and frequently outweighs opposing direct testimony, and that any issue of fact in controversy can be established by circumstantial evidence when the circumstances adduced are such that reasonable minds might draw different conclusions. *St. Louis, I. M. & So. Ry. Co.* v. *Hempfling,* 107 Ark. 476, 156 S. W. 171; *St. Louis, I. M. & So. Ry. Co.* v. *Owens,* 103 Ark. 61, 145 S. W. 879; *Midland Valley Ry. Co.* v. *Ennis,* 109 Ark. 206, 159 S. W. 214; *St. Louis-San Francisco Ry. Co.* v. *Bishop,* 182 Ark. 763, 33 S. W. (2d) 383.

The circumstances relied on by the appellee are as follows: Cooper, the employee whose testimony corroborated that of Ross Smith as to the warning given, stated that when Ross Smith and Mason went up together on the day of the latter's employment to the top of the bin, witness was at the bottom hammering on the bin to

loosen the sawdust, and when they had descended, Mason came to where witness was and inquired how they got the sawdust down, and was told, "We beat it down, if we could. If we could not, we go up on top and work it down." Mason asked if that was the place that had been shown him, and was told, "Yes, that is the only place that you can get into the sawdust," and then Mason said, "Do you reckon I will have to go into it?" and was answered, "No, I don't reckon you will." These questions were significant of the question whether or not he had been warned of the danger and had the methods of unclogging the fuel explained to him, and was a circumstance indicating that he had not.

The night engineer and Mason were the only ones who were shown to have been engaged in the operation around the furnace on the night of Mason's death. The testimony of a witness who had worked for several months in the performance of the same work that Mason did, and who was shown to have been familiar with the situation, was to the effect that it was impossible for one to enter the bin through the fan trough without assistance; that it was necessary for one to hold up the doors of the fan trough when another crawled through; that these doors would fall immediately on being released; that, even with assistance, one could not enter at all when the screws were in motion and the fan operating; that the force of the air from the fan was so strong that it would blow one entering the trough under the boilers. When the body of Mason was uncovered, there was a quantity of sawdust and shavings between it and the bottom of the bin. By the side of the body was the flashlight of the night engineer, and there was a pole in the hands of the dead man. He had on two pairs of coarse trousers or overalls, and both pairs at the bottom of the left leg were torn in several places and hanging in fragments to the remainder of the fabric. When the body was prepared by the undertaker, it was discovered that the big and second toes of the left foot were mashed flat—the nail of the big toe was mashed completely off

and that of the second toe nearly so. The foot was bruised, and a quantity of blood had escaped sufficient to soak through the leather of the shoe. There was also testimony to the effect that frequently men would be sent in at the bottom to dislodge the fuel from above, and that while the employee would be in the bin the fan and feed screws would be put in operation to remove the sawdust as it fell.

According to the familiar rule, this court must give to these circumstances their highest probative value in favor of the appellee and indulge every inference which is reasonably deducible from them in support of the finding of the jury. *Gaster* v. *Hicks,* 181 Ark. 297, 25 S. W. (2d) 760. Giving to the above circumstances the force prescribed by the rule stated, we conclude that they come within the principles heretofore announced, and that there was sufficient evidence to warrant the submission of the issues to the jury. It is true that John Smith, the night engineer, denied helping Mason into the bin, but there was no one else to help him, and he could not have got in without assistance. Therefore the jury might have reasonably concluded that the circumstances refuted the testimony of John Smith, especially when he admitted that he discovered the man inside, and, instead of ordering him out, he gave him a pole with which to dislodge the fuel, and failed to give any satisfactory explanation as to why his flashlight was found in the possession of the deceased. There was no direct testimony as to whether or not the fan and screws were put in motion after Mason entered the bin, but, as it was impossible for him to enter while they were in motion, the injury to his foot must have happened after he had entered the bin, and the jury might have reasonably inferred that these screws and fan were put in motion after Mason's entry, and that in endeavoring to escape from the falling sawdust his foot and trouser leg were caught in the revolving screws, which prevented his egress through the point of entry. In removing the body, care was taken not to injure it, and it might be well believed

from the quantity of sawdust found between the body and the floor of the bin that, when Mason's injury occurred, he began struggling upward in an effort to rise above the sawdust, in which effort he almost succeeded, for it is shown that there was only about three or four feet of sawdust above him and almost an equal amount below.

Instructions Nos. 4, 6 and 7 for the appellee are the only ones of which appellant complains in its brief, on the ground that they were "not supported by any testimony of any character." Instruction No. 4, in effect, told the jury that if the deceased entered the fuel container, and while therein the screws and fan were started in motion, and this was in any manner the proximate cause of the death, and this could have been foreseen in the light of the attendant circumstances, and the deceased at the time was not guilty of contributory negligence and had not assumed the risk, the verdict of the jury should be for the plaintiff.

Instructions Nos. 6 and 7 were on the doctrine of assumed risk, and in these instructions it was left to the jury to say whether Mason was acting under the direction of his superior, and they were told that, if this were true, Mason had a right to rely upon the judgment of his superior unless the risk was so obvious that no prudent man would have obeyed the command.

From what we have already said, it follows that in our judgment these instructions were not abstract, but had substantial evidence upon which to base them.

It is also urged that the court erred in admitting the testimony of five witnesses, each of whom was called in rebuttal, and it is argued that the purpose for which these witnesses were introduced was to prove the declarations of the employees as to who was responsible for the injury, and that such testimony was incompetent under the rule that "declarations of an employee as to who was responsible for any injury made after its occurrence is incompetent as against his employer, for the reason that his employment does not carry with it authority to make declarations or admissions at a subsequent time

as to the manner in which he had performed his duties of employment." *Casteel* v. *Yantis-Harper Tire Co.*, 183 Ark. 475, 36 S. W. (2d) 406; *River R. & H. Const. Co.* v. *Goodwin*, 105 Ark. 247, 151 S. W. 267.

An examination of the record discloses the fact that this testimony does not violate the rule. John Smith was the first witness called by the appellee. He was asked to tell how and why Mason happened to go inside the bin, and, after denying any knowledge of it, he was asked if it were not a fact that he had told Mason to enter the bin and assisted him to do so. He denied this. He was then asked if he had not made statements of that nature to and in the presence of various persons who were named. He answered that he had not. He was then excused, and the attorney for the appellee made this announcement to the court: "I presume it would be proper at this time—if not, I want to make it clear—that in view of the fact that five or six people—reputable people—have told me of statements that this witness has made that he denied, I feel that I have been surprised by his statements, and I expect to introduce these witnesses to impeach him at this time." No objection was made to this statement or to the indicated conduct in calling witnesses for the purpose of impeachment, and, after having called several witnesses who testified for the appellee, five witnesses were called in rebuttal of the testimony of John Smith and to impeach his testimony. The testimony of these witnesses was expressly introduced for, and limited by the court to, purposes of impeachment only, and the jury was instructed not to consider the evidence as affirmative testimony on the part of the plaintiff, but only as to the credibility of the witness whose testimony was sought to be impeached. It is the contention of the appellant that the testimony of these witnesses was improper, first, "for the reason that it tended to impeach the testimony of a witness called by the plaintiff herself; in the next place, it contradicted a witness on a matter of evidence that was wholly inadmissible for any purpose." We do not agree with

the appellant, but think that, since John Smith was the only person who was at or in the vicinity of the bin at the time of the accident, the appellee might well have thought his testimony was indispensable, and from information he had received believed that he would testify to a state of facts which would impose liability on the appellant, and, when appellee's counsel discovered that he would not testify as thought, the appellee was then justified in introducing other witnesses to show that he had made statements different from his present testimony. Section 4886, Crawford & Moses' Digest, provides: "The party producing a witness is not allowed to impeach his credit by evidence of bad character unless it is a case in which it was indispensible that the party should produce him, but he may contradict by other evidence and by showing that he has made statements different from his present testimony." The testimony offered in rebuttal was therefore competent. *Ward* v. *Young,* 42 Ark. 553; *Roy* v. *State,* 102 Ark. 691, 145 S. W. 190; *Midland Valley R. R. Co.* v. *Ennis,* 109 Ark. 206, 159 S. W. 214; *Williams* v. *Cantwell,* 114 Ark. 542, 170 S. W. 250; *Jonesboro-Lake City R. R. Co.* v. *Farner,* 112 Ark. 447, 166 S. W. 571; *Graves* v. *Gardner,* 137 Ark. 197, 208 S. W. 785. There can be no doubt that the testimony sought to be elicited from the witness was competent. It was not a declaration sought to be established by the testimony of another, but merely the narration of what the appellee had been led to believe had actually occurred.

Since all the questions were fully and fairly submitted to the jury by proper instructions, and there is substantial testimony to sustain the verdict, the judgment must be affirmed. It is so ordered.

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

Opinion delivered February 15, 1932.

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

W. B. Scott and *A. B. Shafer,* for appellee.

BUTLER, J. The appellee, T. M. Tidmore, was a section foreman in the employ of the appellant on July 8, 1930, and on that date, shortly after one o'clock in the afternoon, while engaged in the performance of his duties, was injured. The appellee brought suit for damages because of his injuries, and recovered a verdict and judgment against the appellant from which is this appeal.

The principal ground urged for reversal, and one which we think is decisive, was that the evidence was not sufficient to sustain the verdict, and that the appellant's request for a directed verdict in its favor should have been granted. The testimony most favorable to the appellee tended to establish these facts. At about one o'clock, the switch engine passed by a point about 1,600 feet south of Highway No. 70 which crossed the main track of appellant practically at right angles. At this place he was directing two negroes in cutting small trees and bushes on the right-of-way west of the passing

track. The switch engine was travelling north, but its front part was directed toward the south, the engine being in reverse. Several cars were attached to this engine on the north or back end of it, and several at its front on the south. As it passed by appellee, the conductor, who was hanging on one of the cars, gave him a sign with his hand which appellee thought was a "high-ball," and supposed that it meant that the switch engine was passing out of the yards to go to a junction point called Presley about 2½ miles north. At this time there were two or three cars standing on the side track or passing track about 150 or 200 feet south of where the switch enters from the main track to the passing track just south of Highway No. 70. Further south and with an interval between them were other cars, near which the aforesaid work was being done.

Appellee watched the switch engine with its cars attached until it crossed the highway and went on to a team track which connected with the main line by a switch a short distance north of Highway No. 70. The main track ran north and south at this point, and the passing track, immediately west of which appellee was working, ran parallel with it. From time to time appellee looked from the west between the cars toward the north. After the switch engine passed to the north, the work of cutting the timber was continued, and in this operation a sapling or small tree was felled upon one of the coal cars. Appellee directed one of the negroes to get upon top of the coal car for the purpose of dislodging the tree, and, while the negro was on the coal car, appellee asked regarding the whereabouts of the switch engine, and was told that it was near the north end of the team track about a quarter and a half (⅜ of a mile) away. He continued to stand where he was, supposing he was in the clear and in safety when, about eight or ten minutes after the negro had descended from the coal car, the car by which appellee was standing was struck by reason of the switching operation of the cotton

cars from the main line to the passing track, and moved forward, a part of which projecting about four inches to the side, in which standards were fixed, struck the appellee on the shoulder violently knocking him to the ground and injuring him severely.

Appellee stated that it had generally been the practice of men operating the engine to give him a signal when they were going to switch cars upon a track on which he might be working, and that often he would ask the train crew what time they were going to use the track, but on this occasion he did not ask them, as he was not working on the track, but was clearing bushes on the right-of-way. The appellee was an experienced man, having worked on the section for fourteen years, ten years of which he had been foreman. He was well acquainted with the rule that required him to keep a lookout for his own safety and for the safety of the men working under him. It was his duty, when working around any track, to be on the lookout for cars which might be moving. He was working in the yards of the appellant in the city of West Memphis, and through these yards ran the main line from north to south. On the west of this main line and south of Highway No. 70 ran the passing track parallel with the main line. Just north of the highway a switch led from the main line to the team track, east of and parallel to the main track. The passing track was connected with the main line at a point near the depot a short distance south of Highway No. 70 by a switch and again by a switch at a point to the south of where appellee was working. To the right and opposite to where appellee was standing was a cotton compress, and between it and near to it was another track which was used in handling cotton either coming in or going out of the compress. This side track was connected with the main line at a point just south of Highway No. 70 by a switch a short distance north of the switch leading into the passing track. It was also connected with the main line at two points south of the place of appellee's injury. These tracks were used daily for switching purposes, the switch

engine and crew using them several times each day in these operations. On the forenoon of the day of the accident a number of cars had been switched on to the passing track, and the train crew had seen the appellee and his crew at work on the right-of-way cutting the bushes, and they knew that he was continuing this work after the noon hour. About one o'clock P. M. the switch engine entered on the track by the compress and there picked up three carloads of cotton for the purpose of moving them over to the passing track. To accomplish this, they moved down toward the south with the engine headed in that direction and pushing the cars ahead, with some attached to the rear, on to the main line, and backed north on that line past where the appellee was working, proceeding on in a northerly direction. It was necessary for them to pass entirely across Highway No. 70 in order to give clearance between the cars and the north switch so that it might be opened. From the point where that switch entered the main line to the point where the injury occurred there was a considerable down grade of perhaps four or five feet between the two points, and, when the switch engine with its cars attached passed the switch and the highway, it moved again south and shunted the three cars of cotton through the switch on to the main line. A brakeman was riding one of these cars, which were moving at this time at a rate of about four or five miles per hour—a sufficient speed on account of the down grade. No signal was given by the operatives of the switch engine that this movement would be made, and no effort was made by any of them to notify the appellee that the cars would be switched upon the side track. The weight of the cars rolling down grade was sufficient to put the first bunch of cars on the side or passing track south of the switch in movement, and they together with the three cars of cotton moved down, striking the cars near which the appellee was standing with force enough to move them forward, resulting in the accident to the appellee.

These are the essential facts disclosed by the testimony most favorable to the appellee which we think fail to disclose any negligence on the part of the crew of the switch engine, but show that the accident occurred by reason of appellee's own inattention in taking a position sufficiently near the track to be struck by a moving car, which position it was unnecessary for him to occupy in the performance of his duties.

It is argued by the appellee that the train crew was negligent in that the brakeman in charge of the cars being switched failed to put on the brakes when these cars passed upon the passing track, and that this is admitted by the testimony of the brakeman Garner who rode the cars, and also that the crew was guilty of negligence in failing to give a "side track signal." This could not be said to be negligence under any view of the case, since the undisputed testimony shows that the cars were moving at not more than four miles an hour, and no one was expecting workmen upon the track. An examination of the transcript, however, fails to bear out the contention of the appellee as to the purported testimony of the brakeman, Garner. He testified, both on direct and cross-examination, that in the switching operation he set the brakes on the cars being switched. It is true that he testified at one time as to one switching operation that he did not put on the brakes and further stated that he would not say whether or not he did, but there were two switching operations about which he was questioned, and, when the entire testimony of this witness is read, it is uncertain which one he was referring to. Whether he did or did not put on the brakes would be immaterial, as is disclosed in that part of the testimony of the appellee when he testified as to what the custom was with reference to the information being given him when the switching crew intended switching cars on to the side tracks. This would be done when they knew or had reason to believe that he was at work on the track, and appellee himself stated that when he was engaged in work on the tracks he would ask the operatives of their in-

tentions, but that on this occasion he did not because his men were working on the right-of-way and not on the tracks. This the train crew knew, and that appellee's duties did not require him to be upon the tracks or near enough to be within a point of danger, and they had no reason to expect that he would expose himself to unnecessary hazards, and therefore had reason to believe that the track was clear, and that the operation in which they were engaged would result in danger to no one, which was conducted in the customary way.

While acknowledging the duty of the appellee to keep a lookout for his own safety, it is insisted that his failure, if any, to keep the lookout was caused by a sign given him by the conductor in passing which he thought meant that they were through with their switching operations and were going on to the junction at the north. But, although he might have thought this, and even had he been justified in this supposition, he afterward knew by information conveyed to him by the negro on top the coal car that they had not gone on to the north, but were still in the yards on the team track. Within eight or ten minutes thereafter the cars had been pushed on to the passing track and the accident was occasioned by appellee's failure to observe the rule to keep a lookout for his own safety, and because he occupied a position of danger entirely unnecessary for the performance of his duties and one where there was no reason to believe he would be.

It is conceded that the work in which appellee was employed was interstate commerce, and that the Federal Employers' Liability Act is the law applicable to the facts here before us. In *Dallas Coal Co.* v. *Rotenberry,* 85 Ark. 237, 107 S. W. 997, the court said: "The undisputed evidence establishes the fact that appellee went into the place of danger in violation of the rule provided for his protection. This was contributory negligence on his part, and precludes a recovery."

In the case of *C., R. I. & P. Ry. Co.* v. *Abel,* 182 Ark. 631, 32 S. W. (2d) 1059, it was the duty of Abel to keep in repair and to operate the engine used for tamping ties

in the roadbed. The machine was not operating satisfactorily at the dinner hour, and Abel, during that period, engaged in the repair and adjustment of the engine, and, while so at work, he was struck by a passing train. The court, in holding that the facts in that case precluded a recovery, said:

"Appellee was an experienced workman; he knew the location of the machine to be repaired relative to the track and the embankment or side of the cut, that trains were frequently passing over the track, and that the rules required him to rely upon his own watchfulness and keep out of the way, proceeded with his work of making the repairs, leaving the engine running and the air pump working, both making a great deal of noise, without looking toward the direction of the approaching train, according to his own statement, which he could have seen for almost a half mile, and stepped back on the track between his machine and the track where the passing train struck and injured him. * * *

"According to the undisputed testimony, appellee's own statement of the occurrence of the injury, he neglected to take proper care for his own safety and assumed the risk incident upon the performance of the work without relying upon his own watchfulness to keep in the clear as the rules of the company required, and they were entitled to expect of their employees."

The judgment of the trial court is reversed, and, as the facts seem to have been fully developed, the cause is dismissed.

WILSON *v.* LUCAS.

Opinion delivered February 22, 1932.

[redacted]

Cockrill & Armistead and *W. A. Leach,* for petitioner.

Joseph Morrison, for respondent.

HART, C. J., (after stating the facts). This is an original application for a writ of prohibition to restrain the Arkansas Chancery Court for the Northern District from proceeding further in a suit by a single judgment creditor of the Stuttgart Rice Mill Company, a domestic corporation, with a return of execution "no property found," to reach equitable assets in the hands of the officers of said corporation in satisfaction of his judgment.

It is contended by counsel for the petitioner that under our mode of civil procedure, service cannot be had in a transitory action on a defendant in a county other than that of his residence, except where there is service in the county where the action is instituted on a codefendant who is jointly liable. Their contention is that there is no joint liability under the allegation of the complaint in favor of Lockridge against Wilson and McCoy. Hence it is contended that, the liability being several and not joint, the court should have sustained the motion by Wilson to quash the service of summons upon him in Pulaski County, the suit having been brought in Arkansas County. In short, it is claimed that there is no joint liability against Wilson and McCoy, and that jurisdiction could not be obtained over Wilson, a resident of Pulaski County, by joining him in a suit with McCoy, who is a resident of Arkansas County, in a suit brought in the latter county.

The general rule is that the capital stock and assets of a corporation constitute a trust fund for the benefit of creditors, which neither the officers nor the stockholders

can divert or waste. This rule was recognized and followed by this court in the case of *Jones, McDowell & Company* v. *Arkansas Mechanical & Agricultural Company,* 38 Ark. 17. In the discussion of the case, the court said:

"The assets of an incorporated company are a trust fund for the payment of its debts, which may be followed into the hands of any person having notice of the trust. This doctrine was invented by Judge STORY, in the case of *Wood* v. *Drummer,* 3 Mason 308, and it will constitute not the least enduring of his titles to be considered a great jurist. It has been applied by the Supreme Court of the United States in the following cases: (Citing cases.)

"The cases in the State courts on this subject are too numerous to cite; but it is sufficient to say that the doctrine has never been denied by any court of last resort in the Union, before which the question has come, and it is as well settled as any legal principle can be."

The court further held that a director of a corporation is conclusively presumed to know its pecuniary condition, and that his purchase of the assets will not be *bona fide* and without notice of the trust.

In the case of *Wesco Supply Company* v. *El Dorado Light & Water Company,* 107 Ark. 424, 155 S. W. 518, this doctrine was approved, and the court again held that the assets of an incorporated company are a trust fund for the payment of its debts which may be followed into the hands of any person acquiring them with notice of the trust.

In *Nedry* v. *Vaile,* 109 Ark. 584, 160 S. W. 880, the court again expressly approved the doctrine and held that the directors of a corporation stand in the relation of trustees to the stockholders and creditors of the corporation. The court said, however, that the purchase of the assets of a corporation by a director is only to be voided for fraud at the instance of some party in interest. This case also recognizes that chancery is an appropriate forum in which to enforce the rights of creditors.

In varying form, the principle has been before the court in other cases. To illustrate, in *Carter* v. *Union Printing Company,* 54 Ark. 576, 16 S. W. 579, it was held that a voluntary release of a stock subscription by an insolvent company is a fraud upon its creditors, whether its claims arose before or after the stock was issued.

In *Spear Mining Company* v. *Shinn,* 93 Ark. 346, 124 S. W. 1045, it was held that creditors of an insolvent corporation may, on behalf of themselves and all other creditors who may join with them, bring suit to discover assets of such corporation, and to obtain an accounting from other corporations who had assumed to pay, to the extent of such assets, the liability of the debtor corporation.

Other cases recognizing that the capital stock and assets of a corporation are a trust fund that must be devoted to the payment of its debts, which neither the corporation nor the individual stockholders can directly or indirectly divert from this purpose, are the following: *Ward* v. *McPherson,* 87 Ark. 521, 113 S. W. 132, and *Tiger* v. *Rogers Cotton Cleaner & Gin Company,* 96 Ark. 1, 130 S. W. 585.

The Supreme Court of the United States, in later cases than those referred to above, has reaffirmed the doctrine that the property of a corporation is a trust fund for the payment of its debts, which means that the property and assets of a corporation must first be appropriated to the payment of the debts of the corporation before any portion of it can be distributed to the stockholders. The court, in *Hollins* v. *Brierfield Coal & Iron Company,* 150 U. S. 371, 14 S. Ct. 127, quoted with approval from an earlier decision the following:

" 'The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that, when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corpora-

tion, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them.' "

In the case of *Wabash, St. Louis & Pacific Railway Co.* v. *Ham,* 114 U. S. 587, the court said that it was also true in the case of a corporation, as in that of a natural person, that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors is void as to them.

In all the cases above cited, and in many others which might be cited the court expressly recognized that courts of equity have concurrent jurisdiction with courts of law to set aside conveyances of this sort which are made in fraud of the rights of creditors. The plaintiff specifically alleges that the sale of the assets of the corporation was made by the corporation, by Wilson as president and McCoy as secretary, with the other stockholders of the corporation. The complaint alleges that the sale was made in fraud of the rights of plaintiff as a creditor of the corporation, and in this suit it is sought to discover the assets of the corporation and to appropriate them to the payment of the decree of the plaintiff against the corporation. Hence, under the allegations of the complaint, the liability of Wilson and McCoy was joint and several.

Counsel for the petitioner rely upon the principles of law decided in *Hatch* v. *Davis,* 101 U. S. 205, 25 L. ed. 885. We do not think that the principles of law there announced control in this case. The court there said that the presence of all the stockholders might be convenient, but was not necessary. The reason given was that the liability of the subscriber for capital stock of a company is several and not joint. Hence it was held by the court that it was not necessary to make all the stockholders parties to the action in a creditor's suit to enforce the liability of a stockholder for his unpaid subscription. The Supreme Court of the United States did not hold that, if the other stockholders had been made parties defendant in the lower court, that court would have been without jurisdiction. On the other hand, it

recognized that such a course might be convenient and proper in a given case. Unpaid damages due on stock subscriptions are not the primary fund for the payment of corporate debts. Each stockholder is liable on his unpaid subscription only for the proportion thereof which is necessary for the payment of the debts of the corporation when the property of the corporation is insufficient for that purpose. To hold the subscriber liable, the creditor must first show that they have exhausted their legal remedies against the corporation without obtaining satisfaction, or that it is insolvent. *Fletcher* v. *Bank of Lonoke,* 71 Ark. 1, 69 S. W. 580, and *Davis* v. *Scott,* 129 Ark. 226, 195 S. W. 383.

As we have already seen, the assets of the corporation which were disposed of at the time of its statutory dissolution was a primary fund for the payment of its debts, and was subject to be reached either in law or in equity by a judgment creditor in satisfaction of his debt.

In this view of the matter, we do not regard it as necessary to determine whether § 1728 of Crawford & Moses' Digest was repealed by § 38 of act 250 of the Acts of 1927. The latter act was an act to provide for the formation of corporations, the regulation of corporations, and for other purposes. Acts of 1927, p. 854. Both § 1728 of Crawford & Moses' Digest and § 38 of the Acts of 1927, above referred to, were acts regulating the liability of corporations where the capital stock had been withdrawn and returned to the stockholders before the payment of the debts of the corporation. Neither act could enlarge or lessen the ancient jurisdiction of chancery in the premises. The acts could only regulate the chancery practice. In this State, from the very beginning, it has been held that the jurisdiction of courts of equity under our Constitution is fixed and permanent, and that its jurisdiction cannot be enlarged or abridged. *Hempstead & Company* v. *Watkins,* 6 Ark. 317, 42 Am. Dec. 696; *Hester* v. *Bourland,* 80 Ark. 145, 95 S. W. 992; *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579; *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C, 980;

and *German National Bank* v. *Moore,* 116 Ark. 490, 173 S. W. 401.

The result of our views is that the chancery court of Arkansas County had jurisdiction of the case, which is the subject of this controversy, and the petition for the writ of prohibition must be denied.

FENDER *v.* ROGERS.

Opinion delivered February 22, 1932.

Walter L. Pope and *W. J. Schoonover,* for appellant.

W. P. Smith and *W. M. Ponder,* for appellee.

SMITH, J. This case involves the construction of a certain deed, which reads as follows:

"Know all men by these presents: That I, Albert W. W. Brooks, of the county of Randolph, and the State of Arkansas, have this day, for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, and for the further con-

sideration of the natural love and affections that I have for my daughter, Ellen Rogers, have granted, bargained, sold and given, and by these presents do grant, bargain, sell and give, unto my daughter, Ellen Rogers, the following described lands lying and being in Randolph County, Arkansas,

"To have and to hold during her natural life and then to her bodily heirs, to-wit:

"The west half (W½) section two (2); northeast fractional quarter (NE Frl. ¼) east of river, section three (3); northeast quarter (NE¼) of southeast quarter (SE¼) of section three (3); south half (S½) of southeast quarter (SE¼) section three (3); southeast quarter (SE¼) of southwest quarter (SW¼), section fifteen (15), all in township eighteen (18) north, range two (2) east.

"To have and to hold the same unto the said Ellen Rogers and unto her heirs and legal assigns forever. This deed however is made on this condition, that I hereby reserve unto myself the full control and authority and all the rents and profits which may accrue on said lands during my natural life.

"Witness my hand and seal this the 3d day of October A. D., 1893.

(Signed) "Albert W. W. Brooks."

The chancellor was of opinion that this deed from Brooks to his daughter conveyed only a life estate to her, and that the deed which she executed to the ancestor of appellants conveyed only that estate, and that upon her death appellees, her heirs at law, took the fee title by way of remainder. The correctness of this construction of the deed is the question presented for decision on this appeal.

A comparison of the deed set out above with the deed construed in the case of *McDill* v. *Meyer*, 94 Ark. 615, 128 S. W. 364, shows that the deeds in the two cases are substantially identical down to the habendum clause, and what was said in the construction of that portion of the deed in the McDill case is applicable here. The rules

of construction there stated were that, if the granting clause conveys a fee simple a repugnant provision in the habendum clause which diminishes the estate thus conveyed is void. *Carl-Lee* v. *Ellsberry,* 82 Ark. 209, 101 S. W. 407, 12 L. R. A. (N. S.) 956, 118 Am. St. Rep. 60. That at common law a fee could not be granted by deed without words of inheritance, but by force of our statute (§ 1497, Crawford & Moses' Digest) "* * * all deeds shall be construed to convey a complete estate of inheritance in fee simple, unless expressly limited by appropriate words in such deed," but that this statute has no application where appropriate words are used in the deed expressly limiting the grant. It was further said that, while the habendum is the appropriate place in the deed for such limitations, it may appear elsewhere in the deed, and that such limitations or reservations are held to be void only when they are repugnant to or in conflict with the recitals of the interest conveyed in the granting clause; that it was the function of the habendum clause to explain or define the extent of the grant, and that such explanation would be rejected only where there is a clear and irreconcilable repugnance between the estate granted and that limited in the habendum.

It was pointed out in the McDill case that the granting clause there construed did not define the estate granted, and that fact is true here also. It was therefore held in that case, as it must be held here, that there was no repugnancy in the definition of the estate conveyed between the granting clause and the habendum clause, and the interpretation of the deed in that case was arrived at by a construction of the habendum clause. We must resort to the same means here to interpret this deed. There is here not only no conflict between the granting and the habendum clauses, but only in the habendum clause does the grantor define the estate conveyed.

The similarity between the two deeds ceases however with the granting clause. In the McDill case it was recited in the habendum clause that if the grantee "shall die without children lawfully begotten, then the

title to the property herein granted shall revert to me, the said C. F. McDonald, (the grantor) to my heirs, etc.; otherwise to his lawful children."

It was held that the language of the habendum clause did not bring it within the rule in Shelley's case so as to convey an estate in fee simple to the grantee, but that he took only an estate for life. The court found it unnecessary to decide whether the limitation in the habendum clause set out above created an estate tail at common law, which, by force of our statute (§ 1499, Crawford & Moses' Digest), was effective as conveying a life estate with remainder over in fee simple to the "person to whom the estate tail would first pass according to the course of the common law," or whether the deed conveyed a contingent remainder to the children of the grantee who survived at the time of his death, as the result would be the same in either case, inasmuch as the grantee was survived by children lawfully begotten.

Here however there appears two clauses, either of which, if it stood alone, would be treated as the habendum clause. These clauses are not void as being in conflict with the granting clause, for the reason which has been stated that the granting clause is silent as to the extent or character of the estate conveyed.

It is true, of course, that, if there were no habendum clause, the deed would be construed as conveying an estate in fee simple. This by virtue of § 1497, Crawford & Moses' Digest, quoted from above. But there is an habendum clause; the doubt is whether there are not two.

The first of these clauses contains the recital: "To have and to hold during her natural life and then to her bodily heirs." If the language just quoted is to be given effect as the habendum clause, then only a life estate was granted to Mrs. Rogers, and her bodily heirs take the fee title, subject to her life estate and subject also to the life estate reserved by the grantor. *Wilmans* v. *Robinson*, 67 Ark. 517, 55 S. W. 950.

It is apparent that this deed was written by an untrained hand, and it is a matter of common knowledge

that nearly all persons authorized to take acknowledgments write deeds, and that blanks of all kinds are used for this purpose.

It is significant that this clause does not appear in the part of the deed where habendum clauses are usually found, although that fact is not of controlling importance. It appears in connection with the description of the land conveyed, and following this description another clause appears where the habendum clause would be expected to be found and which reads as follows:

"To have and to hold the same unto the said Ellen Rogers and unto her heirs and legal assigns forever. This deed however is made on this condition that I hereby reserve unto myself the full control and authority and all the rents and profits which may accrue on said lands during my natural life."

It must be admitted that these clauses conflict, as one is to the heirs special, whereas the other is to the heirs general, but we have concluded that the second clause is, in fact the habendum clause, and the one to be given effect as such.

We are led to this conclusion, not only from the reasons stated, but from the additional reason that the habendum clause is the appropriate place in the deed where limitations and reservations are expressed, and it is in this second clause that the grantor recites the condition upon which the deed was made, the condition being that, subject to the conveyance to the grantee and her general heirs and legal assigns forever, the grantor had reserved to himself "the full control and authority and all the rents and profits which may accrue on said lands during my natural life." If the grantor intended to convey to his daughter only an estate for her life, he made that subject to the life estate reserved in himself; in other words, a life estate to begin upon the termination of another life estate. The deed does not recite the grantor's intention that his daughter's life estate shall begin at the expiration of his own life estate there reserved, but such is its necessary effect if only a life estate

was conveyed to her. If such had been his intention, this second clause was the place in which that intention would be expressed, because it was here that he undertook to state the condition upon which the deed had been executed.

We conclude therefore that this second clause should be given effect as the habendum clause, and not the first, and, if this be the proper construction of the deed, it follows that an estate in fee simple was conveyed to the grantee named, subject only to the life estate reserved by the grantor in himself.

The decree of the court below will therefore be reversed, and the cause will be remanded with directions to enter a decree conforming to this opinion.

KIRBY, J., dissents.

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

Opinion delivered February 22, 1932.

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

W. B. Scott and *A. B. Shafer,* for appellee.

KIRBY, J., (after stating the facts). Appellant contends that the verdict is not supported by the testimony, that the court erred in the giving and refusing of certain instructions, and especially in not setting the verdict aside as having been arrived at by lot.

The testimony is in conflict on certain points, but from it the jury could have found that appellee was the guest riding in the car with the negro, and also that the appellant was negligent in not keeping a proper lookout and giving the signals as required by law at the cross-

ing, notwithstanding the weight of the evidence supported its contention that the usual signals were given. There is no dispute as to the injury or damage, and the testimony is sufficient to support the verdict.

It is next contended that the court erred in not giving appellant's only requested instruction, which reads as follows:

"You are instructed that, if you find from the testimony in this case that the automobile, on the front seat of which the plaintiff was riding, passed over the track of the defendant ahead of the approaching train in safety, but that the plaintiff, John Steele, jumped out of the automobile on the track of the defendant in front of an approaching train and so near to it that the train could not have been stopped in time to avoid injuring him, the negligence of said Steele in so jumping out of said automobile in front of the moving train was such that it was the sole cause of his injury, and he cannot recover in this action, and your verdict will be for the defendant."

The testimony showed that appellee was riding in the car with the negro as a guest by his own invitation, it is true, but any negligence of the owner or driver of the car cannot be imputed to him, although he was bound to the exercise of ordinary care for his own safety under the circumstances, and a failure to exercise such care contributing to his injury would have constituted contributory negligence barring a recovery. *Graves* v. *Jewell Tea Co.*, 180 Ark. 981, 23 S. W. (2d) 972. The requested instruction was virtually a peremptory one, and the court did not err in refusing to give it.

Appellee was required to exercise ordinary care for his own safety under the circumstances, and, if it appeared to him, as it evidently did, that the car was going to be struck by the train, he had the right, of course, to make the effort to get out of the car and avoid the danger, and was not necessarily negligent in attempting to do so, and certainly not guilty of contributory negligence as a matter of law that would bar his recovery, or of negli-

gence at all, if the jury found, as they might have done, that a person of ordinary care and prudence might have made such an attempt in the emergency. No error was therefore committed in the giving of instruction No. 7.

No error was committed in instructing the jury as to comparative negligence, the instruction given being a correct declaration of the law. Section 8575, Crawford & Moses' Digest.

Instruction No. 10 is a correct declaration of the law that the negligence of the driver of the car in which appellee was riding as a guest, if the jury found him to be such, could not be imputed to appellee, nor was error committed in the giving of instruction No. 12, which is not in conflict with instruction No. 10, as contended by appellant. No. 10 was given on the theory that appellee was the guest of the driver of the car, as the jury could have found, while No. 12 was on the theory that he was engaged in a joint enterprise, leaving the jury to determine the question, and was as much bound to the exercise of ordinary care for his own safety as was the driver of the car to the use of such care.

The jury was directed not to take any one of the instructions as the law of the case, but to consider them all as such, etc.

Neither is there merit in the assignment that the verdict was arrived at by lot. Three of the jurors, who did not sign the verdict, which was made by nine of the jurors returning it, testified that each of them was unwilling to return a verdict for appellee, that the nine jurors who agreed to the verdict were in favor of returning a verdict for appellee in different amounts, and that said jurors set down the different amounts each was willing to allow the plaintiff and divided it by nine, and the result was the amount of the verdict returned into court by the nine jurors signing it, $1,737.50. A. C. Oliver, the foreman of the jury, testified that he had no recollection that each of the nine jurors favoring the verdict wrote down the amount he thought should be returned, the total of which amounts was divided by the number

of jurors returning the amount so reached as the verdict; said he did not hear the matter mentioned, but, if any such suggestion was made, it was not carried out. It was suggested but was not taken into consideration. He stated that, in the consideration of the matter, some of the jurors increased their estimate while others lowered theirs, and the verdict was finally reached. In any event, their testimony tends to show it was a quotient verdict, and it could not be impeached by the testimony of any of the jurors, whether they agreed to it or not, as having been reached by lot. *Speer* v. *State,* 130 Ark. 457, 198 S. W. 113; *Steed* v. *Wright,* 179 Ark. 812, 18 S. W. (2d) 340; *Chess & Wymond Co.* v. *Wallis,* 134 Ark. 136, 203 S. W. 274.

A juror cannot be examined to establish a ground for a new trial, except it be to establish as such ground that the verdict was made by lot, and, although the law has been changed allowing a verdict to be returned by nine jurors, the prohibition of the statute against its being impeached by a juror still applies, although the juror so attempting to impeach it did not sign the verdict. Section 3320, Crawford & Moses' Digest; *Southern Ry. Co.* v. *Simpson,* 140 Tenn. 458, 261 S. W. 677.

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

TANKERSLEY *v.* GIBBS.

Opinion delivered February 22, 1932.

[redacted]

[redacted]

G. E. Morris, for appellant.

Claude V. Holloway, for appellee.

KIRBY, J., (after stating the facts). It is conceded that the balance of the indebtedness due to the Bank of England for supplies furnished appellee was only $252.65 at the time of the purchase by an assignment of the crop mortgage to appellants, and, such being the case, in the absence of any special provision in the mortgage that might authorize its being a security for any other sum or indebtedness, the tender of that amount to the assignee by the mortgage debtor and its payment into the court completed the satisfaction of the mortgage and discharged the lien thereon, as the court correctly held. There can be no question of subrogation to the rights of the mortgagee or marshaling of assets under the circumstances of this case that would permit the assignee of the mortgage to recover any more, or foreclose the mortgage for a greater or different amount, than would have satisfied it by payment to the mortgagee bank before such transfer, and the court correctly held the mortgage was satisfied and could not constitute a lien in the

hands of the assignee upon property included in the mortgage other than the crops, etc.

The decree is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* MCLENDON.

Opinion delivered February 22, 1932.

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

J. W. Perrymore and *Starbird & Starbird,* for appellee.

MEHAFFY, J. The appellee, Harvey McLendon, filed a complaint in the Crawford Circuit Court on January 3, 1931, against Sullivan, Long & Haggerty Company. He alleged that the defendants were a construction company operating under the firm name and style of Sullivan, Long & Haggerty Company; that they were nonresidents of the State of Arkansas, and had property in the possession of the Missouri Pacific Railway Company about to be shipped out of the State.

Allegations and interrogatories were filed and a writ of garnishment was issued and served on the garnishee the same day.

Plaintiff alleged that the defendants were indebted to him in the sum of $1,500. The pleadings were not verified, and no affidavit was filed.

The defendant, at the same time, filed a bond in the sum of $3,000, the defendant's name being signed to said

bond by one of his attorneys, and the attorney signed it as surety.

The Missouri Pacific Railroad Company, on January 22, filed its answer, denying that it had any goods, wares, chattels, moneys, credits, or effects in its hands at the time of the service or at any time thereafter.

On February 3, McLendon filed an affidavit for a warning order and on February 5, the warning order, was issued and was published, the first insertion being the 6th day of February.

On March 5, the appellee filed a response to the answer of the garnishee denying the allegations in said answer. On March 9 the garnishee filed an amended answer.

Report of attorney *ad litem* was filed on March 10, and also a motion to strike the answer of the garnishee from the files. The report of the attorney *ad litem* was to the effect that on February 18, he addressed a stamped envelope with his return address printed thereon to the defendants at Birmingham, Alabama, inclosing defendants a copy of the complaint, but that he had received no reply.

On the same day appellee filed a motion to strike appellant's amended answer from the files, and on the same day, February 18, the garnishee made an oral motion for an order discharging the garnishee, and this motion was overruled by the court.

The garnishee then filed an application to be permitted to defend in the case. In this motion, as well as in its answer, it was stated that on January 5, the defendant tendered shipment of eight cars of second-hand road and paving equipment to the garnishee at Mulberry, Arkansas; that said garnishee issued a bill of lading for the property, which was to be shipped to Lake Providence, Louisiana.

On March 19, the garnishee filed a demurrer to the jurisdiction of the court, alleging that at the time of the issuance and service of the writ of garnishment no suit

had been commenced, and also that the bond filed by appellee was signed by one of the attorneys of appellee without getting the permission of the court to become surety.

The jury returned a verdict for the sum of $750, for which sum judgment was entered against the garnishee. Motion for new trial was filed within the time allowed by the court, which was by the court overruled, exceptions saved, and an appeal prosecuted to this court.

Evidence was taken tending to show the indebtedness of defendants to appellee; and it was agreed by counsel for the parties that there was no original process for the purpose of securing service on the defendant, and it was also agreed that the property shown in the bill of lading exceeded the amount sued for, including costs.

Appellant discusses several questions, but we find it necessary to decide but one question, and that is, whether the writ of garnishment was void because at the time it was issued no action had been commenced against the original defendants.

The statute authorizing writs of garnishment reads as follows: "In all cases where any plaintiff may begin an action in any court of record, or before any justice of the peace, or may have obtained a judgment before any of such courts, and such plaintiff shall have reason to believe that any other person is indebted to the defendant, or has in his hands or possession goods and chattels, moneys, credits and effects belonging to such defendant, such plaintiff may sue out a writ of garnishment, setting forth such claim, demand or judgment, and commanding the officer charged with the execution thereof to summon the person therein named, as garnishee, to appear at the return day of such writ, and answer what goods, chattels, moneys, credits and effects he may have in his hands or possession belonging to such defendant to satisfy said judgment, and answer such further interrogatories as may be exhibited against him;

provided, if the garnishment be issued before the judgment, the plaintiff shall give bond in double the amount for which the garnishment is issued, that he will pay the defendant all damages that he may sustain by the wrongful bringing of his suit or the issuing of the garnishment."

It will be observed that this statute says that, when the plaintiff may begin an action, a writ of garnishment may be issued.

Was any action begun against the defendants in this case before the writ of garnishment was issued?

Section 1049 of Crawford & Moses' Digest is as follows: "A civil action is commenced by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon."

No summons was ever issued against the defendant in this case, the defendants being nonresidents. No affidavit for a warning order was filed until February 3, a month after the writ of garnishment had been issued.

This court has said: "There is no statutory provision defining the commencement of a suit where service is constructive and made pursuant to §§ 6055-6 of Kirby's Digest. But by analogy it seems clear that a suit commenced by constructive service, as authorized by §§ 6055-6, is commenced when the proceedings therein provided for are complied with. In fact, this is a method of summons fitted to a case where the defendant is a nonresident." *Boynton* v. *Chicago Mill & Lumber Co.,* 84 Ark. 203, 105 S. W. 77.

Sections 6055-6 of Kirby's Digest, which were construed by the court, are §§ 1159-60 of Crawford & Moses' Digest.

The remedy given by garnishment is purely statutory, and the statute must be strictly construed. *Beasley* v. *Haney,* 96 Ark. 568, 132 S. W. 646; *Trowbridge & Jennings* v. *Means,* 5 Ark. 135; 9 Enc. Pleading & Practice 809; Rood on Garnishment, § 352.

The Michigan court said: "All the proceedings in this case are special and statutory, and must be strictly

construed. To entitle the defendant to the benefit he claims under them, he must show they are clearly within the provisions of the statute. Statutes of garnishment, at best, give a "harsh and peculiar remedy," and ought not to be resorted to when the redress sought may be obtained through common-law proceedings. * * * It further appears from the record in this case that there was not any legal service, actual or substituted, of the process in the principal case. Clearly there was no legal service of any kind of either summons against the principal defendant. The only attempt at service, as returned by the officers, was a copy, and made several days before the return day in the one case, and the adjourned day in the other. This rendered the proceeding void, and gave the court no jurisdiction of the principal defendant." *Iron Cliffs* v. *Lahais,* 52 Mich. 394, 18 N. W. 121.

In the case of *McDonald* v. *Alanson Mfg. Co.,* 107 Mich. 10, 64 N. W. 730, the garnishment was held valid, although issued after the complaint was filed, but before service, but the court expressly held in that case that under the statute of Michigan a suit is commenced so as to authorize the issuance of a writ of garnishment when the declaration is filed, though the defendant has not been served with process.

Our statute authorizes the writ of garnishment only after an action has been commenced, and this court has expressly held that, where there is constructive service, the action is commenced when the proceedings provided for in the statute are complied with. There is no claim in this case that the statute was complied with before the writ of garnishment was issued and served. The proceedings therefore were void. *First Nat. Bank of Huttig* v. *Rhode Island Ins. Co.,* 184 Ark. 812, 43 S. W. (2d) 535.

Until the affidavit provided for in § 1159 of Crawford & Moses' Digest has been filed, the court had no jurisdiction, and there was no authority prior to this time to issue a writ of garnishment, and the writ issued with-

out a compliance with this statute was void. The statute only authorizes the writ of garnishment where an action has been begun, and one would have no more right to a writ of garnishment after filing his complaint but before the action was commenced, than he would have if no complaint had been filed. In order for the writ of garnishment to be valid, the statute must be complied with. The action must have been commenced before the writ can be issued.

The authorities are not in entire harmony, some courts holding that, if summons is served on the principal defendant before there is any motion made by the garnishee to quash the writ or discharge the garnishee, the garnishment is valid, but under our statute the writ cannot be issued until the action is commenced.

"There must be a strict compliance with the requirements imposed by statute in order that garnishment proceedings may be sustained, but, conversely, such a compliance with the statute is sufficient." 28 C. J. 189; *Schiele* v. *Dillard,* 94 Ark. 277, 126 S. W. 835.

"A strict compliance with the statutory prerequisites is essential to support the jurisdiction of garnishment proceedings as has already been noted. No presumption of jurisdiction is indulged, particularly as against direct attack, or where there is no personal service, and authority must be found in the law providing for the proceeding for every step taken until jurisdiction is acquired." 28 C. J. 190.

"It follows from the ancillary character of garnishment proceedings that, in order to support them, there must be jurisdiction of the proceeding against the principal defendant. * * * Where the court has failed to acquire jurisdiction of defendant in the principal action by any of the methods authorized by the statute, garnishment proceedings based on the principal action are void." 28 C. J. 191-2.

The appellee argues that the garnishment writ would be the beginning of an action, but the action must be

begun against the principal defendant. Appellee calls attention to the case of *Austin* v. *Goodbar Shoe Co.,* 60 Ark. 444, 30 S. W. 888, but the only thing the court held in that case was that the failure of an attaching creditor to file an attachment bond is an irregularity which may be waived by the appellant, and cannot be availed of by a junior attaching creditor to defeat the lien of the prior attachment.

Appellee also calls attention to the case of *Smith* v. *Spinnenweber,* 114 Ark. 384, 170 S. W. 84, but in that case action was commenced before the garnishment was issued. It was commenced against several parties as partners, and one of them was actually served before the garnishment was issued. The action was commenced in that case, because under the express terms of the statute, an action is commenced when complaint is filed and summons issued, but this court has never held that a garnishment may be issued before the action is commenced.

Appellee also calls attention to *Johnson* v. *Foster,* 69 Ark. 617, 65 S. W. 105, but in that case the court states that the complaint was filed and at the same time affidavit, bond and interrogatories for garnishment. The court also states that the defendant, Foster, was duly summoned by warning order.

While the statute must be strictly construed, there is no difficulty in complying with its provisions and commencing the action before the writ of garnishment is issued. At the time a plaintiff files his complaint, he can cause summons to be issued and thereby commence the action, or if the defendant is a nonresident, he can file his affidavit and cause a warning order to be issued, and in either event he can comply with the statute without difficulty.

It follows from what we have said that the judgment of the circuit court must be reversed, and the cause of action against the garnishee is dismissed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* TAYLOR.

Opinion delivered February 22, 1932.

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

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

McHANEY, J. Appellants claim to be preferred or prior creditors of the American Exchange Trust Company, hereinafter called the bank, under the following state of facts: On November 14 and 15, 1930, the local agent at Little Rock of the Missouri Pacific Railroad Company, having funds in his hands which he desired to remit to his company in St. Louis, Missouri, purchased from the bank two bank drafts or checks aggregating $1,931.31, drawn on a bank in St. Louis where it kept a deposit sufficient to cover same, which were delivered to said agent and by him immediately sent by mail to his company in St. Louis. A like transaction took place between the agent of the Transportation Company and the bank, the agent being delivered three bank drafts or checks on the same bank in St. Louis, aggregating $264.01 on November 15, 1930. These drafts were never paid, as the bank was not open for business after November 15. Separate interventions were filed by appellants in the chancery court asserting the right to be classified as prior creditors, to which the bank commissioner demurred. The court sustained the demurrer, disallowed the claims as prior, but allowed them as common or general claims.

The chancery court correctly disallowed the claims as prior or preferred and classified them as common or general claims. Act 107 of the Acts of 1927, page 297, classifies all creditors of the bank of which the commissioner has taken charge as secured, prior or general

creditors. There is no contention that appellants are secured creditors, and a casual reading of said act defining prior creditors shows that appellants do not come within either of the seven subdivisions thereof defining prior creditors. They are not the beneficiaries of an express trust as defined in subdivision 5, nor the owner of the proceeds of a collection made by said bank and not remitted by it, as defined in subdivision 6, nor are they the owners of a remittance of the bank, the proceeds of a collection made by it, as defined by subdivision 7. The act provides that "All creditors not in this section hereinabove classed as secured or prior creditors of said bank, including the State of Arkansas and any of its subdivisions, shall be general creditors thereof."

The authorities relied upon by appellants, such as *Darragh Co.* v. *Goodman,* 124 Ark. 532, 187 S. W. 673, *Rainwater* v. *Federal Reserve Bank of St. Louis,* 172 Ark. 631, 290 S. W. 69; *Taylor* v. *Corning Bank & Trust Co.,* 183 Ark. 757, 38 S. W. (2d) 557, are not in point for the reason that they had to do with the proceeds of collections made by the failed bank or with remittances for collections made by such bank. Here the bank made no collection for appellants. Their agent, instead of sending the collections he had already made to appellants in St. Louis in the form in which he held them, whether in cash or otherwise, elected to purchase drafts of said bank drawn on a St. Louis bank and remitted same to appellants in St. Louis in this form. By so doing appellants became mere creditors of said bank, and the transaction is no different from that decided in the recent case of *Taylor* v. *Dermott Grocery & Com. Co., ante* p. 7. We there said: "Appellee's situation fails to fit this definition in any respect. The bank made no collection for appellee. Its own agent made the collection from Townsend, presented the check to the bank and asked to and did become its creditor by taking a cashier's check. * * * Not being a collection made by the bank, the 6th subdivision of the act has no application. Nor does any other provision of the act defining prior creditors apply."

The situation of appellants is the same as if its agent had deposited the money in the bank and immediately drawn his check against the deposit and forwarded same to appellants in St. Louis. It was a convenient form in which to transmit the money to St. Louis and one in general usage, but it can make no difference that such is the fact, because appellants became mere creditors of the bank in thus electing to transmit its funds.

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

TEXARKANA SPECIAL SCHOOL DISTRICT *v.* CONSOLIDATED SPECIAL SCHOOL DISTRICT No. 2.

Opinion delivered February 22, 1932.

Shaver, Shaver & Williams, for appellant.

James D. Head and *Jones & Jones,* for appellee.

BUTLER, J. On January 17, 1931, petitions were filed with the county board of education of Miller County, signed by 2,858 persons purporting to be qualified electors of the territory affected, asking that the boundaries of Texarkana Special School District be so changed and extended as to bring within the boundaries of said district all of the territory comprising and constituting Consolidated School District No. 2, Rural Special School District No. 19, and Common School District No. 12. On the same day a remonstrance to the petitions was filed with the board, and on that date by consent of all parties the matter was passed until January 24, 1931. On that day, at the request of the petitioners, the board passed said matter and set it for hearing and trial for the 7th day of March, 1931. The notices required by law to be given in such proceedings were first posted on the 29th day of January, 1931. It is conceded that the notices were in proper form and posted in the manner required by law.

On appeal to the circuit court from the order of the county board of education granting the prayer of petitioners, the petition was dismissed, and the order of the court directed to be certified to the county board of education to the end that the order of consolidation theretofore entered by it be set aside and annulled. On appeal to this court, there is but a single question presented: was the notice posted within apt time? It is the contention of the appellants that the notice required can be given either before or after the filing of the petition, while the appellees urge, and the circuit court found, that the notice must be posted before the filing of the petition asking for the consolidation.

The law making provision for the giving of notice is found in § 8821 of Crawford & Moses' Digest, and is as

follows: "When a change is proposed in any school district, notice shall be given by parties proposing the change by putting up handbills in four or more conspicuous places in each district to be affected, one of said notices to be placed on the public school building in each affected district. All of said notices to be posted thirty days before the convening of the court to which they propose to present their petition. Said notices shall give a geographical description of the proposed change."

This statute was written at a time when the jurisdiction relating to the dissolution or change of boundaries of school districts lay in the county court. The act creating the county board of education changed the tribunal authorized to act and not the method of procedure. Therefore, the requirements of the notice remain now as before, the only difference being that "county board of education" is to be substituted for "court." *Mitchell* v. *Directors School Dist.,* 153 Ark. 50, 239 S. W. 371.

It is insisted by the appellants that this court has virtually construed § 8821, *supra,* in conformity with their view. They cite *Rural Special School District No. 11* v. *Baker,* 144 Ark. 397, 222 S. W. 732; *Acree* v. *Patterson,* 153 Ark. 188, 240 S. W. 33; *Nathan Special School Dist. No. 4* v. *Bullock Springs Special School District No. 36,* 183 Ark. 706, 38 S. W. (2d) 19, and *Priest* v. *Moore,* 183 Ark. 999, 39 S. W. (2d) 710; and call attention to the facts of those cases by which it appears that the notice was given after the filing of the petition, and they argue that, since each of these cases held that the notice was sufficient and properly given, the question in the case at bar was settled by the court according to their contention now made. On the contrary, the appellees take the position that the question was settled according to their view in the case of *Lewis* v. *Young,* 116 Ark. 291, 171 S. W. 1197. A careful review of these cases and the points therein decided does not sustain either the appellees or the appellants in their respective views.

The point for decision in the case of *Rural Special School District* v. *Baker, supra,* was the sufficiency of

the petition, and the question of the time in which the notice should be filed was not involved. So, in *Mitchell* v. *Directors, etc., supra,* there was no question before the court as to the time when notice should be given. In that case the court merely held that the section requiring notice to be given was not repealed by subsequent legislation, and that the notice required was jurisdictional. In *Acree* v. *Patterson, supra,* practically the same question relating to the notice was before the court as in the Mitchell case. In *Natham Special School District* v. *Bullock Springs Special School District, supra,* the sufficiency of the notice was questioned merely on the ground that it was signed by four only of those who had signed the petition, the contention being that the notice to meet the requirements of the law should have been signed by all of the petitioners. In *Priest* v. *Moore, supra,* the question of notice did not arise at all, the court in that case merely holding that more than one petition on the question of consolidation of school districts might be circulated, and the county board of education might hear them together, and it was within the sound discretion of the board to determine matters necessary to the formation or consolidation of school districts, and its order is subject to review only when arbitrary or unreasonable.

These are the decisions relied upon by the appellants, and it will be observed that in none of them was the point presented which is now before us.

The case of *Lewis* v. *Young, supra,* was an appeal from the order of the circuit court sustaining that of the county court creating a new district from portions of the territory of two districts, No. 3 and No. 64. The notice prescribed by the statute was posted in District No. 3, but there was no notice posted in District No. 64, but all of the electors in District No. 64 signed the petition. The question was, did the fact that all of the electors of District No. 64 signed the petition give the court jurisdiction to take a part of the territory embraced in that district and transfer it to another district, although no notice had been posted as required by the statute? The

court held that the giving of the notice was a prerequisite to the exercise of jurisdiction by the county court and must be given, even when all of the electors had signed the petition.

We have been unable to find any case where we have been called to pass upon the question we are now asked to decide. Therefore, none of the cases cited are controlling in the instant case, and we are remitted to the statutes providing for the change, dissolution or consolidation of school districts for a determination of the proposition now involved. Section 8821 of the Digest was a part of the act of April 8, 1891, which provided that "the boundaries of school districts in counties shall be and remain as now established except that [the] county court shall have power to alter the same whenever a majority of the citizens residing therein shall petition the court so to do; but in all changes due regard shall be had to the convenience of the citizens and all the territory in the county shall be embraced in said school districts."

By act of April 1, 1895, the county courts were given power to dissolve any school district and attach the territory of the same in whole or in part to an adjoining district or districts "whenever a majority of the electors residing in such district shall petition the court so to do." In the following section of the act it was provided that, "when such dissolution is proposed, notice shall be given by those proposing the same by posters in four public places in the district, said notices to be posted thirty days before the meeting of the term of the court at which such petition is proposed to be presented."

The act of March 11, 1919, conferred upon county boards of education (§ 8823, Crawford & Moses' Digest) the right to form new school districts or to change the boundaries thereof upon a petition of a majority of all of the electors residing upon the territory of the districts to be divided. At the 1927 session of the General Assembly act No. 156 was enacted amending § 8823, *supra*, and providing that, "upon a petition being filed with the

county board of education signed by a majority of the qualified electors in the territory to be affected, said county board of education of any county within the State of Arkansas shall have the right to form new school districts and to change the boundary lines between any school district heretofore formed where, in the judgment of such board of education, it would be for the best interest of all parties affected, provided, however, that no change shall be made that would impair any outstanding indebtedness of any school district now formed."

The only requirements for notice are those provided for in the act of April 8, 1891 (§ 8821) and in the act of April 1, 1895 (§ 8870) which have been quoted above. It is pointed out by the appellants that in neither of the sections requiring the giving of notice is there any provision for giving or posting the notice prior to the filing of the petition, and it is contended that, since the giving of the notice is jurisdictional, if the Legislature intended the notice to be given prior in point of time to the circulation and filing of the petition, it would have so stated in plain words, and, because this was not done, it must be presumed that no such requirement was intended. It will be observed, however, that in none of the legislation providing for dissolution, change or consolidation of school districts is there any time mentioned at or in which the petition shall be filed in the court or before the board, or any specific provision made regarding the time in which the petitions should be circulated for the signatures of the electors. In order, therefore, to determine the meaning of the provisions of the law requiring the posting of the notice, the fact that no specific time is fixed for the circulation and filing of the petition becomes important when the purposes for which a notice is given are considered.

The effect of our decision in *Williams* v. *Citizens*, 40 Ark. 290, and *McCulloch* v. *Blackwell*, 51 Ark. 164, 10 S. W. 259, is that the signing of petitions, such as the one in the instant case, is in the nature of an election and equivalent to a vote cast which, after the filing of the

petition, becomes irrevocable except for deception and fraud. *Nathan Sp. School Dist.* v. *Bullock Springs Sp. School Dist., supra.* In that case we said: "The only purpose 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 hearing." The persons interested are not only those who reside in the territory affected, but those who might reside elsewhere and own property within the affected territory whose interest may be even greater than many of the electors who actually live therein. Of course, all those who have children are interested and all persons, whether electors or not, who reside within the territory affected.

In the case of *Lewis* v. *Young, supra,* after having held that the notice prescribed by the statute was a prerequisite to the exercise of jurisdiction, the court said:

"This principle of law is recognized by counsel for appellee, but they contend that it is not applicable under the facts in the present case because all of the electors residing in District No. 64 signed the petition and to have given notice would, they say, have been a useless thing. But it may be that property owners within District No. 64 did not reside within the district, and therefore did not sign the petition. They were interested in the question as to whether or not a school district in which their property was situated should be dismembered, and for that reason notice should have been given, so that, in the event they saw fit to do so, they might have used whatever influence they might have had with their tenants and other electors residing within the district to cause them not to sign the petition."

It appears from this language that the court attached great importance to the right of those interested to prevent, if they saw fit and could do so, the signing of the petition by those with whom they might have influence, and, of course, they would be deprived of this right if the petition had been signed and filed before they had notice that such would be circulated; and, as the filing of the petition concludes the right of with-

drawal by the signer except for fraud, his vote would have become irrevocable, and the notice would be useless for the purpose indicated in the case last cited. Also, as the board had discretion to deny the prayer of the petition, although a majority might have signed it, the notice of the date upon which it would be submitted would also be important.

The question presented is one which we find difficulty in answering, but we have concluded that, since the statutes are silent as to the date on which the petition should be filed, the better view is that the Legislature intended that it be not filed before its presentation, and the words "present their petition" were equivalent to the words "filing their petition." It is argued that the language of the act regarding notice is unambiguous, but we think, when the statute of 1891 is considered as a whole, there is an ambiguity which requires construction, and that we must read the section applicable to the notice in the light of the section preceding. *State* v. *Hanna,* 131 Ark. 129, 198 S. W. 881; *Rayder* v. *Warrick,* 133 Ark. 491, 202 S. W. 831; *Gardner* v. *Hughes,* 136 Ark. 332, 206 S. W. 678.

The decisions of this court in the cases of *Williams* v. *Citizens* and *McCulloch* v. *Blackwell, supra,* had been rendered prior to the passage of the act of 1891, and the Legislature, in passing this act, is presumed to have known these decisions, and that the act of signing the petition after the same was filed was irrevocable, and that they acted in the light of those decisions. *Rhodes* v. *Cannon,* 112 Ark. 6, 164 S. W. 752; *Merchants' T. & W. Co.* v. *Gates,* 180 Ark. 96, 21 S. W. (2d) 406, and intended that the petition be filed as of the date of its presentation and the notice be given thirty days before.

It is argued by the appellants with much force that, since the statement of facts in the cases cited and relied on by them show that the notice was published after the filing of the petition, those decisions inferentially held that the notices with respect to the time limit and the

relation they bore to the filing of the petition were sufficient. But, as we have seen, the point in issue here was not before the court in those cases and was not considered or decided. "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Marbury* v. *Madison*, 1 Cranch 137, cited with approval in *Cooper* v. *Freeman Lumber Co.*, 61 Ark. 36, 31 S. W. 981, 32 S. W. 494.

Affirmed.

McHaney, J., (dissenting). I agree with the majority that the court has never directly decided the question as to the time of giving the notice, but it has done so inferentially in all the cases cited by appellant and in many others. The statute, § 8821, needs no construction. In express terms it fixes the time for giving the notice. "All of said notices to be posted thirty days before the convening of the court (now county board of education) to which they propose to present their petition." There is nothing ambiguous about that. In all the cases which have come to this court, it is not shown in one of them that the notice was given before the filing of the petition. In many of them the notice was given after the petition was filed. The statute is so plain that it has never been questioned before. I do not now understand whether the majority is holding that the notice must be given before the petition is circulated or whether all that is required is to give it before the petition is filed. I think we are upsetting many former decisions and impairing the organization of many districts. Mr. Justice Humphreys agrees with this dissent.

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

Opinion delivered February 22, 1932.

[redacted]

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

J. G. Waskom, for appellee.

BUTLER, J. This is an appeal from a verdict and judgment in favor of the plaintiffs, in the two cases which were consolidated for the purpose of trial. The damage for which appellees sued was for the killing of a number of mules belonging to them caused by the operation of appellant's train.

The occurrence out of which comes this litigation happened about eight o'clock P. M. on the 23d of August, 1930, on a straight stretch of appellant's line of railway a short distance south of where the railway crossed the floodway of Drainage District No. 7 in Poinsett County, Arkansas, and not near or at a crossing. The track at this point ran from north to south on a long bridge or trestle and across the floodway, which was from a half to a mile wide. To the south of the floodway and nearby

was an inclosure in which about 100 head of mules were accustomed to pasture. On the date aforesaid a number of these mules had got out, and were grazing on the dump and tracks of the railway. The country through which the railway ran at this point was low, and the dump was elevated about fifteen or twenty feet above the level of the surrounding land. The southbound passenger train of the appellant passed over the floodway, and a short distance beyond ran into and killed ten mules, the property of the appellees, and about half a mile further south killed another mule, not involved in this suit, belonging to some other person. At the time of this happening the country was experiencing a severe and protracted drouth, and, while the land in that vicinity was naturally low and swampy, it was very dry at this time, and there was no water about except a small quantity in the two canals which were cut down the floodway. The mules were killed on Friday, and their loss was not discovered by the appellees until a day or two afterward, when evidence of where they had been killed was found. The mules had been buried by the side of the track, and they were dug up for purposes of identification. An examination was made along the line of railroad from this point back toward the floodway, and it was found that south of the floodway a short but undetermined distance the tracks of the mules were seen, and from the distance between these tracks and the nature of the same it was concluded that they had started running south down the railroad, and had gone in this manner a distance of approximately 200 yards before reaching the place where they were killed. All of these facts are undisputed.

The engineer and fireman in charge of the appellant's train, while admitting that their train killed the mules, testified that it was impossible to avoid the injury, because, as the train approached the floodway from the north, a dense cloud hung over it which proved to be

about 100 to 200 feet through, and so dense that the headlight of the locomotive would not penetrate a sufficient distance ahead to give a view of an object on the track in time to stop the train or to slacken its speed in order to avoid injury; that their train was traveling at the rate of fifty miles per hour, and they entered the cloud without slackening speed, and, as they passed through, they discovered the mules on the track but they were then so close that they could not avoid running upon them. They were unable to say of what the cloud was composed—whether smoke or fog—but the engineer stated that he thought it was a little of both. Both the engineer and the fireman testified that they were keeping a constant lookout ahead, but did not say that they gave any signals when they entered, or passed through the zone of cloud, or when they saw the mules as they emerged from it. The engineer also testified that he had observed fog and smoke several times before on that part of his run, but was unable to recall having seen it at this particular point before.

There was testimony introduced on behalf of the appellees tending to show that there had been no smoke recently in that vicinity, and no indications of recent fires in the woods.

Basing their contentions on the testimony of the fireman and engineer, counsel for the appellant insist that the instructions given by the court were abstract and did not present the issues in the case, and that the modification made by the court to instruction No. 4 requested by the appellant and the giving of that instruction as modified was error. They chiefly contend that there should have been a directed verdict in favor of the appellant as requested, because, as they say, the undisputed evidence affirmatively shows that the killing of the mules was an unavoidable casualty, and that the presumption of negligence raised by the admission that the mules were killed by the operation of appellant's train was overcome by the testimony of the engineer and fireman,

which was undisputed, and which established due care in the operation of the train. Upon the last contention depends the question of the correctness or error of the instructions as those given do not depart from the principles applicable, where the statutory presumption of negligence is not overcome by direct testimony probable in itself and not in conflict with other circumstances in testimony.

While freely conceding that, where injury is shown to have been caused by the operation of its train, a *prima facie* case of negligence is established which casts upon its owner the burden of proving by a preponderance of the evidence that it was free from negligence, appellant insists that, as no one saw the accident but the engineer and the fireman, their conclusion that the injury was unavoidable and the facts testified to by them must be accepted, the presumption of negligence is at an end, and the burden of showing that there was no negligence in the operation of the train is discharged.

This contention cannot be sustained. The rule that the testimony of operatives in charge of a train may not be arbitrarily disregarded by the jury does not impose upon it the duty of accepting a statement of fact as true merely because so testified. For the jury to be bound to accept such evidence as true, it must be consistent with the other testimony in the case, reasonable in its nature, and uncontradicted in its essential points. *St. L. I. M. & S. R. Co.* v. *Landers,* 67 Ark. 514, 55 S. W. 940; *St. L.-S. F. R. Co.* v. *Minor,* 85 Ark. 121, 107 S. W. 171; *K. C. So. Ry. Co.* v. *Simmons,* 140 Ark. 80, 215 S. W. 167.

It is elementary that it is the province of the jury to pass upon the credibility of the witnesses and to determine the weight to be given their testimony. In doing this it is the duty of the jurors to consider the testimony of a witness in the light of all the evidence, whether direct or circumstantial, and to apply to any statement made their common sense and experience. *Railway Co.* v. *Lewis,* 60 Ark. 409, 30 S. W. 765, 1135. The engineer

stated that the cloud covered the track for a distance of from 100 to 200 feet, and that it was over the floodway. It is also in testimony that the mules were south of this floodway, and their tracks showed that they were running, and that they had run for perhaps 200 yards south. It is reasonable, therefore, to conclude that, if the zone of cloud existed, the mules were never within it, and injury to them might have been prevented by the exercise of ordinary care. Then, too, the jury had before it testimony as to the climatic conditions then prevailing, and that the woods had not been on fire for some time before the date of the accident, and that no one had observed any smoke in that vicinity at or about that time. It was therefore not unreasonable for the jury to infer that no fog or cloud smoke existed, as no conditions prevailed from which the cloud might be expected to have been formed, and that the killing of the animals was the result of the failure to keep the lookout required by the statute. *K. C. Sou. Ry. Co.* v. *McCrossen,* 140 Ark. 68, 215 S. W. 161.

There was further evidence showing that another mule was killed a considerable distance further south, and that the speed of the train was not slackened nor any signal given upon entering the cloud, nor any testimony as to any effort made by signal or otherwise to avoid the injury to the animals; the engineer and fireman merely contenting themselves with the statement that, when the mules were first seen, the train was so near that it was impossible to keep from striking them.

When all the evidence is considered, we are of the opinion that it was sufficient to fix liability on the appellant. Counsel call our attention to the statement made in 52 C. J. at page 23, to the effect that a number of courts hold that a railroad is liable only for gross and wanton or wilful negligence where the operation of its train causes an injury to animals trespassing upon its tracks and that other courts hold that liability attaches only for injuries recklessly, wantonly, wilfully or intention-

ally inflicted. This has never been the law in this State. Under our statutes and decisions a railroad company owes the duty to the owner of animals straying upon its tracks to use ordinary or reasonable care to avoid injuring them, after they are discovered or might by ordinary care have been discovered by keeping the proper lookout. Section 8568, Crawford & Moses' Digest; *L. R. & Ft. S. Ry.* v. *Holland,* 40 Ark. 336.

Instruction No. 4 requested by the appellant limited the duty of the railway company to take precautions to avoid injury to animals after their peril was discovered. The modification extended that duty to the peril which could have been discovered by the exercise of ordinary care. The instruction as modified was a more correct statement of the law than as requested, and there was no error in the modification.

Since there was substantial testimony warranting the submission of the case of the jury, the instructions given by the court were not abstract, as contended by counsel, and were a fair statement of the principles applicable to the testimony. The record presents no reversible error, and the judgment of the trial court is affirmed.

FORT SMITH TRACTION COMPANY *v.* OLIVER.

Opinion delivered February 22, 1932.

Hill, Fitzhugh & Brizzolara, for appellant.

Partain & Agee, for appellee.

BUTLER, J. This is an appeal from the Crawford Circuit Court, in which a judgment was rendered in favor of Charles Oliver against the Fort Smith Traction Company for damages for personal injury in the sum of $3,500.

The material facts that are undisputed are as follows: Appellee, Charles Oliver, boarded appellant's street car in the city of Van Buren to go to Fort Smith in the early evening of February 15, 1931. The track of appellant's street railway system passes from the city of Van Buren in a southerly direction across the Arkansas River over a public bridge. As the street car on which appellee was riding as a passenger was passing across the bridge from north to south and when it was within perhaps one hundred and fifty feet of the south end of the bridge, an automobile traveling from the opposite direction collided head-on with the street car in such manner that the street car and the automobile became fastened together. There were several persons in the automobile, some of whom were injured. On either side of the bridge was a walkway for pedestrians, who, on entering the bridge, would turn to their right—those traveling from south to north would travel along the east walkway and those from north to south along the west walkway. At the point where the street car and the automobile collided there was a public gas pipe about 18 inches in diameter which ran parallel with the street car track a sufficient distance from the track to give a

space of about 18 inches between the side of a street car and the pipe. On the east side of the bridge at the north end was a telephone booth. In attempting to go from the street car back to the telephone booth to call for an ambulance the appellee was run down and injured by an automobile which was passing along the bridge from Fort Smith to Van Buren.

The theory on which the appellee based his right of recovery against the appellant was that he left the street car at the request of the motorman, who told him where the telephone was located and requested that he go to that place and from there call an ambulance; that in attempting to comply with the request of the motorman appellee descended through the west door at the front of the street car down the steps and into the space between the gas pipe and the street car and went north between the pipe line and the car to the back or north end of the car. When he reached this point he started across the car track toward the east for the purpose of getting on the walkway going on north to the telephone booth. As he was passing behind the street car, it made a sudden and unexpected backward movement, and, in an endeavor to avoid being injured by it, he jumped from behind the street car on to that part of the bridge used for the passage of automobiles and was struck by an automobile driven by one Bonnie Ruth Hill, and injured.

As to what occurred from the time of the collision relating to the request made by the motorman of the appellant to appellee, the manner in which he undertook to obey that request, and the movement of the street car thereafter and just preceding the injury, the testimony is in direct conflict. That upon the part of the appellee was to the effect that the motorman made the request directly to the appellee to go to the telephone; that in complying with this request he went in the direction alleged and was injured by the negligent backward movement of the street car which caused him to spring from behind the street car in front of the automobile. This, in effect, was the testimony of the appellee him-

self, which was corroborated by the testimony of Randolph Bryant, who stated that he was on the bridge on the right-hand side in an automobile going across the bridge to Fort Smith; that he stopped when he got opposite the point of collision between the street car and the automobile and observed a man get out of the street car on the same side witness was on and go down the side of the car toward Van Buren; that, as the man went around behind the street car, it "jerked back" and moved five or six feet according to witness' judgment, and the appellee was struck by an automobile. Witness was unable to state how far from the rear of the street car appellee was when struck, but stated that he was close to it.

The motorman denied telling the appellee to go back to the telephone, but stated that he made a request of the passengers generally that some one of them do this; that he did not open the car to let any one get out, but that the door had been opened by the jar when the collision occurred; that when he asked that some one go to the telephone he had his back to the passengers and did not look to see if any one went or not, but that in about a minute from the time he made the request the appellee suffered the injury complained of; that from the time of the collision until after the injury to the appellee there was no movement made by the street car. He and other witnesses for the appellant stated that it would have been impossible for the street car to move because the brakes were set, and the appliance for releasing them had been broken. The motorman further testified that, when the wrecker arrived to get the automobile, he made an attempt to move the street car, but could not do so, and it was not moved until a mechanic came and released the brakes about 45 minutes after the appellee was hurt.

There was some testimony to the effect that the appellee was not struck while close to the rear of the street car, as testified to by himself and Bryant, but at a point from 60 to 150 feet north of the same.

At the conclusion of the evidence the appellant moved the court for a directed verdict in its favor, and

now argues that it was error to refuse to so instruct the jury; that the evidence fails to establish actionable negligence on the part of the motorman as the proximate cause of the accident, and that the injury occurred to the appellee because of negligence on his part contributing to its happening, and that for these reasons the judgment here should be reversed and the case dismissed.

Appellant further contends that the court erred in giving instruction No. 1 on behalf of the plaintiff, because that instruction attempted to submit the case to the jury on the theory that there was an emergency. We have examined the instructions and have reached the conclusion that they state the law applicable to the facts in a light as favorable as the appellant could ask. In our opinion it is quite immaterial whether or not, for the time being, the relation of master and servant existed between the appellant and the appellee by reason of an emergency and the authority given the appellee to go to the telephone. In this case liability of the appellant does not depend upon that relationship, but on whether or not, after the motorman had requested a passenger to go to the telephone informing the passengers where the telephone was, he made a sudden backward movement of the car which he ought to have foreseen might result in injury to the passenger obeying his request. Since the jury, who were the sole judges of the credibility of the witnesses, have accepted the testimony on the part of the appellee as true, we must consider and weigh that evidence in the light most favorable to the appellee and indulge all reasonable inferences arising from it in his favor.

The law applicable is contained in instructions Nos. 6, 7 and 8 given by the court at the request of the appellant. These instructions, in effect, told the jury that some negligent act on the part of the motorman must have been shown which he ought to have anticipated might occasion an injury, and if the motorman backed the car after appellee started to the telephone he would not be guilty of negligence unless he should have foreseen that

an injury might result as the consequence of his act. Boiled down, instruction No. 1 merely states the converse of these instructions. Therefore, if the reasonable inference can be drawn from the testimony accepted by the jury that the motorman knew that the appellee had started back to the telephone and that a sudden backward movement of the street car might cause injury to him, then this act upon the part of the motorman was a negligent one. The motorman knew where the telephone was located, and that he had directed the appellee where to find it. The reasonable inference is that he knew that appellee would take the usual and most direct route to that point, that, in order to do so, appellee would necessarily have to pass behind the street car, and that he ought to have foreseen that a backward movement of the car might result in injury to the appellee. It was a very short period of time, according to the testimony of the motorman himself, from the time he made the request that the ambulance be called by telephone until the appellee was injured. He estimated it at about a minute and the jury were justified in concluding that the movement of the street car under these circumstances was negligence.

The question of the contributory negligence of the appellee was submitted to the jury, and we are of the opinion that they were justified in finding that under the circumstances he was acting with ordinary care. By the backward movement of the street car he was confronted with an unexpected danger, and he could not be held to that degree of deliberate care which otherwise might have been required and cannot be held to be guilty of negligence *per se* because he chose the way of escaping danger by a method which placed him in the way of another where his conduct would not have been obviously unnecessary, unheedful and dangerous. *Jacks* v. *Reves*, 78 Ark. 426, 95 S. W. 781; *Woodson* v. *Prescott*, 91 Ark. 388, 121 S. W. 273.

Although appellant's street car did not strike the appellee, its backward movement was the proximate cause of the injury, even though affected directly by an-

other concurring cause—*i. e.,* the automobile of Bonnie Ruth Hill. *Bona* v. *S. R. Thomas Auto Co.,* 137 Ark. 217, 208 S. W. 306; *C. R. I. & P. Ry. Co.* v. *Jenkins,* 183 Ark. 1071, 40 S. W. (2d) 439.

The record presents no prejudicial error, and, as there is substantial testimony to support the finding of the jury, the judgment of the trial court is affirmed.

DOYLE *v.* AMERICAN LOAN CO.

Opinion delivered February 29, 1932.

Howard H. Hasting, for appellant.

J. Roy Howard and *Fred M. Pickens,* for appellee.

HART, C. J., (after stating the facts). Under our Constitution and laws, all contracts for a greater rate of interest than ten per cent. per annum shall be void as to principal and interest, and the General Assembly shall prohibit the same by law. Constitution of 1874, article 19, § 13; Crawford & Moses' Digest, § 7362.

Counsel for the plaintiff seek to uphold the judgment under the well settled principle that where the promise to pay a sum above legal interest depends upon a contingency, or where for any cause the principal sum loaned is put in hazard, the loan is not usurious. *Reeve* v. *Ladies' Building Association,* 56 Ark. 316, 19 S. W. 917; 18 L. R. A. 129; and 39 Cyc. 944.

It is equally well settled, however, that a merely colorable contingency or hazard will not prevent excessive interest charges from being usurious. The record shows usury in the present case unless the generally recognized rule above announced should be followed. We are of the opinion, however, that the obligation sued on and the stipulation in the record that the plaintiff is not an insurance company and has not qualified to act as such under the laws of the State of Arkansas renders the contract a mere shift or device to escape our usury laws.

The Supreme Court of Minnesota has held a contract, similar in all essential respects, to be a loan of money with an agreement for perpetual forbearance in case of death, and said that the contingency set up in the contract was a mere contrivance to cover usury. Mr. Justice MITCHELL, who delivered the opinion of the court, said:

"The peculiar and unusual provisions of this contract themselves constitute intrinsic evidence sufficient to justify the finding of the existence of every element of usury, *viz.,* that there was a loan, that the money was to be

returned at all events, and that more than lawful interest was stipulated to be paid for the use of it. The only one of these which could be seriously claimed to be lacking was that the money was not to be paid at all events, but only upon a contingency, to-wit, the continuance of the life of McLachlan; but the facts warrant the inference that this contingency was not *bona fide,* but was itself a mere contrivance to cover usury. The mere fact that the contract has the form of a contingency will not exempt it from the scrutiny of the court, which is bound to exercise its judgment in determining whether the contingency be a real one, or a mere shift and device to cover usury." *Missouri, Kansas & Texas Trust Company* v. *McLachlan,* 59 Minn. 468, 61 N. W. 351.

A similar view was expressed in *Matthews* v. *Missouri, Kansas & Texas Trust Company,* 69 Minn. 318, 72 N. W. 121. Subsequently, the Supreme Court of the United States upon appeal from the Federal courts in the State of Minnesota, sustained this principle and said (172 U. S. 351, 19 S. Ct. 179):

"The precise character of the contract between the present parties is not clear. It has some of the features of a loan of money; in other respects, it resembles a contract of life insurance. But our examination of its various provisions and their legal import has led us to accept the conclusion of the courts below, that the scheme embodied in the application, note and mortgage was merely a colorable device to cover usury."

Continuing, the Supreme Court of the United States expressed approval of the quotation made from the Supreme Court of Minnesota.

We are of the opinion that the principles announced in these cases are sound and should control here. Therefore, we think the transaction was merely a colorable device to cover usury and should not be upheld. It follows that the judgment must be reversed, and the plaintiff's cause of action will be dismissed here.

CLARK-MCWILLIAMS COAL COMPANY *v.* WARD.

Opinion delivered February 29, 1932.

[redacted]

Brock & Williams and *Cravens & Cravens,* for appellant.

R. W. Robins and *G. O. Patterson,* for appellee.

HART, C. J., (after stating the facts). Counsel for appellees seek to uphold the decree on the ground that the case calls for an application of the established rule in this State that a court of equity will treat a deed, absolute in form, as a mortgage whenever executed for a loan of money or as security for a debt. The general doctrine prevails in this State that the grantor may show that a deed absolute on its face was only intended to be a security for the payment of a debt and thus is a mortgage. Since the equity upon which the court acts arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible. If there is a debt existing with a loan of money in advance, and the conveyance was intended by the parties to secure its payment, equity will regard and treat an absolute deed as a mortgage. However, the presumption arises that the instrument is what it purports to be; and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing. By this is meant that the evidence tending to show that the transaction was intended as a security for debt, and thus to be a mortgage, must be sufficient to satisfy every reasonable mind without hesitation.

In the early case of *Scott* v. *Henry*, 13 Ark. 112, the court said: "And, for the purpose of ascertaining the true intention of the parties, it is a well established rule, that the courts will not be limited to the terms of the written contract, but will consider all the circumstances connected with it; such as the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances, verbal or written, as well as the acts and declarations of the parties and will decide upon the contract and the circumstances taken together." In that case, the court said that under the facts proved, although the evidence was not absolutely conclusive, still, under the uniform rules of courts of chancery, the

court must treat the contract as a mortgage. This rule has been steadily adhered to ever since and applied by the court according to the particular facts and circumstances of each case. *Wimberly* v. *Scroggins,* 128 Ark. 67, 193 S. W. 264; *Hays* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027; *Rushton* v. *McIllvene,* 88 Ark. 299, 114 S. W. 709; *Gates* v. *McPeace,* 106 Ark. 583, 153 S. W. 797; *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023; and *Kerby* v. *Feild,* 183 Ark. 714, 38 S. W. (2d) 308.

However, every case must, of necessity, depend upon its peculiar circumstances. No fixed rule can be laid down by which it can be ascertained with mathematical certainty whether the proof has met the test above described. In the very nature of things, no decisive standard can be laid down to determine the sufficiency of the evidence. The reason is that the facts and circumstances stand in different relation to each other in separate cases, and what might satisfy the mind standing in a certain relation to surrounding facts and circumstances might not be clear and decisive proof in another case. Like any other fact to be proved by evidence which satisfies the mind of its truth, the proof may be inferred from the attendant circumstances and often can not be proved in another way.

In the present case, it is a significant fact that there was no contract for a sale and resale of the property. Ward was already indebted to N. R. Clark and H. G. Clark in the sum of $15,000, principal, and $900, interest, which he had secured by a mortgage on the same property, executed to them on the 31st day of March, 1928, due three years after date. As further security, he had also given them a transfer or assignment of whatever dividends or profits might be due him. There was no satisfaction of the mortgage indebtedness, and he continued to be indebted to them after the sale in so far as the written record discloses. The Clarks retained the mortgage, and never at any time offered to satisfy it. Thus, so far as the written record shows, Ward con-

tinued to be indebted to them after the conveyance to H. G. Clark and N. R. Clark on the mortgage indebtedness. Upon the payment of his mortgage indebtedness, he had a right to have the mortgage satisfied, but, until that was done, he continued to be indebted to them after the sale. *Herman* v. *May,* 40 Ark. 146; *Brewer* v. *Yancy,* 159 Ark. 256, 251 S. W. 677; and *Matthews* v. *Stevens,* 163 Ark. 157, 259 S. W. 736.

According to the testimony of Ward, there was a positive understanding between him and H. G. Clark that the deed to his interest in the mine property in the corporation and his assignment of his dividends or profits therein was merely intended to secure his indebtedness, and there was no intention that the sale should be an absolute one. It was understood at the time that there was an amount coming to him in the way of profits for the year 1929 and this amounted to more than the amount of his stock assessment in the sum of $4,500. A subsequent audit of the books showed this to be true; for in about a month after the transaction in question, H. G. Clark paid himself the sum of $5,852.83, as a dividend on Ward's interest in the corporation for the year 1929. Thus, he got $1,352.83 more out of Ward's dividend for the year 1929 than it took to pay the stock assessment of Ward in the sum of $4,500. This tended strongly to corroborate Ward in his version of the transaction. It is true that Ward had already pledged these dividends to secure the payment of his mortgage indebtedness, but the property embraced in the mortgage was ample for that purpose.

Five persons, who testified that they were familiar with the value of the coal mine in question as well as with the value of other coal mines in that vicinity, testified that the property in question was worth from $120,000 to $175,000. According to their estimate, the one-third interest of Ward was more than twice the consideration embraced in his deed to H. G. Clark. As above stated, in about a month after this, more than an amount sufficient to pay his stock assessment of $4,500

was collected as his share of the dividends in the corporation which had already been earned at the time the deed was executed on the 31st day of January, 1930. The witnesses who testified as to the value of the coal mine gave detailed information as to its location and drainage and other matters which add to its value.

It is true that H. G. Clark and N. R. Clark flatly contradict the testimony of Ward, and it is earnestly insisted that their testimony is entitled to as much credence as the testimony of Ward. Be that as it may, the testimony of Ward is strongly corroborated by the surrounding circumstances. These circumstances are stronger than the words of men and point unerringly to the fact that the transaction was intended between the parties to be a security merely for debt and not an absolute conveyance of the property.

Each side claims that it is corroborated by the testimony of Pufahl and Reynolds, but we do not consider their testimony of much value to either side. Each of them at first stated that he thought the transaction was an absolute sale, but his opinion was based upon what the parties said. They stated that later on during the conference, after Clark and Ward had retired for private conversation, they concluded that the transaction was not intended to be an absolute sale of the property. This view of the matter was merely conjecture from what they saw and heard. It is of but little value in arriving at the real intent of the parties.

The purpose of allowing oral testimony in cases of this sort is to prevent fraud and oppression in cases where the deed or other conveyance was obtained by advantage taken of the grantor in the deed. Such course is more apt to obtain the ends of justice.

No useful purpose can be served by entering into a lengthy and detailed discussion of the evidence. It is always embarrassing to judges to decide questions of fact between old friends and persons apparently of equal standing in the community, but our duty is to apply the principles of law above announced to the testimony in the

case viewed in the light of the surrounding circumstances; and, when that is done, it seems to us that the circumstances attending this transaction point unequivocally to the fact that the transaction was not intended to be an absolute sale of the property, but was to be a mortgage to secure the indebtedness owed by Ward to the Clarks.

In addition to what we have said, it may be stated that this court has uniformly held upon appeal that the findings of fact made by a chancery court will not be disturbed unless they are against the preponderance of the evidence. Here the chancery court made an express finding in favor of Ward in the application of the well-settled rule that the testimony in his favor must be clear, unequivocal, and convincing, and we cannot say that his finding and application of the well known principles of law stated above to the facts of this case is against the weight of the evidence.

We now come to the question of excess salaries, and on this point the finding of the chancellor was again in favor of Ward. It will be noted that an accounting by the auditors showed the profits made by the partnership when it came into existence during the first part of the year 1916 on down through the year 1927. The corporation was organized in 1922. Great profits were made during all of this time, and a resolution had been entered of record when the corporation came into existence, continuing the managing officers of the coal mine at the same salary they had when it was a partnership. No good reason is shown why these officers should be so suddenly advanced in salary during the years 1929 and 1930. On the other hand, according to the testimony, the business was not so profitable during these years, and it would seem that there was every reason why the salaries of the officers and the expenses allowed them should not be increased. They had exclusive management of the affairs of the corporation, and Ward and McWilliams knew nothing at all about it. The whole relation of the parties during the existence of the partner-

ship as well as of the corporation show that the Clarks were the actual managers, and they stood in the relation of trustees to the other stockholders. *Nedry* v. *Vaile,* 109 Ark. 584, 160 S. W. 880; and *Horner* v. *New South Oil Mill Company,* 130 Ark. 551, 197 S. W. 1163.

It was the duty of the directors to manage the corporate property for the benefit of the stockholders, just as it was the duty of the partners to manage it for the benefit of the other members of the partnership. In the performance of that duty, they were chargeable with the utmost good faith, and it was a breach of trust to the other stockholders for the managing directors to obtain an undue advantage to themselves by way of excess salaries.

Finally, it is insisted that the court erred in making Pat McWilliams a party to the suit. We do not think so. On this branch of the case but little need be said. Pat McWilliams became a party to the suit on the accounting branch of it. He immediately acted with Ward in the matter. He was entitled to an accounting of the corporate affairs just as much as Ward was entitled to it. Besides this, no prejudice could have resulted to appellants on this account. McWilliams would be concluded by the decree of the court and could maintain no subsequent suit for an accounting. Thus, it will be seen that he was a proper party if not a necessary one. He had a right to assign and transfer to Ward his part in the undivided profits of the corporation, and Ward could thus use the balance so assigned to him by McWilliams in payment of whatever indebtedness he owed the Clarks.

After a careful consideration of the whole testimony and of the arguments made by counsel in their respective briefs, we are of the opinion that the decree of the chancery court was correct, and it will therefore be affirmed.

MAXWELL *v.* MITCHELL.

Opinion delivered February 29, 1932.

[redacted]

Edward Gordon, for appellant.

E. A. Williams, for appellee.

SMITH, J. E. E. Mitchell, trading as E. E. Mitchell & Company, obtained a decree foreclosing a vendor's lien upon 160 acres of land which he had sold to Johnnie Maxwell, who was dead at the time of the rendition of the decree. Maxwell's widow and his heirs, who were minors, were defendants in the suit. A receiver had been appointed, who was in possession of the land and had collected the rents.

Pursuant to this decree, this land was sold by the commissioner named for that purpose to Mrs. Maxwell, the widow, for $1,025. The sale was reported to and approved by the court, but Mrs. Maxwell declined to comply with her bid by executing a note and bond as the notice of sale required the purchaser to do.

Thereupon a notice was served upon Mrs. Maxwell by Mitchell which contained the following recital: "You have failed to comply with said bid, by either making bond or paying cash for same, and will also ask that the lands be resold and if they fail to bring the amount bid by you to-wit: the sum of $1,025, that judgment be given against you for the difference, and that execution

issue for said balance, if any, and for all cost." A formal petition was filed by Mitchell in which relief was prayed as indicated in the notice, and a response was filed by Mrs. Maxwell.

In this response Mrs. Maxwell alleged that she had refused to comply with her bid for the reason that, prior to the sale and unknown to her, Mitchell had caused the merchantable timber on the land to be cut and removed, thereby destroying the value of the land for the purpose to which she intended to devote it.

Testimony was heard to the effect that there was only a limited quantity of merchantable timber on the land, and that its value was only about $50, and Mitchell had credited the decree with that sum. The timber was cut between the time of the rendition of the decree of sale and the sale thereunder, and Mrs. Maxwell testified that she had moved her family from the land, and did not know the timber had been cut at the time she bid in the land, and that she would not have bid on the land had she known this fact.

Under the decree of the court, the land was ordered resold, and at the resale Mitchell bid in the land for $700, and, upon the final hearing of Mitchell's petition and the response thereto, a decree was rendered in his favor against Mrs. Maxwell, from which is this appeal.

By § 4320, Crawford & Moses' Digest, it is provided that, if any person shall refuse to pay the amount bid for any property struck off to him, the officer making the sale may again sell such property to the highest bidder, and, if any loss shall be occasioned thereby, the officer may recover such loss by motion before the court under whose order the sale was made.

In the case of *Fulbright* v. *Morton*, 131 Ark. 492, 199 S. W. 542, it was held that this statute provided a cumulative, and not an exclusive, remedy against the purchaser at a judicial sale who refuses to comply with his bid, and that the selling officer still has the common-law remedy of maintaining an action against the purchaser for the full amount of his bid.

It is insisted that, while two remedies are open against the purchaser at a judicial sale who refuses to complete his purchase, neither remedy can be pursued by any one except the officer making the sale. If this were true, the jurisdiction of the court would not be affected under the facts of this case, for the reason that all persons who would be made parties in such an action were parties to this suit, and the court had expressly retained jurisdiction of the cause for the purpose of making such orders as might appear to be appropriate. The commissioner, who was merely an agent of the court to perform its orders, was, of course, a party, for the reason that his report was before the court and the litigation arose over the action to be taken thereon. The decree of the court thereon would necessarily be conclusive of any right on his part to pursue either the statutory or the common-law remedy against Mrs. Maxwell, who not only became a party by her bid, but was also an original party, and was made a defendant in the proceeding brought by Mitchell on account of her default in the petition above referred to. All these proceedings were had in the case brought by Mitchell to enforce his lien. We conclude therefore that the relief prayed is not to be denied for the reason that Mitchell proceeded in his own name, instead of that of the commissioner.

Now it is settled law that the rule of *caveat emptor* applies to judicial sales, and we do not intend by this opinion to impair it. One must know what he buys when he bids at a judicial sale. But it nevertheless appears inequitable to permit Mitchell to recover in this case. The recovery was for his benefit, although we have treated the case as if it had been a suit by the commissioner.

We do not impute to Mitchell any improper conduct or wrongful intention in cutting the timber, and he has credited his judgment with an amount which the court found represented the fair market value of the timber cut and removed. Yet the fact remains that Mitchell had no right to cut the timber, and Mrs. Maxwell did not know

that he had done so, and she had the right to assume, when she bid in the land, that he had not done so. To permit him to recover under the facts of this case would be to allow him to profit from his own wrongful act, especially in view of the fact that he has his land back at his own price.

The case of *Connell* v. *Savings Bank of Newport,* 47 R. I. 60, 129 Atl. 803, 41 A. L. R. 1269, was one in which a house and lot were sold under a mortgage foreclosure sale, under which the purchaser was required to make a cash deposit of ten per cent. of the amount of his bid, which he did. Before the confirmation of the sale, and before possession was delivered to the purchaser, the house was destroyed by fire, and the purchaser not only refused to pay the balance due on his purchase, but sued to recover the part paid. It was held by the Supreme Court of Rhode Island in that case, to quote the headnote, that, "where purchaser at mortgage foreclosure sale made deposit to be forfeited on failure to pay balance and take deed at time appointed, and before that time cottage on premises was destroyed by fire, purchaser was entitled to refuse deed and recover deposit."

In the opinion in that case the court quoted from the case of *Thompson* v. *Gould,* 20 Pick. (Mass.) 134, as follows: "The only question therefore is, whether the plaintiff or the defendant is to sustain the loss by fire. In respect to the loss of personal property, under the like circumstances, the principle of law is perfectly clear, and well established by all the authorities. When there is an agreement for the sale and purchase of goods and chattels, and after the agreement, and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of its destruction. * * * No reason has been given, nor can be given, why the same principle should not be applied to real estate. The principle in no respect depends on the nature and quality of the property, and there can therefore be no distinction

between personal and real estate. * * * The same principle applies to an agreement to purchase a house, as in the present case, the house being casually destroyed before the purchase is completed. Neither party being in fault, the loss must be borne by the owner of the property."

The authorities are not uniform on this question, and cases on both sides are cited in the annotated cases of *Re Mortgaged Lands of R. L. Sarmon,* 182 N. C. 122, 17 A. L. R. 965, 108 S. E. 497; *McGinley* v. *Forrest,* 107 Neb. 309, 22 A. L. R. 567, 186 N. W. 74; *Fine* v. *Beck,* 140 Md. 317, 25 A. L. R. 68, 117 Atl. 754; *Skean* v. *Ellis,* 105 Ark. 513, 152 S. W. 153.

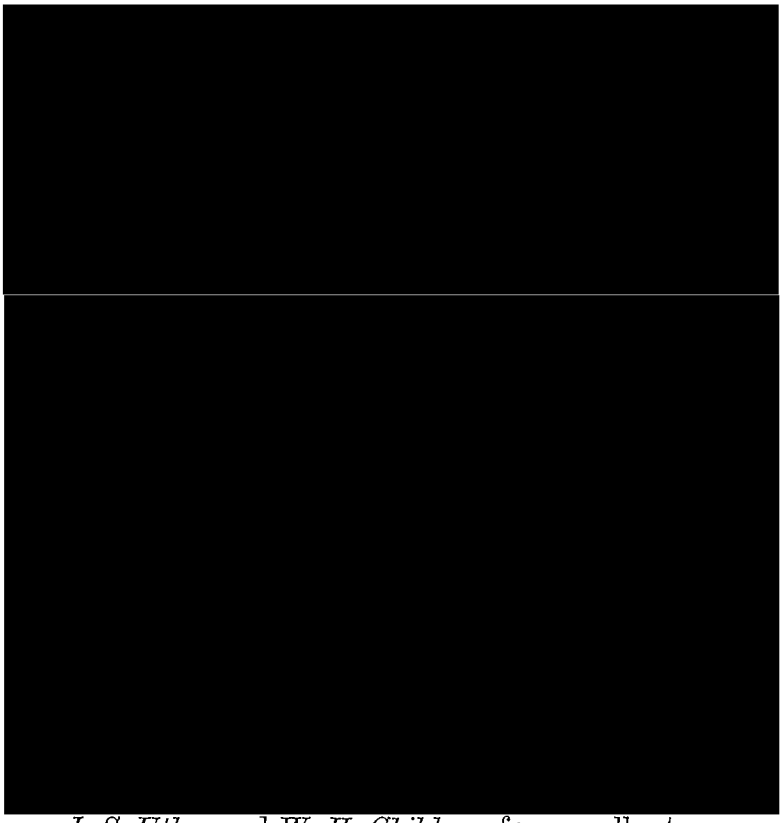
Now it must be admitted that there is a distinction between this Rhode Island case and the instant case, the distinction being that in the former the fire occurred after the sale, while in the instant case the timber was cut before the sale. The doctrine of *caveat emptor* would ordinarily operate to make this distinction of controlling importance, but the application of that doctrine to the instant case would permit Mitchell to profit by his own wrong. Mrs. Maxwell did not want the farm without the timber, and she had the right to assume, but for the doctrine of *caveat emptor,* that she was buying it and would have gotten it but for Mitchell's wrongful act, of which she was not advised, and it appears inequitable to permit him to profit by his own wrong.

The more appropriate practice would have been for Mrs. Maxwell to have stood on her exceptions to the confirmation of the report of sale, on the ground that it was inequitable to confirm it, and to have appealed from an order of confirmation; but such, in effect, is the present status of the case, inasmuch as no persons are concerned in this litigation except only Mrs. Maxwell and Mr. Mitchell, there being no intervening rights of any third parties.

The decree of the court, in so far as it holds Mrs. Maxwell liable on account of her bid, will therefore be reversed, and the cause remanded with directions to enter a final decree conforming to this opinion.

LEE *v.* STATE.

Opinion delivered February 29, 1932.



J. S. Utley and *W. H. Childers,* for appellant.

Houston Emory, Prosecuting Attorney, for appellee.

KIRBY, J., (after stating the facts). The statute upon which the motion for discharge is based, § 3132, Crawford & Moses' Digest, reads as follows:

"If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

This statute has been construed and applied first in *Stewart* v. *State,* 13 Ark. 720, in *Ware* v. *State,* 159 Ark.

540, 252 S. W. 934, where all the cases are reviewed, and in *Fulton* v. *State,* 178 Ark. 841, 12 S. W. (2d) 777. In the last cited case it was held that the person committed to the penitentiary, who had no opportunity to demand a trial on other indictments, did not waive his right to discharge from such indictments under said statute.

This case, however, furnishes no authority for the granting of the motion to discharge the defendant from the indictments herein because the prisoner there was prevented from making such motion while he was in the custody of the State, serving a sentence upon a conviction for violation of her laws, the State having the exclusive custody of the convict there, and could and should have brought him into open court that he might demand a trial, and he waived no right to discharge under this statute by its not having done so. Here the appellant was in the custody of the United States Government, in her penitentiary, upon a plea of guilty to a violation of its laws, which furnished no ground for the dismissal of charges pending against him on indictments in the State court because of his not having had opportunity to demand a trial therein, and this is so without regard to whether the State could have sooner procured his presence under the comity rule from the United States Government, as announced in *Ponzi* v. *Fessenden,* 258 U. S. Reports, 254, 42 S. Ct. 309. In *Rigor* v. *State,* 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719, it was said by the Supreme Court of Maryland:

"The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt."

Appellant made no effort to demand trial while he was imprisoned in the United States Penitentiary, which he could have done, and the fact that the State could have procured his presence in her court for trial on the indictments and did not do so deprived him of no right he was entitled to, and the court did not err in denying his motion for a discharge from the indictments pending in her court. The judgment is affirmed.

McHaney, J. On the authority of *Fulton* v. *State*, 178 Ark. 841, 12 S. W. (2d) 777, I think the case should be reversed. The distinction attempted to be made between that case and this is, in my opinion, not a valid one. I therefore dissent.

Gilbert *v.* Life & Casualty Insurance Company of Tennessee.

Opinion delivered February 29, 1932.

R. H. Peace, Alvin D. Stevens and *Joe Joiner,* for appellant.

Leonard C. Smead, for appellee.

KIRBY, J., (after stating the facts). The policy insures against accident resulting from insured's being struck by a vehicle "propelled by steam, cable, electricity, * * * gasoline, etc., while insured is walking or standing on a public highway, which term, public highway, as here used, shall not be construed to include any portion of railroad or interurban yards, station grounds, or right-of-way except where crossed by a thoroughfare dedicated to and used by the public for automobile or horse vehicle traffic."

The evidence shows that the place at which insured was standing when struck by the cable was laid out and made a public highway by order of the county court on the 20th day of January, 1930, insured being killed on the 5th day of May thereafter, and the stipulation shows that he was struck by a cable, one end of which was attached to a tractor pulling stumps out of this new roadway laid out. The Legislature, by act 666 of 1923, § 5, defined a public highway, and the policy limits the meaning public highway as prescribed in it, which in nowise

conflicts with the contention that the road, laid out and being improved, was a public highway within the meaning of the statute and our decisions. *Finney* v. *State,* 172 Ark. 115, 287 S. W. 744. See, also, 29 C. J. 363.

If a person coming alongside a public highway over which vehicles of the kind specified in the policy moved, and while there was injured by being struck by any such vehicle with a cable or board or something else attached to it, or by a car or piece of car or anything carried on such vehicle in a collision between two cars, it would hardly be contended that the accident was not within the provision of the policy insuring against risks of this nature; or if he had been struck and injured by any such vehicle on a short detour from the public highway, made necessary by its obstruction, or a washout, certainly it could not be claimed that the injury was not covered by the terms of the policy, and, in the first illustration, whether he negligently or foolishly stood or walked by the side of the road would make no difference.

Being struck by the cable attached to the tractor was as much being struck and injured by a vehicle within the meaning of the policy as if the insured had been run over by the wheels thereof, or had come in collision with any other part of it, and such an injury was covered by the terms of the policy and insured against. *Great American Casualty Co.* v. *Williams,* 177 Ark. 87, 7 S. W. (2d) 775.

It was there held that, when a policy provided indemnity for accidental injury to insured while actively engaged in farming by actual contact with and while operating a threshing, mowing, reaping or binding machine, such provision covered an injury to insured, who was operating a binding machine harvesting rice, while he was down under it making adjustment or repairs and injured by a sledge hammer falling off the seat of the machine and striking his foot.

If there is ambiguity in the policy, or if its provisions are of doubtful meaning, it must be most strongly construed against the company writing it, and more

favorably to the insured. *Great American Casualty Co.* v. *Williams, supra.*

The court therefore erred in directing a verdict against the appellant, and the judgment is reversed, and the cause will be remanded for a new trial. It is so ordered.

CATLETT *v.* BRADLEY.

Opinion delivered February 29, 1932.

Patterson & Patterson, for appellant.

Brock & Williams, for appellee.

McHANEY, J. Appellees, twelve separate and distinct landowners, brought this suit in one action for the cancellation of twelve separate and distinct conveyances of mineral rights under their respective parcels of land situated in Johnson County, Arkansas, on the ground of misrepresentation and fraud in the procurement thereof. The conveyances were made at different times by separate instruments. Eleven of them were made to appellant Catlett, and one to appellant Vance. They were procured by the other appellants acting separately. Appellants filed a motion to strike improperly joined causes of action and to require appellees to elect, which the court overruled. They then demurred on several different

grounds, which was also overruled. They then filed a motion to dismiss for misjoinder of cause of action, which was also overruled. Thereafter appellant Catlett filed a separate answer, denying that any fraud was practiced on any of the appellees, in procuring the conveyances, by him or his codefendants, and alleged that each of the grantors in the instruments of conveyance had full knowledge of the nature of the instrument executed by him, and that it was executed voluntarily for the purpose of conveying the rights purported to be conveyed by such instrument, and that it was a valid instrument in his favor. The case was submitted to the court upon the pleadings, and the depositions taken on behalf of appellees, from which the court found in their favor and entered a decree canceling all the separate instruments mentioned in the complaint.

The record in this court is incomplete. The decree of the court recites that it was heard upon depositions taken on behalf of appellees. These depositions are not brought into the record by bill of exceptions or otherwise. There is a conclusive presumption therefore that the evidence before the court was sufficient to support the findings and decree of the court. *Dumas* v. *Crowder*, 178 Ark. 143, 10 S. W. (2d) 43; *Franklin County* v. *Smith*, 178 Ark. 666, 11 S. W. (2d) 446.

It is urged, however, that the court erred in failing to dismiss the complaints on their motion so to do on misjoinder of causes of action, and that the demurrer was improperly overruled. Conceding for the sake of argument that the causes of action were improperly joined, such misjoinder did not and could not prejudice appellants in any manner, since, if separate causes of action had been instituted, it would have been proper to have consolidated them for trial and heard them together. Section 1081, Crawford & Moses' Digest, provides: "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."

These actions, if they had been brought separately, were against the same parties, were of a like nature, and all related to the same question, and would therefore have been subject to consolidation for trial. *St. L., I. M. & S. R. Co.* v. *Broomfield,* 83 Ark. 288, 104 S. W. 133; *Mahoney* v. *Roberts,* 86 Ark. 130, 110 S. W. 225; *Van Troop* v. *Dew,* 150 Ark. 560, 234 S. W. 992. In the two cases last cited it was held that it was not prejudicial error to join several causes of action having sufficient identity to justify consolidation under § 1081 of the Digest, *supra.* Many other cases might be cited to the same effect.

As to the demurrer, it is argued that the allegations of the complaint were insufficient to show fraudulent misrepresentation in law. The complaint alleged in each case that the appellants represented to each grantor that he was signing a lease for oil and gas to the tract of land conveyed and persuaded them to sign an instrument which turned out to be a mineral deed and not an oil and gas lease. It was further alleged that the conveyance was wholly without consideration. We think this was sufficient allegation to state a cause of action for fraud and deceit in procuring the execution of the instruments, and not open to demurrer. Appellants answered, denying any fraud or misrepresentation, but the proof in this regard is not before us.

Affirmed.

NORTHWESTERN CASUALTY & SURETY COMPANY *v.* ROSE.

Opinion delivered February 29, 1932.

Buzbee, Pugh & Harrison, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

BUTLER, J. This action was instituted by appellee against appellant, Northwestern Casualty & Surety Company, to recover from appellant under an automobile liability insurance policy for sums appellee expended for medical bills and hospital bills for one Ben D. Bonner, struck by appellee's automobile.

On the trial of the case the appellant took the position that it was not liable for medical and hospital bills because of the following provision in the policy: "The assured shall co-operate with the company at all times in facilitating the disposition of claims and suits, but shall not voluntarily assume any liability nor incur any expense or settle any claim except at his own cost without

written consent of the company. In case of personal injury, the assured may provide at the company's expense such first aid as is imperative at the time of the accident."

Upon this theory the appellant first requested a peremptory instruction for a verdict in its favor, and, such instruction being refused, it requested by instruction No. 2 a declaration that the appellee was only entitled to recovery for expenses incurred in securing immediate aid necessary at the time to relieve the sufferings of Bonner, and to see that he reached a place for treatment. The court refused to give instruction No. 2 as requested, but modified the same by adding the words, "unless Mr. Rose was liable to Mr. Bonner for his injury and damages." The instruction, as modified, reads as follows: "You are instructed that in this case plaintiff is entitled to recover only for such immediate and imperative aid as was necessary to at the time relieve the sufferings of Mr. Bonner, unless Mr. Rose was liable to Mr. Bonner for his injury and damages."

The trial resulted in a verdict in favor of the appellee for $1,640.05, the amount admittedly expended for medical bills and hospital fees.

Hospital charges and expense of medical treatment and such other expenses as are necessarily incurred in the usual and ordinary treatment of a victim of an accident are among the damages which are the direct and proximate result of the injury for which a recovery may be had against one whose negligent conduct causes the injury, and therefore come within the terms of a liability insurance policy such as the one before us, by which the assured is indemnified against liability for damages suffered by any person on account of the operation by the assured of an automobile causing the injury. *U. S. Casualty Co.* v. *Johnson Drilling Co.,* 161 Ark. 158, 255 S. W. 890, 34 A. L. R. 727.

The appellant now concedes the rule announced and the correctness of the court's modification of its instruction No. 2, but insists that there could be no recovery except for the expenses of first aid because the evidence

does not justify the finding that the appellee was liable for the accident. After the appellant was notified of the accident, it procured an explanatory statement from Mr. Rose, and, presumably after other investigations, settled with Mr. Bonner, the injured person, for $5,000, exclusive of the amount expended by Mr. Rose for hospital and medical attention for Bonner, and, during the course of the settlement with Mr. Bonner, Mr. Rose was advised by the appellant that Bonner was willing to accept $5,000 in settlement provided the former would assume for his own account the medical and hospital bills which he had paid. This Mr. Rose declined to do. Because of this refusal and the contention of the appellant as to the law of the case noted above, it seems that the testimony regarding the accident was not fully developed, the only testimony taken with respect to the same being that of Mr. Rose himself. We, however, are of the opinion that this was sufficient to warrant the jury in finding that there was liability. It is the well-settled rule that the duty rests upon the driver of an automobile to exercise ordinary care in its operation, and in the exercise of such care it is his duty to keep a constant lookout to avoid injury to others. This is particularly incumbent upon him when driving on the street of a city in order to avoid injury to pedestrians, as he should anticipate their presence upon such streets and their equal right to their use. *Murphy* v. *Clayton,* 179 Ark. 225, 15 S. W. (2d) 391; *Byrd* v. *Galbraith,* 172 Ark. 219, 288 S. W. 717; *Smith A. T. Co.* v. *Simmons,* 181 Ark. 1024, 28 S. W. (2d) 1052; *Duckworth* v. *Stevens,* 182 Ark. 161, 30 S. W. (2d) 840; *Morel* v. *Lee,* 182 Ark. 985, 33 S. W. (2d) 1110.

It is the rule arising from common custom and recognized by law (Acts 1927, p. 721, § 9; Huddy, Cyc. Auto Law, vols. 3, 4, p. 157) that it is the duty of the driver of a motor vehicle to keep to the right of the road, and whether this is done or not is a matter to be considered by the jury in determining the question of negligence. The accident to Bonner occurred on Woodlawn Avenue, just beyond where it passes out of Prospect Ave-

nue. Woodlawn does not leave Prospect at a right angle, as is usual in city streets, but at less than a 45 degree angle, so that on leaving Prospect and entering Woodlawn one has a clearer view of the way ahead than where a street crosses at right angles. Mr. Rose was driving to his home on Woodlawn and approached on Prospect Avenue, turning into Woodlawn, driving at about the center of the street because it was a gravel street, and he was selecting the smoothest part of the road. This was on the 16th day of November, on a rainy evening. It was dark, but the street lights had not yet been turned on. He had passed the intersection of Prospect and Woodlawn about four car lengths "when all at once a man loomed up in front," who appeared to be walking toward Rose. Rose thought the man too close to apply his brakes and stop the car, and thought that he could avoid striking him by turning quickly to the right. This he did but did not accomplish his purpose, striking the man with the left lamp and fender of his car, causing him to fall and the wheels of the car to pass over him. There was no one present at the time of the accident except Mr. Rose, the driver of the car, and Mr. Bonner, who received the injury. Within a short time, however, some one came who telephoned for an ambulance, and Bonner was taken to the hospital at the direction of Rose, where he was treated for about a week, and it was then deemed necessary to amputate his left leg. This operation was performed, and Mr. Rose paid the hospital expenses, including nurse's hire, surgeon's fees and other necessary expenses, amounting in all to the sum sued for.

The testimony is silent with reference to the direction from which Bonner was crossing the street, but it is reasonable to infer that it was from the left of the driver of the automobile, as the left light and fender knocked him down. The manner in which Woodlawn leaves Prospect Avenue does not require any considerable slowing down of a car to make the turn, and it was in testimony that the car was being driven at about 18 miles an hour and was slowed down somewhat on entering

Woodlawn. There is no testimony as to whether or not the horn was sounded on making the turn or as to whether the headlights of the car were burning. If the lights on the car were not burning, it would have been extremely difficult to see ahead at all, and the jury might have inferred that, under the conditions then existing, the lights were burning, and, if so, that they cast light a sufficient distance ahead to enable Bonner's presence on the street to have been discovered in time for the driver of the car to stop the same by an application of the brakes, or to have turned it to the righthand side of the street where it properly belonged, and thus to avoid the injury to Bonner. There was no question raised as to the contributory negligence of Bonner, nor is there any evidence regarding his actions except the impression of Mr. Rose, who stated that "he was angling across the street," and that the point of accident was not at the crossing. It must have been very near the crossing, however, since the accident occurred just after the car was "straightened out on Woodlawn, and in about the center of the street." All of these circumstances raised a question of fact as to whether or not the appellee was in the exercise of ordinary care, and such circumstances are sufficient to sustain the finding that he was not.

The judgment is therefore correct, and it is affirmed.

LAZARUS *v.* ALPHIN.

Opinion delivered March 7, 1932.

Haynie, Parks & Westfall and *Powell, Smead & Knox,* for appellant.

J. K. Mahony, H. S. Yocum, W. T. Saye and *J. N. Saye,* for appellee.

HUMPHREYS, J. This suit was brought in the chancery court of Ouachita County, Second Division, by appellee, who was a creditor of the estate of Abraham Lazarus, deceased, against appellant to recover the proceeds derived, and to be derived from certain policies of insurance in excess of what an annual premium of $300 would pay for and subject said proceeds to the payment of the balance due him by the estate of said Abraham Lazarus. The proceeds derived and to be derived were and are from policies of insurance procured and carried by Abraham Lazarus for the benefit of his wife, Rosa L. Lazarus. She was the beneficiary named in said policies at the time of his death. The suit was based upon § 5579 of Crawford & Moses' Digest, which is 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 payable 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."

In the recent case of *Townes* v. *Krumpen,* 184 Ark. 910, 43 S. W. (2) 1083, this court construed said section to mean that, in any event a husband might expend as much as three hundred dollars annually out of his funds as premiums on life insurance protection for his wife,

and that he might expend more than said amount for insurance if purchased in good faith and without an intent to cheat, hinder and delay his creditors. It was ruled in that case that the creditors of the deceased husband might subject any excess insurance carried for the benefit of his wife to the payment of their debts, provided it was alleged and proved that he made a gift out of his funds in order to cheat, hinder and delay his creditors.

The record in the instant case fails to show that Abraham Lazarus expended more than $300 per annum in premiums out of his funds for life insurance for the benefit of his wife in order to cheat, hinder and delay his creditors. Appellee made no such allegation in his complaint and did not introduce any evidence to that effect. The allegation and facts in the instant case bring it within the rule announced in the case of *Townes* v. *Krumpen, supra.*

The decree rendered by the chancery court must therefore be reversed, and the cause dismissed, which is accordingly done.

ELLIOTT *v.* LOCKLAR.

Opinion delivered March 7, 1932.

R. K. Mason and *Gaugham, Sifford, Godwin & Gaughan,* for appellant.

Haynie, Parks & Westfall, for appellee.

KIRBY, J. The only question for determination here is whether the setting aside and cancellation of a deed made in fraud of judgment creditors bars the wife's inchoate right of dower, she having joined in such conveyance relinquishing her right of homestead and dower.

Appellants insist that the court erred, after cancelling the deed executed by herself and husband conveying the lands to Miss Audrey Marks, and the one from Miss Audrey Marks to intervener, Mrs. Flote Elliott, as fraudulent conveyances, in decreeing that her right of homestead and dower be subjected to the lien of appellee's judgment and sold with the land in satisfaction thereof, foreclosing and barring her rights therein.

The statutes provide for the endowment of the wife in the lands whereof her husband was seized of an estate of inheritance unless the same shall have been relinquished in legal form, and also that no conveyance of such lands by the husband without the assent of his wife evidenced by acknowledgment of such conveyance as required by law shall pass the estate of a married woman, and no judgment or decree recovered against him shall prejudice the right of his wife to her dower or preclude her from recovery thereof if otherwise entitled thereto.

The general rule applicable herein is set out in 19 C. J., page 529, as follows:

"Although there is authority to the contrary, it is very generally held that where a conveyance or deed executed by a husband or wife is set aside as fraudulent as to the husband's creditors, the wife's dower in the land is restored. It is not material whether she participates in the fraudulent intent or not; in either case her right to dower is revived." See also *Rickett* v. *Bolton,* 173 Ky. 739, 191 S. W. 471; and *Huntzicker* v. *Crocker,* 153 Wis. 38, 115 N. W. 340, and cases cited therein.

Certainly when the deeds executed by her in relinquishment of her dower and homestead in his lands under

the statute are held to be void and set aside as fraudulent, they could be of no binding effect to convey her dower and homestead interest therein, and her status remained as though no such deeds had been executed so far as his said creditors are concerned.

Appellant waived no right by intervening in the cause nor was she put to any other action to determine whether she would defend the action as claiming to be the owner of the lands under a valid conveyance or claiming only the right to her dower and homestead interest therein upon the cancellation of the conveyance as fraudulent, the remedies being in no wise inconsistent.

The court erred in holding otherwise, and the decree is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

STATE MILITARY NOTE BOARD *v.* CASEY.

Opinion delivered March 7, 1932.

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

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

MEHAFFY, J. The appellee, Lee V. Casey, as a citizen and taxpayer of Pulaski County, Arkansas, brought this suit to enjoin the issuance and sale by the State Military Note Board of negotiable notes of the State.

He alleged that act No. 14 of the Acts of the General Assembly of 1931 creating the State Military Note Board and authorizing and enjoining it to issue and sell negotiable notes, not to exceed $400,000, was void; that senate bill No. 74, which became act 14, was not passed as required by the Constitution. He alleged that it was invalid on the ground that the journals of the two houses of the General Assembly do not show that the bill was agreed to in each house, but that the record shows that the bill was not read three times in the House of Representatives, was not placed on final passage, the vote was not taken by "ayes" and "nays," and the names of the persons voting for and against the same were not entered on the journal.

It was further alleged that the Military Note Board had been appointed under the provisions of the invalid act; that it was attempting to, and would, unless restrained, offer for sale and sell the obligations of the State in the amount of $400,000.

The complaint also alleged that the notes should be direct obligations of the State for the payment of which the full faith and credit of the State are pledged, and alleged that the State Military Note Board was without authority to pledge the faith and credit of the State.

The prayer of the plaintiff was that the act be declared invalid, and the defendants and each of them be enjoined from doing any act under the provisions of said act 14.

The appellants filed answer in which they denied that act 14 was invalid, and denied that the bill was not read three times and placed on its final passage, and, in

fact, denied all the material allegations of the complaint with reference to the act being void.

It was also alleged in the answer that the legislative journals affirmatively show that every legal requirement was complied with, with reference to the passage of said act.

There was introduced a copy of the record of the proceedings on Bill 74, certified by the Secretary of State to be correct.

"Proceedings in the Senate on the Passage of Senate Bill No. 74, as Shown by the Senate Journal.

"SENATE CHAMBER.

"Little Rock, Arkansas, January 20, 1931.

"Senate Bill No. 74 by Senator Ward the same being a bill for an act to be entitled, 'An Act to Provide the Funds for the Construction or Purchase of Armories for the Use and Benefit of the Arkansas National Guard, to Authorize the Issuance of Notes, and for Other Purposes.'

"Read the first time, rules, suspended, read the second time and referred to the Committee on Militia.

"January 28, 1931.

"SENATE.

"Little Rock, Arkansas, January 28, 1931.

"Mr. President: We, your committee on Militia, to whom was referred Senate Bill No. 74, by Senator Ward of the 6th District, beg leave to report that we have had the same under careful consideration and herewith return the same with recommendation that it do pass.

"Respectfully submitted,

"J. Paul Ward,

"Chairman Committee on Militia.

"January 30, 1931.

"Senate Bill No. 74 by Senator Ward, re-referred to Budget Committee.

"February 2, 1931.

"SENATE.

Little Rock, Arkansas, February 2, 1931.

"Mr. President: We, your committee on Budget, to whom was referred Senate Bill No. 74 by Senator Ward of Independence, beg leave to report that we have had the same under careful consideration and herewith return the same with recommendation that it do pass.

"Respectfully submitted,

"Roy Milum, Chairman,

"Committee on Budget.

"February 3, 1931.

"Special order for tomorrow. Senate Bill No. 74.

"February 4, 1931.

"Senate Bill No. 74, by Senator Ward, the same being a bill for an act to be entitled, 'An Act to Provide the Funds for the Construction or Purchase of Armories for the Use and Benefit of the Arkansas National Guard, to Authorize the Issuance of Notes and for Other Purposes.'

"Was placed on third and final passage. The question being shall the bill pass? The secretary called the roll and the following voted in the affirmative:

"Abington, Atkins, Bailey, Bennett, Brewer, Caldwell, Counts, Dillon, George, Hendricks, Kimsey, Lake, McElhannon, McGehee, Milum, Mitchell, Nelson, Poole, Purkins, Quarles, Shaver, Shuster, Spence, Stewart, Thornton, Wahlquist, Waldron, Walls, Ward, Whaley, Wheatley, Wilson.

"Voted in the negative, none.

"Absent and not voting: Norfleet, Norrell.

"Total No. of votes cast.....33

"Necessary to passage of bill.....17

"Total No. voting in the affirmative.....33

"Total No. voting in the negative.....00

"Total No. absent and not voting..... 2

"So the bill passed, and the title as read was agreed to.

"Senate Bill No. 74 by Senator Ward having an emergency clause thereon, roll was called, vote as follows:

"Voting in the affirmative:

"Abington, Atkins, Bailey, Bennett, Brewer, Caldwell, Chaney, Counts, Dillon, George, Hendricks, Kimsey, Lake, McElhannon, McGehee, Milum, Mitchell, Nelson, Poole, Purkins, Quarles, Shaver, Shuster, Spence, Stewart, Thornton, Wahlquist, Waldron, Walls, Ward, Whaley, Wilson.

"Voting in the negative, none.

"Absent and not voting: Norfleet, Norrell.

"Total No. votes cast.....33

"Necessary for adoption.....24

"Total No. voting in the affirmative.....33

"Total No. voting in the negative.....00

"Total No. absent and not voting..... 2

"So the emergency was adopted.

"SENATE.

"Little Rock, Arkansas, February 4, 1931.

"Mr. Speaker: I am instructed by the Senate to inform your honorable body of the passage of Senate Bill No. 74 by Senator Ward, the same being a bill for an act to be entitled, 'An Act to Provide for the Construction or Purchase of Armories for the Use and Benefit of the Arkansas National Guard, to Authorize the Issuance of Notes, and for Other Purposes,' and I hereby transmit the same for your favorable consideration.

"Respectfully,

"M. E. Sherland, Secretary.

"February 6, 1931.

"Senate Bill No. 74 by Senator Ward, a bill for an act to be entitled, 'An Act to Provide the funds for the construction or purchase of armories, for the use and benefit of the Arkansas National Guard, to authorize the issuance of notes, and for other purposes.'

"Was read the first time, rules suspended, read the second time and placed on the calendar.

"February 10, 1931.

"On motion of Mr. Pruitt the House went into the committee of the whole for the purpose of considering Senate Bill No. 74. Mr. Owen in the chair. On motion

of Mr. Deane the Committee arose and through its chairman made the following report:

"HALL OF THE HOUSE OF REPRESENTATIVES.

"Little Rock, Arkansas, February 10, 1931.

"Mr. Speaker: We, your committee of the whole, to whom was referred Senate Bill No. 74 by Mr. Ward, beg leave to report that we have had the same under careful consideration and herewith return the same with recommendation that it do pass.

"Respectfully submitted,

"John T. Owen,

"Chairman of the Committee of the Whole.

"February 10, 1931.

"Was read the third time and placed on final passage; the question being, 'Shall the bill pass?' The Clerk called the roll when the following voted in the affirmative:

"Adkins, Alexander, Blackwell, Bollinger, Boyette, Bransford, Brown, Bullock, Burke, Butler, Cannon, Cardwell, Clark, Clay, Clayton, Coffelt, Coxey, Crumpler, Cunningham, Danley, Day, Dean, Dudley, Eberhart, Eddy, Evans, Ewell, Feinberg, Flemming, Gilliam, Gooch, Graham, of Benton, Graham, of Lonoke, Hall, Hardin, Hassell, Hollobough, Hollensworth, Johnson, Kelley, Kimbro, Latting, Levine, Mason, McElhaney, Morehead, Myers, Newton, Oliver, Owens, Pilkington, Permenter, Perry, Pruitt, Ramsey, Raney, Robertson, Rogers, Rothrock, Scott, Stroupe, Stubblefield, Switzer, Tackett, Thomas, Thorn, Toland, Turner, Wade, Waldrip, Ward, of Lee, Ward, of Stone, Warfield, Watkins, Watson, Wheatley, Wilson, Mr. Speaker.

"The following being absent and not voting: Arnold, Campbell, Clement, Dowell, Duncan, Hester, Kaufman, Kitchens, Lawrence, McCabe, Proctor, Purdy, Reed, Silvey, Smith, of Pulaski, Talkington, Toney.

"Total No. of votes cast.....83

"Necessary to the passage of the bill.....42

"Total No. voting in the affirmative.....83

"Total No. voting in the negative.....00

"Total number absent and not voting.....17

"So the bill passed, and the title as read was agreed to.

"There being an emergency clause attached to Senate Bill No. 74, the Speaker ordered the Clerk to call the roll upon the adoption of the emergency clause. The Clerk called the roll and the following voted as follows: "Affirmative: Atkins, Alexander, Blackwell, Bollinger, Boyette, Bransford, Brown, Bullock, Burke, Butler, Cannon, Cardwell, Cunningham, Danley, Day, Dean, Dudley, Eberhart, Eddy, Evans, Ewell, Feinberg, Flemming, Gilliam, Gooch, Graham, of Benton, Graham, of Lonoke, Hall, Hardin, Hassell, Hester, Hollobough, Hollensworth, Johnson, Kelley, Latting, Levine, Mason, McElhaney, Morehead, Myers, Newton, Oliver, Owens, Pilkington, Permenter, Perry, Pruitt, Ramsey, Raney, Robertson, Rogers, Rothrock, Scott, Sellers, Smith, of Fulton, Smith, of Randolph, Spinks, Stroupe, Stubblefield, Switzer, Tackett, Thomas, Thompson, Thorn, Toland, Turner, Wade, Waldrip, Ward, of Lee, Ward, of Stone, Warfield, Watkins, Watson, Wheatley, Wilson, Mr. Speaker.

"The following being absent and not voting: Arnold, Campbell, Dowell, Hester, Kaufman, Kitchens, Lawrence, McCabe, Proctor, Purdy, Reed, Silvey, Smith, of Pulaski, Talkington, Toney, Duncan, Clement.

"Total No. of votes cast.....83
"Necessary to the passage of the bill.....42
"Total No. voting in the affirmative.....83
"Total No. voting in the negative.....00
"Total No. absent and not voting.....17

"So the bill passed, and the title as read was agreed to.

"February 11, 1931.

"Returned to the Senate as passed.

"W. H. Phipps, Chief Clerk."

"SENATE.

"Little Rock, Arkansas, February 11, 1931.

"The sergeant-at-arms announced a message from the House, whereupon the Chief Clerk of the House ap-

peared within the bar of the Senate and read the following communication:

"House of Representatives.

"Little Rock, Arkansas, February 11, 1931.

"Mr. President: I am instructed by the House of Representatives to inform your honorable body of the passage of Senate Bill No. 74 by Mr. Ward, the same being a bill for an act to be entitled, 'An Act to Provide the Funds for the Construction or Purchase of Armories for the Use and Benefit of the Arkansas National Guard, to Authorize the Issuance of Notes and for Other Purposes,' and I hereby return same for your favorable consideration.

"Respectfully,

"(Signed) W. H. Phipps, Chief Clerk.

Section 22 of article 5 of the Constitution provides: "No bill shall become a law unless on its final passage the vote be taken by ayes and nays and the names of persons voting for and against the same be entered on the journal and a majority of each house be recorded thereon as voting in its favor." This provision of the Constitution is mandatory, and must be observed by both houses in the passage of a bill; otherwise the statute is illegal and void. *Butler* v. *Kavanaugh,* 103 Ark. 109, 146 S. W. 120; *Smithee* v. *Garth,* 33 Ark. 17; *Chicot County* v. *Davies,* 40 Ark. 200; *State* v. *Corbett,* 61 Ark. 226, 32 S. W. 686; *Rogers* v. *State,* 72 Ark. 565, 82 S. W. 169; *State* v. *Bowman,* 90 Ark. 174, 118 S. W. 714; *Pelt* v. *Payne,* 90 Ark. 600, 30 S. W. 426, 134 Am. St. Rep. 45.

It is however equally well settled by the decisions of this court that an enrolled statute, signed by the Governor, and deposited with the Secretary of State raises the presumption that every requirement was complied with, unless the contrary affirmatively appears from the records of the General Assembly, and this presumption is conclusive, unless the records of which the court can take judicial knowledge show to the contrary. *Road Improvement District No. 16* v. *Sale,* 154 Ark. 551, 243 S. W. 825; *State* v. *Crowe,* 130 Ark. 272, 197 S. W. 4,

L. R. A. 1918A, 567, Ann. Cas. 1918 D, 460; *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92; *Perry* v. *State,* 139 Ark. 227, 214 S. W. 2; *Booe* v. *Sims,* 139 Ark. 595, 215 S. W. 659; *Booe* v. *Rd. Imp. Dist.,* 141 Ark. 140, 216 S. W. 500; *Connor* v. *Blackwood,* 176 Ark. 139, 2 S. W. (2d) 44.

Act No. 14 of the General Assembly of 1931 was signed by the Governor and deposited with the Secretary of State and the presumption is that every requirement of the Constitution was complied with unless the contrary affirmatively appears from the record of the General Assembly.

The only question for us to determine is whether the record affirmatively shows that the Constitution was not complied with. We have set out the statement of the Secretary of State above which gives a full history with reference to the proceedings as to Senate Bill No. 74, which became act 14.

There is no contention that there is any irregularity or failure to comply with the constitutional provision, except it is contended that the vote on the bill in the House does not show that it was a vote on Senate Bill 74.

The record shows that on February 10, 1931, the bill was considered by a committee of the whole, and the committee of the whole reported on the same day that they had carefully considered the bill and returned it with the recommendation that it do pass. There were then some other transactions by the House, and then followed this statement: "Was read the third time, and placed on final passage; the question being, shall the bill pass? The clerks called the roll when the following voted in the affirmative."

Then follows the names of those voting for and against the bill and the names of those absent and not voting. The bill was then declared passed, and the title as read agreed to.

Immediately following this vote was the vote on the emergency clause attached to Senate Bill No. 74. There is no question, and can be none, about the house voting

on the bill, and the ayes and nays being recorded as required by the Constitution. The only question is, was that Senate Bill No. 74? or rather, does the journal show affirmatively that it was not Senate Bill 74?

Some bill was voted on on February 10, the number of which was not shown by the record. We have examined the record, and it shows that every other bill voted on on February 10, was designated by number and title, and this vote therefore could have been on no other bill than Senate Bill 74. Moreover the indorsement on the original bill, filed in the office of the Secretary of State, shows that on February 10, Senate Bill 74 was passed by the House, and as we have already said, the bill was enrolled, signed by the Governor, and deposited in the Secretary of State's office. In addition to this, the journal shows that on February 11, the day after the vote on the bill, the House reported to the Senate the passage of Bill 74.

We think it is not so much a question about recording the ayes and nays on the passage of the bill, as a question of identification of the bill, and when the entire record is considered, we think it shows beyond question that Senate Bill 74 was passed in the House in the manner required by the Constitution, and certainly the record does not affirmatively show that it was not so passed.

We have therefore reached the conclusion that it does not affirmatively appear from the record that the constitutional provision was not complied with.

The appellee also contends that the State Military Note Board is without authority to pledge the faith and credit of the State. We do not agree with appellee in this contention. See *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9, and also *Connor* v. *Blackwood,* 176 Ark. 139, 2 S. W. (2d) 44, and *Cobb* v. *Parnell,* 183 Ark. 429, 36 S. W. (2d) 388.

The decree of the chancery court is reversed, and the cause dismissed.

HARRISON *v.* ROSENSWEIG.

Opinion delivered March 7, 1932.

Arthur D. Chavis, for appellant.

Reinberger & Reinberger, for appellee.

MCHANEY, J. An execution from the Pine Bluff Municipal Court on a judgment in favor of appellee against appellant of March 23, 1931, was returned unsatisfied. In June, 1931, a certified transcript of said judgment was filed with the clerk of the Cleveland Circuit Court, upon which execution was issued by said clerk, and the sheriff levied same on certain real property owned by appellant in that county. Thereafter appellant filed his schedule claiming the property levied upon as his homestead exempt, which was disallowed by the clerk, and the matter was presented to the court sitting as a jury. The court disallowed the claim of exemption as a homestead on the ground that appellant had moved away and abandoned his homestead, and that same was subject to execution. This appeal is from that judgment.

Appellant was the only witness examined. He testified that the 20 acres of land was his homestead, and had been for about 20 years; that he had lived upon said land all that time until 1929 or 1930; that his first wife died while they were living there as also one child who

predeceased his wife, and that he continued to live there about two years after his wife's death; that he then moved to Pine Bluff to work where he had lived about a year; that he did not abandon his homestead, but was temporarily away at work, intending to return to it at an indefinite time, when he married again; that he had been married the second time about five months, but that he and his present wife had not lived on said land, but had been on it several times, and intended to move back "this fall," when he got money to move on; that he never did move all his household goods from the property, his cooking utensils and plow tools still being there in the custody of his relatives who rent the premises; that he re-covered the house on said land about six months ago at a cost of $75; and that he paid his personal tax for 1931 at Pine Bluff, in Jefferson County.

On this evidence the court found that appellant had abandoned his homestead, and this appeal challenges the sufficiency of the evidence to support the finding and judgment. The rule in this court in this kind of case is the same as in any other case tried before the court sitting as a jury, and that is, that the finding of the court is entitled to the same weight as the verdict of a jury, which this court will not disturb if there is any substantial evidence to support it. *Creekmore* v. *Scott,* 179 Ark. 1113, 20 S. W. (2d) 177. In this case we think there is some substantial evidence of abandonment. Appellant, on the death of his wife, was left without a family. Later he went to Pine Bluff to work, intending, as he says, to return when he married. If he had never married again, the presumption is, from that statement, that he would not have returned. In other words, his intention to return to his homestead was not unqualified, definite and certain, such as the law requires. In the case last cited, we said: "This court has uniformly held that an abandonment of a homestead is almost, if not entirely, a question of intention, which must be determined from the facts and circumstances attending each case. The court

has further held that a removal from the homestead may be caused by necessity, or for business purposes, and that, if the owner has an unqualified intention to preserve it as a homestead and to return to it, his removal cannot result in the abandonment of the land as a homestead. *Gazola* v. *Savage,* 80 Ark. 249, 96 S. W. 981; *Caldcleugh* v. *Caldcleugh,* 158 Ark. 224, 250 S. W. 324, and cases cited."

The evidence further shows that appellant had been married to his second wife five months and had not moved back to his homestead and had paid his 1931 personal taxes in Jefferson County. These are circumstances tending to show abandonment, and abandonment of a homestead may be proved by conduct, circumstances, and actions, as well as by direct testimony. *Lilly* v. *Lilly,* 178 Ark. 324, 11 S. W. (2d) 765; *Creekmore* v. *Scott, supra.* Tested by these rules, we cannot say there is no substantial testimony to support the finding and judgment of the circuit court.

Affirmed.

KIRBY and MEHAFFY, JJ., dissent.

COLEMAN *v.* HAWKINS.

Opinion delivered March 7, 1932.

Isgrig & Morrow, for appellant.

L. P. Biggs, for appellee.

MCHANEY, J. Appellants purchased from appellee building material and supplies on a cash basis to the

amount of $951.02 for rebuilding a house in Little Rock which had been partially destroyed by fire. The house was insured, but the amount of the loss was largely paid to the holder of the mortgage thereon to discharge it. Part of the insurance money was used to pay for labor in rebuilding the house. Appellants thought they could borrow sufficient money on a new mortgage to pay all labor and material bills, but were unable to do so. Mechanics' liens were filed against the property, and finally an arrangement was effected to borrow $2,000 on a first mortgage and prorate this amount among the different lien-claimants. This was done, and the liens released. In this deal appellee received $483.01, leaving a balance due him of $468.01. Appellants then executed and delivered to appellee their notes aggregating $900 dated August 1, 1930, payable $75 November 4, 1930, and $50 on the first of each month thereafter until the sum of $900 was paid with interest at 8 per cent., secured by a second mortgage on said property, both providing for accelerated maturity in the event of default. Appellants defaulted, made no payments, and suit was instituted to foreclose. The defense was that the contract was usurious and void. Included in this mortgage was a balance due another for plumbing in the sum of $83.75. The court found for appellee for the balance due him with interest in the sum of $525 and decreed a foreclosure.

Usury is the ground urged for a reversal. We think the court correctly held the contract not to be usurious. Appellants executed the notes and mortgage and delivered them to appellee to be held for a time with the intention of selling them at a discount, or a sufficient amount of them, to pay appellee's account. No sale could be made. Appellee never at any time sought to collect more than the balance due him, and that is all he wanted or asked for in the trial of this case. It was simply an arrangement between appellants and appellee to issue notes in excess of the account to be sold at discount for their joint benefit. "There was no element of lending or

borrowing money in the transaction." *Smith* v. *Kaufman*, 145 Ark. 548, 224 S. W. 978.

We find no error, so the decree is affirmed.

TAYLOR *v.* VINER.

Opinion delivered March 7, 1932.

John C. Ashley and *Gus Causbie*, for appellant.

Geo. T. Humphries and *W. P. Smith*, for appellee.

BUTLER, J. This is an action begun in the circuit court of the northern district of Sharp County by the appellant, Farmers' Bank of Hardy, against J. T. Viner, Lee Weaver and Eliza Weaver, to recover on a promissory note executed on the 4th day of December, 1926, which was past due and unpaid. From a judgment adverse to Taylor, the commissioner in charge of said bank, he has appealed.

The appellee, J. T. Viner, defended on the ground that his signature to the note was conditioned upon the procurement of the signature of one Wess Weaver on the note, that this person's signature was not obtained, and therefore he was not liable. He testified that Lee Weaver came to him one evening, and requested him to sign the note; that he agreed to sign it if Lee Weaver would get Wess Weaver to sign it, and, having received the promise that this would be done, he signed the note; that early the next morning about the time the bank opened he went to Mr. Turner, the cashier of the bank, and informed him of the understanding between himself and Lee Weaver and told him that if Wess Weaver did not sign the note not to take it.

It appears from the testimony of the assistant cashier of the bank who testified from the records that this note was given in renewal of another note for the same amount executed on March 6, 1925, and due ninety days after date.

The president of the bank, who became active as an official in 1928, testified that when he took charge he began efforts to collect the note from Viner and Lee Weaver; that Viner did not deny liability, but said to let the note run along and see what would be the outcome of the bankruptcy proceedings in which Weaver was then involved.

On rebuttal, Viner stated that he had never acknowledged liability on the note, and did not know until after Lee Weaver died that Wess Weaver had not signed it.

This case is ruled by the case of *Halliburton* v. *Cannon,* 160 Ark. 428, 254 S. W. 687, in which it was held that, where a note is given signed by an accommodation maker, and afterward a note is executed in renewal of the first note, it is a good defense by the accommodation maker to his liability as signer of the renewal note that his signature was affixed thereto upon the express condition that other persons should sign the note before it should become binding on him, and that the payee was

notified of the condition on which the note was signed before it was delivered to him.

The court correctly instructed the jury that the burden of proof was upon Viner to prove by a preponderance of the evidence in order to escape liability that he had signed the note on condition that the signature of Wess Weaver should be obtained and also that he had notified the bank before the note was accepted by it.

It is insisted by the appellee that the case of *Halliburton* v. *Cannon, supra,* does not govern because there is a lack of evidence that the bank was notified of the condition before it accepted the renewal note. The evidence in this case is very brief. Viner informed Turner, the cashier of the bank, of the condition about the time the bank was opened and just what was said between the two is uncertain. Viner, in answer to a question as to whether or not Turner said anything about turning the note over to Lee Weaver, answered, "No, he talked like they had though," and, when asked if Turner had the note then, answered, "I asked him about it, and he didn't seem to have it and didn't claim that Wess Weaver had signed it." On cross-examination witness stated that he told Turner about the condition upon which he signed the note and told him not to take it unless Wess Weaver signed it. He was asked, "You don't know if he had the note at that time," and answered, "No, sir."

This was all the testimony relative to the notice given the bank, and, while not conclusive, we are of the opinion that the reasonable inference might be drawn that the notification was given the bank before the note had been delivered to it by Lee Weaver and accepted by it in renewal of the note of March 6, 1925.

After the verdict was returned, the appellant filed a motion for judgment, notwithstanding the verdict, on the note dated March 6, 1925, for which the renewal note was given, on the theory that the renewal note did not extinguish the obligation of the former. It is true that, without an agreement to that effect, the renewal of the note will not operate as a payment of the original note, but

there was no evidence regarding any agreement at the time the note was renewed or as to whether it was surrendered or retained by the bank. Moreover, the note of March 6, 1925, was not declared on, and therefore the court did not err in overruling the motion.

We find no error in the record, and conclude that there was substantial evidence to support the verdict. The judgment of the trial court is therefore affirmed.

TRENT *v.* JOHNSON.

Opinion delivered March 7, 1932.

Karl Greenhaw, for appellant.

Ulys A. Lovell, for appellee.

BUTLER, J. The appellee, as trustee in succession, brought suit against the appellant and a number of other defendants for judgment on a note executed on the 7th

day of June, 1911, and for foreclosure of a mortgage on certain lands in Washington County, to secure payment of the same. The appellant, Trent, demurred to the complaint, and, his demurrer being overruled, filed an answer in which he raised the defense of the statute of limitations and of laches.

The court, sitting as a jury, heard the case upon an agreed statement of facts, overruled the appellant's plea of limitation and laches, entered a decree foreclosing the mortgage, and rendered a personal judgment against the appellant, from which judgment is this appeal.

The facts as agreed upon are as follows:

"1st. That A. L. Trent borrowed the sum of $1,250 on June 7, 1911, from M. F. Croxdale, clerk and trustee, and executed his note therefor due and payable five years after date and bearing eight per cent. interest from date until paid, and, to secure said note, the said A. L. Trent and wife executed and delivered to said payee in said note their certain real estate mortgage upon certain lands in Washington County, Arkansas, sought to be foreclosed herein.

"2d. That the said A. L. Trent sold and conveyed said lands to J. M. Hamilton, who died more than one year before the institution of this suit, said lands having been sold to the said J. M. Hamilton, by warranty deed, December 31, 1913, and in said deed the said J. M. Hamilton assumed and agreed to pay said mortgage indebtedness sued on herein; that thereafter the said J. M. Hamilton sold said lands to Finis L. Trimble, on the 16th day of September, 1914, who assumed and agreed to pay said mortgage indebtedness, and that thereafter said lands changed hands many times, and that the grantees in most of the deeds assumed and agreed to pay said mortgage indebtedness.

"3d. That A. L. Trent had no further connection with said note or mortgage nor said lands after he conveyed the same to Hamilton on December 31, 1913, and that, at the time Trent conveyed said lands, he owed no

delinquent interest. That all interest due and payable on said note and mortgage was kept paid by various owners of said lands from and after the date Trent sold it until and including June 7, 1929. That the interest due June 7, 1930, was unpaid, and that this suit was brought to foreclose after the failure of the interest payment due on June 7, 1930, for the preceding year.

"4th. That the said A. L. Trent did not make any payment of interest after he sold said lands in 1913, and that he knew nothing whatever about said interest payments, and did not know that said note and mortgage were still running or that said interest payments were being made each year after he sold said lands in 1913.

"5th. That said note became due according to law June 7, 1916, and would have become barred by law as to Trent on June 7, 1921, unless the acts of the various grantees in the various deeds, the owners of said lands, in paying the interest thereon through all these years up to and including June 7, 1929, served to toll the statute of limitations as to A. L. Trent.

"6th. That the first A. L. Trent knew said mortgage and note had not been paid and satisfied was in the year 1930, at or about the time the foreclosure suit was filed herein.

"7th. That said mortgaged lands have depreciated in market value since the year 1921, and would not sell for near as much money now as they would have brought had said mortgage been foreclosed and the land sold prior to June 7, 1921."

The question raised by the appellant's plea of the statute of limitations is whether or not the payments by the grantee will interrupt the running of the statute as to the personal liability of the mortgagor. This question has never before been presented to this court for decision. It may be said, first, that it is well settled that the assumption by a grantee and the agreement by him to pay the mortgage debt does not, within itself, change the relationship of the mortgagor and the mortgagee nor release the mortgagor from payment of the mort-

gage debt, and its collection may be enforced as long as the debt remains unpaid or until barred by limitation or laches.

It is also the settled rule that partial payments will keep alive the lien as between the parties and also as to third parties when the memorandum thereof is indorsed upon the record in the manner provided by the statute. However, the theory on which partial payments keep alive the debt is that these imply a new promise to pay the debt. Consequently, to bind the mortgagor the payments must have been made by him in person or by some one authorized by him to make a new promise in his behalf. *Abbott* v. *Johnson,* 130 Ark. 7, 195 S. W. 676; *Chase* v. *Carney,* 60 Ark. 491, 31 S. W. 43; *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. (2d) 1089, 59 A. L. R. 899.

It is the contention of the appellee that by the agreement to pay the mortgage debt the grantee became the agent of the mortgagor, and therefore the payments by him will be imputed in law to be that of his principal, the mortgagor, and these payments be effectual to suspend the statute as if made by the mortgagor himself. He argues that this is the effect of our decision in *Felker* v. *Rice,* 110 Ark. 70, 161 S. W. 162, and in the cases of *Walker* v. *Mathis,* 128 Ark. 317, 194 S. W. 702, and *Farrell* v. *Steward,* 135 Ark. 617, 204 S. W. 423, which approve the doctrine announced in *Felker* v. *Rice, supra.* A critical examination of those cases does not warrant the contention made. In *Felker* v. *Rice, supra,* it was held that the grantee assuming the mortgage "stood in the position of surety for the debt." It is evident from the context that the court merely intended to hold that, not only was the mortgagor primarily liable because of his promise to pay the debt, but by the assumption of the grantee of the mortgage debt and his promise to pay he became also liable personally for its payment, and therefore the mortgagee had, in addition to the security of the mortgage lien and the promise of the mortgagor, the security created by the promise of the grantee; and in those cases

where the court said that the grantee became the surety of the mortgagor the word "surety" was not used in its proper and technical sense, but to mean that the mortgagee, in addition to the liability of the mortgagor, had as a security for the payment of his debt the promise of the grantee to which the law imputes the same force as if made directly to the mortgagee.

This view is strengthened by an examination of the cases of *Kirby* v. *Young,* 145 Ark. 507, 225 S. W. 970; *Wallace* v. *Hammond,* 170 Ark. 952, 281 S. W. 902; *Boone* v. *Trezevant,* 181 Ark. 504, 26 S. W. (2d) 582. Those cases but reiterate the well-settled doctrine in this State that the grantee of mortgaged lands who assumes and agrees to pay the debt secured by the mortgage becomes personally liable to the mortgagor for its payment; and where default is made by the grantee, the mortgagor, upon paying the debt assumed by his grantee, may recover it from him and be entitled to be subrogated to the rights of the mortgagee in the lien on the property contained in the mortgage.

On the question as to whether an acknowledgment of the continuance of the mortgage debt by partial payments made on it by the grantee of mortgaged premises who has assumed and agreed to pay the debt interrupts the running of the statute of limitations as against the liability of the mortgagor, the authorities are in conflict. The weight of authority, however, is to the effect that no act of a grantee who has assumed a mortgage will toll the statute of limitations as to the mortgagor. 17 R. C. L., p. 916-917; 18 A. L. R., note IIIa, p. 1033; *Fitzgerald* v. *Flannigan,* 155 Iowa 217, 135 N. W. 738, Ann. Cas. 1914C, 1104; *Regan* v. *Williams,* 185 Mo. 620, 84 S. W. 959; Ann. Cases, 1914C, p. 1113, note; *Cottrell* v. *Shepherd,* 86 Wis. 649, 57 N. W. 983, 39 Am. St. Rep. 919. We are of the opinion that the better reason supports the view taken in the authorities above cited. The grantee is personally liable to the mortgagee because of his assumption and agreement to pay the debt se-

cured by the mortgage, the payments are made by the grantee for his own benefit and not as the agent of the grantor, as their liabilities are separate and distinct. *Old Alms-House* v. *Smith,* 52 Conn. 434. Therefore, the grantee cannot, by any act of his, impute to his grantor the effect of his act or subject him to a new liability. Hence we adopt the prevailing view and hold that the trial court erred in overruling the appellant's plea of the statute of limitations. As more than seven years elapsed since the debt became due, we hold that the statute bar attaches. As the grantee was personally liable for the debt secured by the mortgage, his payments of interest interrupted the running of the statute, the debt remained enforceable against him, and therefore the lien remained in existence, and the trial court correctly decreed its foreclosure, but erred in rendering a personal judgment against the appellant.

For these reasons the decree of the trial court rendered against the appellant is reversed, and the cause remanded with directions to dismiss the complaint as to him.

ARKANSAS COUNTY ROAD IMPROVEMENT DISTRICT NO. 5 *v.* TAYLOR.

Opinion delivered March 14, 1932.

John W. Moncrief and *R. E. Wiley,* for appellant.

Coleman & Gantt and *C. E. Condray,* for appellee.

SMITH, J. This cause was heard in the court below upon an agreed statement of facts from which we copy the following essential recitals.

The Home Bank of DeWitt suspended business on January 4, 1929, and its assets are now in charge of the State Banking Department for purposes of liquidation. At the time of the bank's suspension, Arkansas County Road Improvement District No. 5 (a road improvement district created by special act of the General Assembly) had on deposit $19,799.21, which was a general deposit subject to check.

The deposit was made pursuant to the supposed authority conferred by act 182 of the Acts of 1927 (Acts 1927, page 634). At the time of the deposit the bank held certain warrants drawn by the board of directors of Special School District No. 1 of DeWitt, Arkansas, on the county treasurer in the sum of $10,572.59.

It is recited in the agreed statement of facts that "the sum of $11,699.80 has been paid on the deposit by delivery of $9,000 in U. S. bonds which had been separately pledged on June 22, 1927, to secure $9,000 of the aforesaid deposit, and by a twenty-five per cent. dividend by the successor to and purchaser of the assets of the Home Bank of DeWitt, leaving unpaid $8,099.41 of said deposit, and the school warrants aforesaid are worth their face value of $10,572.59, and thereby have excess value of $2,473.18 over the unpaid balance of the deposit."

The school district was a legally organized school district under the laws of the State of Arkansas, and the deposit was made under a contract for the payment of three per cent. interest on daily balances.

The deposit was made under a written contract whereby the school warrants and the Government bonds

were deposited in the First National Bank of DeWitt, to be delivered to the road improvement district upon the failure of the Home Bank to repay the funds upon the check or order of the road district.

The school warrants deposited in escrow had been drawn by the school district for teachers' salaries, janitor service, and other small necessary supplies. The school warrants were in regular form and such as are in general use throughout the State, and were valid orders for the payment of the indebtedness of the school district upon presentation to the county treasurer out of any funds in his hands belonging to the school district, and would have been paid upon presentation to the county treasurer when settlement had been made by the collector of taxes collected for the school district.

Upon these facts it was decreed that the State Bank Commissioner "is the owner of all the school warrants described in the pledge, * * * and that all said school warrants be surrendered and delivered by the escrow agent, First National Bank of DeWitt, to Walter E. Taylor, State Bank Commissioner, and be held by him free of all claim of the said Arkansas County Road Improvement District No. 5, or any of the other parties to this action," and this appeal is from that decree.

It is said that the decree from which this appeal comes was rendered upon the authority of the case of *Arkansas-Louisiana Highway Improvement District* v. *Taylor,* 177 Ark. 440, 6 S. W. (2d) 533, and in our opinion the law there announced was correctly applied to the facts herein stated.

In that case the Bank Commissioner brought suit to recover the assets of an insolvent bank which was in his hands for the purposes of liquidation. The insolvent bank had, a short time before closing its doors, pledged certain notes payable to its order for the purpose of securing a general deposit made by a road improvement district. In that case, as in this, the deposit had been made under the supposed authority conferred

by act 182 of the Acts of 1927, *supra,* and that case depended, as does this one, on the construction of that act.

Section 1 of this act provides that the officers of road and other improvement districts shall, before depositing money belonging to such districts in any bank, require a surety bond, conditioned for the apt, full and complete payment of all funds so deposited, together with interest thereon. It was provided, however, that in lieu of such surety bond the bank might "deposit United States bonds or notes of the State of Arkansas, the bonds of any legally organized school, levee, drainage, or other improvement district of the State of Arkansas, which bonds and all proceedings concerning the issuing of same have been approved by some reputable attorney who is recognized by the bond buyers of the United States as such, as collateral security, and such bonds shall be deposited in escrow with some other bank than the depository of the funds of such district to be delivered to such district only on failure of the depository of such funds to repay the said funds to the district or to pay same on the order of the district."

It was held in the former case, above cited, that this act should be strictly construed for the benefit of stockholders and depositors, and that the power to deposit assets as collateral by a bank should not be held to extend beyond the express authority there given by the act. This holding was made upon the view, there expressed, that: "If a bank could pledge any portion of its assets to secure deposits, it could pledge all of its assets, because, if the authority to pledge its assets exists at all, it is without limit. And a few large depositors might be able to secure the entire assets of the bank as a pledge for their deposits, to the injury of every depositor and the stockholders. The act relied on should be strictly construed for the benefit of the stockholders and protection of the depositors, and the power to deposit assets by a bank should not be held to extend beyond the express authority given in the statute."

The Bank Commissioner was permitted in that case to recover the assets which had been pledged contrary to the provisions of the act.

The attempt is made to distinguish that case from the instant case, upon the ground that the warrants of the school district are, in legal effect, the same as the bonds of the district, and that as the authority is conferred to pledge bonds to secure deposits, the authority also exists to pledge school warrants for the same purpose. The correctness of this contention is the controlling question in the case.

The opinion in the case of *Gaster* v. *Dermott Special School District,* 184 Ark. 536, 42 S. W. (2d) 990, is decisive of this question. There a school district sought to refund both its bonded and floating indebtedness under the authority of §§ 59 and 60 of act 169 of the Acts of 1931, page 476.

By § 59 of this act all school districts are authorized to borrow money for certain designated purposes 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 of the act of 1931 reads as follows: "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."

It was there held that the Dermott district might issue bonds in excess of seven per cent. of the last county assessment only for the purpose of refunding the bonded indebtedness of the district, and that bonds could not be issued in excess of the seven per cent. limitation for the purpose of paying the floating indebtedness of the district evidenced by school warrants, such as those pledged

to the Home Bank in the instant case. It was there said: "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."

School bonds and school warrants are not synonymous terms. The characteristics of each are well known, and so also is the difference between them.

In the case of *Shelley* v. *St. Charles County Court and Another,* 21 Fed. Rep. 699, Mr. Justice BREWER (later an associate justice of the Supreme Court of the United States) said: "There is a vast difference between bonds and warrants. Warrants are general orders payable when funds are found, and there is propriety in the rule providing that they shall be paid in the order of presentation, the time of presentation to be indorsed by the treasurer on the warrants. But bonds are obligations payable at a definite time, running through a series of years. They are payable when the time of their maturity arrives, independent of any presentation."

The obligations of school districts which the act of 1927, *supra,* authorizes the banks to use as collateral security are bonds, "which bonds and all proceedings concerning the issuing of same have been approved by some reputable attorney who is recognized by the bond buyers of the United States as such." These bonds have a defined security behind them, and, with the interest thereon, are payable at fixed definite periods, whereas the ordinary school warrant is payable on presentation when funds for that purpose are available. These school warrants are not ordinarily subjected to that scrutiny which precedes the approval of a bond issue. The Legislature

evidently intended to require, and has required, a higher form of security than a mere school warrant, and the deposit in question was not therefore authorized by the act of 1927. This being true, there was no authority in law for the pledge, and the opinion in the former case, above cited, applies and sustains the decree here appealed from. It is therefore affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* WOMACK.

Opinion delivered March 14, 1932.

Thos. B. Pryor and *H. L. Ponder,* for appellant.

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

HUMPHREYS, J. Appellee recovered damages against appellant in the circuit court of White County in the sum of $75 for killing his cow in the operation of its passenger train en route to Memphis on the 5th day of August, 1930, near bridge No. 4 between mile posts 291 and 292. The right of recovery was based upon the alleged negligence of appellant's employees engaged in the operation of said train in failing to give warning of the approach of the train and to stop said train after discovering the cow upon its track.

Appellant requested the court to instruct a verdict for it upon the theory that the undisputed testimony reflected that the cow came suddenly onto the top of the

track from under the east end of the trestle about 150 or 200 feet in front of the train, which was running at a speed of about sixty miles an hour, rendering it impossible for the engineer to have stopped the train and avoided hitting the animal. This was the effect of the testimony of the engineer, who swore that, although keeping a constant lookout, he did not discover the cow until he was within 150 or 200 feet of her as she came from under the east end of a trestle onto the track; that he immediately blew the whistle to frighten her off, but that he struck her before she cleared the track. He further testified that the train was the fast passenger train out of Memphis to Little Rock, and that he struck the cow about 5:30 P. M. According to the testimony of the section foreman, he found the cow on the north side of the track about 100 yards east of the trestle and buried her the next morning.

Had the testimony of the engineer been undisputed, appellant would have been entitled to its request for an instructed verdict. His testimony was disputed, however, by the testimony of witness Sawyer. This witness testified that the track was straight for a long distance each way at the point where the cow was struck; that several cows had crossed the track ahead of the cow owned by appellee and that she was the last one to cross the track from the south side to the north side thereof, and that, just as she was about to clear the track, she was struck by a fast passenger train en route to Memphis about four or four-thirty o'clock P. M.

If the cow in question was killed at four or four-thirty o'clock P. M. by a fast east-bound passenger train, then the engineer who testified was not operating the train that killed appellee's cow, for he was operating a west-bound train en route to Little Rock. The place where the carcass was found tended to corroborate the testimony of Sawyer rather than that of the engineer.

The jury accepted the testimony of witness Sawyer as true, and the conflict in testimony warranted the sub-

mission of the issue of fact to the jury for determination. The court did not err in refusing the peremptory request of appellant.

Appellant also contends for a reversal of the judgment because the court refused to give its requested instruction No. 3, which is as follows:

"The jury are instructed that the engineer and fireman and other employees of the defendant company have a right to testify in this cause, as to how this accident happened, and you are further instructed that you are to take their testimony along with the other testimony in the case, and that you have no right to disregard said testimony unless the same is contradicted by other testimony in this case."

The giving of this instruction would have singled out and given undue prominence to the testimony of the engineer. The court therefore properly refused to give the instruction.

No error appearing, the judgment is affirmed.

ATKINSON *v.* REID.

Opinion delivered February 15, 1932.

Frank C. Douglas and *W. Leon Smith,* for appellants.

C. A. Cunningham, for appellees.

MEHAFFY, J. The Blytheville Feed & Coal Company was an Arkansas corporation. J. W. Adams was president and owned 98 shares of the stock. His wife, Love B. Adams, owned 2 shares of the stock. Gaines Jasper was secretary-treasurer and owned 99 shares of stock. His wife, Pauline D. Jasper, owned 1 share of stock.

Insurance policies in the sum of $10,000 each were carried on the lives of J. W. Adams and Gaines Jasper. J. W. Adams died October 31, 1926, and shortly thereafter the insurance company paid to the Blytheville Feed & Coal Company $10,000.

Love B. Adams was appointed administratrix of the estate of J. W. Adams, deceased.

In order to ascertain the value of the stock, an audit and an appraisement was made on November 19, 1926.

The audit and appraisement showed the net worth of the company to be $14,559.09. The liabilities of the Blytheville Feed & Coal Company at that time were $10,328.44 and the assets $24,887.52. $2,559.09 was deducted to cover depreciation and loss on collections, leaving a balance of $12,000 as the net value of the property of the corporation, and this was the basis used to determine the value of the stock.

The capital stock was $20,000, and Jasper purchased the stock belonging to the estate of J. W. Adams and the 2 shares belonging to Mrs. Adams, paying therefor $60 a share, and the stock was transferred to Gaines Jasper. This sale and transfer of the stock was authorized and approved by the probate court of Mississippi County. The order of the probate court was December 9, 1926.

Gaines Jasper thereby became the owner of the entire capital stock of the corporation, and the corporation, in the early part of January, surrendered its charter as provided for in § 1823 of Crawford & Moses' Digest.

Thereafter Gaines Jasper continued the business as an individual, but using the same name of the corporation.

On September 17, 1927, Gaines Jasper filed a petition in bankruptcy, and Max Reid was appointed trustee and brought this suit against Gaines Jasper, Love B. Adams, and Blytheville Feed & Coal Company.

The suit was filed February 3, 1928. The complaint alleged that Max Reid was the duly elected and qualified trustee for Gaines Jasper, bankrupt; that the Memphis Coal Company, which was joined as a plaintiff, was a corporation with its principal business at Memphis, Tennessee; that the Blytheville Feed & Coal Company was an Arkansas corporation; that the Ætna Life Insurance Company, after the death of J. W. Adams, paid $10,000 to the Blytheville Feed & Coal Company; that prior to December 11, 1926, the stock of the Blytheville Feed & Coal Company was owned by Gaines Jasper and wife and Love B. Adams personally and as the administratrix of the estate of J. W. Adams, deceased; that Love B.

Adams and Gaines Jasper knew that the insurance money was a trust fund; that the Blytheville Feed & Coal Company owed various creditors and owed the Memphis Coal Company $1,547.45; that said insurance money was appropriated by Love B. Adams and Gaines Jasper for their personal use, and that they knew this would render the Blytheville Feed & Coal Company insolvent.

It was alleged that Gaines Jasper attempted to pay Love B. Adams the sum of $6,000 of the funds of the Blytheville Feed & Coal Company for stock in said company; that said Love B. Adams then undertook to pay Gaines Jasper $2,000 of said insurance money for an undivided interest in lots 1 and 2 in block 1 in Davis' 2d Addition to Blytheville, Arkansas; that, at the time the trust funds were misappropriated, Love B. Adams and Gaines Jasper were officers of the Blytheville Feed & Coal Company; that Gaines Jasper assumed the liabilities of said company and attempted to dissolve the corporation on the theory that he owned all of the stock; that he continued to operate said business as Blytheville Feed & Coal Company and that said Blytheville Feed & Coal Company was never dissolved, but still exists as a corporation; that Gaines Jasper dissipated the funds of the corporation in fraud of his creditors and the creditors of said corporation, and that Jasper filed a petition in bankruptcy in September, 1927, and he is liable now for misappropriating the funds of the corporation; that Love B. Adams is liable for misappropriating the funds to the extent of any portion of the insurance money which she received; that the $2,000 paid by her to Jasper was a part of the insurance fund, and that she holds the real estate as trustee for the corporation and its creditors.

The prayer of the complaint was that Max B. Reid be appointed receiver for the Blytheville Feed & Coal Company with authority to take charge of the undivided half interest in the above described real estate and such other assets as he might locate; that he collect rents and profits and distribute same as directed by the court; that

plaintiffs have judgment against Love B. Adams and Gaines Jasper for the sum of $10,000; that a trust be impressed upon the real estate, and that the same be sold to satisfy the judgment herein rendered.

The Memphis Coal Company prayed that it be paid the sum of $1,547.45 and for general relief.

Love B. Adams filed answer denying the allegations of the complaint and alleging that she sold the stock, but was not guilty of any fraud in its sale.

After hearing the evidence the chancellor entered a decree that the plaintiff have and recover of and from Love B. Adams, (now Love B. Atkinson), and Gaines Jasper the sum of $6,000 with interest thereon at the rate of 6 per cent. per annum from December 11, 1926, for the use and benefit of the creditors of the Blytheville Feed & Coal Company as of that date. A list of such creditors is contained in the audit report of Neville Audit Company, covering a period from January 1, to November 19, 1926. The decree also said: "Whether the money of the corporation, converted by the parties, was used in the purchase of property belonging to Love B. Atkinson, is reserved."

There is practically no dispute about the material facts. The appellees contend, and the court found, that Gaines Jasper and Mrs. Atkinson became liable to all the creditors of the Blytheville Feed & Coal Company to the extent of money taken from its treasury. And it is contended that the corporation was never dissolved. The appellee does not say why it was not dissolved, but makes the contention that it was not.

Section 1823 of Crawford & Moses' Digest reads as follows: "Any corporation may surrender its charter by resolution adopted by the majority in value of the holders of the stock thereof and a certified copy of such resolution filed in the office of the Secretary of State and a copy thereof filed in the office of the county clerk of the county in which such corporation is organized shall have effect to extinguish such corporation."

After Gaines Jasper became the owner of all the stock, he complied with the above statute, and the corporation was thereby extinguished. It is said that a corporation is an entity, irrespective of and entirely distinct from the persons who own its stock. All of the shares of stock in a corporation may be held by a single person, and yet the corporation continue to exist, and if the charter or bylaws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares so as to conform to the letter of the rule, and the fact that one person owns all the stock in a corporation, does not make him and the corporation one and the same person.

A corporation does not lose its legally distinct and separate personality by reason of the ownership of the whole of its stock by one person. *Commonwealth ex rel. Atty. Gen.* v. *Monongahela Bridge Co.,* 216 Pac. 108, 64 Atl. 909; *Parker* v. *Bethel Hotel Co.,* 96 Tenn. 252, 34 S. W. 209; *Newton Mfg. Co.* v. *White,* 42 Ga. 148; Re J. D. Belton, 47 La. Ann. 1614, 18 So. 642, 30 L. R. A. 648.

This court said: "And when from death or disfranchisement so few remain that by the constitution of the corporation they cannot continue the succession, to all purposes of action at least, the corporation itself is dissolved. As long, however, as the remaining corporators are sufficient in number to continue the succession, the body remains; as though all the monks of an abbey died, yet, if the abbot was alive, the corporation was not determined, since the abbot might profess others." *Blackwell* v. *State,* 36 Ark. 178.

Gaines Jasper became the owner of all the stock of the Blytheville Feed & Coal Company, but this did not either dissolve the corporation or make him and the corporation the same person. He had a right to comply with the law and dissolve the corporation, and, when he did this, the corporation no longer existed. It could neither sue nor be sued, nor hold nor convey property. In fact, as said by the statute above quoted, such corporation is extinguished. Of course, this could not pre-

vent a suit by the proper parties against the stockholders for misappropriating funds which belonged to it before its dissolution.

The Blytheville Feed & Coal Company did not go into bankruptcy. In fact, the appellees contend that the corporation was never dissolved, and that it is still in existence, but it is not contended that it was in bankruptcy, or that any trustee in bankruptcy was ever appointed for its creditors. Max B. Reid was appointed in the bankruptcy proceedings of Gaines Jasper, and this would give him no authority to sue for the benefit of the creditors of any one except Gaines Jasper. He therefore had no authority to bring or maintain a suit for the creditors of the Blytheville Feed & Coal Company.

It is also alleged by appellees and not disputed that, when Gaines Jasper surrendered the charter of the corporation, he assumed the debts of the corporation. He would be liable for the debts, of course, whether he assumed them or not, to the extent of the value of the property he received.

The undisputed evidence shows that the Memphis Coal Company knew all about the facts; it knew that Gaines Jasper was operating as an individual, and was attempting to pay the prior debts of the corporation. The undisputed evidence shows that there was an effort made to form a new corporation, and that the articles were actually signed. One of the officers of the Memphis Coal Company was a party to this, and the Memphis Coal Company agreed to it. This corporation, however, was not perfected, and the Memphis Coal Company continued to sell to Gaines Jasper, individually, although he was operating under the name of the old corporation.

Mrs. Atkinson and Jasper, if they misappropriated the funds of the corporation, as found by the court, would be liable to the creditors of the Blytheville Feed & Coal Company, but not liable to the creditors of Gaines Jasper.

The undisputed evidence also shows that more than the amount due the Memphis Coal Company at the time

of the surrender of the charter of the Blytheville Feed & Coal Company was paid to it after the surrender of the charter. There is no dispute about this, and, if the Memphis Coal Company's debt owed by the Blytheville Feed & Coal Company had been paid, it could not collect a debt against Gaines Jasper, either from Mrs. Atkinson or from the property of the corporation. Its remedy would be against Gaines Jasper.

The payments made to the Memphis Coal Company should be applied to the oldest items, unless there is some reason for making a different application, and the evidence shows none in this case. The evidence does not show the application of the payments; that is, there is no evidence tending to show whether either the debtor or creditor gave any directions as to how the payments were to be applied.

"Subject to some limitations, the general rule is that, in case of a running account, where there are various items of debt on one side, and various items of credit on the other, occurring at different times, and no special appropriation of payments has been made by either party, the successive payments are to be applied in discharge of the items of debit antecedently due, in the order of time in which they stand in the account. In other words, each item of payment is applied in extinguishment of the earliest items of debit until the payment is exhausted." 48 C. J., 657; 30 Cyc. 1243; *Jones* v. *Dowell,* 176 Ark. 986, 4 S. W. (2d) 949.

Applying this rule, the debt due from the Blytheville Feed & Coal Company to the Memphis Coal Company was paid before this suit was brought, unless it is shown by the evidence that a different application was made by the parties.

If the creditors knew nothing about the surrender of the charter, and did not know that Gaines Jasper had acquired all the stock, but still extended credit with the belief that they were selling to the corporation, they would be entitled to recover, and, if the funds had been

misappropriated by Jasper and Mrs. Atkinson, they would be entitled to recover against them.

The suit, however, could not be maintained by Reid, as trustee for the creditors of Gaines Jasper, but the suit would have to be brought by the creditors.

Jasper and Mrs. Atkinson could not appropriate or dispose of the property belonging to the corporation without being liable to the creditors of the corporation to the extent of the value of the property appropriated by them.

The court decreed that the plaintiffs were entitled to recover for the use and benefit of the creditors of the Blytheville Feed & Coal Company as of the date December 11, 1926.

The only showing about creditors of the corporation is the audit report of the Neville Audit Company, which was from January 1, to November 19, 1926. There is no showing whether payments were made after this time on behalf of the corporation, and in a retrial of the case it will be necessary to show the indebtedness, if any, due each one.

A recovery may be had in a suit by proper parties against Gaines Jasper and Mrs. Atkinson for the debts of the Blytheville Feed & Coal Company, due at the time of the beginning of this suit, not exceeding the sum misappropriated by them.

The pleadings show that there was a prayer for a receiver, but the abstract does not show whether a receiver was appointed. But the suit for the benefit of the creditors of the corporation would have to be brought, not against the corporation which has been dissolved, but against the parties misappropriating the funds of the corporation.

The decree of the chancery court is reversed, and the action in favor of Max B. Reid, trustee, is dismissed, and the cause of action by the Memphis Coal Company is remanded with directions to permit proof to be taken as to the application of payments, and to determine the amount of indebtedness, if any, due from the Blythe-

ville Feed & Coal Company to the Memphis Coal Company at the time this action was begun.

ARKANSAS BAKING COMPANY *v.* WYMAN.

Opinion delivered February 22, 1932.

A. W. Taylor and *DeWitt Poe,* for appellant.
Compere & Compere, for appellee.

McHaney, J. Appellee sued appellant for damages for the injury and death of his infant son, seven years of age, caused by the alleged negligence of appellant in driving its automobile truck against that of appellee while driving along a highway between Warren and Monticello, both traveling in the same direction. The accident occurred on the 26th day of December, 1930. The appellant's bread truck was driven into the rear end of appellee's truck with such force and violence as to dislodge and throw to the ground several persons riding on the rear of appellee's truck. Appellee, his wife and three children were riding in the cab of the truck, the little son, Wayne, sitting between his mother and father with his feet hanging down and his back some distance from the back of the seat. It is alleged that the impact from the collision threw the child back against the back of the seat in such a way as to injure the back of his head and neck near the base of the brain, causing a severe and painful injury, from which he died on January 16, 1931. Appellant denied the material allegations of the complaint, and the case was tried to a jury, which resulted in a verdict and judgment against appellant in the sum of $5,000 for the benefit of the estate for pain and suffering, and in the sum of $3,806.50 "for the benefit of the next of kin for medical bills, funeral expenses and loss of services during minority."

For a reversal of the judgment, it is first insisted that the evidence is insufficient to support the verdict; that it does not show that the deceased received any injury in the accident; and that it was impossible for the deceased to have received an injury at the place alleged by reason of the accident. It is true that at the time of the accident, which is undisputed, appellee did not know that his son had received an injury and did not know it for some days thereafter, although he knew that his little son was complaining about his head hurting him. At the time of the accident, as stated above, four or five persons riding on the rear of the truck were thrown out, and all the others except the deceased got out of the car

on account of the accident. Appellee soon discovered that there was no substantial damage to his car, and, although his car was knocked 40 or 50 feet down the road and they were all considerably shaken up, appellee did not know any person had been seriously injured. Dr. Smith, who examined the child about eighteen days after the accident, testified that the child had an injury at the back of his neck, about the edge of the hair and that such injury was caused from a lick received in that place. The evidence further shows that the child began complaining about his head shortly after the accident, and that he continued so to complain until his death. Shortly after the accident appellee discovered that bloody water was coming from the child's ears and nose, took the child to a physician who made a perfunctory examination and prescribed a wash for the bloody discharge. This physician was not advised that the child had been in an accident, as it did not occur to appellee at that time that he was suffering from an injury received therein. We think the evidence was sufficient to take this question to the jury under all the facts and circumstances, especially so in view of the fact that the child did not get out of the truck with the others during the excitement caused by the accident, and began to complain of his head hurting him only a short time after leaving the place of the accident. Nor do we think we can say as a matter of law that it was impossible for the child to have received the injury it did receive in the place and in the manner stated. This was a question for the jury. The evidence when viewed in the light most favorable to appellee, as we must do in determining its sufficiency, was such that the minds of reasonable men might differ as to the cause of the injury, and we cannot set the verdict aside on this account.

It is next insisted that there is no sufficient showing that the truck that caused the accident was appellant's property, was being used at the time of the accident in its business, or that the driver of the truck was in its employ and that he was engaged in the business of appellant at the time of the accident. It is undisputed that the

truck that caused the accident had appellant's name printed or painted thereon. It is further undisputed that this truck, or a like truck bearing the name of appellant, traveled over this highway daily. The evidence further shows that a short time prior to the accident, while appellee and another were in Warren they saw this same truck and the same driver who caused the accident delivering bread or other articles of merchandise to a customer in Warren. We think this evidence sufficient to establish the fact that the truck belonged to appellant, and that it was being operated at the time of the accident by its employee, and that this was sufficient to raise the inference that at the time of the accident he was acting within the scope of his employment and in the furtherance of his master's business. *Casteel* v. *Yantis-Harper Tire Co.*, 183 Ark. 912, 36 S. W. (2d) 406; *Mullins* v. *Ritchie Grocery Co.*, 183 Ark. 218, 35 S. W. (2d) 1010; *Terry Dairy Co.* v. *Parker*, 144 Ark. 401, 223 S. W. 6. The facts established were sufficient to take this question to the jury, aside from the admissions of appellant's counsel made in his opening statement to the jury.

It is next argued that the verdict, both for the value of the services of the deceased during minority and for pain and suffering, was excessive. It appears that appellee incurred $56.50 for medical attention and funeral bills. There was a net amount of recovery for loss of services of $3,750. It is argued that this amount is excessive because it amounts to nearly $400 a year or approximately $1.25 for every working day for fourteen years. In *Morel* v. *Lee*, 182 Ark. 985, 33 S. W. (2d) 1110, we allowed a recovery for pecuniary damages in the sum of $2,500. In this case, however, the child was the son of a small farmer, well developed and a strong able-bodied boy. While he had not reached that age that his services would be of very great value, he was able to run errands, do chores and numerous other things about the farm of value to appellee. It is well known that a boy, so reared by a father in poor or moderate circumstances, is required to work, and, when quite young, must

do a man's work in assisting his father to make a living for the family. It is true that they are required to go to school a portion of the year, but it is quite usual in farm communities to so arrange the terms of school as to permit the children to assist their parents in the growing and gathering of crops. We have reached the conclusion that the amount of the verdict in this respect was a question for the jury, and it does not appear to be so excessive under the circumstances stated as to justify us in reducing it. Neither can we say that the judgment for pain and suffering is excessive. On the contrary, it appears to us to be a moderate allowance. The child lived 21 days after its injury, and a number of witnesses testified that it suffered continuously, having to be rested on a feather bolster and that although during this time it was taken to physicians for examination two or three times, it finally reached the point where the physician had to come to see it, and at that time it was too near death to be taken to a hospital for an X-ray.

The only other question we find it necessary to discuss is that relating to the hypothetical question asked Dr. Wm. B. Grayson, an expert witness. Before putting Dr. Grayson on the stand, a number of witnesses had testified regarding the accident, how it occurred, the actions and demeanor of the child, its complaints of injury and to other facts and circumstances relating to the manner of the supposed injury. There was no conflict in any of this testimony. Dr. Smith was examined and testified that he had personally examined the child and found a bruised place on the back of his head near the base of the brain which was caused from an injury. Dr. Grayson was then put upon the stand and asked whether he had been sitting in the court room all day and had heard all the witnesses testify, and he answered that he had been in the court room, and thought he had heard them all; whether he had paid attention to the testimony as given by all the witnesses with reference to the manner of the alleged injury to the child, the symptoms that were shown by him, the appearance of his body, and he answered that

he had. He was then asked this question: "If this testimony is found to be true, Dr. Grayson, we want to ask you what, in your opinion, based on this testimony as you have heard it, and upon your experience and knowledge as a physician and surgeon, was the cause of the death, in your opinion of Wayne Wyman?" The witness was permitted to answer the question over the objections and exceptions of appellant that the child's death was caused by traumatism which is considered an injury due to a blow direct or indirect. Appellant objected to the question on the ground that numerous witnesses had testified to different conditions and symptoms, and that the evidence was in conflict so that it was impossible for his answer to show what testimony he believed or accepted or what he did not, or upon what conditions or symptoms he based his answer. We have read the testimony carefully, and we fail to find any substantial conflict in the testimony as to how the injury occurred. In addition, it is argued here now that his answer was based in part upon the testimony of Dr. Smith, but at the time it made no objection to the question on that ground. It is true that the better practice is, in eliciting the opinion of an expert witness, to ask a hypothetical question detailing all the undisputed facts which must be included and all the facts assumed to have been established by the party propounding the question may be included, if relevant. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; *Newport Mfg. Co.* v. *Alton,* 130 Ark. 542, 198 S. W. 120; *Mo. State Life Ins. Co.* v. *Fodrea, ante* p. 155. An expert cannot be asked his opinion upon disputed questions of fact except upon hypothetical statement, unless he is personally acquainted with the material facts in the case. *Ringlehaupt* v. *Young,* 55 Ark. 128, 17 S. W. 710. It was held in that case that there are two methods of eliciting the opinion of an expert on matters not depending upon general knowledge, but on facts not testified of by himself, and one of them is that the witness is present and hears all the testimony, and

the second is to ask a hypothetical question. The same rule was announced in *St. L. I. M. & S. R. Co.* v. *Williams,* 108 Ark. 387, 158 S. W. 494, where it was said: "If the expert has been present and heard all the evidence as to the symptoms and appearances, detailed upon the trial, he may give his opinions upon the fact so stated, if they be found true by the jury, but cannot himself judge of their truth." Appellant argues that the holdings in both cases are *dicta,* but, whether they are or not, such seems to be the general rule where the witness is present and heard all the testimony, which is not in conflict. It is argued that Dr. Norman testified that the child was suffering from infantile paralysis, but Dr. Norman did not testify until after Dr. Grayson had given his opinion on the facts then in evidence. Assuming that appellant's objection to the question asked Dr. Grayson covered the testimony of Dr. Smith and that his argument now made against the expert's testimony as being based on another expert's opinion, our holding in the Mo. State Life Ins. Co. case, *supra,* is contrary to appellant's contention. Dr. Smith did not testify as an expert witness. He gave his diagnosis from a personal examination. He was not asked any hypothetical question, and the opinion of Dr. Grayson cannot be said to be based in part on another expert's opinion.

Other assignments of error are suggested and urged for a reversal which we have examined and cannot sustain. No useful purpose could be served by a discussion of them, and we therefore refrain from doing so.

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

KOSS CONSTRUCTION COMPANY *v.* VANDERBURG.

Opinion delivered March 7, 1932.

Buzbee, Pugh & Harrison, for appellant.

Arthur Cobb and *Murphy & Wood,* for appellee.

HART, C. J. This is an appeal by Koss Construction Company, a corporation, from a judgment rendered against it for damages on account of the personal injury of G. L. Vanderburg, one of its employees, alleged to have been caused by the negligence of appellant.

G. L. Vanderburg was a witness for himself. According to his testimony, he was twenty-eight years of age at the time he was injured, and had been engaged as an employee on construction work since he was fourteen years of age. He commenced to work for appellant some time in August, 1930, and continued to work for it until he was injured along about the 23d day of December, 1930. He was employed as a concrete finisher at the time he was hurt. Appellant was engaged in building a bridge across a stream on a public highway; and, at the particular time in question, was finishing concrete on the bridge. After the concrete is poured, it is necessary to smooth it up and finish it, to prevent it from setting in a rough and irregular way.

Herbert Legler was superintendent of construction for appellant. He was over all the employees and could tell each one what part of the work to do, and whom to obey. About three or four weeks previous to the accident, Legler told appellee to help W. E. York at any time he might need assistance. At that time, the construction company had taken over the ferry at the stream over which the bridge was being constructed, and York was operating the ferry. On the occasion in question,

the river was rising, and York had to have assistance to raise the cable by which the ferry was operated. Appellee was not called upon by York at any other time until the date of the accident.

On that day, Ira Ware was left in charge of finishing the concrete after the day's work was done. At the same time, Legler told appellee to stay and help Ira Ware smooth the concrete. W. E. York was night watchman, and he had charge of furnishing the electric light by which Ware and appellee worked. Between eight and nine o'clock in the evening, York called to Lee Ware to come down there because the water was out of the boiler. Ware told appellee to go down and do whatever York told him to do. When appellee got down to the pumping place, York had turned the lights off and was throwing the fire from the boiler in order to prevent it from exploding. Appellee went down and started the pump, but could get no results.

York then told appellee to go up on the hill, climb upon the tank, and see why the water wasn't passing into it. The tank was sitting upon beams about sixteen or eighteen feet above the ground. There were cross braces nailed to the beams in order to strengthen and support them. At the top of the beams and surrounding the bottom of the tank were pieces of lumber two by six inches in diameter with the edge side up. These were placed there for the purpose of steadying the tank. There was a piece of two-inch pipe fastened about six feet from the bottom of the tank through which the water was carried to the top of the tank. The water pipe was not fastened at the top of the tank on the occasion in question, but appellee did not know of this fact.

Pursuant to the directions of York, appellee climbed upon the cross braces, and put his left foot up on one of the two by six pieces, and then caught hold of the two-inch water pipe to brace himself, so that he could climb up on by the two by six pieces and look into the tank to see if the water was flowing into it through the pipe.

There was nothing to stand upon except the two by sixes, which, as above stated, were placed around the tank to keep it from rocking. York did not explain the conditions surrounding the tank to appellee, and he did not know what they were. When he caught hold of the water pipe with his left hand, it pulled off of the tank at the top and caused him to fall and strike on some lumber about eighteen feet below, injuring him severely. On cross-examination, appellee stated that he had worked for three years for the Texas Utilities Company, which used the same kind of tanks. This company required the water pipes to be securely fastened to the tank. When appellee caught hold of the water pipe, his foot slipped, and he went downwards, carrying the pipe over the edge of the tank with him. He was shaken loose and fell on a piece of timber on his right hip. His head was about a foot and a half or two feet above the top of the frame at the time. He had hold of the pipe with his left hand, and when his foot slipped, he started falling, and the pipe came over with him.

According to the testimony of Ira Ware, Legler told him to stay there and finish smoothing the concrete, and that he was leaving appellee there to help him. Ware supposed that he was the one to see that the concrete was finished, and that it was his business to direct appellee in the work. He does not know what happened after he told appellee to leave the bridge and go to the assistance of York. Other testimony for appellee tended to corroborate the above.

W. E. York was one of the witnesses for appellant. According to his testimony, he was night watchman at the time of the accident, and also ran the ferry boat. He did not boss appellee or any one else. On the evening of the accident, York asked appellee to come down and help start the pump. After starting the pump, they did not know whether or not the water was flowing into the tank. York first went up and listened and could not hear the water flowing into the tank. He then told appel-

lee, who had had more experience in matters of that sort, to go up and see about it. He did not tell him to climb up on the tank.

According to the testimony of Herbert Legler, he was superintendent of appellant, and appellee and Ira Ware were common laborers. W. E. York was night watchman. He had no authority over any of the men. The water pipe was placed up the side of the tank in order to carry water to it. It was not necessary nor was it intended to be used for the purpose of climbing upon the tank. There was a ladder near there which could be used for that purpose, for it was necessary to find out whether the water pipe was stopped up with sand or other matter. The ladder was standing within ten feet of the tank at the time the accident occurred.

In rebuttal, another employee of the company testified that he had climbed the cross braces two or three times in the daytime to see if the water pipe had become clogged up. He said that there were ladders around there but none at the tank.

The principal contention of appellant for a reversal of the judgment is that York was not its vice principal, and had no authority to direct or to command appellee to climb upon the tank in the night on the occasion he was injured.

On the other hand, it is sought to uphold the judgment on the ground that the service which appellee undertook to perform at the time he was injured was required by a superior servant, and was such as to demand that he act at once. Hence, it being an emergency calling for promptness and rapidity, it would be unreasonable to require of him that care and scrutiny of his place of work as would be the case where there was time for observation and deliberation. The claim is that the case falls squarely within the doctrine announced in *Southern Cotton Oil Company* v. *Spotts,* 77 Ark. 458, 92 S. W. 249; and *Michigan-Arkansas Lumber Company* v. *Bullington,* 106 Ark. 25, 152 S. W. 999, and other cases of this court.

It is insisted that the fact that appellee was directed by York to climb the tank and see if the water pipe had been clogged up created an emergency, and that he had no opportunity to examine the place and discover the danger he was about to encounter. In this situation, it is claimed that the doctrine of assumed risk is inapplicable, and that appellee cannot be held to have assumed the risk of a danger about which he knew nothing and had no opportunity to inform himself.

Many other cases calling for the application of the doctrine above announced have been decided by this court, and the doctrine has been applied according to the facts of each particular case. Therefore we do not deem it necessary to cite or review these cases.

We do not think this is a case calling for the application of the doctrine. There was no evidence from which the jury might have found the existence of facts to make either Ware or York a vice-principal. The most that can be said of Ira Ware is that he was left in charge of smoothing out the concrete, and had no other duty to perform on the occasion in question. Appellee was left to help him in this work, and there is nothing to show that Ware had the control or jurisdiction over the other employees. There was nothing about the work which would require Ware to be in superintendence and control of the other workmen as vice-principal. It is not the law that, because two or more men are engaged in the same work, the duty of supervision of one of them over the others, follows as a legal obligation. To put the mere details of the work under one man does not make him a vice-principal over the others. If such was the case, in every piece of work, whether hazardous or not, it would be necessary to employ one person to oversee the others. Ware was merely the leader of the work of smoothing the concrete, and appellee was left to assist him. It is a matter of common knowledge that, in plough gangs and persons engaged in hoeing cotton, one of them is usually the leader; but this does not give him any

control or supervision of the others. If Ware was not the vice principal of appellant, he could not have directed appellee to have gone into a place of danger, and thereby have relieved him from the doctrine of assumed risk.

But, it is earnestly insisted, York was a vice principal. To sustain this theory, it is pointed out that Legler, the regular superintendent of appellant had on one occasion three or four weeks before the date of the injury, directed appellee to help York whenever he might need assistance in his work of operating the ferry. It is claimed that the general direction given on that occasion warranted the jury in finding that York had general supervision and control over appellee in any part of the work intrusted to his care. In the first place, we think that the only legitimate construction that could be put upon the direction of Legler would be that appellee was to help York in raising the cable by which the ferry was operated, and in other work pertaining to the ferry. As far as the service of York was concerned, there was nothing in the circumstances from which the jury might have inferred that he had any dominion or control over appellee. Ware, appellee and York were all engaged in finishing up the concrete so that it could not set in an irregular manner. The work was harmless and required no supervision. Ware and appellee were directed to smooth the concrete, and York was engaged in pumping water to furnish light for that purpose, and also for the purpose of enabling him better to discharge his duties as night watchman. There is a difference between a leader of a crew of men, merely charged with the duty of overseeing the work, and one in which authority is given to one man to have superintendence, control and dominion over the other men, in order to properly carry on the work.

We think the case falls squarely within the principles of law decided by this court in *Williamson & Williams* v. *Cates*, 183 Ark. 579, 37 S. W. (2d) 88. Ware, appellee and York were all fellow-servants, and neither York nor Ware had supervision, control or dominion

over appellee in the sense that either was a vice principal of appellant. Therefore it was error for the court below to refuse to direct a verdict in favor of appellant under the doctrine of assumption of risk.

It is also insisted that the judgment should be upheld under the rule laid down in *Booth & Flynn* v. *Price,* 183 Ark. 975, 39 S. W. (2d) 717, 76 A. L. R. 957, where it was held that where an emergency exists requiring immediate action to protect the master's interest, the servant has implied authority to employ help, and that the person so called upon is not required to exercise the same care for his own safety as in ordinary cases where no such emergency exists. We do not think that case has any application to the facts of the present case. Appellee was not engaged in an effort to save the property of appellant or to protect the lives of any one for it. As we have had occasion to say in former opinions, courts cannot trespass upon the power and functions of the Legislature. This was an unfortunate accident, which is another case illustrating the justness of a reasonable compensation act; but we can not encroach upon the power of the Legislature by judicial fiat.

The views we have reached above render it unnecessary to consider or to determine the other assignments of error argued in the briefs of counsel. Inasmuch as the case seems to have been fully developed, no useful purpose could be served by remanding it for a new trial. Therefore the judgment will be reversed, and the cause of action will be dismissed here. It is so ordered.

PURVIS *v.* HORNOR.

Opinion delivered March 7, 1932.

W. G. Dinning, for appellant.

Bevens & Mundt and *Moore, Daggett & Burke,* for appellee.

SMITH, J. This suit was brought at law to recover possession of a life insurance policy which was issued upon the life of C. H. Purvis on December 31, 1894, for $2,500.

On January 8, 1900, Purvis became indebted to S. H. Hornor in the sum of $1,650, evidenced by two notes each for the sum of $825. These notes represented a portion of the purchase price of a home that was then being purchased by Purvis, and were secured by a second mortgage on that property. Purvis and Hornor had numerous other financial transactions. It was shown, and not denied, that the home which Purvis was purchasing was mortgaged to a building and loan company, and that this loan was discharged by monthly payments made by Hornor extending over a period of years in accordance with the building and loan plan of payment.

On January 9, 1900, the insurance policy was twice assigned to Hornor. One of these assignments appears to have been made by filling in the blank spaces printed on the policy designed for use in case of assignment, a copy of which was sent to the insurance company. This assignment reads as follows:

"For value received I do hereby assign, transfer and set over the above-described policy of assurance, and all sum or sums of money, interest, benefit, and advantage whatsoever, now due or hereafter to become due by virtue thereof, unto S. H. Hornor as his interests may appear.

"Subject to all the terms and conditions expressed in said policy.

"Witness my hand and seal this 9th day of January, 1900.

(Signed) "C. H. Purvis.

"Signed in presence of
"B. A. Dunlap."

In the space reserved for the name of the assignee in the blank upon which the above assignment was made there was a * calling attention to a direction at the bottom of the assignment as to how the assignment should be made, which reads as follows:

"*Insert here full name and relationship of person to whom policy is assigned, and, if a creditor, state amount of indebtedness.

"The company does not guarantee the validity of any assignment."

Attached to this assignment were two canceled internal revenue stamps of one dollar each.

On the back of the policy there was written the following assignment:

"For value received I hereby assign, transfer and set over to Sidney H. Hornor and authorize the payment of the within policy to him or his assigns, whenever the same becomes due under the terms of said policy. This January 9th A. D., 1900.

"Signed in duplicate.

(Signed) "C. H. Purvis.

"Witness:
"B. A. Dunlap."

It thus appears that there are two assignments indorsed upon the policy, both under date of January 9, 1900, and each was witnessed by B. A. Dunlap. One is conditional; the other is unconditional. The conditional assignment was written with pen and ink, and was shown to have been in the handwriting of J. J. Hornor, who at that time was one of the leading lawyers of the State. J. J. Hornor died in 1905. S. H. Hornor, the assignee, died November 18, 1900, and Dunlap, the witness to both assignments, died some years before this suit was begun,

and only the assignor, the plaintiff in the case, is now living. It was shown, and not disputed, that all premiums on the policy were paid after its assignment by the representative of the estate of S. H. Hornor.

No explanation was made by Purvis of the two assignments except that the purpose of both was to secure the indebtedness of Purvis to Hornor. Much testimony was offered as to the state of the accounts between them. The testimony on behalf of Purvis was to the effect that the policy was assigned as additional security for the current debts of Purvis to Hornor, and that the indebtedness thus secured was finally paid in full. The testimony on behalf of the defendant, who is the son of S. H. Hornor, and who claims the right to retain the policy as a part of his father's estate, was to the effect that the assignment was unconditional, and that the entire indebtedness due from Purvis to Hornor had never been paid.

Upon this issue of fact the court charged the jury at the request of the plaintiff that, if the policy had been assigned as security for debt, and the debt had been paid, the plaintiff was entitled to the possession of the policy. The court also charged the jury upon his own motion that this finding might be made by a preponderance of the evidence.

The court gave, at the request of the defendant and over the objections of the plaintiff, two instructions, which read as follows:

"II. The undisputed evidence in this case shows that one of the assignments of the policy sued for herein, absolute in its terms, was executed by the plaintiff to S. H. Hornor, January 9, 1900. The plaintiff seeks to avoid the effect of such absolute assignment by the introduction of evidence to the effect that such assignment was, in fact, made for the purpose of securing an indebtedness which then existed between him and the said S. H. Hornor, which said indebtedness was afterwards discharged by him. You are instructed that the law presumes an instrument to be what it seems to be upon

its face, in this case, an absolute assignment and not an assignment to secure an indebtedness. Therefore, before you could be warranted in returning a verdict for the plaintiff herein, the evidence that the absolute assignment was in fact not an absolute assignment, but conditional for the purpose of securing an indebtedness, the evidence to that effect must be clear, satisfactory and convincing to your minds."

"V. You are instructed that the assignment 'to S. H. Hornor as his interest may appear', shown on the policy herein, is merged into the absolute assignment appearing on the policy in the handwriting of J. J. Hornor dated January 9, 1900, unless you find that the intention of the parties at the time of the absolute assignment was to secure the payment of the plaintiff's indebtedness to the said S. H. Hornor."

We think these instructions are erroneous under the testimony in this case. It must be remembered that there were two assignments, and that they both bore the same date, and the case presents just two questions of fact. The first is, which assignment reflected the intention and agreement of the parties? and the second is, whether the indebtedness which the policy was pledged to secure has been paid, if the assignment was, in fact, conditional?

If the second assignment set out above had been the only assignment, it would, of course, have been proper to tell the jury that it could not be treated as a mere pledge unless the testimony to that effect was clear, satisfactory and convincing. But there is another assignment, and, according to it, the policy was pledged as security for debt, and was not transferred in satisfaction of the debt.

It would be true, of course, that the plaintiff could not recover possession of the policy unless the debt had been paid, even though it had been transferred conditionally, as plaintiff insists.

The jury should have been permitted to find from a preponderance of the testimony only which assignment

reflected the agreement between the parties, and then, if it be found that the assignment was conditional, and not absolute, whether the condition had been performed—that is, whether the debt which it was intended to secure had been paid.

The testimony is legally sufficient to support a finding either way on these questions, and the verdict of the jury would be conclusive of these questions of fact, had the instructions not imposed the requirement that the plaintiff must establish his case by testimony that was clear, satisfactory and convincing.

In our opinion a preponderance of the testimony only was required, and for this reason the judgment must be reversed, and it is so ordered.

School District No. 10 *v.* County Board of Education.

Opinion delivered March 7, 1932.

Jack Machen, for appellant.
Ezra Garner, for appellee.

KIRBY, J. This appeal comes from a decision of the circuit court denying a petition for certiorari to bring up and quash the order of the county board of education changing the boundary lines between School Districts 10 and 66 in Columbia County.

The petition was filed for the change of the boundaries between said districts on May 5, 1931, before the board of education, accompanied by a map showing the proposed changes.

The purpose of the petition and its effect, if granted, was to take from School District No. 10 a strip of territory, varying in width from one-fourth to one-half mile and extending across the entire west side of the district, and annex same to Emerson School District No. 66. Within this territory was located a tank farm with an assessed valuation of $57,380, the Southwestern Bell Telephone Company's transmission lines with an assessed valuation of $872, the Louisiana & Northwest Railroad with an assessed valuation of $16,500, the Arkansas Transit Company with an assessed valuation of $860, "or property, exclusive of the value of the territory proposed to be detached, of the total valuation of $75,742."

The county board of education called a joint meeting of themselves with the directors of the two districts concerned for the purpose of making the change of the boundary lines, and the board of directors were unable to agree to the change proposed, and the board of education changed and adjusted the lines as prayed for in the petition. School District No. 10 was present with its entire board of directors, and its attorney on May 15th, had notice of the action of the board of education, but took no appeal from the order changing the boundaries.

On June 30, appellant filed its petition in the Columbia Circuit Court for a writ of certiorari which was by the court denied, final order being entered on August 25, 1931, from which this appeal was prosecuted.

It is insisted that the county board of education was without jurisdiction to make the order because no petition was filed by a majority of the qualified electors in

District No. 10 asking for a change of boundaries, nor any election held to ascertain whether a majority of the electors of the territory affected favored the change, nor was a petition filed by qualified electors asking the detachment of the territory from District No. 10 to be annexed to District No. 66, nor any legal notice given relative to the proposed change of boundaries.

Decision of the question necessitates a construction of §§ 44 and 52 of act 169 of 1931, which appear to be in conflict about the procedure required. Under the terms of said § 44 the board is given the same authority for a change of boundary lines of school districts, the formation of new districts, the dissolution of existing districts, the transposition of territory of old districts, and the law requires that it can exercise such authority on the consent of the majority of electors in each school district affected as shown by petition or elections as herein provided, and also provides the method for holding the elections or presenting the petitions, the giving of notice, etc. Section 52 appears to provide for an adjustment or change of boundary line or lines between adjoining districts upon application made by the directors of any district after 10 days' notice of a call for a joint meeting of the directors of the districts affected with the county board of education, and that the chairman of the board may make the order changing the boundary line or lines between the districts upon approval of a majority of the members of the school boards of the districts, and, if they are not able to agree to the proposed change of boundary lines, the county board may either change or fix the boundary line or deny the relief asked and let the boundaries remain unchanged.

Appellant insists that appellee wrongfully attempted to annex some of its best revenue producing territory to appellee district under the guise of asking a change of boundary lines between the districts and in violation of the law providing for annexation of territory.

Said § 44 of said act gives plenary authority to change the boundary lines of school districts on consent

of the majority of electors in each school district affected, and, if such change is in effect taking territory from one district and adding it to another, it cannot be done otherwise than in accordance with the provisions of said section and the procedure as for dissolution of districts, taking territory from one and adding to another, and making new districts therefrom.

Said § 44 is virtually a re-enactment of the old statute, § 8823 of Crawford & Moses' Digest, subsequently amended by act 156 of 1927, requiring a majority petition from the electors of each district affected by the change in boundary lines, instead of a majority of electors from the districts divided in order to confer jurisdiction upon the board. Under either of these statutes the consent of a majority of the electors, as shown by the petition filed with the board, was necessary to give it jurisdiction to change the boundary line between the school districts. *Stephens* v. *School Dist.,* 104 Ark. 145, 148 S. W. 504; *District No. 45* v. *District No. 8,* 119 Ark. 149, 177 S. W. 892; *Hughes* v. *Roebuck,* 119 Ark. 592, 179 S. W. 163; *Consolidated Dist. No. 2* v. *Special District 19,* 179 Ark. 822, 18 S. W. (2d) 349.

No notice was given of the proposed change of the boundaries amounting to annexation of territory, in accordance with said § 44, nor any petitions presented or election held for that purpose, and the county board was without jurisdiction or authority to make the order changing the boundary lines, in effect taking a very substantial part of the territory of one district and annexing it to the other under the guise and procedure as for a change of boundary lines only. Having no such jurisdiction, the board's order was void, and could be quashed on certiorari, and the court erred in not granting the desired relief. The judgment is reversed accordingly, and the cause will be remanded to the circuit court with directions to grant the petition for certiorari and quash the order of the county board of education changing the boundary line of the districts petitioned for. It is so ordered.

MUTUAL LIFE INSURANCE COMPANY *v.* MARSH.

Opinion delivered March 7, 1932.

[redacted]

Frederick L. Allen and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Martin & Martin, for appellee.

MEHAFFY, J. The appellee brought suit on an insurance policy for $3,000 and 12 per cent. penalty and attorney's fees.

The appellant is a citizen of the State of New York and the appellee is a citizen of the State of Arkansas. The appellant filed its petition for removal to the Federal court, alleging diversity of citizenship, and that the amount in controversy exceeds the sum of $3,000.

The appellant filed a bond and prayed that the court proceed no further, and that the cause be removed to the United States District Court.

The circuit court denied the petition, and appellant filed answer, the case proceeded to trial, and there was a judgment for $3,000 and $360 penalty, and a $500 attorney's fee. Motion for a new trial was filed and overruled, and an appeal granted to the Supreme Court.

The only question we find it necessary to determine is, whether the cause was removable to the Federal court. The Federal statute provides: "Any suit of a civil nature at law or in equity, arising under the Constitution or laws of the United States, or treaties made under their authority, of which the district courts of the United States are given original jurisdiction in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district.

"Any other suit of a civil nature at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of the State." Title 28, § 71, U. S. Code, Annotated.

It is also provided by the Federal statute: "The district courts shall have original jurisdiction as follows: (1) Of all suits of a civil nature at common law or in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and is between citizens of a State and foreign States, citizens or subjects." Title 28, § 41, U. S. Code, Annotated.

The diversity of citizenship is not disputed, but appellee contends that the cause was not removable because, he says, under the decisions of the Federal court, § 6155 of Crawford & Moses' Digest, is unconstitutional. The contention is that, while this court has held the statute valid, the Federal court has held that it is void.

If this section is valid, it necessarily follows that the amount in controversy exceeds $3,000, exclusive of interest and costs. He sues for $3,000 and 12 per cent. damages and attorney's fees. Section 6155, *supra,* provides that the attorney's fees shall be taxed as costs, but it does not provide that the 12 per cent. penalty shall be taxed as costs. Therefore the amount in controversy was $3,360.

Appellee calls attention to *Standard Accident Ins. Co.* v. *Rossi,* 35 Fed. Rep. (2d) 667. That case does not hold that the Arkansas statute for penalty and attorney's fees is invalid, but the court said in that case: "In view of the fact that the case must be tried again, we think some remarks upon the imposition of penalties and attorney's fees, under § 6155, *supra,* of the Arkansas Digest, are pertinent. It is true that the language of the statute, strictly construed, imposes these penalties in

all cases where the company fails to pay—within the time specified in the policy, after the demand made therefor. However, the rigor of this language has been somewhat relaxed by the Supreme Court of Arkansas, in *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384. * * * In the absence of any decision of the Arkansas court of last resort to the contrary, and none has been cited, we are of the opinion that the statute in question should not be construed to demand the imposition of its penalties where the refusal to pay without suit is based upon an honest and fairly debatable difference of opinion as to the law involved; should be confined to cases of vexatious and inexcusable neglect and failure to respond to contract obligations, as is the rule in other jurisdictions."

There is nothing in the decision relied on indicating that the law is unconstitutional. There might be cases, of course, where the company refused to pay without incurring the penalty. If demand was made for more than one was entitled to recover, the insurance company would not be subject to the penalty imposed by statute.

The next case relied on by the appellee is *Inter-Southern Life Ins. Co.* v. *McElroy,* 38 Fed. (2d) 557. In this case, the court repeated what was said in the opinion in *Standard Accident Ins. Co.* v. *Rossi, supra.* The court did not hold the statute invalid, but said that the facts in the case did not warrant or justify the assessment of penalty and attorney's fees.

The next case cited and relied on by appellee is *North American Transportation & Trading Co.* v. *Morrison,* 178 U. S. 262, 20 S. Ct. 869. The only thing the court said in that case that is relied on by the appellee was: "Where the plaintiff asserts as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere *ad damnum* clause will not confer jurisdiction on the circuit court, but the court on motion or demurrer, or of its own motion, may dismiss the suit."

But the court also said in that case that it was obvious on the face of plaintiff's complaint that if he was

not entitled to recover the money which he alleged he could have earned and secured by obtaining employment and engaging in business at or about Dawson City, the amount necessary to give the court jurisdiction was not involved.

It cannot be said in the present case that either under the decisions of this court or the Federal court the amount necessary to give the court jurisdiction was not involved. The right to recover 12 per cent. damages was an issue. Of course, it might be found, either by this or the Federal court, that the plaintiff was or was not entitled to recover, but that is not the question. The question is the amount in controversy.

Appellant calls attention to several authorities which we do not think it necessary to review, because if the amount in controversy exceeded the sum of $3,000 exclusive of interest and costs, the appellant was entitled to a removal of the cause. The statute expressly provides for the removal where the amount in controversy exceeds $3,000, and we hold that the amount in controversy in this case exceeds $3,000.

The judgment of the circuit court is reversed, and the cause remanded with directions to grant the petition for removal.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* SNOW.

Opinion delivered March 7, 1932.

Allen May and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

J. S. Utley and *Wm. T. Hammock,* for appellee.

McHaney, J. Appellee holds two life insurance policies issued by appellant for $1,000 each, with like "total and permanent disability" provisions for the payment of $10 per month per $1,000 of insurance for total and permanent disability as defined in the policies. This disability is defined as follows:

"Total and permanent disability may be due either to bodily injuries or to disease, which must occur and originate while this policy is in full force after the first premium has been paid, and must be such as to prevent the insured then and at all times thereafter from engaging in any gainful occupation. Total disability as defined above, which exists and has existed continuously for not less than three months shall be presumed to be permanent. At any time after approval by the company of the aforesaid proof and from time to time, but not oftener than once a year after disability has continued for two full years from the date of approval, it may demand of the insured proof of the continuance of such disability and the right to examine the person of the insured. Upon failure to furnish such proof or if it appears that the insured has recovered so as to be able to engage in any gainful occupation, the company's obligations to pay further disability benefits shall cease and the insured shall be required to pay the premiums becoming due on this policy thereafter in accordance with the original terms hereof."

In December, 1924, appellee became disabled by reason of ankylosis of the right hip. He filed a claim which was approved, and he was paid $20 per month to July 1, 1929, when payments were stopped because appellant

concluded that he had recovered to such an extent that he was no longer totally and permanently disabled within the above quoted provision of the policies. This suit followed to recover the present value of such monthly payments over the period of his expectancy. A recovery was had, and this appeal comes from the judgment based thereon.

The first assignment urged for a reversal is that the court erred in refusing to direct a verdict for appellant at its request. This challenges the sufficiency of the evidence to support the verdict. We think this assignment must be sustained, as we are of the opinion that the undisputed evidence shows that appellee is not totally and permanently disabled as this term is defined in these policies. There can be no question that he is partially disabled, that he has a stiff hip which seriously impairs its usefulness, that he cannot stand or walk as he once could, but it does not follow from this that his disability is covered by the policies. The total and permanent disability therein defined "must be such as to prevent the insured then and at all times thereafter from engaging in any gainful occupation." That is the hazard insured against under this clause and against no other, except that certain injuries specified "shall be considered total and permanent disability within the meaning of this provision," none of which were suffered by appellee.

By his own testimony appellee is shown to be performing the material and substantial duties of a "gainful occupation," and that his disability is not such as to prevent him from engaging therein and has not been since July 1, 1929, unless it may be said that the business of operating a country store with an average stock of $2,000 and the business of leasing and operating a 400-acre plantation near England, Arkansas, is not a "gainful occupation." Such an occupation has been regarded as "gainful" in the past, whatever might be said to the contrary in the last year or two. The proof shows that appellee does conduct the business of a country mer-

chant, with the assistance of his wife all the time or nearly all, and of his daughter a part of the time; that he drives his own automobile, purchases his goods in England and Little Rock, waits upon his customers and does all the work when his wife and daughter are out; that he is unable to do heavy lifting, but his goods are trucked to his store and delivered therein by the drivers; that in the year 1930 he farmed through tenants 80 acres of land and in 1931, 400 acres of land; that he furnishes his tenants and sharecroppers supplies, takes mortgages on their crops and other personal property, travels to Lonoke in his car to see the agent of his landlord and to record his mortgages and transact other business; and that in the farming end of his occupation he has no help from his wife, daughter or any one else. He attends to that himself. He says that he engaged in the farming business to help his store business, but that does not change the situation. It is also true that he cannot handle a plow, walk over the fields and see after his business as well as he could without the stiff hip, but he is able to drive along the turn-rows, direct the tenants as to how, when and what to do, and to give his farming business the same general care and management as do others. He was asked this question: "Q. Did you take 400 acres this year thinking you could attend to it yourself and that you would make a profit on it?" He answered: "A. I thought I could. Certainly I did." The evidence further showed that the business of the store was such as to require help in its operation, and it appears certain that, with appellee away purchasing goods, or attending to his farming business, the store could not be kept open without some assistance in the capacity of clerk.

This, in substance, is appellee's condition as testified to by himself, and we hold that it shows conclusively that he was not totally and permanently disabled from "engaging in any gainful occupation." It shows positively that he engaged in the farming business and attended to all the duties connected therewith without help, and that

he engaged in the mercantile business and attended to all the substantial and material acts connected with that business. The rule in this State is quoted from Kerr on Insurance, §§ 385 and 386, in *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029, as follows: "Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists, although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labor so long as was reasonably necessary to effect a speedy cure."

This statement of the law has been followed many times since, the latest cases being *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335, and *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 486, 32 S. W. (2d) 310. Of course, such a provision in a policy does not require that the insured shall be absolutely helpless or insane, but there must be such disability as renders him unable to perform all the substantial and material acts in the prosecution of a gainful occupation.

As we have already seen appellee was not so disabled. There being no question of fact to be submitted to the jury, the request for a directed verdict should have been granted.

Reversed and dismissed.

STUTTGART RICE MILL COMPANY *v.* LOCKRIDGE.

Opinion delivered March 7, 1932.

[redacted]

W. A. Leach, for appellant.

Joseph Morrison, for appellee.

BUTLER, J. On the 15th day of December, 1923, Lozier Lockridge, appellee, instituted this suit against the appellant, Stuttgart Rice Mill Company. In his complaint the appellee declared on a verbal contract alleged to have been entered into between himself and the appellant, acting through its president, J. C. Lloyd, by which he was to deliver to the appellant rice grown

in the year 1920, the same to be milled and sold by the appellant for his account. For this service appellant was to receive $1 per barrel and the by-products consisting of bran and polish; that appellant undertook to mill said rice immediately and to sell the milled product at once; that, as an inducement for appellee to enter into the agreement with the appellant, appellant represented that it could mill and sell the rice without delay, and that appellee would thereby be enabled to realize net more for his product than if he should sell it in the rough; that at that time there was an active market for rough rice; that he entered into this contract on or before the 15th day of November and began to deliver the appellant rice completing delivery on or before the 29th day of November, 1920; that on the date of his agreement and during the time of the delivery of the rice and for a considerable time subsequent thereto there was an active market for clean rice of the kind and grade of that which he had delivered to the appellant, and, if the appellant had performed its agreement, it would have been able to realize for appellee's account a net sum of $1.27 per bushel.

Appellee further alleged that, after the appellant had milled the rice, he demanded an accounting, which was not made until on or about the 29th day of March, 1921, at which time appellant accounted to appellee for $2,495.92, representing to him that this was all that appellant had realized from the sale of his product; that the appellant sold appellee's rice at a much higher figure than the price which it rendered on an accounting and fraudulently concealed the fact that it had sold rice at a higher figure, which, after all proper charges had been deducted, would have returned to appellee a net sum of $1.27 per bushel.

Appellee further alleged that, if the rice had not been sold at a figure sufficient to yield him the return aforesaid, appellant breached its agreement in failing to market the rice with reasonable promptness after the

same had been milled, to appellee's damage in the sum of $5,000.80, the difference between what he should have received had the appellant performed its contract with him and what it actually accounted for. Appellee further alleged that, until the appellant rendered him an accounting in March, 1921, he did not know that it had not sold his rice at the time it had agreed to sell it and did not know what actual disposition was made of the rice, but alleged that the appellant either sold it at a figure to yield him $1.27 per bushel net, fraudulently accounting to him for a different lot of rice, or that appellant fraudulently failed and neglected to sell his rice with reasonable promptness after same had been milled in accordance with the agreement, to his damage in the sum aforesaid.

The first testimony taken in the case was the deposition of the appellee given on the 19th day of May, 1927. From time to time thereafter testimony was taken in the form of depositions down to 1930 or 1931. After all the testimony was in, the appellee filed his motion to amend the complaint to conform to the proof, and on the 7th day of April, 1931, filed an amended complaint in which the allegations of the original complaint were reiterated and the further allegation was made that appellant fraudulently failed to account for 900 bushels of rice, failed to account for the complete proceeds resulting from the sale of the rice, and failed to report the correct amount of mill product, and unlawfully converted a portion of the rice delivered by the appellee to its own use; that, by reason of this unlawful misconduct and fraud, the appellant forfeited its right to compensation of $1 a barrel and the by-products for milling the rice.

To this amended complaint answer was made by the appellant and objections filed to the testimony of the deposition of witnesses B. E. Chaney, George E. Carlson, Oak H. Rhodes, and to parts of the testimony of the appellee. The case was thereupon submitted to the court, and a decree was rendered on May 11, 1931. The court

found, first, "that the rice in controversy was of superior quality for which appellee had been offered $1.10 per bushel prior to delivery to defendant; that J. C. Lloyd was president of the Stuttgart Rice Mill Company; that, as an inducement to plaintiff to deliver rice to defendant, plaintiff was guaranteed a minimum of $1.25 per bushel, and that the president was authorized to negotiate contracts of this kind. Second, the court found that the evidence shows that irregularities and mismanagement on the part of those in charge of defendant mill amount to a fraudulent transaction against the plaintiff; third, that the defendant received from the plaintiff 5,401 bushels of rice; that the rice was delivered upon verbal toll milling agreement with no specific milling charge agreed upon; that the customary milling charge for milling rice was $1 per barrel and by-products; that the defendant retained the by-products and is therefore only entitled to milling charge aforesaid as a credit upon the judgment hereinbefore rendered; that plaintiff is entitled to interest from the 29th day of March, 1921, at the rate of six per cent. per annum from date until paid; fourth, that defendant is entitled to a credit upon the amount guaranteed plaintiff of $2,495.22 for moneys paid him by defendant on or before March 29, 1931, and $1,500.50 toll milling charges on the amount of rice delivered by plaintiff to defendant.

Judgment was rendered for $2,755.53, principal, with interest from the date aforesaid, from which decree both the appellant and the appellee have appealed.

The complaint alleged, and the testimony on the part of the appellee tended to show, that he and one Finch his tenant, each owned a one-half interest in the rice delivered to appellant, the total amount of which was 11,806 bushels, half of which was appellee's part amounting to 5,903 bushels. Both appellee and Finch testified that they weighed and loaded on the cars at Goldman this amount of rice which was shipped to appellant's mill at Stuttgart. The original memorandum of the weights was

asked for and not produced. The explanation given by the appellee for his failure to do so was that he had given them to his lawyer. It was shown on behalf of the appellant that the statement of the rice accounted for was obtained from the records made by the receiving clerk, and that the rice was weighed on the city scales. By the fourth finding of fact the chancellor found against the contention made by the appellee as to shortage in weights, finding the amount of rice received to be 5,401 bushels as shown by the books of the appellant. We are of the opinion that this finding was supported by the evidence.

The first finding of fact made by the chancellor is the one upon which the decree was based. Appellee testified to a certain conversation between himself and J. C. Lloyd, president of the appellant company, occurring 6½ years before, and not in the presence of any other person and after Lloyd, the only one who could testify directly to the contrary, had died. That statement was that at the Arkansas County Bank in Stuttgart "he called me in at the bank and asked me what I could get for my rice, and I told him I could get $1.10 and he told me there was no use to take that. If you will deliver it to the Stuttgart Mill, I will guarantee you $1.25 in thirty days, and it might bring $1.35." I had been offered $1.10 per bushel for my rice by southern mill, and Mr. Lloyd held my note which he had put up with the Arkansas County Bank as collateral. I did not sign any toll milling agreement. After my conversation with Mr. Lloyd, we loaded my rice on the cars at Goldman and shipped it to the Stuttgart Mill.

Oak H. Rhodes, testifying on behalf of the appellee, said in substance that he recalled something being said by Lloyd about Lockridge's rice, and he gained the impression, as he then remembered, that this rice was bought and was not handled under the toll milling contract.

L. H. Harper, who was the shipping clerk in 1920, stated in effect that both he and Lloyd knew that more

of appellee's rice was received than accounted for, and that Lloyd had promised him (Harper) he would correctly settle with appellee and pay him for all his rice.

There was other testimony to the effect that rough rice was selling at the time appellee delivered his at from $1.10 to over $1.25 per bushel, and that there was then a market for rough rice, and that there was no considerable decline in the price until after January 1, 1921.

Finch, the tenant of appellee and owner of one-half the rice, testified that he received $1,000 more money than Lockridge, and he and Lockridge further testified as to a conversation said to have taken place between the appellant's bookkeeper and Lockridge in which the bookkeeper, after an examination of the books, said that he thought the rice would net Lockridge at the rate of $1.27 per bushel.

It is contended by counsel that all of this testimony tends to corroborate the contention of the appellee that the rice was delivered at a guaranteed price, and that the testimony relative to the sale of rice, the excess of amount of money paid Finch over Lockridge, and that relating to the alleged conversation with the bookkeeper, justified the chancellor in the finding that Lockridge's rice was delivered at a guaranteed price.

It is impracticable, without unduly lengthening this opinion, to review and analyze this testimony. We have, however, examined it with care, and cannot assent to the contention made by counsel for the appellee. Clearly the overpayment made to Finch was an error of the bookkeeper in failing to take into consideration an account charged against Finch on the books of the appellant and in failing to deduct the same from the amount due him. As to all the other evidence claimed as corroborative and supporting the contention of appellee, we find the testimony vague and uncertain, general in its nature and inconclusive, as is not strange, when it is a relation from memory of the events occurring some six or seven years in the past.

There are circumstances in evidence not dependent upon human memory which tend strongly to refute the testimony of Lockridge relative to the alleged guaranty of $1.25 per bushel.

He was a member of the Southern Rice Growers' Association, and was bound by the contract of the association with rice mills, known as the "Toll Milling Contract" (*Joy Rice Milling Co.* v. *Brown,* 167 Ark. 205, 268 S. W. 1), under the terms of which the mills were to act as its agent and that of its members in milling and marketing rice, receiving a stipulated price for the milling and certain charges for selling, which charges were recognized and allowed by the chancellor.

A large crop of rice was produced in 1920, and the price of the product broke sharply from the previous high level occasioned by various causes—the large crop, the influx of foreign rice on European markets, and the general deflation in prices in 1920, which is recent history. In order to stabilize prices, the toll milling contracts were entered into between the Rice Growers' Association and the rice mills.

The evidence fails to show the amount of rice appellant had on hand to mill at the time it received appellee's, or that it failed to mill and place on the market appellee's rice as soon as possible. He received payment for his rice by checks issued to him and the Arkansas County Bank in March, 1921, the last being dated March 29, 1921. It appears from the allegations in appellee's complaint and by his testimony that on or about that date the appellant claimed that these checks were in full settlement of all that was due him for his rice. On the reverse side of these checks was a memorandum showing the lot number, the account sales, charges, and net amount for which the checks were drawn. These checks were accepted without protest, and, so far as the record discloses, no demand was made upon the mill for an accounting. It was apparent from the face of the checks that the rice brought far below $1.25 a bushel, and,

if the guaranty was as appellee claimed, he knew then that it had not been complied with, and still he remained silent. He does not claim to have done anything about it for about a year, when he stated he took the matter up with his lawyer, who delayed taking action although often importuned to do so. The fact remains, however, that no action was taken until December, 1923, after Lloyd had died in November preceding, and even then no allegation was made of the guaranty of $1.25 per bushel. It was not until May, 1929, that appellee first made any such claim. We are of the opinion that appellee delivered his rice under the toll milling agreement to be milled and marketed in the usual course of business, and the circumstances do not support the claim of a guaranty of $1.25 per bushel, and there is no evidence of a failure by the appellant to mill and market appellee's rice as speedily as could be done or that it accounted to appellee for a less price than it actually received. The finding of the chancellor therefore (finding No. 1 aforesaid) is against the preponderance of the testimony.

T. A. Patrick, an accountant, whose testimony is not disputed, in checking the account of Lockridge and Finch on the books of the appellant discovered some errors in bookkeeping, a part of which was in favor of the appellant and a part against it, and in the credit for the receipts of a certain grade of rice called "brewers' rice." He prepared a statement of his finding showing that the errors amounted to the sum of $753.68. A part appear to have been errors in extension while the credit given for the brewers' rice was under the mistaken belief of the appellant that it had only to account for brewers' rice at its actual market price on the date it was sold. In June of 1920, however, it seems that the appellant contracted to sell the brewers' rice handled by it from the crop of 1920 at four cents a pound and that brewer's rice obtained from milling the rice of appellee was a part which the appellant delivered under its contract of June, 1920, and for which it received four cents per

pound. At the time the appellant made the contract for the sale of brewers' rice it had no rice of its own on hand with which to fill the order, and filled it in part by rice received from the appellee which it was to handle as the latter's agent. Lockridge delivered the rice to the appellant to be milled by it and the finished product sold by it for his account, which created the relationship of principal and factor. Therefore, appellant rested under the duty, because of the confidential relationship existing, not to speculate on the product of its principal, but to account for the amount actually received by it, although this was the result of a trade made for its own benefit previous to the receipt of the rice grown in 1920. It cannot be permitted to make a profit in excess of the toll and commission allowed by the toll milling contract. 25 C. J., Factors, § 35, and cases cited in note 28.

The figures arrived at by Patrick, the accountant, are not disputed, and was the joint account of the appellee and his tenant, Finch. Appellee was therefore entitled to receive one-half of the amount found by Patrick from his examination of the books that represented the errors in bookkeeping and the contract price for the brewers' rice sold, with interest at 6 per cent. from the 29th day of March, 1921.

The evidence indicates that about 1923 an investigation was made of the conduct of the persons in charge of the appellant's mill, and that some of these persons were prosecuted, but with what result is not shown. The evidence raises ground for grave suspicion of fraudulent practices over a period of a number of years on the part of those persons, and would indicate that large amounts of rice were fraudulently converted by these persons to their own use, and that the growers of rice in the aggregate were defrauded of large quantities of rice. The testimony, however, as to all of these transactions is vague and uncertain, and, with the exception of the testimony of Harper, fails to establish any fraudulent diversion of

the rice of appellee, to which testimony the chancellor attached no weight, as his finding as to the amount of rice accounted for was in favor of the appellant. His finding therefore "that the evidence shows that irregularities and mismanagement on the part of those in charge of the defendant mill amounted to a fraudulent transaction against the plaintiff" was without evidence to support it.

"Fraud is never presumed, but must be proved, and the burden of proving it is upon the party alleging it. It need not be shown by direct or positive evidence, but may be proved by circumstances. 'Slight circumstances or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results,' are not sufficient evidence. 'They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting.' They may be sufficient to excite suspicion, but suspicion is not the equivalent of proof. Circumstances necessary to prove fraud must be such as naturally, logically and clearly indicate its existence." *Bank of Little Rock* v. *Frank,* 63 Ark. 16, at page 22, 37 S. W. 400, 401; *Russell* v. *Brooks,* 92 Ark. 509, 122 S. W. 649; *Dufresne* v. *Paul,* 144 Ark. 87, 221 S. W. 485.

It is unnecessary to pass upon the question of the competency of the testimony of the appellee and other witnesses raised by appellant's motion, for the reason that, treating this testimony as competent, we are of the opinion that, considering it in connection with the other circumstances in proof, it fails to make out appellee's case.

The question was raised by the appellee as to certain depositions having been filed out of time. It is quite evident that the chancellor considered these depositions, and had before him a copy of the same, and that the originals were filed in court before the decree was entered.

From the views expressed, it follows that the decree of the trial court must be reversed, and the cause is remanded with directions to enter a judgment in favor of the appellee for one-half the amount of the discrepancy in the credits he should have received, as shown by the statement of the accountant Patrick.

ROACHELL *v.* GATES.

Opinion delivered March 14, 1932.

Walter Killough, for appellant.

David A. Gates and *Ogan & Shaver,* for appellee.

HART, C. J. L. L. Roachell and R. C. Floyd have appealed from a decree of the chancery court, granting

the Commissioner of Revenues judgment for motor vehicle tax and penalty due the State of Arkansas under an act of the Legislature of 1929.

The cases were consolidated for trial upon an agreed statement of facts in writing. The facts may be briefly summarized as follows: L. L. Roachell is a citizen and resident of Parkin, Cross County, Arkansas. He operated a truck from August 31, 1930, to May 1, 1931, hauling freight from Parkin, Arkansas, to Memphis, Tennessee, and from the latter point back to Parkin. He was a private carrier for hire, and was exclusively engaged in interstate commerce. He only operated one truck which he had purchased from the International Harvester Company, and that company had retained title until the vehicle was paid for. Roachell had agreed to pay for the truck $978 in monthly payments and had paid a total of $225 on the purchase price. R. C. Floyd is a citizen and resident of Parkin, Cross County, Arkansas, engaged in operating trucks as a private carrier since March 1, 1929. He first bought a truck on the installment plan in which the vendor retained title until the truck was paid for. The purchase price was $721, and he had paid $300 of the purchase money. From March 1, 1929, he has hauled as a private carrier, cotton from McDonald, Arkansas, to Memphis, Tennessee. He also engaged in one private contract from Memphis, Tennessee, to points in the State of Oklahoma, in which his motor truck passed across the State of Arkansas without making any stops for delivering any shipments within the State of Arkansas. It was further agreed that, if the act sought to be enforced by the State Commissioner of Revenues is constitutional, the amounts demanded are due and payable.

The record shows that appellants were private carriers engaged exclusively in interstate commerce, and this appeal involves the construction of act 65 passed by the Legislature of 1929 for the purpose of amending

and codifying the laws relating to State highways. Acts of 1929, vol. 1, p. 264.

The particular section of the act which is claimed to be unconstitutional, as violating the commerce clause of the Constitution of the United States, is § 68, which reads as follows:

"Any motor vehicle carrier of persons or freight for compensation who operates between a certain point or points without the State of Arkansas to certain point or points within the State of Arkansas, shall be subject to the same rules and regulations and shall pay the same privileges or excise tax as motor vehicle carriers operating entirely within the State; but, in computing the privilege or excise tax to be paid by such motor vehicle carriers operating partly within and partly without the State, the privilege or excise tax of four per cent. upon the gross amount of fares and charges shall be based upon the proportion that the mileage within this State over which said haul is made bears to the total mileage."

In the absence of Federal legislation covering the subject, the Supreme Court of the United States has repeatedly recognized that a State or one of its delegated agencies may enforce, as to the owner of vehicles using the highway exclusively in interstate commerce, regulations insuring the public safety and convenience, and impose such a license fee as will reasonably defray the expense of administering the law and be a fair contribution to the cost of constructing and maintaining the public highways and the facilities furnished by the State. The State acts under its police power, and it is recognized that the movement of motor vehicles over the public highways is a serious and constant danger to public travelers and very destructive to the highways themselves. The use of the public highways under modern conditions is exceedingly expensive because motor vehicles cannot be used except upon hard-surfaced highways, which are very costly in construction and maintenance. Hence it is held that the State may im-

pose the tax for the purpose of constructing and maintaining the highways where there is a reasonable relation between the measure employed for that purpose, and the extent or manner of use of the motor vehicles. When that is done, the Supreme Court of the United States has held that a tax on motor vehicles used exclusively in interstate commerce as compensation for the use of the public highways which is a fair contribution to the cost of constructing and maintaining them and regulating traffic thereon, is not unconstitutional as a burden on interstate commerce. *Sprout* v. *South Bend, Indiana,* 277 U. S. 163, 48 Sup. Ct. 502, 62 A. L. R. 45; and *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 51 S. Ct. 380. In the latter case, all the earlier cases on the subject are reviewed, and no useful purpose could be served by citing them or reviewing them here.

It is true that the court held the act in the Lindsey case to be unconstitutional, but it recognized the principles above announced as being the doctrine of that court. In the Lindsey case, the tax levied was upon a bus carrying passengers, according to the number of passengers carried, and provided that the tax should be in lieu of all county and municipal taxes. The court said that no sufficient relation between the measure employed and the extent or manner of use was shown to justify holding that the tax was a charge made merely as compensation for the use of the highways.

Here the facts are essentially different. The Legislature passed an act amending or codifying the laws relating to State highways at its 1929 session, and created a State Highway Commission to be composed of five members. The act was very comprehensive in its nature, and contained seventy-five sections. Section 67 provides for the levy of an excise or privilege tax upon the business of each person or corporation operating any motor vehicle for compensation. The amount to be levied was four per cent. of the gross amount received by such carrier of all fares and charges collected for the transporta-

tion of persons and property. It also provides for the payment monthly to the Commissioner of Revenues. Section 68, which is copied above, provides in substance that any motor vehicle carrier of persons or freight for compensation which operates between a point or points within the State of Arkansas and a point or points without the State of Arkansas shall be subject to the same rules and regulations and shall pay the same privilege or excise tax as motor vehicle carriers operating entirely within the State, but in computing the tax of those engaged in interstate commerce the four per cent. charge upon the gross amount of hauling for charges shall be based upon the proportion which the mileage in this State bears to the total mileage. Thus, it will be seen that there is no discrimination whatever between interstate and intrastate carriers. There is no attempt in the record to show that the amount collected was arbitrary or excessive.

It is also earnestly insisted that the showing made in the record that Floyd hauled freight from a point in Tennessee to points in Oklahoma, across the State of Arkansas, without stopping or delivering freight therein, renders the act unconstitutional as being discriminatory. We do not think this contention is well taken when the whole scope and purpose of the act in connection with its relation to prior acts on the same subject is considered. The Legislature of 1929, by an act which was approved February 27, 1929, provided for the regulation, supervision, and control of motor vehicles used in the transportation of persons or property for hire by the Railroad Commission. Acts 1929, vol. 1, p. 137. This act contained twelve sections and § 1 (d) provides that the term, "motor vehicle carrier," wherever used in the act, means every corporation or person owning and operating any motor-propelled vehicle used in the business of transporting persons or property for compensation over any improved public highway in this State. Section 1 (f) provides that the term, "improved public highway," shall mean every improved public highway in

this State which is or may hereafter be declared to be a part of the State highway system. Section 1 (g) provides that the term, "property and freight," as used in the act, shall mean any kind of property transported by motor vehicle carrier for compensation over any improved public highway in the State. Act 65, relating to the amendment and codification of the State highway laws, was approved on February 28, 1929.

This court has held uniformly that acts passed upon the same subject must be taken and construed together. The intention of the Legislature should be carried into effect, where that can be done without doing violence to the language used. Another cardinal rule of construction is that this rule is especially applicable where the two acts were under consideration by the Legislature at the same time. *Merchants' Transfer & Warehouse Company* v. *Gates,* 180 Ark. 96, 21 S. W. (2d) 406.

This court has uniformly approved the doctrine of substitution, elimination, or supplying words in conformity to the obvious spirit and purpose of the act in attempting to carry out the intention of the Legislature. *State ex rel. Attorney General,* v. *Chicago Mill & Lumber Corporation,* 184 Ark. 1011, 45 S. W. 2d 26, and cases cited.

After a careful consideration of the matter, in connection with the obvious purpose and intent of the Legislature to regulate all motor traffic over the improved public highways of the State, we do not think that it meant to exempt from the provisions of the act motor vehicles hauling freight from a point in another State across the State of Arkansas, to points in other States. A reasonable construction of the act would indicate that the legislative purpose and intent was to regulate all traffic over the public highways of this State; and, when all the provisions of both acts under consideration are considered together, we are of the opinion that the act applies to motor vehicles operating in the manner just described as well as to motor vehicles operated in inter-

state commerce from a point within the State to a point without the State. The gist of the whole matter, as we have already seen, was to regulate motor traffic for hire over the public highways of the State under the police power for the safety of the traveling public and for a reasonable proportion of the expense of constructing and maintaining the improved public highways.

Therefore, we hold the act to be constitutional, and it is conceded that the amount demanded is due under the terms of the act.

Finally it is contended that there is no authority to levy an execution on the property of appellant. Reliance is placed upon *Jennings* v. *McIlroy,* 42 Ark. 236, and later decisions of this court, where it was held that mortgaged personal property is not subject to attachment or execution for a debt of the mortgagor. The reason for so holding was that at common law equitable interests in personalty were not liable to be taken in execution at law. The court said that, by a mortgage of personal property, the title passes, and the mortgagor has only the equitable right to reclaim it on payment.

Here the facts are different. The title to the property was in the vendor of appellants, and they stood in the relation of a conditional vendee. This court has frequently held that the vendee of an automobile, having paid part of the purchase price and having been given possession under a contract retaining title to the vendor until the payments are completed, had an interest therein which he could sell or mortgage. *Loden* v. *Paris Auto Company,* 174 Ark. 720, 296 S. W. 78.

Upon principle, it would seem that, if he had an interest which he could sell or mortgage, it would be subject to attachment under execution for his debts. Such a rule would not in any sense deprive the vendor of his right to retake the property as his own if he saw fit to do so. Upon the other hand, the vendor would have the right to elect to treat the sale as absolute and sue for the purchase price. Hence we do not consider this objection well taken.

Upon the whole case, we are of the opinion that the decision of the chancery court was correct, and the decree will therefore be affirmed.

BUTTERWORTH *v.* TELLIER.

Opinion delivered March 14, 1932.

Frauenthal, Sherrill & Johnson, for appellant.

June P. Wooten, for appellee.

HART, C. J., (after stating the facts). Counsel for appellee seek to uphold the construction placed upon the contract by the court under the rule that, when a man undertakes by an express contract to do a given act, he is not absolved from liability for nonperformance, even though he is prevented from doing it by an act of God or some impossibility placing it beyond his power to perform the contract. Among the many cases following this rule are *Cassady* v. *Clarke,* 7 Ark. 123; and *Davis* v. *Bishop,* 139 Ark. 273, 213 S. W. 744. In the latter case, the court also recognized certain exceptions to the general rule, and one of them is that where the subject-matter of the contract has been destroyed or the event creating the impossibility is one which could not reasonably be supposed to have been within the contemplation of the contracting parties, the promisor is discharged from the performance of the contract or the obligation to answer in damages.

Again in *Holton* v. *Cook,* 181 Ark. 806, 27 S. W. (2d) 1017, 69 A. L. R. 709, the court recognized that contracts of this character must be considered as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible without fault of the contractor.

Numerous other cases applying the rule and the exceptions thereto may be found in a case note to 21 A. L. R. commencing at 1274, and in 74 A. L. R., commencing at 1290. No useful purpose could be served by an extended review of the decisions because, to determine whether a case falls within the general rule or the exceptions thereto, reference must be made to the facts of each particular case.

It is earnestly insisted by counsel for appellee that in all of these cases the court has recognized that the death of the person or destruction of the subject-matter of the contract has rendered the performance of the

contract a physical impossibility. We do not agree with counsel in this contention. Since the question is one as to the construction of the contract, it can make but little difference how the subject-matter of the contract went out of existence, so long as the party charged was not in any degree in fault in the premises. The minds of the parties are presumed to have contemplated the possible loss of the property. For cases illustrating the principle, see *Dexter* v. *Norton,* 47 N. Y. 62, 7 Am. Rep. 415; and *Lorillard* v. *Clyde,* 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489.

In the latter case, there was a guaranty of dividends of the corporation for a term of years made by the manager to persons who were formerly his competitors in business, which the corporation had been formed to continue under what was substantially a partnership arrangement, while both parties were prohibited from becoming interested in competing business during that period, which the court held implied the existence of the corporation during the time specified, capable of earning and declaring dividends. In that case it was also held that a defense to a guaranty of corporate dividends that the corporation had been dissolved would not be defeated on the ground that the dissolution was caused by the defendant's own misconduct, where it was adjudged on the application of the plaintiff for technical breach of corporate duty, for some of which he was as much responsible as the defendant.

We have set out the contract, which is the basis of this lawsuit, in our statement of facts, and need not repeat it here. Reference to it will show that Miller and Butterworth were owners of the majority of the stock in the corporation. Tellier first subscribed for $5,000 worth of the stock and then increased it to $15,000. Miller and Butterworth were original subscribers of stock for $25,000 each. The contract recites that in consideration of the purchase of said stock by Tellier and the personal advantage accruing to Butterworth and Miller as

majority stockholders, it was agreed by the parties that Tellier should receive dividends on said stock at the rate of ten per cent., and that he should continue to receive them until such time as the corporation was in a position to declare regular dividends out of its earnings. It then provides that said stock shall be credited with the payment of said dividends and shall draw dividends the same as all other stock at such times as regular dividends shall be declared. It then provides that Miller and Butterworth shall guaranty said ten per cent. dividends, payable as above stated, and for the further consideration enumerated. Miller, Butterworth and Tellier were all intimate friends and closely associated with each other in business. Miller and Butterworth were the managing officers of the corporation. Just what relation Dickinson had is not shown.

A reasonable construction of the contract shows that there was an implied condition that the dividends to be paid on the stock of Tellier were to be made by Miller and Butterworth as managing officers of the corporation, and were to continue only so long as the corporation continued in existence, and was not dissolved on account of the neglect or mismanagement of its affairs by Miller and Butterworth. The record does not show that any act of Miller or Butterworth caused the insolvency of the corporation. It was organized at a time when the business affairs of the country were in good condition, and it was thought in good faith by all of the parties that great profits would be made in the operation of the granite quarry. The parties had made large profits in other transactions. Like many other businesses, the corporation lost instead of making money. This resulted finally in its insolvency, and its assets were sold to pay the creditors of the corporation. As above stated, there is nothing to show that Miller and Butterworth were at fault in the management of the corporation and caused its insolvency by any act of neglect of their own in the management of the corporation.

In this connection, it may be stated that Tellier received the price of his subscription to the last stock and a little more besides. Even after the death of Miller, Butterworth continued to make payments for a time, and this was after the corporation ceased to exist. This at least showed good faith in the premises.

Upon a consideration of the whole case, we are of the opinion that there was no liability under the contract, and the court erred in directing a verdict for the plaintiff. Inasmuch as the case seems to have been fully developed, the judgment will be reversed, and the cause of action will be dismissed here.

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

Opinion delivered March 14, 1932.

Carter, Jones & Turney, McKay & Smith and *Lamb & Adams,* for appellant.

W. H. Kitchens, Jr., and *Wade Kitchens,* for appellee.

SMITH, J. Appellees brought this suit to enjoin the appellant railway company from obstructing a road by means of which they had ingress and egress to and from certain lots owned by them and on which they resided. These lots adjoined the railroad right-of-way, and the road in question ran from appellees' lots, across a portion of the railroad right-of-way, to a street in the city of Magnolia.

The court found, from testimony which fully sustains the finding, that the plaintiffs themselves, for more than seven years, and their predecessors in title, for more than forty years, had used the railroad right-of-way as a road to and from the lots on which they resided, and that there is no way of ingress or egress to and from said lots except over and along the right-of-way of the railroad, and that the railway company had, over the protest of appellees, obstructed this way so as to deprive appellees and all others of the use of this way by stretching barbed wire across it.

The finding was made that appellees, and their predecessors in title, had acquired an easement over and along said railroad right-of-way from their lots to the nearest street for purpose of ingress and egress to their property, and upon this finding the railway company was enjoined from obstructing the way in such manner as to prevent appellees from using it, and this appeal is from that decree.

Without setting out the testimony, which, as we have said, fully sustains the finding of fact made by the court below, it may be said that a continuous use of this way by all persons who had occasion to use it was shown for a period of fifty years, and it was also shown that the street commissioner of the city of Magnolia had worked and improved this way as a part of the streets of the city.

For the reversal of the decree, it is first insisted that a prescriptive right may not be established by adverse possession and use of a railroad right-of-way. Upon

this question it may be said that, while there is a division in the authorities, it has been several times decided by this court that such a prescriptive right may be acquired. *Graham* v. *St. L. I. M. & S. R. Co.*, 69 Ark. 562, 65 S. W. 1048; *St. Louis & S. F. R. Co.* v. *Ruttan,* 90 Ark. 178, 118 S. W. 705; *St. L. I. M. & S. R. Co.* v. *Martin,* 104 Ark. 274, 149 S. W. 69; *St. Louis, S. W. R. Co.* v. *Fulkerson,* 177 Ark. 723, 7 S. W. (2d) 789.

It is next insisted that, even though such a right may be acquired, there was no sufficient notice to the railway company that such an adverse right was being asserted. This is, of course, a question of fact, and the court has found that there was such notice as to apprise the railway company that an adverse use was being made of the portion of its right-of-way in question. See *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830, and cases there cited.

It is next insisted that the decree should be reversed because the court did not find that the public had acquired the right to use the road or way in question, but had found only that appellees had acquired an easement which permitted them to use the road or way.

There is no cross appeal from the failure of the court to find that the road in question had become a public road by prescription, and we do not, therefore, decide whether that finding should or should not have been made. The court granted the plaintiffs the relief they prayed, that is, that their easement be not interfered with.

It was said in the case of *Bond* v. *Stanton,* 182 Ark. 293, 31 S. W. (2d) 409, that: "The doctrine that the owner of one lot may acquire an easement over the lot of another by the open, notorious and adverse use thereof under a claim or right for a period of seven years is well settled in this State. Such adverse user is sufficient to vest the claimant with an easement therein." [Citing cases].

The testimony being sufficient, as we find it to be, as did the court below also, that appellees had acquired, through long continued adverse use, an easement over the right-of-way, the railway company is in no position to complain that the decree of the court below limited its finding to the grant of the particular relief prayed in the cause, and did not enlarge its finding to include the general public. If there is any error in this omission, which we do not decide, it is one of which the railway company may not be heard to complain, as an individual may acquire such a right in which the public generally is not entitled to share. The decree must therefore be affirmed, and it is so ordered.

BURNETT *v.* SEVENTH STREET PRODUCE COMPANY.

Opinion delivered March 14, 1932.

R. E. Rison and *Lewis Rhoton,* for appellant.

Verne McMillen, for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellee to recover damages for injuries received to his shoulder and back through the alleged negli-

gence of appellee's truck driven, with whom he was riding by permission of appellee. Two separate acts of negligence were alleged as follows: That at the time of the injury the truck was being driven at a reckless, negligent and dangerous rate of speed; and that the driver failed to sound any alarm before trying to pass a truck traveling in the same direction, in violation of paragraph "B," § 12 of act 223 of the Acts of 1927.

Each allegation of negligence was denied, and the cause was submitted upon the pleadings, testimony and instructions of the court, resulting in a dismissal of appellant's complaint, from which is this appeal.

Appellant's main contention for a reversal of the judgment is that the right to recover was limited by instruction No. 8, given by the court at the instance of appellee, to the sole issue whether appellee's driver failed to blow the horn when attempting to pass the truck in front of him. Appellee admits this was the effect of the instruction, but attempts to justify it upon the ground that there was an entire failure of any substantial evidence upon which to submit the issue whether the driver was negligent in the rate of speed he was driving at the time of the injury. We cannot agree with appellee in this conclusion. When the driver passed the truck in front of him, he was traveling at a speed of thirty-five miles an hour and within a narrow space due to the load on the truck in front sticking over the left side. Appellant testified that he requested the driver not to attempt to pass the truck in front, but that, without giving any signal, he attempted to do so and was forced into the ditch, where the truck they occupied turned over several times, injuring and rendering appellant unconscious. We think these facts sufficient to warrant a submission of the issue of whether appellee's truck was being driven at a reckless, negligent or dangerous rate of speed when attempting to pass the truck in front.

Appellant also contends for a reversal of the judgment because the court gave appellee's requested instruction No. 10, which is as follows:

"You are instructed that, before you can find for the plaintiff in this action, you must find that the driver of defendant's truck negligently attempted to pass the truck traveling in the same direction, and negligently failed to sound any alarm before trying to pass a truck traveling in the same direction, and, unless you so find, the court tells you that the plaintiff cannot recover, and you will find for the defendant."

The effect of this instruction was to tell the jury to find for appellee unless appellant established by the weight of the testimony both allegations of negligence set out in the complaint, whereas it was sufficient for him to establish either by a preponderance of the testimony.

This, as well as the first instruction referred to, was inherently wrong as applied to the facts and subject to a general objection. It was not necessary to point out either defect by specific objection as contended by appellee.

Appellant also contends that there was no evidence upon which to base instruction No. 6 given by the court at the request of appellee. The instruction objected to is as follows:

"You are instructed that it was incumbent upon the plaintiff to use reasonable care to avoid unnecessary aggravation of his injuries; and if you believe from the evidence that the plaintiff did not use reasonable care in following the advice of his physician, and if you further believe from the evidence that, because of his failure to observe such reasonable care, his collar-bone was deformed, then the court tells you that the plaintiff cannot recover in this action for such deformity."

The evidence relied upon by appellee in support of said instruction is as follows:

"Q. At that time you informed him (appellant) that he would have to have that kind of an operation, to have a proper union? A. No, sir, I told him at the time that it would be one that I thought advisable in

order to have proper position. Mr. Burnett asked me, if I thought we could get a union without an operation. I told him I thought we could, but that we would have a deformity. Q. You told him that to start with? A. Yes, sir. Q. And he didn't have you to perform that operation? A. No, sir, he said he would rather not have to be cut on if he didn't have to be. Q. And he would take the chances of the deformity? A. No, he didn't say he would take the chances of any deformity. Q. Did you tell him that he probably would have a deformity if he didn't do it A. Yes, sir, I told him that he might have a deformity; yes, sir. Q. And he didn't have you perform that operation? A. No, sir, he said he would rather not be cut on, if he didn't have to be. Q. And he said he would take the chances on the deformity? A. No, he didn't say he would take the chances of any deformity."

This piece of evidence does not show that appellant was guilty of negligence in failing to follow the advice of his physician. The most it shows is that he did not want to submit to an operation unless it was absolutely necessary. The effect of this testimony was not as contended by appellee that appellant took the chance of a deformity rather than submit to an operation.

On account of the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

STATE USE CALHOUN COUNTY *v.* POOLE.

Opinion delivered March 14, 1932.

Joe Joiner, for appellant.

C. L. Poole, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment denying appellant the right to recover $300 of school funds alleged to have been wrongfully retained by appellee as an attorney's fee for the collection of moneys for the school district.

It appears from the testimony that W. A. and Ida Tomlinson made their will in the State of Texas, county of Jeff Davis, providing that $3,000 out of their estate be paid to the public school fund of Calhoun County.

Sikes was appointed executor of the will, and the $3,000 was collected out of the estate, but he failed to pay same to the school fund, paying it to C. L. Poole instead, who was alleged to be without authority to accept it for the school fund, and Poole acting for Sikes, executor, did pay the school fund of said county the sum of $2,700, wrongfully retaining $300 as a fee for the collection of it, and it was alleged that both he and the executor were liable to the county school board therefor.

Poole answered denying any indebtedness, and alleged that he had the right to and did retain the $300 out of the money collected as a fee for professional services rendered.

The testimony shows the services necessary to be performed, which were done by Poole and an assistant employed by him in having the will, which appeared to have been lost for a time, probated in Denton County, Texas, where Ida Tomlinson died, a copy of the lost will being procured from Pilo Pinto County where it had first been probated. The necessity for procuring affi-

davits from the subscribing witnesses from Jeff Davis County, etc., was shown. The money was finally collected after three trips made to Texas by appellee and paid over to the public school fund, except $300 retained by Poole as his fee in accordance with what he claimed to be his contract of employment.

He testified that he had talked with the board at regular meetings two or three times about the employment and the necessity for it, and that finally the president of the board with another man came over to his office and told him to proceed with the collection; that he accordingly collected the money after three trips down into Texas at an expense of about $75 each and retained his fee agreed upon, as he had the right to do.

Several members of the board testified that Mr. Poole had come before the board and stated the necessity for having some one employed to collect the money from the estate, but that the board had never employed him; that Sikes, the executor, was Poole's brother-in-law, his wife being a daughter of the testator, as was also Poole's wife, and that the board thought it could collect the money without the employment of counsel.

Sometime after Poole had begun to proceed about the collection and before it was actually made, the board passed a resolution to rescind any previous action towards employing an attorney to collect the money willed to the school fund of the county by Mr. Will Tomlinson and leave it in the hands of Mr. Sikes of Monticello.

The jury under instructions not complained of returned a verdict in favor of appellee Poole, from which this appeal comes.

It is insisted for reversal that the school board was without authority to employ a lawyer to collect the money given to it under the terms of the will, that the testimony is insufficient to support the verdict, and that the court erred in not granting a new trial on account of newly discovered evidence.

The county board of education is granted certain powers by the statute, § 8873, *et seq.*, Crawford & Moses' Digest, in effect substituting the county boards of education for the county court in the supervision of school affairs, the duties of the board being set forth in § 8876 of the Digest. The right of the county board to bring suit for the protection of the common school fund and for the purpose of requiring the county treasurer to transfer moneys to the common school fund appears to be recognized in *County Board of Education* v. *Austin*, 169 Ark. 436, 276 S. W. 2. Although the authority is not expressly given, it would necessarily be implied from the authority conferred to manage and control school funds, etc. The jury decided the fact as to whether there was a contract between appellee Poole and the county board of education to collect the fund, and there is sufficient evidence to support the verdict. All admitted Mr. Poole appeared before the board at one or two meetings, stated the conditions about the collection of the fund and his desire to represent the board in the collection, agreeing to do so for the amount of $300. Although several members denied that he was ever employed and stated that the minutes of the board meetings did not show any such employment, he testified that the president of the board came to his office after the last conference with them and told him to proceed with the collection, which he did. The president was not very definite in his recollection of what occurred when he spoke to Poole about it, but he admitted that he called at the office for some purpose and had a conversation with Poole. Then the resolution passed by the board after appellee was proceeding with the collection of the fund, which was afterwards paid to him, to rescind any previous action toward employing an attorney to collect the money indicates that the board thought that an attorney may have been employed for whose services it would be bound, unless it did take such action. If appellee had been employed, as some of the testimony tends to show and the

resolution indicates, the board could not discharge or refuse to pay him a reasonable fee for the services necessarily rendered in the collection of the money to which the board was entitled. He stated what his services consisted of, the necessity of payment of expenses of three trips to Texas, the employment of a local attorney to assist, and it cannot be said that the fee charged for making the collection, if one had not been agreed upon, was more than the services rendered were worth.

Neither was error committed in refusing to grant the motion for a new trial on account of newly discovered evidence. No diligence was shown to procure the testimony of the witness, which was claimed would furnish the newly discovered evidence, no subpoena having been issued for him, and, although he was a party to the suit, appellant could not have a new trial because of the disappointment of its expectations that said witness would necessarily be at the trial and could be introduced by it as a witness for appellant. The testimony claimed to be newly discovered was largely cumulative too, about the payment of the expenses of the attorney for his trips to Texas, one witness having testified he had seen the account and the statement of it and its payment by the executor, etc.

We do not find any prejudicial error in the record, and the judgment is affirmed.

LEE *v.* WAGNER.

Opinion delivered March 14, 1932.

Jas. S. McConnell, for appellant.

Feazel & Steel, for appellee.

MEHAFFY, J. This suit was begun by the appellant, Laura Lee, administratrix of the estate of W. Ridley Lee, deceased, against the appellee, Ferris Wagner, to recover the possession of two mules, alleged to be of the value of $125. The suit was in replevin; a bond given, and order of delivery was issued, and appellant took possession of the mules and disposed of them.

The justice of the peace found in favor of appellee, and appeal was taken to the circuit court, where the case was tried and resulted in a judgment and verdict for appellee.

In the fall of 1929, Dr. W. Ridley Lee was the owner of the two mules, and told appellee that the mules were in the pasture, and if appellee wanted them he could go and get them, and pay $125 for them. There was no time fixed for the payment, except appellee told Dr. Lee he would pay when he could.

The appellee used the mules in 1930 to cultivate his land, but there was a crop failure, and he was unable

to pay. Dr. Lee did not retain title to the mules, did not take any note, but entered a charge on his books of $125 for the mules.

The appellee does not claim that he has paid for them, but he went to the appellant after Dr. Lee's death and told her he wanted to sell the mules to a Mr. Runnels.

The appellant testifies that she told appellee that, if satisfactory with her attorney, appellee could keep the mules until fall. Appellee testified that she agreed that he could keep them until fall. She says he wanted to turn the mules over to her, but she was unable to keep them, and told him to see her attorney. At any rate, appellee kept the mules and began to make a crop, and this suit in replevin for possession of the mules was begun as stated above.

There is no claim that title was retained to the mules, but the admitted facts show that appellee was the owner, and in possession of the mules. There was then considerable testimony about the amount of damages caused by taking the mules under order of delivery, but we do not deem it necessary to set out this testimony.

At the close of the evidence the court instructed the jury that the plaintiff had no right to maintain the action for the recovery of the mules, and directed the jury to return a verdict for the defendant for the mules in controversy; but the court also stated to the jury that, since the testimony showed the mules had been disposed of, and that the purchase price had not been paid, these two items would offset each other; but that, since the mules had been wrongfully taken, defendant was entitled to recover damages if he had sustained any.

The jury returned a verdict for $100 damages for the wrongful taking of the mules, and judgment was entered for this amount. Motion for a new trial was filed and overruled, and the case is here on appeal.

The evidence showed that appellee had begun the cultivation of his land, had broken his corn land, laid

it off, and planted it; had row-bedded the other land, a part of it twice.

Appellee and others testified about the damage for taking the mules, and about their reasonable rental value. The evidence as to the rental value of the team, and the damages caused by the wrongful taking, was competent.

Appellant contends that she had no right to make an agreement with appellee for him to keep the mules until fall; that this agreement could not be made without specific authority from the probate court, and relies on § 122 of Crawford & Moses' Digest, to sustain her contention. The section referred to is with reference to compromising a debt, and provides that the probate court may authorize the administrator to compromise a debt due the estate, which cannot be realized in money.

The agreement testified to by appellee was not a compromise of the debt in any sense. He wanted to turn the mules over to appellant, and he says she wanted him to keep them and feed them during the winter, and agreed that he might make another crop with them and pay in the fall, but there never was any agreement or suggestion about compromising the debt. Appellee did not deny that he owed the debt, and did not make any offer of compromise except he offered to deliver the mules to her, which she declined.

Appellant also calls attention to § 213 of Crawford & Moses' Digest, with reference to the personal liability of persons sued as executors or administrators. This section has no application to the facts in this case.

It was error for the court to set off the debt of appellee against the value of the mules. The statute provides: "Where the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property or its value, in case a return cannot be had, and damages for the taking and withholding of the property."

It would therefore have been proper for the court to direct the jury to return a verdict for the defendant for the return of the property or its value, and damages for the taking and withholding the property, if any had been shown by the evidence.

However, the appellee does not complain, and admits that he owes the debt, and there was no objection by appellee to this instruction of the court.

The appellant did not allege or prove either title to the property or the right to immediate possession, and, in order to maintain replevin for personal property, it is necessary to allege and prove both title and right to possession.

"Property in defendant is a good defense in an action of replevin, and this is ordinarily true, whether it be an absolute or a special or qualified property in the goods which are the subject-matter of the litigation." 54 C. J. 456.

In this case, the undisputed proof shows that title to the property was in the appellee, and that the appellant had no title. As said in a recent case: "Appellant might have maintained an action to establish and enforce a lien on the mules under the vendor's lien statute, after breach of the contract by appellee for the rental of the land, but the action of replevin will not lie. To maintain replevin, plaintiff must show title in the property, and a landlord's lien is not sufficient to sustain the action." *Laughlin* v. *Tyler,* 177 Ark. 1183, 9 S. W. (2d) 567; *Security Bank & Trust Co.* v. *Bond,* 132 Ark. 592, 201 S. W. 820; *Brown & Hackney, Inc.,* v. *Lovelace,* 152 Ark. 540, 239 S. W. 21; *Passwater Chevrolet Co.* v. *Whitten,* 178 Ark. 136, 9 S. W. (2d) 1057; *Reavis* v. *Barnes,* 36 Ark. 575; *Knox* v. *Hellums,* 38 Ark. 413.

Replevin lies for the possession of specific personal property. Where one sells property and retains title, he may bring suit in replevin for possession of the property because he has title to it; but where one sells personal property without retaining title, he cannot bring suit

for the possession of the property, but his remedy is a suit against the vendee for the debt, and he may attach the property and cause it to be sold for the payment of the debt.

Suit was not brought in this case for the debt, but was brought to recover the specific property, and the trial court correctly held that the appellant had no right to recover in this action.

Appellant contends that the damages are excessive, but this question was not raised in her motion for new trial, and cannot therefore be considered by this court.

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

HILL *v.* STATE.

Opinion delivered March 14, 1932.

G. Roy Taylor, for appellant.

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

MEHAFFY, J. The appellant, Tom Hill, was indicted by the Crawford County Grand Jury, the first count in the indictment charging him with the crime of burglary, and it is alleged that the burglary was committed by breaking into and entering box car No. A. R. T. 21404 of the

Missouri Pacific Railway Company. The second count charged appellant with grand larceny.

He filed a demurrer to the indictment which was overruled, and he was tried and convicted, and his punishment fixed at three years in the penitentiary. After the verdict, appellant filed a motion in arrest of judgment, which was overruled. He then filed a motion for new trial, which was also overruled. The case is here on appeal.

The motion in arrest of judgment and the motion for new trial alleged that the indictment was faulty; that it had been changed, amended and altered. The evidence showed that the original indictment charged appellant with breaking into car No. A. R. T. 41404, and that it was changed to A. R. T. 21404, and that the indictment was also amended by adding the words "a corporation" after the Missouri Pacific Railway Company. These changes were made by the prosecuting attorney after the indictment had been filed in court.

The evidence was sufficient to support the verdict of the jury, and the only question for our consideration is whether the change in the indictment by the prosecuting attorney rendered the indictment void.

The Attorney General argues that it was not necessary to allege the car number, and therefore changing it from 41404 to 21404 did not affect the substantial rights of the appellant, and that the change was immaterial.

It was not necessary to allege the car number, but, having alleged it, it becomes descriptive of the offense, and must be proved as charged. "It has been held by this court that it is unnecessary, in an indictment of larceny for money, to describe it as money of the United States, but, having alleged that it was money of that kind, it must be proved as alleged. The same degree of certainty in the proof has been held to be necessary under indictments for embezzlement, for obtaining property under false pretenses, and for burglary." *Value* v. *State,* 84 Ark. 285; *Carleton* v. *State,* 129 Ark. 361;

Bryant v. *State,* 62 Ark. 459; *State* v. *Anderson,* 30 Ark. 131; *Shover* v. *State,* 10 Ark. 259; *Jenks* v. *State,* 63 Ark. 312; *Lee* v. *State,* 114 Ark. 310; *Adams* v. *State,* 64 Ark. 188.

In the last case mentioned, it was said: "A description of the house in which the liquors were kept for sale is therefore descriptive of the offense, and material, and must be proved as alleged."

This court has uniformly held that while not necessary to describe the house or the car by number, yet where it is alleged that the offense was committed by breaking and entering a certain described house or car, the description of the house or car is descriptive of the offense, and is material. Therefore, the car number, having been alleged in the indictment, was material, and cannot be changed by the prosecuting attorney or any other person.

The indictment, when filed in court, became a record, and could not be withdrawn for amendment or any other purpose.

"When the original indictment was returned into the court by the grand jury, and filed, it became a part of the records of that court, and thereafter could not be withdrawn for amendment or for any other purpose, either by the grand jury or the prosecuting attorney. If the indictment was supposed to be insufficient, either for uncertainty or for want of proper legal words, the proper practice was to enter a *nolle prosequi* and have the grand jury find a second indictment on the original evidence. But there is no such thing known to our law as the amendment of an indictment, although an error as to defendant's name will not vitiate the proceedings, and there are some formal defects which will be cured by verdict. In fact, there are constitutional objections to such amendments." *State* v. *Springer,* 43 Ark. 91.

Our Constitution provides: "No person shall be held to answer a criminal charge, unless on the presentment or indictment of a grand jury." Article 2, § 8, Constitution of Arkansas.

If the prosecuting attorney or any one else could change the indictment after it had been filed in court, it would no longer be the indictment presented by the grand jury, and no person could be held to answer a criminal charge under it after it had been changed.

In a note to 7 A. L. R. 1555, it is said: "The proposition that in the courts of the United States any part of the body of an indictment can be amended after it has been found and presented by a grand jury, either by order of the court or on the request of the prosecuting attorney, without being resubmitted to them for their approval, is one requiring serious consideration. Whatever judicial precedence there may have been for such action in other courts, we are at once confronted with the 5th of those articles of amendment, adopted early after the Constitution itself was formed, and which were manifestly intended mainly for the security of personal rights. This article begins its enumeration of these rights by declaring that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

There are many cases cited in the above note, and among others attention is called to the case of *Henderson* v. *State,* 91 Ark. 224, 120 S. W. 966, in which this court held that, to secure a conviction, the proof in a prosecution or an indictment must correspond with the allegations of the indictment, since the indictment cannot be amended to conform to the proof.

After the indictment was changed it was no longer the indictment of the grand jury which presented it, and as said in Ex parte *Bain,* quoted from in the above note, in 7 A. L. R.: "Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made, by the consent or order of the court, in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer

to the indictment as thus changed, the restriction which the Constitution places upon the power of the court in regard to the prerequisites of an indictment in reality no longer exists."

The Wisconsin court said: "If the amendments were at all material, their allowance would be good cause for arresting the judgment. Indictments cannot be amended." *State* v. *McCarty,* 54 Am. Dec. 150; *Dickson* v. *State,* 20 Fla. 800; *Patrick* v. *People,* 24 N. E. 619; 14 R. C. L. 192.

The motion in arrest of judgment should have been granted.

The judgment is reversed, and the cause remanded with directions to quash the indictment.

ARKANSAS POWER & LIGHT COMPANY *v.* HILLIARD.

Opinion delivered March 14, 1932.

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

O. H. Sumpter, for appellee.

MCHANEY, J. In 1926 appellant contemplated the construction of a dam across the Ouachita River near Hot Springs above Remmel Dam. It caused its engineers

to determine and survey off all the land which would be flooded by the construction of said dam. It proceeded to purchase or condemn the land that was to be flooded by reason thereof. The appellee was the owner of certain land, a portion of which would be flooded, and it entered into negotiations with her for the purchase thereof, which finally resulted in a sale by her to it of such land as it contemplated flooding at a price of $40 per acre, for which she executed to its representative a general warranty deed. The deed was dated March 23, 1926, and in it she reserved the use and occupancy and the right to remove all improvements and timber thereon until December 31, 1927. This is the only reservation in the deed, but it is conceded that appellee had the right to purchase from appellant at the same price such of the land as was not flooded. There is a public road running from State highway No. 6 in a southwesterly direction to the east side of her land where it terminates at a gate in the fence around her land. A private road leads from the gate to her residence near the southeast corner of the southwest quarter of the northeast quarter of section 10. The house is located on a knoll or hill, and there is a depression between the gate and the house which has been flooded by the construction of Carpenter Dam, the lake formed thereby being known as Lake Hamilton. The water in this depression or swale is on the land purchased by appellant from appellee and floods the roadway from the gate to appellee's house to a depth of 10 or 12 feet and about 300 feet wide. Appellee is therefore unable to get to or from her home over this roadway.

She brought this suit to enjoin the appellant from raising its lake to such a level as would flood her roadway between the public road and her house and also asked for damages against appellant in the sum of $2,950. The evidence showed it would cost from $2,000 to $3,000 to build a dump and culvert across the flooded roadway so as to provide her a way to get in and out over the same

route. On a hearing the court denied the injunction, but gave judgment in her favor against appellant in the sum of $2,000.

The court did not find that the roadway from appellee's gate to her house, and which has been flooded, is a public road. The court did find that at the time of the grant and for more than seven years prior thereto she had been using the way over the granted land, such use being open and notorious, and that there was a way of necessity reserved in her grant by implication. Appellant does not object to her use of the way or of the water over the way, provided the facilities for its use are constructed without expense to it, and that its use does not interfere with the raising or lowering of the water level in the lake. It is undisputed that both parties knew the land purchased from appellee was to be flooded. Appellant's agents pointed out to her what land would be flooded at the 400 foot level, and what would be flooded at the 414 foot level. The dam was constructed so as to bring the water to the 400 foot level only, but she knew that at that level the low place between her house and gate would be flooded, and of necessity knew that the road running across such low place would also be flooded. She made no reservation in her deed that it should not be flooded, nor that, if it were, appellant should construct a bridge or other way across same. Nor did she testify in positive terms that any agent of appellant agreed to provide her a way in the event her road was flooded. She testified that the road was to be taken care of: "That was my understanding that they would never shut me in there"; that she talked to Mr. Longino, agent for appellant, many times and told him she didn't want to be shut in; that she, Mr. Longino, and Mr. Belding, her lawyer, were together when the deal was finally closed in Belding's office, and, when asked if anything was said about keeping the roadway open at that time, she answered, "Well, I won't say." At no place in this record does Mrs. Hilliard say she had an agreement with Mr.

Longino for appellant that it would keep her way open by building a bridge, culvert or anything else. The most she says is that she got the impression from Mr. Longino that it would give her a way. Her son, who was a joint owner at that time with appellee and who signed the deed to appellant, says: "I just took it for granted we were to have the use of the road; wasn't anything said against our using it." And again he said: "No, I just took it for granted we would be able to have the use of the road. The road ends at our home."

Conceding without deciding that oral testimony would have been competent to show, as a part of the consideration for the deed, (the deed reciting "$1 and other good and valuable consideration") that appellant agreed to build her a bridge or viaduct, still the evidence of such an agreement is too indefinite, vague and uncertain to show a binding contract on appellant to do so.

What we have said makes it unnecessary to discuss other questions argued in the briefs. Other ways of ingress and egress are open to appellee, one tendered by appellant, attended with some inconvenience and expense. It cannot be said therefore that she is entitled to the way demanded as of necessity.

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

HUMPHREYS and MEHAFFY, JJ., dissent.

NATIONAL FIRE INSURANCE COMPANY *v.* KIGHT.

Opinion delivered March 14, 1932.

Verne McMillen, for appellant.

John L. McClellan, for appellee.

McHaney, J. The only question presented for determination in this case is the liability of appellant for the payment of the statutory damages and attorney's fee under § 6155, Crawford & Moses' Digest. The statute provides: "In all cases where loss occurs and the fire, life, health or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorney's fee. * * *"

There is no dispute in the facts. The case was submitted on an agreed statement of facts, substantially as follows: Appellee's building was insured by appellant in the sum of $3,000, and sustained a partial loss by fire while the policy was in full force and effect. Appellant did not deny liability, but admitted same, and agreed to pay whatever sum was necessary up to its liability to restore the building in good condition. The disagreement arose over the amount necessary to restore the building in as good condition as before the fire. Appellee in apt time made proof of loss in which he claimed damages to the building in the full amount of the policy $3,000. Appellant secured three estimates of reputable contractors in which they offered to restore the building for from approximately $2,100 to approximately $3,250. Appellee secured estimates from contractors ranging from $3,200 to $3,800. The parties were unable to agree on an amount within sixty days after proof of loss, but appellant offered to pay appellee $2,122.36, which appel-

lee refused, and made a counter offer to accept $2,800 in settlement of the loss which appellant declined to pay. Counsel for appellee wrote a letter to appellant's adjuster under date of May 23, 1931, rejecting appellant's offer, in which he said: "I have gone into and carefully considered all these estimates, made further investigation and have concluded the loss is practically equal to the face of the policy, but have recommended to Mr. Kight, and he has agreed to accept rather than delay settlement any longer, $2,800. * * * He will not accept less, and, if your company will not accept on this basis, there is no prospect of amicable settlement." Under date of June 1, 1931, appellant's adjuster replied, refusing to pay the demand for $2,800, in which he said that he was not in position to exceed the estimates of two of the contractors and concluded by stating: "You may therefore take whatever action you deem advisable." Thereafter appellee filed suit for $2,675. Appellant answered admitting its liability for $2,675, together with interest from May 12, 1931, the date of the proof of loss, but denied that appellee was entitled to recover 12 per cent. damages or an attorney's fee. At the same time it paid into the registry of the court the sum demanded, together with interest and costs to that date, in full of its liability under the policy and prayed to be dismissed. The court found against appellant, and rendered judgment against it in the sum of $321 damages, being 12 per cent. of $2,675, and $250 attorney's fee. This appeal is from that judgment.

We think the court erred in so holding. Appellee first demanded the full amount of the policy, $3,000. Later it reduced this amount and demanded $2,800, and in this demand he stated that he would not accept less. Appellant did not deny its liability in a sum sufficient to restore the building to its former condition, and the only difference between them was the amount necessary for this purpose. Appellee for the first time demanded a less amount than $2,800 when it filed its complaint seek-

ing to recover $2,675 with interest, 12 per cent. damages and a reasonable attorney's fee. Thereupon appellant promptly paid the amount of the demand with interest and the accrued costs. This court has several times held that the above statute providing for 12 per cent. damages and a reasonable attorney's fee is highly penal and should be strictly construed, and that it should not be held to apply except in cases which come clearly within the statute. *Home Life Ins. Co.* v. *Stancell,* 94 Ark. 578, 127 S. W. 966, and *National Union Life Ins. Co.* v. *Crabtree,* 151 Ark. 561, 237 S. W. 97.

We have many times held that the above statute has no application where an excessive demand is made upon the insurance company, and that there can be no recovery for damages and attorney's fee where the judgment is for less than the demand. *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384, 124 S. W. 764; *Industrial Mutual Indemnity Co.* v. *Armstrong,* 93 Ark. 84, 124 S. W. 236; *Interstate Business Men's Accident Assn.* v. *Sanderson,* 148 Ark. 195, 229 S. W. 714; *Illinois Bankers Life Ins. Co.* v. *Mann,* 158 Ark. 425, 250 S. W. 887; *American Alliance Ins. Co.* v. *Paul,* 173 Ark. 960, 294 S. W. 58; *Mutual Relief Assn.* v. *Poindexter,* 178 Ark. 205, 10 S. W. (2d) 17; *Lincoln Reserve Life Ins. Co.* v. *Jones,* 178 Ark. 466, 10 S. W. (2d) 910.

In *Queen of Arkansas Ins. Co.* v. *Milham,* 102 Ark. 675, 145 S. W. 545, the appellant claimed that the appellee was indebted to it on a premium note of $12, and appellee conceded that that amount should be deducted from the amount sued for in the original complaint. In response to appellant's contention that it was not liable under the statute for the penalty and attorney's fee, this court said: "If appellant wished to avoid the penalty and attorney's fee provided for in the statute, it should have offered to confess judgment for that amount, and thus have ended the suit. It did not do so, but elected to go on and contest the claim of the appellee on other grounds, and thereby became liable for the penalty and

the attorney's fee provided for in the statute when appellee recovered the amount sued for."

In *Life & Casualty Co.* v. *Sanders,* 173 Ark. 362, 292 S. W. 657, we held that the plaintiff could reduce his demand by amendment to the complaint after the trial had started and still recover the penalty and attorney's fee. We there said: "If, instead of proceeding with the trial of the case and denying any liability whatever on the grounds here urged, it had either offered to pay the reduced amount, or had asked to be given the time in which to pay same as provided in the policies, appellee could not have recovered the penalty and attorney's fee, and, in addition, would have been required to pay all costs, for the reason that he demanded a sum greater than he was entitled to under the policy." These cases settle the principle here involved. Appellee demanded a sum of appellant greater than he was entitled to receive. When he made a demand for the correct amount, appellant promptly paid it and cannot therefore be liable for the damages and fees provided for in the statute because he has not brought himself within its provisions.

The judgment of the circuit court will be reversed. and the cause dismissed.

KIRBY, J., dissents.

STONE *v.* STONE.

Opinion delivered March 14, 1932.

Jas. S. McConnell, for appellant.

Feazel & Steel, for appellee.

McHaney, J. Appellee is the widow of W. C. Stone, deceased, and appellants are his heirs at law, children by a former marriage, all adults. At the time of her marriage to said Stone, appellee was the widow of one Joe Caldwell, deceased, from whose landed estate she claimed and was allowed a homestead which she has continued to claim, and the rents and profits from which she has continued to enjoy since Caldwell's death, more than 25 years ago. After the death of Mr. Stone and after letters of administration had been taken out on his estate (he having died intestate), appellee as widow filed her petition in the probate court for the assignment to her of her homestead rights in said estate. Appellants contested her right to a homestead out of said estate on the ground that she already had a homestead in her own right, which had been assigned to her out of the estate of Joe Caldwell, her former husband, and which was still in her possession, and from which she was still enjoying the rents and profits. The probate court denied her claim on this ground, and she appealed to the circuit court. Appellants then sought to have dower assigned to her by petition to the probate court which included the land claimed by her as homestead, which she opposed because it included the homestead claim, but the court assigned dower as petitioned by appellants. She appealed from this order. Both cases were consolidated in the circuit court by consent, heard together, and the

court rendered judgment allowing appellee her homestead right in said estate as claimed by her, and also assigned dower to her in the whole estate after carving out the 80 acres allowed as homestead. This appeal is from that judgment.

The Constitution, article 9, § 6, which is § 5523, Crawford & Moses' Digest, provides: "If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life. Provided, that if the owner leaves children, one or more, said child or children shall share with said widow, and be entitled to half the rents and profits till each of them arrives at twenty-one years of age; each child's rights to cease at twenty-one years of age, and the shares to go to the younger children, and then all to go to the widow; and provided that said widow or children may reside on the homestead or not. And, in case of the death of the widow, all of said homestead shall be vested in the minor children of the testator or intestate."

Counsel for both parties agree that a proper decision of the case depends upon what is meant by the clause in the above section of the Constitution which says, "and said widow has no separate homestead in her own right." It is well settled in this State that the homestead acquired by a former marriage is not forfeited or abandoned by a subsequent marriage and removal to the homestead of the second husband. *Davis* v. *Neal,* 100 Ark. 399, 140 S. W. 278, L. R. A. 1916A, 999; *Colum* v. *Thornton,* 122 Ark. 287, 183 S. W. 205. In the latter case we said: "The general rule is that a remarriage by a widow will not operate to destroy the homestead character of a home left to her and her children by a former husband. Our Constitution does not require a widow to occupy the homestead. There is nothing in it to indicate that the framers intended that the marriage of a widow and her going to her second husband's homestead and occupying

it with him should work a forfeiture of her previously existing legal rights."

The phrase above quoted, "has no separate homestead in her own right," has been frequently defined by this court. It means "the separate homestead of the widow established by her as a widow; that is, after, and not before the death of her husband." *Davenport* v. *Devereaux,* 45 Ark. 341. It "is not the separate homestead of the wife, but of the widow; that is, the separate homestead of the widow, selected by her on her own lands after the death of her husband (for she is not his widow until then)." *Willmoth* v. *Gossett,* 71 Ark. 594, 76 S. W. 1073. And in *Bruce* v. *Bruce,* 176 Ark. 442, 3 S. W. (2d) 6, it is said the widow becomes entitled to the homestead on her husband's death, "and unless, after his death, the widow selects some other homestead," she is entitled to the one occupied as such at the time of his death.

We are of the opinion therefore that appellee had the undoubted right to select as a homestead the home she had occupied for many years with her husband, Mr. Stone, and that the homestead acquired from her former husband, Caldwell, was not abandoned during the lifetime of Mr. Stone. Whether the selection of the Stone homestead as his widow constitutes an abandonment of the Caldwell homestead, we do not decide as appellants cannot raise that question, they having no interest in the Caldwell estate.

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

JOLLEY *v.* MEEK.

Opinion delivered March 14, 1932.

H. L. Veazey, for appellant.

Aubert Martin, for appellee.

BUTLER, J., (after stating the facts). The appellee insists that, because of the failure of the appellant to abstract certain instruments, exhibits to the pleadings and testimony, there has been a failure to comply with rule 9 of this court. We are of the opinion that this contention cannot be sustained because the pleadings and testimony abstracted are sufficient to give us an understanding of the issues involved.

We pretermit the second question raised by the appellee, *i. e.,* that the record is insufficient in that the oral testimony taken was not properly preserved by a bill of exceptions, for the reason that treating the testimony as properly preserved and brought forward in the record, it is insufficient to overturn the finding and decree of the chancellor.

The appellant, having denied that she signed the notes and deeds of trust or that she acknowledged the same, the burden of proof was upon her to show by preponderance of the evidence that her signature was a forgery, and that she had not in fact acknowledged the instruments. *Thompson* v. *Kinard,* 168 Ark. 1057, 272 S. W. 668; *Hildebrand* v. *Graves,* 169 Ark. 210, 275 S. W. 524. The chancellor found that the appellant had not sustained this burden of proof, and under the well-settled rule his decision must be upheld unless it is against the preponderance of the testimony.

The appellant testified that she did not sign the notes and deeds of trust, and that she did not acknowledge the same, but her testimony cannot be regarded as undisputed if, from all the facts in proof and from an examination of her testimony itself, any reasonable inference can be drawn contrary to her statement. *Harris* v. *Bush,* 129 Ark. 369, 196 S. W. 471; *Interstate Business Mens' Acc. Assn.* v. *Sanderson,* 144 Ark. 271, 222 S. W. 51. There is some corroboration of appellant's testimony to

be found in the testimony of her brother and sister, who stated that they were familiar with appellant's handwriting, and that in their opinion the signatures to the instruments involved were not written by the appellant. There is evidence, however, in direct conflict with this. The appellant, in open court, wrote her signature three times. We are unable to say whether or not there was an attempt upon her part to disguise her handwriting, but the chancellor had it before him at the time and doubtless compared it with the signatures on the instruments and considered it in the light of the attendant circumstances.

J. O. Jolley, the husband of the appellant and the signer with her of the instruments, testified that his wife, to whom the property mortgaged had been conveyed about five years previously by her father, knew of the purpose for which the mortgages were executed and stated that she had acknowledged the same before a notary and had signed the instruments.

The notary whose name appeared as the officer taking the acknowledgments was not able to testify in specific terms regarding the time and place and the incidents surrounding the taking of the acknowledgments, but this is not surprising as he was testifying about five years after the date of the acknowledgments. He did testify, however, that he took the acknowledgments, and that he had never taken the acknowledgment of a woman unless she was present. The officer had no interest in the result of the suit, and the chancellor doubtless attached more weight to his testimony than to that of the appellant, in view of the latter's interest and her denial, not only to the signatures on the instruments, but to her acknowledgment of the same. If the appellant did not in fact sign the deeds of trust, this would be of no importance if she acknowledged their execution before a notary. There is no evidence, nor is there any contention made, that the appellee colluded in any way with J. O. Jolley, who admitted signing the instruments and getting the money, to deceive the appellant. On the contrary, it is apparent that he

was entirely innocent of any fraud. Therefore as to him, the appellant's acknowledgment of the instruments would be effective to bind her, although the signatures might not have been her own and were unauthorized. *Ward* v. *Stark,* 91 Ark. 268, 121 S. W. 382; *Goodman* v. *Pareira,* 70 Ark. 49, 66 S. W. 147; *O'Neal* v. *Judsonia State Bank,* 111 Ark. 589, 164 S. W. 295; *Clifford* v. *Federal Bank & Trust Co.,* 179 Ark. 948, 19 S. W. (2d) 1026; *Abernathy* v. *Harris,* 183 Ark. 22, 34 S. W. (2d) 765.

We are unable to say that the finding of the chancellor was against the preponderance of the testimony, and the decree is therefore affirmed.

KELLEY TRUST COMPANY *v.* PAVING IMPROVEMENT DISTRICT NO. 47 OF FORT SMITH.

Opinion delivered March 21, 1932.

[redacted]

Geo. F. Youmans and *J. F. O'Melia,* for appellant.

George W. Dodd, for appellee.

HART, C. J., (after stating the facts). Numerous persons, who were citizens of Fort Smith and property owners in the proposed improvement district, joined in the suit and attacked the validity of the assessment of benefits on the ground that it was so excessive and discriminatory as to render it arbitrary and void. The burden was upon them as attacking the validity of the assessment as a whole to prove that it was made upon the wrong basis or that it was arbitrary and void. *Turner* v. *Adams,* 178 Ark. 67, 10 S. W. (2d) 41, and *Lenon* v. *Street Improvement District No. 512,* 181 Ark. 318, 26 S. W. (2d) 572. In the latter case, it was said that there was a presumption in favor of the validity of the assessment of benefits, and that the burden was upon the property owners who assailed it to show that it was so excessive as to render it void.

Special assessments proceed upon the theory that, when a local improvement enhances the value of adjacent property, that property should pay for the improvement. Hence, special assessments are made upon the assumption that the land in the proposed district is to be actually benefited by the enhancement of its value. Local assessments can only be imposed to pay for local improvements clearly conferring special benefits on the property as-

sessed, and to the extent of those benefits only. This court has uniformly held, in a long line of cases, that all assessments for local improvements in municipal corporations are based on the principle that the property subjected to the assessment is benefited by the improvement for which the assessment is made. Hence there is a constitutional limitation that the amount of the special assessment must not exceed the special benefit derived, and also that the imposition of the assessment must be uniform and free from unjust discrimination. Otherwise the special assessment would be invalid on the ground that it is an attempt to take private property without just compensation, in violation of the Constitution. *Ahern* v. *Board of Improvement District No. 3 of Texarkana,* 69 Ark. 68, 61 S. W. 575; *Mullins* v. *Little Rock,* 131 Ark. 59, 198 S. W. 262, L. R. A. 1918B, 461; *Stevens* v. *Shull,* 179 Ark. 767, 19 S. W. (2d) 1018, 64 A. L. R. 1258; and *Thacker* v. *Paving Improvement District No. 5 of Mena,* 182 Ark. 368, 31 S. W. (2d) 758.

The cases above cited, as well as many other cases decided by this court, establish the doctrine that special assessments cannot be levied in local improvement districts unless the property charged receives a corresponding physical, material and substantial benefit from the improvement.

It is first sought to set aside the assessment of benefits on the ground that it was so excessive as to be arbitrary. It is first pointed out that the total of the assessed benefits is $74,235, and that the estimated cost of the improvement is $47,763. This, of itself, could not constitute an arbitrary assessment of benefits. In the first place, interest on the amount of bonds to be issued to make the contemplated improvement would be necessary; and, when the testimony of all the witnesses on both sides is considered, it cannot be said that the assessment of benefits was made upon an arbitrary basis, so as to leave a large margin of benefits in favor of the bondholder.

It is next insisted that the assessment of benefits is so discriminatory and excessive as to render the assess-

ment arbitrary and void under the principles of law above announced. About eight witnesses were introduced by each party. So far as the record discloses, they were responsible citizens, property owners, and were more or less interested in the contemplated improvement. There is nothing to impeach their integrity or veracity except that they wholly contradicted each other about the assessment of benefits made upon the property in the district.

On the part of the property owners, the testimony shows that the assessment of benefits was excessive, and that in many instances there was discrimination in the assessment of benefits between the property owners in the district. On the other hand, the testimony of the witnesses for the district shows that the assessment of benefits was made after due consideration of every element that should enter into it. The situation of the property and the condition surrounding it, as well as all other matters which might tend in a substantial way to increase its value, were given due consideration in the assessment of benefits, and the assessment was not void as being excessive or made in an arbitrary manner. The assessors had before them a map of the proposed district, showing the situation of the property and the physical material benefits that might accrue to it.

It is true that the testimony of the witnesses for the property owners tended to show that in many instances the assessment of benefits, as regarding the different property owners, was unequal and discriminatory. This was a matter which would have entitled these individual property owners to relief, had they proceeded in the manner pointed out in the statute. The present suit, however, is an attack upon the assessment of benefits as a whole as being made on the wrong basis.

It is claimed that the assessment of benefits as a whole was excessive, and made in such a discriminatory manner as to render it arbitrary and void. The evidence tends to show that part of the streets in the district had already been paved and had become badly worn, but this matter seems to have been taken into consideration

by the assessors in making their assessment. It also claimed that some of the property abutted the street, and some of it did not. This fact of itself would not render the assessment void, and the situation of the property appears to have been taken into consideration by the assessors in making the assessment of benefits. *Cooper* v. *Hagen,* 163 Ark. 312, 260 S. W. 25; and *Little Rock* v. *Boullion,* 171 Ark. 245, 284 S. W. 745, and cases cited.

To set out the testimony in detail and to review it would serve no useful purpose in this case, and would unduly extend this opinion. We deem it sufficient to say that it was fully abstracted by counsel for appellant, and that we have carefully read and considered it. We have also considered the brief of opposing counsel, and are of the opinion that the assessment of benefits was made in attempted compliance with the principles of law announced in the cases above cited. It is not within our province to say whether or not the chancery court should have reached a different conclusion upon the facts. Under our settled rules of practice, it is our duty to uphold the finding of facts made by a chancery court, unless it is against the preponderance of the evidence. It is true that we try cases *de novo* upon the record made in a court below, but it is our duty to give due deference to the finding of facts made by the chancellor as above indicated.

It cannot be said that the finding of facts made by the chancellor in the court below is clearly against the weight of the evidence; and, under our settled rules of practice, it becomes our duty to affirm the decree. It is so ordered.

ALBRIGHT *v.* TAYLOR.

Opinion delivered March 21, 1932.

J. F. Parish and *H. U. Williamson,* for appellant.

C. M. Erwin, for appellee.

HART, C. J., (after stating the facts). Under our rules of practice, in equity exhibits to the complaint control its averments, and may be looked to for the purpose of testing the sufficiency of the allegations of the complaint. *Moore* v. *Exelby,* 170 Ark. 908, 281 S. W. 671.

The general rule is that, where a deposit is made in a bank with the distinct understanding that it is to be held by the bank for the purpose of furthering a transaction between the depositor and a third person, or where it is made under such circumstances as give rise to a necessary implication that it is made for such a purpose, the deposit becomes impressed with a trust which entitles the depositor to a preference over the general creditors of the bank, where it becomes insolvent while holding the deposit. See case notes to 31 A. L. R., at page 473; 39 A. L. R. 930; 57 A. L. R. 386; and 60 A. L. R. 336.

Among the many cases cited in support of the rule is *Covey* v. *Cannon,* 104 Ark. 550, 149 S. W. 514. In that case, the general rule was stated by the court substantially as above. It was held that, where checks, given as part of the purchase price of lands, and either made payable to a certain bank or indorsed to it, and where delivered to the bank to be held until the sales were completed, with no intention that the checks should be cashed and the money deposited to the credit of the drawers,

the deposits were special, and the relation of debtor and creditor was not established, though the bank cashed the checks and mingled the proceeds with its funds. It was further held that, where a bank has mingled trust money with its own funds, money paid from such fund for its own purposes will be presumed to have been paid from its own money and not from the trust funds; but, where the mingled fund is at any time reduced below the amount of the trust fund, the latter must be regarded to that extent as dissipated, and sums subsequently added from other sources cannot be treated as a part of the trust fund.

In that case, as here, the account was marked, "escrow," and the court in its opinion recognized that this showed that the bank received the fund upon the express condition that it was not to be mingled with its own funds, and that it was intended by the parties that it should be a trust fund. The checks were given to the bank with the understanding that they were to be held for the seller until the transaction was completed and delivered to him. Hence this act constituted a deposit for a special purpose, and, as such, was impressed with a trust entitling the vendor to preference on the bank's insolvency, provided he could trace the funds or their equivalent as pointed out in the opinion. The court said: "It was not the purpose nor intention of Mason or Cannon, upon placing the checks and drafts with the contracts of purchase and the deeds to be held in the bank and delivered when the trades were consummated, that the checks should be cashed and the money deposited therein to their credit, and the bank did not understand that such was the purpose, as clearly shown by its marking the account 'escrow' in each instance. This was all done without the knowledge of either of the parties, and doubtless for its own convenience to identify the fund. Said deposits, in any event, were not general, but special, deposits for a particular purpose. The funds were so placed to the credit of these individuals as depositors without right and authority, and wrongfully mingled with

the funds of the bank. The ordinary relation of debtor and creditor was not thereby established, nor did the funds lose their character as trust funds by being so wrongfully used and commingled with the funds of the bank."

Other cases recognizing the principle will be found in the case note to 31 A. L. R., pp. 476-478.

In *Shulz* v. *Bank of Harrisonville,* (Mo. App.) 246 S. W. 614, in a similar case, the bank marked the deposit slip with the word "escrow," and it was held to constitute a special deposit impressed with a trust.

Again, in *Bank of Rison* v. *Layne & Bowler Company,* 173 Ark. 368, 292 S. W. 126, the court held that an escrow agreement with a bank, providing that the deposit in escrow should be paid out only to plaintiff company engaged in drilling a well for a depositor, was not *ultra vires.*

See also *Brogan* v. *Creip,* 116 Kan. 506, 227 Pac. 261, 37 A. L. R. 126, and case note.

But it is insisted that such holding would be contrary to the rule announced in *Blalock* v. *Bank of McCrory,* 170 Ark. 597, 280 S. W. 650, where it was held that money deposited under a special act in a certain bank, to the credit of the county treasurer, to pay the expenses of a special election to be held on the question of the removal of the county seat, created the relation of debtor and creditor between the bank and the county treasurer. There was nothing in the account to show that the parties intended it to be a special deposit. The record shows that the sum of $400 was deposited in the bank, "subject to the check of the county treasurer, for the purpose of paying the expense of said election." The court expressly passed over the question as to the validity of the provision of the statute in regard to the deposit of funds by the citizens of the town of McCrory, on the ground that no issue was raised on that feature of the case. Continuing, the court said that the funds had been deposited in the bank and thereby came into the hands of the treasurer, and, like any other deposit, created the

relation of debtor and creditor between the appellant as treasurer and the bank as depository. No reference was made to the case of *Covey* v. *Cannon, supra,* and this indicates that the court had no intention whatever of overruling it.

Here a copy of the account is placed in the record, and it shows that the parties intended that it should be a special deposit. We are of the opinion that the deposit in this case is a prior claim, as defined in § 1, subdivision 4, of act 107 of the Acts of 1927, which reads as follows:

"The owner of a special deposit, expressly made as such in said bank, evidenced by a writing signed by said bank at the time thereof, and which it was not permitted to use in the course of its regular business."

We are of the opinion that plaintiff's claim should be regarded as a special deposit and treated as a trust fund, and that he should have been awarded a preference under the statute. 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.

SURBAUGH *v.* DAWSON.

Opinion delivered March 21, 1932.

C. T. Carpenter, for appellant.

Knott & Spencer, for appellee.

SMITH, J. Appellee recovered a judgment, from which is this appeal, for a commission alleged to have been earned by him upon the sale of a tract of land owned by appellant, which appellee had been employed to sell.

Stated in the light most favorable to appellee, the facts disclosed in the record are as follows: Appellee had an agency to sell the land, the terms thereof being defined in the correspondence between the parties. The agency was not exclusive, nor was it for a definite time. While this contract was in force, appellee showed the land to Faggs and priced it to him, but no sale was made because Faggs declined to make the cash payment required by appellant. Subsequent attempts by appellee to sell the land to Faggs failed for the same reason. The letters above referred to were all written in January, 1930, the last being dated January 21, 1930. Appellant wrote appellee a letter in which the agency was definitely canceled. Appellee testified this letter was received only three months before appellant himself sold the land to Faggs. Appellant testified this letter was written several months earlier.

However, after this letter was written, appellant leased the land—a farm—to Carlton for a year, with an option to Carlton to renew the lease on the same terms for a period of three years. The good faith of this transaction is not questioned. Carlton occupied the land under this lease for a short period of time, when he surrendered it. Thereafter, one Thompson told Faggs that appellant was in possession of his farm, and was offering it for sale. Thompson introduced Faggs to appellant. They had never previously met. Faggs did not tell either Thompson or appellant that he had ever discussed the

purchase of this land with appellee, and appellant was without information to that effect until he sold the land to Faggs on November 1, 1930.

Appellant made a reduction in the price for which he had authorized appellee to sell, but, in consideration of this reduction, the sale was made on an all-cash basis of $4,250, of which $2,250 was paid in cash to appellant. The $2,000 balance was paid by the agreement to discharge a mortgage for that amount outstanding against the land.

It has been held in a number of cases that, where a real estate agent employed to sell land introduces a purchaser to the seller, and through such introduction a sale is effected, the agent is entitled to his commission, although a sale was later made by the owner. *Scott* v. *Patterson,* 53 Ark. 49, 13 S. W. 419; *Hunton* v. *Marshall,* 76 Ark. 375, 88 S. W. 963; *Hodges* v. *Bayley,* 102 Ark. 200, 143 S. W. 92; *Horton* v. *Huddleston,* 132 Ark. 396, 200 S. W. 1003; *Carpenter* v. *Phillips,* 157 Ark. 609, 249 S. W. 357; *Johnson* v. *Garrett,* 174 Ark. 682, 297 S. W. 839.

It was held in the case of *Moore* v. *Moss,* 117 Ark. 593, 175 S. W. 1195, that a real estate broker is entitled to his commission where he has been given authority to sell the land and produced a purchaser ready, willing and able to pay, but the sale is delayed by the seller, and the property is finally sold to the purchaser provided by the broker.

But it is also settled law that, when an agency is not exclusive, the owner may sell it himself without liability for commission. *Gammell* v. *Cox,* 143 Ark. 72, 219 S. W. 745.

It is also well settled that, when an agency is not for a definite time, it may be discharged at the pleasure of the owner, provided the discharge is in good faith and not done for the purpose of defeating the payment of the agent's commission. One must, of course, act in good faith with his agent, and will not be permitted to discharge him as a subterfuge to prevent the payment of the commission where the owner later sells to the purchaser provided by the agent.

The instant case is not unlike that of *Bodine* v. *Penn Lumber Co.*, 128 Ark. 347, 194 S. W. 226, in which case it was contended by the agent that he was the procuring cause of the sale and entitled to a commission, notwithstanding there was a cancellation of the agency before the sale was made. We said, however: "We do not think this contention is well founded. There was no length of time specified in the contract between plaintiff and defendant, and the authority to sell was revocable at any time, subject only to the limitation that it should be done in good faith. [Citing cases.]"

The instant case is similar also to that of *Johnson* v. *Knowles*, 169 Ark. 1089, 277 S. W. 868, in which case the headnote reads as follows: "Where a broker showed a house to a prospective purchaser, who declined to purchase it, but three months later rented the house, and thereafter purchased it from the owner, there being no connection between the broker's efforts and the sale, the agent was not entitled to a commission."

Here, under appellee's own testimony, the agency was not exclusive, and was not for a definite time. The agent failed to procure a purchaser ready, willing and able to buy upon terms under which the agent was authorized to sell. The agency was definitely terminated, and there was no testimony that this was not done in good faith. The owner had never met Faggs, and did not know, until after he had sold him the property, that Faggs had ever been interested in its purchase. It is true appellant sold the land for a less price than he had authorized appellee to sell it for, but it is true also that he received a much larger cash payment than he had directed appellee to demand.

We conclude therefore, under the undisputed testimony, that appellee was not entitled to a commission upon this sale, and the judgment in his favor must therefore be reversed, and, as the case appears to have been fully developed, it must be dismissed, and it will be so ordered.

BANK OF MULBERRY *v.* SPRAGUE.

Opinion delivered March 21, 1932.

[redacted]

Starbird & Starbird, for appellant.

G. C. Carter, for appellee.

SMITH, J. This suit was brought by Sprague and his wife to foreclose a mortgage given to them by W. W. Mahan and wife to secure a note payable to their order for the sum of $400, dated March 8, 1916, and due twenty-four months after date. The complaint was filed April

14, 1930, and alleged that the property mortgaged was an undivided one-eighth interest in the land described, which Mahan had inherited from his father, W. Mahan. On the back of the note there appeared the following indorsements: "$80 Sept. 26, 1918. Rec'd of F. L. Wagner eighty dollars. (Signed) Herbert Sprague. April 4, 1920. Rec'd of F. L. Wagner forty dollars. (Signed) Herbert Sprague. May 27, 1921. $140. Rec'd of F. L. Wagner one hundred forty dollars. (Signed) Herbert Sprague. $60. Dec. 15, 1922. Rec'd of F. L. Wagner sixty dollars. (Signed) Herbert Sprague. $50. Nov. 23, 1925. Rec'd fifty dollars."

It is apparent that, but for this last payment, the note was barred by the statute of limitations when the suit was brought. It will also be observed that all the payments were signed as having been received by Herbert Sprague, whereas the last payment is not so signed, and was written in pencil, and the other payments are indorsed in ink. The mortgage was also made an exhibit to the complaint, and it appears to have been filed for record March 16, 1916, and to have been duly recorded.

An intervention was filed July 14, 1930, by the Bank of Mulberry, in which it was alleged that F. L. Wagner had purchased the interests of all the heirs of W. Mahan, and had on June 5, 1927, mortgaged the entire tract to the bank to secure a note due June 15, 1930, on which there was due an unpaid balance of $1,261.21. This mortgage was not introduced in evidence, but its execution and validity were admitted in open court.

The intervener alleged that the mortgage sought to be foreclosed was barred by the statute of limitations, and prayed the court to adjudge that fact, and that intervener's mortgage be declared a first lien, and that it be ordered foreclosed as such.

Wagner filed an answer, in which he adopted the recitals of the intervention, and specifically denied that he had made the alleged payment, or any payment, credited on the note as having been made on November 23, 1925. Counsel for plaintiff offered the note in evi-

dence, but no witness gave any testimony concerning it, and no one testified that the alleged payment of November 23, 1925, had in fact been made.

Only three witnesses testified in the case, but, before calling any witness, plaintiff introduced three letters from Wagner to Sprague, but no witness testified that Wagner had written them, or that Sprague had received them. These letters relate to the debt to Sprague, and promised to pay it, and two of them refer to remittances therein made. The last of these is dated 12-15, 1922, and stated that a check for $60 was enclosed. There is no reference to the alleged payment made in 1925 in any of these letters; in fact, none of them bore a date later than 1922.

The first witness called was the clerk and recorder, who identified the mortgage record in which the mortgage to Sprague was recorded, and he stated that there appeared on the margin of the record the same indorsements which were found on the back of the note, set out above. This marginal indorsement was not signed by Sprague, or his wife, or by any one for either of them, or by any other person, and was not attested by the clerk or his deputy. No name whatever was signed on the record. The clerk testified that he knew nothing about these indorsements except that they were on the record, and that he had just seen them on the day of the trial for the first time.

A vice president of the bank was the next witness called. He introduced the note of Wagner to the bank, and stated the balance due on it.

The third and last witness called was J. D. McIlroy, who testified that he had been a deputy clerk for fifteen years, but had "quit working the 14th of February, 1927, or 1928." This witness was shown the indorsements on the margin of the record and stated that they were in his handwriting. But he did not remember when or by what authority he made the indorsements. Being asked when the indorsements were made, he answered that he did not know, and, when asked about "How many years back"? he answered: "I cannot say." He knew nothing

whatever about the payments, and could only identify his writing, but stated that "Some one gave me the information." He did not recall why he had failed to attest the indorsement on the record.

This is a brief but complete summary of the pleadings and testimony in the record before us, and upon this record a decree was rendered ordering the foreclosure of plaintiff's mortgage as prior to that of the bank, and this appeal is from that decree.

The decree of the court below contains the recital that Wagner had purchased "subject to the note and mortgage of the plaintiff and assumed the payment of plaintiff's mortgage in writing as a part of the purchase price of the lands mentioned in plaintiff's mortgage." No pleading filed in the case contained any such allegation, and there was no testimony on that subject except only the unidentified letters addressed to Sprague and signed by Wagner. The deed to Wagner from Mahan was not offered in evidence, and no testimony was offered concerning that instrument.

The letters from Wagner to Sprague, above referred to, were offered in evidence without objection, and, if it be said that this failure to object to their introduction rendered them competent, they prove only that Wagner recognized that the mortgage to Sprague from his grantor of an undivided eighth interest was then a subsisting lien on the land, it not then being barred by the statute of limitations. He bought this eighth interest subject to this mortgage, because that mortgage was of record when he purchased, and it was, of course, necessary for him to pay the debt there secured, or cause it to be paid, to clear his title of this outstanding incumbrance. However, the last of these letters was written more than seven years before the suit was filed to foreclose the mortgage.

Laying aside all questions of pleadings and of evidence, and, assuming that all testimony offered was competent, and that all pleadings were amended to conform thereto, although no request to that effect was made, we have left certain questions of law.

The first of these relates to the alleged payment of November 23, 1925, the only payment made within five years of the date of the filing of the suit. The complaint alleges that this payment was made. The answer denied that fact. Neither pleading was verified. The note itself showed only that the payment was indorsed on its back. No witness testified concerning this payment. This payment having been alleged and denied, the burden was on the plaintiff to show that it had, in fact, been made.

In the case of *Taylor* v. *White,* 182 Ark. 35, 31 S. W. (2d) 745, it was said: "The fact of a part payment, which was relied upon to stop the running of the statute of limitations, was denied by (defendant) White, and the burden was therefore upon the plaintiff to prove that fact." A number of cases were there cited in support of this statement of the law, and many others to the same effect might also be cited.

There is no proof that the payment was made except the indorsement thereof on the note, and this does not suffice to prove the payment. It was held in the case of *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. (2d) 1089, 59 A. L. R. 899, to quote a headnote in that case, that: "Where payments were relied upon to stop the running of the statute of limitations, the burden of proof is on the party alleging it to show by other evidence, in addition to the indorsement on the note, that the payment was in fact made." See also, to the same effect: *Alston* v. *State Bank,* 9 Ark. 455; *Slagle* v. *Box,* 124 Ark. 43, 186 S. W. 299.

We are therefore of the opinion that the note from Mahan to Sprague was barred under the record thus made by the statute of limitations at the time of the institution of the suit to foreclose the mortgage given to secure it, and for this reason the decree of the court below must be reversed.

We are also of the opinion that the mortgage from Mahan to Sprague was barred, as against the intervener, the Bank of Mulberry, through failure to comply with the provisions of § 7408, Crawford & Moses' Digest, under the record before us.

It is provided by this § 7408, Crawford & Moses' Digest, that in suits brought to foreclose mortgages or deeds of trust it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt for the security of which they were given, with the proviso, however, that where payment has been made on such indebtedness before the same is barred by the statute of limitations, such payments shall not operate to revive the debt, or to extend the statute of limitations, so far as the same affects the rights of third persons, unless the mortgagee or trustee shall, prior to the expiration of the period of the statute of limitations, indorse a memorandum of such payment, with the date thereof, on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk. There was no compliance with this statute in the instant case, as the memorandum was not attested by the clerk (*Clark* v. *Lesser,* 106 Ark. 207, 153 S. W. 112), and there is a total failure to show when the indorsement was made or by what authority. If, therefore, the bank was a third party, the plaintiff's mortgage was barred as to it (unless its payment was assumed in the deed from Mahan to Wagner), for, as was said in the case of *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278, in construing § 5399, Kirby's Digest (now § 7408, Crawford & Moses' Digest): "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 is indorsed on the margin of the record of the mortgage, it becomes as to such third parties an unrecorded mortgage; and like an unrecorded mortgage it constitutes no lien upon the mortgaged property, as against such third party, notwithstanding he has actual knowledge of the execution of such mortgage. (Citing authorities)."

If Wagner assumed and agreed to pay the plaintiff's mortgage, he was not a third party as to that instrument within the meaning of § 7408, Crawford & Moses' Digest,

although that agreement was not expressed in the deed to him from Mahan. *Kenney* v. *Streeter,* 88 Ark. 406, 114 S. W. 923. But whether Wagner was a third party or not, there is no valid reason for holding that the Bank of Mulberry was not a third party, unless the agreement to pay it was contained in the deed to Wagner from Mahan. As we have said, there is no testimony that any such agreement on the part of Wagner appeared in his deed from Mahan. That instrument was not offered in evidence, and we do not even know its date.

The recent case of *Connelly* v. *Hoffman,* 184 Ark. 497, 42 S. W. (2d) 985, is in point on this question and is decisive of it. The facts stated in that opinion are as follows: Huggler executed a mortgage to Connelly on March 31, 1922, to secure the payment of notes due in 1923 and 1924. On July 15, 1927, neither of said notes then being barred by the statute of limitations, Huggler executed a mortgage on the same property to Wilson, but made no mention of the prior mortgage to Connelly. The mortgage to Wilson was assigned to Hoffman, who brought suit to foreclose it on February 28, 1930, making Connelly and Huggler parties. Hoffman alleged that Connelly's mortgage was barred by the five-year statute of limitations. Connelly filed an answer and cross-complaint, in which he alleged that Huggler had agreed in writing to pay his debt, this agreement being within the period of limitations, and he prayed a foreclosure of his mortgage from Huggler. An answer was filed by Huggler, who denied the promise to pay and pleaded the statute of limitations against Connelly's demand. The court granted the prayer of Hoffman's complaint and dismissed Connelly's cross-complaint as being without equity. The question of the priority of mortgages as between Connelly and Hoffman was presented on the appeal from that decree.

The opinion states the fact to be that Connelly's mortgage was prior in point of time and was a valid subsisting lien when Hoffman's mortgage was executed. Both mortgages had been promptly recorded.

At the time Hoffman brought his suit to foreclose (February 28, 1930) there was no indorsement upon the margin of the record where Connelly's mortgage was recorded showing any extension thereof, but on August 26, 1930, Connelly caused such a marginal indorsement to be made. The court found the fact to be that there was an agreement on the part of Huggler for an extension of his mortgage lien to Connelly, but that no indorsement thereof was made on the record until after the bar of the statute had fallen. The court held that because of this fact the mortgage from Huggler to Connelly became, in effect, an unrecorded mortgage, and that it made no difference whatever that this mortgage was not barred when Hoffman took his mortgage from Huggler.

It was contended by Connelly in that case that, as Hoffman and Wilson had at least constructive notice of his mortgage, and, having taken their mortgage at a time when his own was a valid and subsisting lien and after the mortgagor Huggler had acknowledged the debt in writing and had agreed to its extension, his mortgage continued thereafter to be a valid lien and paramount to the lien of the Hoffman mortgage. We held to the contrary, for the reason that Hoffman was a third party within the meaning of the law, and, being such, his mortgage was superior to that of Connelly, because of Connelly's failure to indorse the extension agreement upon the margin of the record as required by § 7382, Crawford & Moses' Digest, which section required the extension agreement to be attested and dated by the clerk. The extension agreement made by Huggler operated to extend the lien of his mortgage as between himself and Connelly, but did not have that effect so far as Hoffman was concerned, for the reason that Hoffman was a third party, as the statute had not been complied with.

So here, whatever may be the effect of any agreement on Wagner's part to pay plaintiff Sprague's mortgage, as between himself and Sprague, that agreement could not affect the mortgage of the bank—a third party—

as Hoffman was in the case last cited, for the reason that the provisions of § 7408, Crawford & Moses' Digest, which are similar to those of § 7382 of Crawford & Moses' Digest construed in the Connelly case, *supra,* in regard to keeping liens alive, had not been complied with (unless the deed from Mahan to Wagner contained that agreement).

We have said that there was no allegation or proof that Wagner assumed the payment of the debt secured by the mortgage from Mahan to Sprague as a part of the consideration of the deed to him from Mahan, and this is one of the undeveloped issues of fact in the case. If this is true, then the bank was affected with notice thereof, as it was a fact appearing in the chain of Wagner's title. *Gunnells* v. *Farmers' Bank of Emerson,* 184 Ark. 149, 40 S. W. (2d) 989; *Elk Horn Bank & Trust Co.* v. *Spraggins,* 182 Ark. 27, 30 S. W. (2d) 858. In this event the bank would not be a third party within the meaning of § 7408, Crawford & Moses' Digest, if the plaintiff's mortgage lien has been kept alive by payments.

If the conveyance to Wagner from Mahan was not made subject to this mortgage, the subsequent agreement of Wagner to discharge that indebtedness would not affect the status of the bank as a third party, as there would be nothing to charge it with notice of plaintiff's mortgage. The payments not having been indorsed upon the margin of the record where this mortgage was recorded in the manner required by law, it became as to third parties, in legal effect, an unrecorded mortgage, and the bank is a third party unless its mortgagor had assumed the payment of this mortgage debt in the deed under which he acquired his title. His agreement, if not expressed in his deed, to discharge the outstanding lien, would not affect the status of his mortgagee—the bank—as a third party.

The case must therefore be more fully developed, and leave so to do is here granted. Therefore, upon the remand of the cause, which is here ordered, the court will hear testimony to determine whether or not the al-

leged payments indorsed upon the note to Sprague were in fact made. If they were not made, as Wagner alleges in his answer, then, of course, the mortgage was barred as to all parties and for all purposes. If, however, the court finds that the payments were made as alleged in plaintiff's complaint, the court will then determine whether Wagner assumed the payment of this indebtedness in his deed from Mahan. If this finding is made, the court will decree that plaintiff's mortgage is superior. *Gunnells* v. *Farmer's Bank of Emerson, supra,* and *Elk Horn Bank & Trust Co.* v. *Spraggins, supra.* If that finding is not made, it will be decreed that the bank, as a third party, has a superior lien.

The decree of the court below will therefore be reversed, and the cause remanded for further proceedings in accordance with this opinion.

KIRBY, J., dissents.

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* MEEK.

Opinion delivered March 21, 1932.

O. D. Thompson and *E. L. Matlock,* for appellant.

H. C. Rains and *Partain & Agee,* for appellee.

HUMPHREYS, J. This suit was instituted on February 25, 1931, by appellee against appellant to recover $1,000, penalties, and attorney's fee for total disability under paragraph 12 of a beneficiary certificate No. R-219, 309-D, issued to him by appellant, which paragraph, in so far as material to a determination of the issues involved in this case, is as follows:

"If such member, while younger than sixty years of age, and while the certificate is in full force and effect, has suffered bodily injury, through external, violent or accidental means, or by disease, and shall furnish satisfactory proof to the society that he is and will be permanently, totally, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations or performing any work for compensation of value," he shall be entitled to the payment of one-half the face amount of his policy.

It was alleged in the complaint that during the time the certificate was in force and effect appellee became totally disabled on account of a disease commonly known as pernicious anemia.

Appellant filed an answer denying the material allegations of the complaint, and interposed the further defense of a failure on the part of appellee to make satisfactory proof of appellee's total disability to it prior to the institution of the suit.

The cause was submitted to a jury upon the pleadings, testimony, and instructions of the court, resulting in a verdict and judgment against appellant in amounts sued for, from which is this appeal.

The record reflects, without material dispute, that during the life of the certificate appellee became a confirmed invalid on account of a disease that crept upon him by degrees, commonly known as pernicious anemia, which disease totally disabled him. He paid premiums on his certificate for about twenty-one years and did not cease to do so until his earning capacity was destroyed by said disease and until his finances were entirely depleted. He explained his condition fully to the local agent to whom he had paid his premiums for many years, and on several occasions asked the agent to take up the matter of adjusting and settling his rights under the certificate with the auditor. The local agent had knowledge of his financial and physical condition during the life of the certificate, but during that time or after appellee did not

notify other officials in a formal manner of his disability. It seems that the officials of the order treated the certificate as forfeited and void after the last premium was paid in June, 1928, and, when sued, denied liability.

Appellant contends for a reversal of the judgment because appellee made no satisfactory proof to it of his total disability. Under our construction of paragraph 12 of the certificate quoted above, the existence of total disability during the life of the certificate was enough to create liability. Under a correct interpretation of the meaning of paragraph 12, the obligation of appellant rested upon the total disability of appellee during the life of the certificate, and not upon the receipt of the proof of disability by appellant. A similar clause or paragraph in an insurance policy was thus construed by the Circuit Court of Appeals, 29 Fed. (2d) 977, and approved by the Supreme Court of the United States in the case of *Bergholm* v. *Peoria Life Ins. Co. of Peoria, Ill.*, 284 U. S. 489. It will be observed that no time was fixed in the paragraph construed for making the proof of total disability.

There is no provision in the policy providing for a forfeiture upon failure to make proof of disability; so the failure to make such proof cannot be regarded as a condition precedent to recovery. *Hope Spoke Co.* v. *Maryland Casualty Co.*, 102 Ark. 1, 143 S. W. 85, 38 L. R. A. (N. S.) 62.

No error appearing, the judgment is affirmed.

LOFTIN *v.* KING.

Opinion delivered March 21, 1932.

D. H. Howell, for appellant.

J. P. Clayton and *J. B. Perrymore,* for appellee.

KIRBY, J, (after stating the facts). Appellant insists that the court erred in not instructing the verdict in his favor, the note attempted to be used as an offset having

been purchased by appellee after the beginning of the suit as shown by the indorsement thereon.

Under the statute "bonds, bills, notes or other writings assigned to the defendant after suit has been commenced against him and the writ served" are not allowed to be set-off against the demands of the plaintiff. Section 1199, Crawford & Moses' Digest.

The testimony shows that appellee's father begun trying to find and purchase a note of appellant's immediately after his son, who lived in Detroit, wrote him that he was about to be sued by appellant upon a note he had given him. That he approached Battles and bought the note in April before the suit was brought, agreeing to pay 33 1/3 per cent. of the face value thereof, provided the note was not "outlawed" as he expressed it, and that he later found it was not barred by the statute of limitations. After some investigation he feared it might be barred and went to a holder of one of appellant's other notes to see about making a purchase of him, telling him that he had already bought one note but feared it might be outlawed. He ascertained some time before the trial of the case that the note was not barred by the statute of limitations and went to Battles, from whom he had purchased it sometime before, and told him it would be necessary for him to indorse it, and the indorsement was made at that time, rather than at the time of the sale thereof. Other testimony was also introduced explaining the indorsement of the note.

The jury was properly instructed as to the law and found a verdict against appellant. No error was committed in allowing the explanation made of the date of the indorsement on the note, the title to same having been acquired on the date of its sale and delivery to appellee's agent upon condition that it was not barred by the statute of limitations. The sale was to be effective at the date of delivery of the note, and the title passed then, since in fact the note was not barred by the statute of limitations as was later discovered to be the case, and

the purchaser was entitled to have assignment made as of the date of sale and delivery of the note and it necessarily related back to that time.

There was substantial testimony sufficient to support the verdict of the jury returned under correct instructions from the court as to the law of the case, and the verdict is conclusive. We find no error in the record, and the judgment is affirmed.

RILEY *v.* ATHERTON.

Opinion delivered March 21, 1932.

Harry T. Wooldridge, for appellant.

Reinberger & Reinberger, for appellee.

McHANEY, J. On or about December 1, 1927, appellees purchased from Captain M. W. Ware, through the National Bank of Arkansas at Pine Bluff, certain real property in said city for a home. The purchase price was $6,200, of which Captain Ware was paid $1,700 in cash by said bank for appellees, and they executed and delivered their first mortgage and note to him for $4,000. At the same time, they borrowed a sum of money from said bank on second mortgage on said property to secure their notes for $2,300, including the $1,700 paid to Cap-

tain Ware. Appellees entered into possession of said property, reduced their indebtedness to the bank in the sum of $600 at the rate of $60 per month over a period of ten months, moved out of the house, delivered the keys to the house to the president of the bank under an alleged agreement that they surrendered possession in satisfaction of their indebtedness to the bank secured by the second mortgage. Thereafter, suit was brought to foreclose the first mortgage, in which appellant, who is the receiver of the National Bank of Arkansas (it being insolvent) and appellees were made defendants. Appellant answered, admitting the validity and priority of the first mortgage, and filed a cross-complaint against appellees seeking judgment on their indebtedness to the bank and a foreclosure of the second mortgage. Appellees answered, denying that they were indebted to appellant as receiver for the reason stated above—that they had surrendered the property to the bank in satisfaction of the debt in October, 1928, and that the bank had accepted same for such purpose. The court found for appellees, entered a decree dismissing appellant's cross-complaint for want of equity, and the receiver has appealed.

It is not claimed that there was any written agreement between appellees and the bank by which a delivery of the property to the bank was accepted in satisfaction of the mortgage debt, and it is conceded that such an agreement could rest in parol. This court has so held with reference to chattel mortgage indebtedness. *Fincher* v. *Bennett,* 94 Ark. 165, 126 S. W. 392; *Horton* v. *Thompson,* 124 Ark. 545, 187 S. W. 627; *Ribelin* v. *Loyd,* 148 Ark. 487, 230 S. W. 556. The reason for the rule is, as stated in the case last cited, that "a mortgage is a mere security for a debt, and the property may be released from the mortgage by parol agreement, as well as by a written one." In this and in many other States a mortgage is considered as security for the debt merely, and not the principal obligation. An oral agreement to satisfy therefore does not fall within the statute of frauds. In other jurisdictions the mortgage is held to

be the principal obligation, and that a parol agreement to release or satisfy is void as being within the statute of frauds. 19 R. C. L., § 238, p. 454.

The next question that arises is what is the degree of proof required to establish a parol agreement to release or satisfy a mortgage? May such fact be established by a mere preponderance of the evidence, or does the clear, unequivocal and convincing rule apply? This question has given us some concern. We do not find that we have heretofore decided it. In *Fincher* v. *Bennett, supra,* a replevin suit, the court instructed the jury that a preponderance of the evidence was sufficient, and this court sustained the instruction. The question as to the degree of proof was not there raised or decided. In the section of R. C. L., above cited, the author states that, in those jurisdictions where a mortgage is held to be security for the debt, "it is generally held that a parol release of a mortgage * * * is not void by reason of the statute of frauds, though it has been said that an agreement in parol to release the mortgagor from his personal liability must be established by clear and convincing evidence, for the effect thereof is to set aside the written contract." *Benson First Nat. Bank* v. *Gallagher,* 119 Minn. 463, 138 N. W. 681, Ann. Cas. 1914B 120, and note, are cited to support that statement, which it does. And in *Stevens* v. *Turlington,* 186 N. C. 191, 119 S. E. 210, 32 A. L. R. 870, it is held that evidence of a parol discharge of a written contract within the statute of frauds, or of an equitable estoppel by matter *in pais,* must be positive. In 41 Corpus Juris, p. 805, it is said that "a parol release may be shown by circumstances and declarations and acts of the parties inconsistent with the continued existence of the mortgage. The proof of matters relating to the discharge or release of a mortgage should be clear and satisfactory." A great many cases are cited to support that statement.

We have reached the conclusion that, as to mortgages of real estate, the correct rule is that the proof relating to the discharge or release thereof must be clear, satisfactory and convincing. Title to real property, and the

validity and continued existence of mortgages thereon, would be insecure by any less stringent rule.

Having reached this conclusion, the next question is: Does the proof in this case meet the requirements of the rule? We hold that it does not. Appellee, Mr. Atherton, testified to the effect that he told Mr. Hudson, president of the bank, that he was quitting, would make no other payments, and that Hudson told him to bring the keys to the bank when he moved out; that he offered to deed the property back to the bank, but that Mr. Hudson told him to wait until they sold it to another purchaser and deed could be made direct to the purchaser; that the bank accepted the keys, took charge of the property, rented it out, kept the rents, and otherwise dealt with it as owner. Mr. Hudson testified to the contrary; that Mr. Atherton brought the keys to the bank, told him he was quitting, moving out, because he couldn't meet the payments; that he took the keys and told Atherton he would list the property for sale for his account with a real estate firm and try to have it sold so as to make a profit for him. This was in October, 1928. No sale was made, but the house was rented, and the rents did not cover the taxes, insurance and interest on the first mortgage, which the bank had to pay to protect itself. The evidence is in conflict, but the circumstances speak strongly against appellees. They did not demand or receive from the bank their notes in the sum of $1,700, nor did they demand a satisfaction of the record of the mortgage. It seems reasonable to believe that, if they were surrendering the property in satisfaction of the debt, they would have demanded their notes, the written evidence of the debt, and a satisfaction of the mortgage. They did not tender the bank a deed to their equity of redemption in the property. Under these facts and circumstances, it is doubtful if appellees proved their case by a clear preponderance of the evidence. It is certain that such evidence is not clear, satisfactory and convincing. The burden was on them to do so, and they have failed.

The judgment will be reversed, and the cause remanded, with directions to enter a decree of foreclosure

on the cross-complaint in accordance with the prayer thereof.

KIRBY, J., dissents.

RURAL SPECIAL SCHOOL DISTRICTS NOS. 24 AND 63 *v.* HATFIELD SPECIAL SCHOOL DISTRICT NO. 22.

Opinion delivered February 15, 1932.

[redacted]

Lake, Lake & Carlton, for appellant.

Byron Goodson, for appellee.

KIRBY, J., (after stating the facts). It is contended for reversal that a majority of the electors did not sign the petition and that their status became fixed upon the

filing of the first petitions, the giving of notice, etc., and that the court erred in not permitting the remonstrants' names to be stricken from the petitions, and in counting the names of certain petitioners which had been signed by other parties.

The statutes require the giving of notice of a proposed change in a school district, and provide the authority for the creation of new districts or change of boundaries of districts and the procedure therefor. Section 8821, Crawford & Moses' Digest, and § 8823, Crawford & Moses' Digest, as amended by Acts 1927, No. 145; *Consolidated School District No. 2* v. *Special School Dist. No. 19,* 179 Ark. 822, 18 S. W. (2d) 349.

Notice is required to be given by posting up handbills in four or more conspicuous places in each district to be affected, one of the notices to be placed on the public school buildings in each district, and all of same to be posted 30 days before the convening of the board to which the petition is to be presented, all containing a geographical description of the proposed change. The giving of the notice prescribed by statute is a prerequisite to the exercise of the jurisdiction of the county board, which cannot be waived being required for the benefit of the landowners as well as the electors. *Lewis* v. *Young,* 116 Ark. 291, 171 S. W. 1197; *Mitchell* v. *Directors of School District No. 13,* 153 Ark. 50, 239 S. W. 371; *Acree* v. *Patterson,* 153 Ark. 191, 240 S. W. 33.

Notice is only required to be given in accordance with the statute 30 days before the convening of the board to which it is proposed to present the petition for a change in the school district or its boundaries, and it makes no difference, if it were true even, that one or two parts of the identical petition were filed with the board after the principal petition was lodged there, since they were all signed before the date fixed in the notice for hearing of the petition, and the fact that there were several petitions identical in form, except as to signature, filed at different times, "did not change the prayer or

lessen the number of petitions." They were evidently intended to be used as one, entitled to be considered as such, and were in fact only one petition. *Bridewell* v. *Ward,* 72 Ark. 187, 79 S. W. 762; *Priest* v. *Moore,* 183 Ark. 1002, 39 S. W. (2d) 710.

After the petitions were filed, the names of the petitioners could not be withdrawn merely upon request of the signers, but only upon showing that the signature had been procured by some improper method deceiving the signer, in effect by a fraud perpetrated upon him. *Nathan Special School Dist. No. 4* v. *Bullock Springs Special School Dist. No. 36,* 183 Ark. 710, 38 S. W. (2d) 19. There is no evidence in the record showing that any of the petitions for creation of the new school district was signed subsequent to the filing of the petitions by the remonstrants, and no error was committed in refusing to allow such names to be withdrawn.

It is also insisted that the court erred in allowing the names of certain petitioners signed by others than themselves counted as valid upon the petitions for the change and creation of the new district. Only seven names not previously authorized to be signed were counted on the petition, and each of the seven, with the exception of Schultz, testified that he had information that his name was signed to the petition for consolidation prior to the time of the hearing by the county board, and all appeared in the circuit court and testified that they each had ratified the action of the agent in signing their names to the petition and did not wish to withdraw them. These names were signed either by the husband for the wife or by the wife for the husband, and in one instance by a mother for her daughter, who was away at the time, and the undisputed testimony shows that some of these parties had informed their husbands or wives that they were in favor of the petition and asked that their names be signed by them accordingly in case they were not present when said petition was submitted; and all testified that they had been immediately informed that their

names had been signed to the petition and that they ratified such action and made no effort to withdraw their names and were in favor of the consolidation of the districts. The court therefore did not err in holding that these were valid signatures and could not be withdrawn, even by the persons whose names had been signed, as a matter of right without a proper showing first made.

It is doubtful any way whether any one but the persons whose names were so signed could challenge the validity of the signatures, and, even though all seven names were considered withdrawn, it would have left the petition still signed by a majority of the qualified electors of the territory affected; and, if an error was committed in holding the signatures valid, it was harmless.

We find no error in the record, and the judgment must be affirmed. It is so ordered.

QUARRY SAVINGS BANK & TRUST COMPANY *v.* FIRST NATIONAL BANK OF DEWITT.

Opinion delivered March 14, 1932.

G. W. Botts, for appellant.

George E. Pike, for appellee.

BUTLER, J. These cases were consolidated in the court below for the purpose of trial, and as consolidated are here on appeal.

These are the facts material to the decision of the case: One Luebke, to secure loans from the appellants, executed to each of them mortgages on identical lands, which were duly filed for record on January 29, 1919. Subsequent thereto, being indebted to appellee bank, he executed a mortgage on the same lands to it, subject to the first mortgages, to secure it therefor. All of these debts remaining unpaid, appellants brought their several suits on March 2, 1929, for judgment on their debt and for foreclosure of the mortgage securing them. A decree was rendered in this suit on March 30, 1929, and on May 3d, following, the lands were sold by virtue of the decree and purchased by the appellee for the debts and interest named in the decree and the costs that had accrued.

Between the date of the decree of foreclosure and the date of the sale and purchase of the lands by appellee, appellant paid, to-wit, on April 13, 1929, the taxes on the lands which had become due January 1 preceding in the sum of $331.87.

The report of the sale was duly made, and the sale confirmed, and a commissioner's deed executed and approved in open court on June 10, 1929, by the terms of which deed the lands were conveyed to the appellee in consideration of the payment of the debt, interest and costs aforesaid.

On the 29th day of September, 1929, the appellants brought this suit against the appellee to recover the amounts of taxes paid by them as aforesaid and asked that they have a lien declared on the lands for the payment thereof. On the hearing of the case, the above state of facts was developed, and the chancellor made a general finding in favor of the defendants.

Generally in judicial sales the rule of *caveat emptor* applies by reason of which the purchaser is charged with full knowledge of all of the facts affecting the title to the lands purchased and takes it subject to all legal or equitable incumbrances. *Guynn* v. *McCauley,* 32 Ark. 112; *Green* v. *Maddox,* 97 Ark. 403, 134 S. W. 931; *Miller* v. *Henry,* 105 Ark. 265, 150 S. W. 700, Ann. Cas. 1914D, 754.

The taxes which became due January 1 were a lien on the land (Crawford & Moses' Digest, § 10023) and in discharging this lien appellants were not volunteers as contended by the appellee, for the reason that the payment of the taxes was necessary to protect their interest, and ordinarily they would be entitled to be subrogated to the State's lien for reimbursement. *N. Y. Life Ins. Co.* v. *Nichol,* 170 Ark. 791, 281 S. W. 21; *First National Bank of Mineral Springs* v. *Hayes-McKean Hdw. Co.,* 178 Ark. 429, 10 S. W. (2d) 866; *Federal Land Bank of St. Louis* v. *Richland Farming Co.,* 180 Ark. 422, 21 S. W. (2d) 954.

This rule does not apply, however, in cases where taxes are due on real estate when it is sold at judicial sale. By act of the General Assembly of 1883, at page 199 of the acts of that year, digested in § 10056 of Crawford & Moses' Digest, provision is made that "when any real estate shall be sold at judicial sale, * * * the court shall order the taxes and penalties and interest thereon against such lands to be discharged out of the proceeds of such sale." This court, in the case of *Miners' Bank* v. *Churchill,* 156 Ark. 191, 245 S. W. 829, construed this language to apply to all judicial sales. In that case the question under consideration was whether, under a sale to foreclose a mortgage on real estate, the taxes which had fallen due prior to the date of the sale could be treated as an incumbrance on the land to be borne by the purchaser, or whether it should be paid out of the proceeds of the sale. We there said: "Our statute provides that a lien for taxes as between grantor and grantee shall attach on the first Monday in January of

each year. Crawford & Moses' Digest, § 10023. At the time of the sale there was then unpaid taxes due on the land which constituted a lien in favor of the State and county. It was well established at common law that the rule of *caveat emptor* applied to purchasers at judicial sales, and that the purchaser took the land subject to all incumbrances existing at that time, including tax liens. This rule was changed as to tax liens, however, by statute which is a part of the general revenue laws enacted by the General Assembly of 1883. * * * The question suggests itself as to when, under the statute, the order of the court must be made, whether at the time of the decree or later, before the fund is paid out by the commissioner. We think that the statute itself declares that the tax shall be paid out of the proceeds of the sale, and it is not essential that the original decree directing foreclosure shall contain a direction for such payment, but the court may direct the payment at any time before the fund is disbursed."

In the case at bar the taxes were due at the time of the institution of the suit and at the date of the decree of foreclosure, and therefore the court might have ordered these paid out of the purchase money. It may be argued that, as the taxes were not included in the judgment of the court, and were paid by appellant to protect the land after the date of the decree of foreclosure and before the sale, the statute would not apply. But this is not so. The appellants might well have discharged the liens at any time before the final decree and secured their reimbursement by amendment to their complaints, and, having failed to do this, might have appeared on the day of sale and themselves bid an amount sufficient to cover the sum named in the decree together with the taxes they had paid. They could not, however, avoid the effect of the statute by neglecting to do this and, after confirmation of the sale and the execution of the commissioner's deed, enforce the payment by the method undertaken. This is especially true when the proceeds

of the sale are paid to them, since the court might have made the order for the payment of the taxes out of the purchase money at any time before the fund was distributed, and since they, themselves, have received it, they are in no attitude to complain.

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

WALTHALL *v.* MCARTHUR.

Opinion delivered March 21, 1932.

John G. Rye and *J. B. Ward,* for appellant.

Dean, Moore & Brazil, for appellee.

SMITH, J. This suit was instituted by appellee, Mrs. Ola McArthur, for the purpose of having declared void a certain mortgage purporting to have been executed by her, in conjunction with her husband, W. R. McArthur, on July 13, 1929, to secure the payment of a note for $1,040, given to E. F. Walthall for the purchase of an automobile. The property described in the mortgage was the homestead of Mr. and Mrs. McArthur. An answer and cross-complaint was filed by Walthall, making Mr. McArthur a party, in which the execution and validity of the mortgage was alleged, and its foreclosure was prayed. The court found the fact to be that Mrs. McArthur had not signed or acknowledged the mortgage, and that it was void for this reason, and granted the relief prayed, and this appeal is from that decree.

The acknowledgment was in proper form, and purports to have been taken by W. D. Vance, a notary public,

who testified that Mrs. McArthur appeared before him and acknowledged the execution of the mortgage. We do not give this testimony the weight it would ordinarily have for the following reasons: Mr. Vance was an abstractor of land titles, and knew full well the purpose and effect of acknowledgments, yet he admitted that Mrs. McArthur did not appear before him at the time he filled in the certificate of acknowledgment and signed it and attached his seal thereto. He stated that he was unwilling to do this, but did do it at the request of Mr. McArthur only upon the promise that Mrs. McArthur would later appear before him and acknowledge the execution of the mortgage; that he kept the matter in mind, and that on September 20, 1930, Mrs. McArthur came to his office, and, in response to his question as to whether she had signed the mortgage, she stated that she had. This was more than a year after the date of the alleged acknowledgment, and at that time the automobile, for the security of which the mortgage was alleged to have been given, had been taken out of McArthur's possession. Vance testified that Dr. Berryman was present when Mrs. McArthur admitted signing the mortgage.

The note and mortgage in question were exhibited to M. A. Patrick and to Clarence E. Lemley, cashier and assistant cashier and paying teller, respectively, of the People's Exchange Bank of Russellville, where Mrs. McArthur carried an account, and each stated that he would pay a check against her account on a signature similar to that appearing on the note and mortgage.

Mrs. McArthur testified that she did not sign either the note or the mortgage, and knew nothing of either until after the automobile had been taken from her husband's possession, and that, when she had been advised that Walthall claimed to have a mortgage on her home, she consulted Dr. Berryman, who was her physician and financial adviser, and that they went together to the office of the clerk and recorder to examine the record, and that, when they found the mortgage of record, she called, with Dr. Berryman, at Vance's office, and that she then men-

tioned the matter to Vance for the first time, and denied in his presence that she had ever signed either the note or mortgage. She was fully corroborated by the testimony of Dr. Berryman.

Mr. McArthur testified that he signed the name of his wife to both the note and mortgage, and that she had not authorized either signature. He also testified that he had on more than one occasion signed his wife's name to checks on the People's Exchange Bank against her account, which had been paid on presentation.

In response to a request so to do, both Mr. and Mrs. McArthur wrote the name "Ola McArthur" a number of times in the presence of the court, and the originals of these signatures have been brought before us. We are not handwriting experts, but we have carefully compared all these signatures with those appearing upon the note and mortgage, and those admittedly written by Mr. McArthur appear to resemble the signatures on the note and mortgage, as much so as those written by Mrs. McArthur in the presence of the court; indeed, they all look very much alike.

The law of the case is well settled. The property mortgaged being a homestead, it is essential to the validity of a mortgage thereon that it be both signed and acknowledged by Mrs. McArthur. Section 5542, Crawford & Moses' Digest. Inasmuch as the mortgage was apparently signed and acknowledged by Mrs. McArthur, it was presumptively valid, and the burden was upon her to establish, by a preponderance of the evidence, that she did not sign and acknowledge it. *Eades* v. *Morrilton Lumber Co.,* 172 Ark. 52, 288 S. W. 1, and cases there cited.

The chancellor found the fact to be that Mrs. McArthur did not sign or acknowledge the mortgage, and we are of the opinion that this finding is sustained by a preponderance of the evidence. As we have said, the testimony of the notary public does not, under the circumstances, carry much weight. Section 2472, Crawford & Moses' Digest. He was, moreover, flatly contradicted

by Dr. Berryman as to the alleged admission made more than a year after its purported date by Mrs. McArthur that she had signed the mortgage. Mr. McArthur wrote the name of his wife seventeen times in the presence of the court, and these signatures are strikingly similar to those appearing on the note and mortgage. It does not appear that either of the witnesses testifying as handwriting experts were examined as to these signatures, and we do not know what their opinion would have been in regard to them.

The court rendered a decree against McArthur for the balance due on the note, and declared this balance to be a lien on the automobile, from which decree there is no appeal, but canceled the mortgage as not having been signed and acknowledged by Mrs. McArthur. As we concur in this finding, the decree must be affirmed, and it is so ordered.

BUSHMIAER *v.* SPECIAL PROTECTIVE REWARDS COMMITTEE OF ARKANSAS BANKERS' ASSOCIATION.

Opinion delivered March 21, 1932.

R. S. Wilson, for appellant.

Starbird & Starbird, Partain & Agee and *Wm. G. Akers,* for appellees.

HUMPHREYS, J. The issue involved on this appeal is which of three claimants is entitled to a reward of $500 offered by the Special Protective Rewards Committee of the Arkansas Bankers' Association for the arrest and conviction of any one implicated in the robbery of the Bank of Alma on or about the 14th of September, 1926.

The committee brought this suit in the chancery court of Crawford County, admitting its liability in the sum of $500 for the arrest and conviction of Ky Coatney for complicity in the crime, alleging that appellant, its co-appellees, and W. S. Chastain each claimed all the reward, and praying that the court determine to whom the reward should be paid.

Each of the three intervened and claimed to have earned the entire reward.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a finding and consequent decree adjudging that the reward be divided equally between appellant and A. D. Maxey and his deputies, to which all parties excepted, and from which is this appeal and cross-appeal.

Appellees contend for an affirmance of the decree because the bill of exceptions was not filed within sixty days first allowed to file same. Nineteen days after the time elapsed, the court allowed additional time and signed and filed same. The original time given and the additional time allowed was given and allowed during the same term of court, so there is no merit in appellee's contention for the reason that a court has absolute control over all orders and decrees rendered during the term, and may modify, change, or set them aside at any time before final adjournment.

An inspection of the record discloses that the salient and controlling facts necessary to a determination of the issues involved are undisputed.

On the day of the robbery, W. S. Chastain discovered suspicious circumstances in the conduct of Ky Coatney which convinced him that Coatney was implicated in the crime, and immediately went to J. C. Alexander, the cashier of the looted bank, who was the person in charge of the investigation and prosecution of the guilty parties, and told him of Coatney's suspicious conduct and urged that he be arrested. The next day after the robbery, A. D. Maxey, sheriff, aided by his deputies, arrested Ky Coatney without a warrant and placed him in jail. J. C. Alexander informed the prosecuting attorney and A. D. Maxey of the information obtained from Chastain, whereupon Chastain appeared before the grand jury and gave testimony, upon which the indictment was rendered charging Coatney with the crime of robbery. Coatney gave bond for his appearance in the circuit court and absconded. A forfeiture was taken on the bond, which was set aside by the Governor at the instance of appellant. J. C. Alexander obtained information that Coatney was living with a brother in New York and imparted this information to appellant, who had, in the mean time, been elected sheriff of Crawford County to succeed A. D. Maxey. A requisition was procured for him, and appellant proceeded to New York as agent or representative of Arkansas, paying his own expenses, apprehended and returned Coatney to the Crawford County jail. At the succeeding term of the circuit court, Coatney pleaded guilty to the charge in the indictment returned on the evidence of W. S. Chastain and was adjudged to serve a term in the State penitentiary as a punishment therefor. Within thirty days after his conviction, appellant notified the rewards committee that he claimed the reward. The others failed to notify them of their claim, but, having heard that there were three claimants for the reward, they filed the instant suit and offered to pay the reward into the registry of the court to be paid to the party entitled thereto. There is a dispute in the testimony as to whether they sent it to appellant as a payment or whether they sent it to him through mistake. According

to the weight of the evidence, they intended that it should be deposited in the registry of court, and through mistake sent it to him instead of the circuit clerk. Although ordered by the chancery court to deposit the money in the registry of the court, appellant was permitted to retain same during the pendency of this appeal upon the execution of a supersedeas bond.

The law is that officers acting within the scope of their duties, and those called to aid them in the performance of their official duties, shall not receive rewards or other compensation not allowed by statute. The reason for the rule is based on public policy and is in accord with the weight of authority. *Chambers* v. *Ogle,* 117 Ark. 242, 174 S. W. 532, and numerous cases cited therein.

This rule precludes A. D. Maxey and his deputies from claiming the reward. They were acting within their official duties when they arrested Ky Coatney. Their contention is that they were not acting within the scope of their official duties because they made the arrest without a warrant and because the offense was not committed in their presence. On account of suspicious conduct on the part of Ky Coatney, it was believed that he was implicated in the robbery, and his arrest was based upon this belief. In other words, the officers who made the arrest did so upon the belief that Ky Coatney was one of the guilty parties. Section 2904 of Crawford & Moses' Digest provides: "A peace officer may make an arrest: * * * without a warrant, where a public offense is committed in his presence or where he has reasonable grounds for believing that the person arrested has committed a felony."

The reward was offered for the arrest and conviction of any unknown person implicated in the robbery of the bank, and not for following and recapturing one who had already been indicted for the offense and who had forfeited his bond. Appellant did not procure the indictment and conviction of Ky Coatney, and hence did not bring himself within the purport and intent contained in the terms of the offer of reward. In following and

recapturing Ky Coatney, he did so as an agent or representative of the State and not as an individual. The State could not participate in the reward, and it follows that its agent could not do so where he was acting for the State and not for himself.

The first information disclosed to the cashier of the bank relative to Ky Coatney being a participant in the offense came from W. S. Chastain. He not only disclosed his suspicious conduct to the cashier, but urged his arrest. It is true that A. D. Maxey testified that he received information from some other sources that caused him to arrest Ky Coatney. After the arrest, the cashier notified the prosecuting attorney and A. D. Maxey of the information disclosed to him by W. S. Chastain, and he subsequently appeared before the grand jury and procured an indictment against Ky Coatney upon his own testimony. After the return of the indictment, Ky Coatney gave bond and absconded. When apprehended and returned to the Crawford County jail, he was held under the original indictment until court convened, whereupon he pleaded guilty to the charge preferred in the indictment. We think it may well be said that W. S. Chastain procured the indictment and continued incarceration or arrest of Ky Coatney until he obtained his liberty under bond. There can be no question that his conviction was the direct result of the testimony given by Chastain before the grand jury. W. S. Chastain brought himself clearly within the rule announced in the case of *Railway Company* v. *Dickinson,* 78 Ark. 483, 95 S. W. 802, 115 Am. St. Rep. 54, and earned the reward. In the case referred to, Dickinson swore out a warrant before a justice of the peace against the criminal and later appeared against him as a witness and procured his conviction. In that case, the offer for the reward was a general one, for the arrest and conviction of the unknown offender. We think the instant case is ruled by the Dickinson case, *supra.*

Appellant cites the case of *Chambers* v. *Ogle* as authority for eliminating W. S. Chastain as a claimant

for the reward. In the Chambers case, Mrs. Ogle did nothing except to give a torn envelope with an address on it which led to the whereabouts of the criminals. She did not become a prosecuting witness either before a magistrate or a grand jury, and the conviction was not obtained upon her testimony. The Ogle case is not analogous to the instant case.

On account of the error indicated the decree is reversed, and a judgment is directed to be entered here against appellant and his bondsmen in favor of W. S. Chastain in a sum of $500 and interest thereon from the date appellant received same together with costs incurred in the trial and appeal of the case.

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

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION *v.* BIRD.

Opinion delivered March 21, 1932.

Malcolm W. Gannaway, for appellant.

W. A. Bates, Sam T. Poe, Tom Poe and *Donald Poe,* for appellee.

MEHAFFY, J. This suit was originally filed by appellee against appellant for $175 with interest, penalty and attorney's fees.

Appellee filed an amendment to his complaint in which he asked judgment for $2,675 together with 12 per cent. penalty and $400 attorney's fees. He alleged that the appellant, in consideration of the payment to it by the

appellee, of an annual premium of $40, delivered to appellee its policy of accident insurance, attaching a copy of the policy to his complaint. He further alleged that on January 5, while said policy was in full force and effect, appellee was accidentally injured in an automobile accident, wherein two cars ran together, thereby inflicting injuries to his head, hips, back, chest and forehead, and breaking and crushing ribs, and causing internal injuries, which have totally and permanently injured him; that as a result of the injuries he has been totally and permanently injured from January 5, 1931, and will continue so.

He further alleged a performance of all the conditions of said policy on his part, and that he gave appellant due notice and proof of his injuries, and made demand for payment, which appellant refused to pay, and asked judgment against the appellant for the amount alleged to be due under the policy.

Appellant filed answer in which it denied all the material allegations in the complaint, and alleged that at the time of the accident there was no policy of accident insurance in force.

One of the clauses in the policy reads as follows: "If such injuries as described in the insuring clause shall wholly and continuously disable the insured for one day or more, and so long as the insured lives and suffers said total loss of time, the association will pay a monthly indemnity at the rate of eighty ($80) dollars."

The appellee testified that he was 58 years old, and that his occupation was and had been for some time, that of running and working in a filling station at Waldron; prior to that time he had been a blacksmith; that his policy was issued to him in 1924, and was in force at the time of his accident and injury. All premiums had been paid since the policy was delivered to him. He paid $12 when the policy was delivered, and $10 every quarter thereafter; early in 1931 he was injured in an automobile accident at Waldron; that he was confined to his home on account of the injuries sustained for about six

weeks, and was treated by Dr. Duncan; that since the accident he had been unable to fix or repair heavy casings or tires, or to grease cars; that before the accident he could do this work; when he lifts anything heavy or pulls with his right arm it hurts his side; two or three ribs and his breast bone were broken on the right side; he spit up blood for a week, and does not sleep or lie on his right side, as he could before the injury.

Some of the ribs were caved in, and this was shown to the jury. A copy of the policy was introduced in evidence. Dr. Duncan had treated him since January 26, 1931.

Mr. Harris and a boy named Chandler, appellee and his son worked at the filling station; appellee's son was the proprietor; Mr. Harris does the heavy work. Immediately after the injury he told his son to notify the company.

Mack Bird, son of appellee, testified that he was the cashier of the bank of Waldron and had been paying his father's premiums for seven or eight years; that on December 30, 1930, he mailed a check for $10 to appellant; the check was mailed in a long envelope, with the Bank of Waldron printed thereon; that it was addressed to the appellant at Omaha, Nebraska. It was drawn on the bank at which witness worked, and had been paid and canceled. His father was injured on January 5.

He testified that in September or October, 1930, he paid the premium to appellant's collector at Waldron; he sent a letter to the company with the check on December 30, 1930. He did not have a copy of the letter. He testified that he did not mail the check in the envelope attached as an exhibit to the deposition of Grace Welch, but that he mailed a notice of the accident in an envelope similar to the one attached to her deposition. He mailed the notice of the accident the day after his father was injured.

The check sent on December 30, to Little Rock, was deposited in Omaha, Nebraska, and paid by the Bank of

Waldron, and did not show that it ever went to any bank in Little Rock.

T. R. Harrison testified that he sold policies and collected premiums for appellant, and that sometimes he would remit to appellant by his own check or by a cashier's check, charging 10 per cent. Appellant would send witness a list of policyholders in Waldron twelve or fifteen days before premiums were due; that he collected $10 every quarter from appellee on the policy sued on; that he wrote the policy, and that the application was dated January 29, 1924. He said if the premium due January 1, 1931, was not paid until January 5, 6 or 8, the policy had lapsed.

Dr. Duncan was introduced and testified as to appellant's injuries, and also introduced a statement made to the company. Dr. Bevil also testified about the injuries to appellee.

Grace Welch, a witness for the appellant, testified that she was mail clerk for the appellant in its home office in Omaha, Nebraska, and had been for six years; that all premiums which were paid direct to said office by mail were brought to her; that she received a premium on January 8, 1931, in the amount of $10 from appellee. She introduced an envelope in which she said the check came, and she testified also that a reinstatement blank came in the same envelope; that the reinstatement blank showed premium paid on January 6, 1931. She testified that there was no other policy issued to appellee, and that appellee's policy had lapsed on October 1, 1930, for nonpayment of premium due on that date, and that it was not reinstated until January 8, 1931.

The deposition of C. E. Forbes, witness for appellant, was introduced and in said deposition he testified that the policy had lapsed. He also introduced a letter in which he said that appellee had been notified that his policy had lapsed. This witness also testified that the appellee had no other policy of insurance with appellant.

The deposition of Thelma Webber was introduced. She testified that she was a stenographer and bookkeeper

for appellant in the office at Little Rock, Arkansas, and received all checks and remittances from policyholders which were sent to the Little Rock office; that the Little Rock office received a premium on July 4, 1930, and that no other premium was received until April 1, 1931; that the records at Little Rock showed that the policy was in force until October 1, 1930, and that it was reinstated on January 6, 1931. She had a card showing appellee's payments, and this card constituted all the records in her office with reference thereto. There was no correspondence between the Little Rock office and the Omaha office with reference to appellee's claim. The only record she had in her office showing remittances of appellee on his policy, was that contained on the card which she exhibited, and it was attached to her deposition.

She also testified that T. R. Harrison was appellant's collector and furnished by the home office with a list of policyholders whose premiums were due, and that Harrison, after collecting, would remit to the Little Rock office; that the home office sent out notice of premiums due, and that her office notified policyholders of the lapsing of their policies; she did not remember whether she had sent a lapse notice to appellee or not. Her records did not show how the premium was paid on January 6.

Alva Hall testified that he lived in Waldron, was connected with the Chevrolet Company who sold Chevrolets, and waited on the public in servicing, selling, greasing and oiling cars, and running a general garage and repair business; that about two hours before he testified, Mr. Gannaway brought a Cadillac or Packard car, and witness took the right front tire therefrom and weighed it; that it weighed 54 pounds.

Numerous instructions were given by the court, and there was a verdict and judgment for appellee in the sum of $2,675, 12 per cent penalty, and attorney's fees. This appeal is prosecuted to reverse said judgment.

Appellant states that it defends the suit on two grounds: first, that the policy sued on had lapsed, and

was not in force on January 5, 1931, the date of the injury; and second, that the appellee was not totally and permanently injured.

It was contended by the appellant that the policy lapsed on October 1, 1930, because of nonpayment of dues, but the appellant concedes that the finding of the jury against appellant on this point is conclusive. There is therefore no necessity to call attention to or discuss the evidence on this question.

Appellant however contends that the premium due January 1, was not paid until January 8, and that the policy lapsed because of the failure to pay the premium due January 1, 1931, and was therefore not in force on January 5, at the time of appellee's injury.

Mack Bird, a witness for appellee, testified that he had been sending the premiums for his father for seven or eight years, and that on December 30, 1930, he sent a check to the company for $10; that the check was mailed on the night of December 30, in a long envelope of the Bank of Waldron, and that he wrote a letter.

The check dated December 30, was introduced in evidence and showed that it was deposited in the bank at Omaha, on January 8. The witness testified that he mailed it to the office at Little Rock. Witnesses for appellant testify that the check for the January premium was not received until after the injury.

C. E. Forbes, assistant secretary of the company at Omaha, Nebraska, testifies that the policy was reinstated on January 6. Of course, it could not have been reinstated if appellant's theory is correct, until the check and reinstatement application was received.

Grace Welch, the mail clerk at the home office in Omaha, Nebraska, testified that all premiums that came to that office by mail were brought to her desk, opened, and a record made of them, and that she received the premium on January 8, 1931.

The evidence of the appellee shows that on the 6th, the day after the injury, a notice of the injury was sent, and Grace Welch introduced an envelope in which she

says was inclosed the check for the premium and the reinstatement application, but which the appellee's witnesses say was the envelope in which the notice of the injury was sent.

The two witnesses for appellant disagree as to the time when the premium was received, and their testimony is in conflict with the testimony of the appellee that the premium was paid on December 30, 1930. It is undisputed however that the check was dated December 30, 1930, and it is also undisputed that notice of the injury was mailed to the office at Omaha.

The evidence being in conflict as to whether the premium was paid or whether the policy had lapsed, this was a question of fact for the jury, and at the request of the appellant the court gave the following instruction: "If you find from the evidence that premiums on the policy sued on did not reach the defendant's office in Omaha, Nebraska, or its Little Rock office, on or before noon of the first of January, 1931, that the policy lapsed at that time, and the plaintiff cannot recover for his alleged injuries, unless he has shown by a preponderance of the evidence that said premium was so received before plaintiff's alleged injury of January 5, 1931."

The question therefore whether the policy was lapsed was submitted to the jury under an instruction requested by the appellant, and the jury's finding on this question is conclusive. There was substantial evidence to support the verdict. The jury are the judges of the weight of the evidence and the credibility of the witnesses.

The next question, and the most difficult one, is whether the appellee was wholly and continuously disabled. The undisputed evidence is that appellee was 58 years old; that, before he went to work for his son in the filling station, he was a blacksmith; and the undisputed evidence also shows that, while he did some light work at the filling station for his son, he did not receive any salary or wages, and he testifies that he was unable to do any heavy work; that his ribs and breast bone

were broken, and that it caused him pain and suffering to attempt to do any lifting or any heavy work.

Dr. Duncan testified that appellee had two broken ribs, and there might have been more than two; that he was nervous, and also testified that the breast bone was fractured; that he spit blood for a time, and Dr. Bevil testified that he found the sixth rib had been fractured and was bent down, and made a kind of depression, and it was pointed out by Dr. Bevil to the jury where and how appellee was injured. He testified at length as to appellee's condition, and that the injuries were permanent, and it seemed very reasonable that as a result of the injuries he was incapacitated from doing his work in any way. He also testified that appellee would never get any better.

The evidence showed that his rib was bent, his breast bone broken; that these injuries would cause him pain and suffering, and would disable him from performing the work that he had theretofore done. Of course, he is not entirely helpless, and after his injury endeavored to do some work, but his condition was such that he could not do the heavy work without constant pain.

Total disability does not mean that he is unable to do anything.

The general rule and that adopted by this court is stated in Kerr on Insurance, p. 385, as follows:

"Total disability must, from the necessity of the case, be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged. One who labors with his hand might be so disabled by a severe injury to one hand as not to be able to labor at all at his usual occupation, whereas a merchant or prefessional man might, by the same injury, be only disabled from prosecuting some kinds of business pertaining to his occupation. Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists although the insured is able to perform a few occasional acts, if he is

unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labors so long as was reasonably necessary to effect a speedy cure."

A careful reading of the evidence in this case shows that appellee's injuries were of such a character and degree as to wholly disable him from doing all the substantial and material acts necessary to be done in the prosecution of his business, and that common care and prudence would require a man in his condition to desist from the kind of labor he had performed prior to his injury.

This court, in a decision of the *Mo. State Life Ins. Co.* v. *Snow, ante* p. 335, quoted with approval the rule above set out, stating that it had been followed many times since by this court, and stated: "Of course, such a provision in a policy does not require that the insured shall be absolutely helpless or insane, but there must be such disability as renders him unable to perform all the substantial and material acts in the prosecution of a gainful occupation."

The clause as to total disability in the case last referred to stated that the disability must be such as to prevent the insured then and at all times thereafter from engaging in any gainful occupation.

The disability clause in the policy here involved states that he shall be wholly and continuously disabled, or for so long as he suffers said total loss of time.

Appellant calls attention and quotes from *Aetna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 336. The court said in that case: "Appellant's contention for reversal of the judgment is that the undisputed evidence showed appellee had not become wholly, continuously and permanently disabled. We think there is substantial testimony in the record tending to show that appellee was

totally and permanently disabled, according to Mr. Kerr's definition of total disability when used in indemnity insurance policies."

The rule announced in Kerr on Insurance is quoted with approval in that case. *Industrial Mut. Ind. Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029.

Appellant next quotes from *Smith* v. *Supreme Lodge of Order of Select Friends,* 62 Kan. 75, 61 Pac. 416, and that court said, among other things: "Whether an injury constitutes a total disability is ordinarily a question for the jury," but the court also stated in that particular case from the facts alleged and the well known requirements of plaintiff's occupation, it is clear that he is not totally and permanently disabled from carrying it on.

In the above case the insured was a pharmacist, and suffered an accidental gun-shot wound in the left arm, and it became necessary to amputate the arm at the shoulder joint. The policy in that case provided, among other things, that the loss of one hand and permanent crippling of the other would constitute total and permanent disability. The insured suffered the loss of one hand, but there was no injury to the other hand. His right hand was uninjured, and the court said to hold that that was a total disability under the policy would be to alter the contract.

The next case relied on by appellant is *Lobdill* v. *Laboring Men's Mutual Aid Association,* 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. Rep. 542. The court in that case said that the cases which have placed a construction upon the term "total disability" might seem to be divided in two classes, *viz*: those which construe it liberally in favor of the insured, and those which construe it strictly against him. The court also said in that case, in speaking of the acts that the insured performed, that the frequency and nature of acts would be for the consideration of the jury in determining whether he was totally disabled, and that the evidence in the particular case justified the jury in finding that he

was, for the full 17 weeks, wholly disabled within the meaning of the policy.

The next case relied on by appellant is *Metropolitan Life Ins. Co.* v. *Blue,* 222 Ala. 665, 133 So. 707. In that case the court said: "We have had occasion to consider total disability or total disablement in accident policies." In *U. S. Casualty Co.* v. *Perryman,* 203 Ala. 212, 82 So. 462, there was a sprain of the knee joint. "The insured did not at the time think it serious, and proceeded in good faith to do his usual work in part, but, becoming worse, he did become wholly disabled for a time, and it appeared that, with due regard to his own care, he should not have worked from the beginning. We held such evidence would support a finding of total disability from the beginning, and that entering upon his work, although it may have aggravated the trouble, being in good faith, worked no estoppel against him."

The court, in the same case, also said: "Total disability may exist, though it is physically possible for insured to perform occasional acts as part of his employment or business."

In the instant case, the appellee did not think at first that he was totally and permanently disabled, and he undertook to do some work, but this would not work an estoppel or disentitle him to recover if the evidence was sufficient to justify the jury in finding that he was totally disabled.

The next case relied on is *Marchant* v. *N. Y. Life Ins. Co.,* 42 Ga. App. 11, 155 S. E. 221. The court in that case said: "The fact that the plaintiff attempted for a season to carry on this line of employment before ascertaining his disability to do so, and refraining from such employment, should not prevent a recovery for benefits thereafter accruing under provisions of the policies; and this is true even though such employment had been his only occupation."

The next case relied on is *Bachman* v. *Travelers' Ins. Co.,* 78 N. H. 100, 97 Atl. 223. In that case the court, after calling attention to the evidence, said: "With this

evidence in the case, it was a question of fact whether the plaintiff did or did not have substantial and valuable earning capacity during that time."

Total disability does not mean absolute helplessness. If construed in that sense, the policy would be worthless; it would not mean anything. A man might be totally disabled in the sense that this term is used in insurance policies, although he was able to go about, go to places of business, and perform light work occasionally. He might be able to do these things and still be totally disabled in the sense that he could not wait on the trade in such a manner as to retain it, and, if one is so disabled that he cannot perform the substantial and material acts in the prosecution of his occupation, he is totally disabled.

Appellant calls attention to the following Arkansas cases which discuss the question here involved and adopt the rule above set out: *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 103, 254 S. W. 335; *Industrial Mutual Ind. Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S) 635, 21 Ann. Cas. 1029; *Brotherhood of Locomotive Firemen & Enginemen* v. *Aday,* 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126; *Great Eastern Casualty Co.* v. *Robins,* 111 Ark. 607, 164 S. W. 750; *American Life & Acc. Assn.* v. *Walton,* 133 Ark. 348, 202 S. W. 20; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. 310.

In the last case the court said: "His business was such that he could not profitably conduct it by merely supervising it and hiring others to perform the work. * * * His loss in this respect was the very object in taking out the insurance. Hence, when the character of the business, together with the attendant circumstances, is considered, we are of the opinion that reasonable minds might reach the conclusion that the insured was totally and permanently disabled within the meaning of the policy as above defined, and that the jury was warranted in finding a verdict in his favor."

In this case there was substantial evidence tending to show that appellee could not perform the work without great pain and suffering, and some of the work he could

not do at all, and we think the evidence was such as to make it a question of fact for the jury, and the jury's finding is conclusive here.

At the request of the appellee, the court gave an instruction, which was not objected to, defining total disability, and, under the instructions not objected to, the jury found for the appellee.

We find no error, and the judgment is affirmed.

MOONEY *v.* TILLERY.

Opinion delivered March 21, 1932.

Buzbee, Pugh & Harrison, for appellant.

Witt & Witt, for appellee.

MEHAFFY, J. The appellant, Ed B. Mooney, was engaged in the general construction business in the city of Hot Springs, and owned and operated a number of automobile trucks and other vehicles. The appellant, Floyd Cockrell, was employed by Mooney as a driver of an automobile truck.

On June 28, 1931, Floyd Cockrell was driving a truck of Ed B. Mooney, on the Little Rock-Hot Springs Highway, five or six miles from Hot Springs, and was driving in the direction of the city of Hot Springs.

W. T. Tillery was driving an automobile in the opposite direction. There was a collision, and Andy Lee

Wilson, who was riding with Tillery, was killed, and Tillery's car was demolished.

There was a judgment in favor of Tillery for $350, a judgment in favor of the estate of Andy Lee Wilson for $6,000, and a judgment in favor of J. H. Wilson in his own right, for $1,500. This appeal is prosecuted to reverse these judgments.

The evidence was in conflict as to whose negligence caused the collision, and the verdict of the jury on that question is conclusive. Appellants do not contend that there was not sufficient evidence to sustain the verdict as to negligence. They contend, however, first, that the evidence is not sufficient to sustain a verdict for $6,000 for the benefit of the estate, on account of the pain and suffering endured by deceased.

Appellants concede that there was evidence sufficient to justify a verdict for pain and suffering, but it is contended that the evidence as to pain and suffering was not sufficient to justify a verdict in the sum of $6,000.

Witnesses testified that Andy Wilson groaned several times, twisted his body and shoulders, and was suffering pain. Some of appellants' witnesses testified that he was not conscious, but, as conceded by appellants, it was a question for the jury, and their finding is conclusive as to pain and suffering.

The time, however, which he suffered was very short because the evidence showed that he died within thirty minutes or an hour after his injury. Considering the character of the injury and the short time that he lived after the injury, we have reached the conclusion that $6,000 is excessive, and that the evidence is not sufficient to sustain a verdict for more than $3,500 for pain and suffering, and the judgment in favor of the estate for $6,000 is therefore reduced to $3,500.

It is next contended that instruction No. 3, given at the request of the appellee, was erroneous. Instruction No. 3 reads as follows: "If you believe, from a preponderance of the evidence in this case, that the plain-

tiff, J. H. Wilson, as father and administrator of the estate of Andy Lee Wilson, deceased, and Homer Tillery, are entitled to recover, then, in assessing the damages due J. H. Wilson, as administrator, you should take into consideration the conscious pain and suffering endured by the deceased, Andy Wilson, from the time of the collision, or injury, until the time he died, if any such pain and suffering has been shown by the evidence. In assessing the damages due to J. H. Wilson as the father of said Andy Wilson, you should take into consideration the pecuniary loss suffered by the father of the deceased, if any has been shown by the evidence, resulting from the death of the said Andy Wilson. In estimating this loss, it is proper for you to consider the age of the deceased at the time he was killed, the probable duration of his life if he had not been killed, the probable duration of his father's life, his health, habits, occupation, the value of his services to his father, and the probable value of his services he would have rendered in the future."

One objection to instruction No. 3 was that there was no proof that the deceased, Andy Wilson, contributed any sum to his father, or that he would in the future contribute any sum to his father.

J. H. Wilson, father of the deceased, testified that his son helped him in his crop the biggest part of the time. He was 22 years old, and made his home with his father. He helped in the farming, plowing corn, breaking land, chopping cotton, getting wood in the winter time, and things like that. He testified that his son helped support him, and gave him some small sums of money, and bought some clothes for his mother, and he did not charge anything for the work he did for his father.

There was therefore some substantial evidence to support the verdict in favor of the father, and no evidence contradicting it.

Appellant calls attention to 8 R. C. L., § 40, p. 477, and that section states the rule to be that any one who is

injured in his person may recover for loss or diminution of his earning capacity, but it is also stated in said section, "nor will recovery by an infant for prospective loss of earnings, after he has reached his majority, be precluded by the fact that he has never earned anything, and that no one can tell with certainty what his future earning capacity will be."

Of course, it would be impossible to tell what contributions would be made by a son to his father, but it may be shown to a reasonable certainty what his future contributions would be.

The next case to which attention is called by the appellant is *Hines* v. *Johnson,* 145 Ark. 592, 224 S. W. 989. We do not think the principles announced in that case have any application to the facts in this case. The court held in that case that, where damages are claimed for the death of a child incapable of earning anything or rendering services of any value, the value of its probable future services to the parent during its minority is a matter of conjecture, and may be determined by the jury without the testimony of witnesses. The court also held in that case that the surviving father was the next of kin, and that he could recover, but that the mother could not, for the loss of the child's services.

Appellant also calls attention to the case of *Interurban Ry. Co.* v. *Trainer,* 150 Ark. 19, 233 S. W. 816. In that case it was held that the measure of damages to a parent was the pecuniary value of the services during minority, and that, since the parent was entitled to the services of the minor child, the law presumes that the parent has incurred and suffered pecuniary loss and damage in the death of an infant, even before it has arrived at an age to render services of pecuniary value.

But this court has held that, where the evidence shows contributions to the parent by the son, and where the evidence would justify the finding of the jury that he would contribute in the future, and that the father had a reasonable expectation of receiving contributions in the future, this evidence would justify recovery. *Fordyce* v.

McCants, 55 Ark. 384, 18 S. W. 371; *St. L., Memphis & S. E. Rd. Co.* v. *Garner,* 76 Ark. 555, 89 S. W. 550.

The deceased in this case was 22 years old, lived with his parents, worked on the farm for them, did not receive from them any compensation for his work, and the jury returned a verdict for $1,500. There was substantial evidence to sustain the verdict, and we do not think $1,500 was excessive.

"Legal liability alone is not the test of the injury in respect of which damages may be recovered; but the reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into account. It is not essential to the recovery of substantial damages by the father of an adult son that the latter had accumulated property, or given pecuniary aid to the former after attaining his majority, other facts being proved which justify the conclusion of substantial loss." Sutherland on Damages, § 1273.

"In case of the killing of an adult child, who is at the time actually rendering services, recovery may be had even in all jurisdictions. * * * A reasonable probability of pecuniary advantage from the continuance of life must be shown; if it is shown, the parent may recover, if not, there can be no recovery. So, where at and before the time of his death the deceased was not contributing to his parent's support, there can be no recovery." Sedgwick on Damages, vol. 2, p. 1117.

The verdict in favor of the appellee for $6,000 for pain and suffering is reduced to $3,500, and affirmed for that amount. We find no other error, and the judgment is in all other respects affirmed.

RIDGE *v.* MILLER.

Opinion delivered March 21, 1932.

W. J. Dungan, for appellant.

Ross Mathis, for appellee.

BUTLER, J. This appeal is from a decree of the Woodruff Chancery Court dissolving a temporary injunction by which the appellee, Edgar Miller, as county treasurer, was temporarily restrained from paying certain warrants duly issued by the school board of district No. 22, in payment for services rendered in transporting the children of that district to and from school, and warrants issued to pay a part of a teacher's salary.

The agreed statement of facts presented to the trial court were that (1) on November 24, 1930, R. H. Curtis began to transport certain pupils of the district to the school, and on the 29th day of that month the board of directors adopted a resolution authorizing a lease by the district of the truck of Curtis and his employment to drive the same; that Curtis transported an average of twenty or more pupils of the district each school day, using his truck from the date he first began until and including May 27, 1931. Warrants were issued to him for his services and use of his truck. Of these warrants, $216.80 was for services rendered by Curtis after March 25, 1931. It was agreed that the services rendered were worth the sums represented by the warrants, and that the said Curtis was a member and president of the board of directors of the school district on November 24, 1930, and until and including May 27, 1931.

(2) That Mrs. Dorothy Patterson was regularly employed as a teacher during the school term, ending in

May, 1931, and performed her duties in person except for a period of ten days during the month of February. On four of these days her infant child was ill; on two days she was ill herself, and on four days her mother was sick. With the knowledge and permission of the superintendent of schools of the district, she employed as a substitute teacher a pupil of the school in the 10th grade, who held a second grade teacher's certificate; that the said substitute taught Mrs. Patterson's classes during the said ten days, and for her services was paid $15 by Mrs. Patterson, that sum being arrived at by agreement between Mrs. Patterson, the substitute teacher and the superintendent. Mrs. Patterson was issued warrants in full compensation of the amount that would have been due her under her contract.

1. It is conceded by the appellant that Curtis was entitled to be paid the value of his services from November 24 until March 25, 1931, but that he should not be paid for his services rendered thereafter, because on that date act No. 169 of the General Assembly was approved, which act, by § 102, provided:

"The board of directors of all school districts in the State are authorized to purchase vehicles and otherwise provide means for transporting pupils to and from the school, when necessary. To this end it may hire or purchase such school wagons, buses, or other vehicles, and hire persons to operate them, or make such other arrangements as it may deem best, affording safe and convenient transportation to the pupils; and the board may pay for all such property or services out of the funds of the district. Provided, that any contract with any member of the school board for the transportation of children or to drive a bus shall be null and void."

This court, in the early case of *Lindsay* v. *Rottaken,* 32 Ark. 619, recognized the rule that any act which is forbidden by the common or statutory law cannot be the foundation of a valid contract, nor can anything auxiliary to, or promotive of, such act be such.

In *Spearman* v. *Texarkana,* 58 Ark. 348, 24 S. W. 883, 22 L. R. A. 855, a distinction was recognized between

contracts which are against public policy merely on account of the personal relation of the contractor to the other parties in interest and those which are void because the thing contracted for is against public policy. In the latter class the parties acquire no rights which can be enforced either at law or in equity, but in the former class, it of itself being lawful and beneficial, it would seem unjust to allow the party who may be entitled to avoid it to retain the benefits without any compensation at all. In the application of these principles, this court held in the case of *Smith* v. *Dandridge,* 98 Ark. 38, 135 S. W. 800, 34 L. R. A. (N. S.) 129, Ann. Cas. 1912D, 1130, that, as a general rule, it is unlawful for a school director to enter into a contract with the school district in which he has a personal and individual interest, because his relation to the district is of a confidential and fiduciary nature, and therefore public policy forbids that he place himself in a position where his own personal interest might conflict with that of the school district which he must represent. This disability, however, arises not because the thing contracted for is of itself illegal or immoral, but because of the personal relation to the district which requires that he should not suffer himself to be placed in a position which might render his personal interest antagonistic to that of the district; but, following the rule recognized in *Spearman* v. *Texarkana, supra,* and in *Frick* v. *Brinkley,* 61 Ark. 397, 33 S. W. 527, it was held that, where a contract such as the one then under consideration was not affected with any intrinsic immorality or unlawfulness, when services were rendered and accepted under the contract, on principles of natural justice and right just compensation therefor ought to be made.

In the instant case, it is admitted that no fraud was practiced in the procurement of the contract; that the ends proposed thereby were necessary and beneficial, and that the services rendered were worth the amount for which allowance had been made and the warrants issued; and it is appellee's contention that, on the principle of

natural justice recognized in the cases, *supra,* the decree of the trial court should be upheld.

The rule insisted by the appellee, Curtis, runs counter to the general rule that, where a contract is expressly prohibited by law and the statute in terms declares the contract null and void, no recovery can be had, and the taxpayer, where money has been paid under the same, may maintain an action for its recovery when the officers charged with that duty neglect or refuse to perform it. *Martin* v. *Hodge,* 47 Ark. 378, 1 S. W. 694; *Wood* v. *Stewart,* 81 Ark. 48, 98 S. W. 711; *People's Savings Bank* v. *Big Rock Stone & Construction Co.,* 81 Ark. 599, 99 S. W. 836; *Eager* v. *Jonesboro, Lake City & Eastern Exp. Co.,* 103 Ark. 288, 147 S. W. 60; *Tallman* v. *Lewis,* 124 Ark. 6, 186 S. W. 296.

In *People's Savings Bank* v. *Big Rock, etc., Co., supra,* under a statute (then § 5644 of Kirby's Digest, now § 7716, Crawford & Moses' Digest) which forbade the board of public affairs of a city to make any contract with any person associated in business or related to any member of the board or city council, and providing that every such contract should be null and void, it was held that a bank, of which the mayor of a city was a stockholder and president, could not take an assignment of the claim of a contractor against the city for the price of work performed by him for it. In that case, both the mayor and bank officials appeared to have acted in entire good faith, and to have intended what they did for the benefit of the city, but, because of the statute which declared such contracts null and void, no benefit might accrue to the bank, since to enforce the contract would be for "the law to aid in its own undoing."

In the case of *Tallman* v. *Lewis, supra,* a contract was made between a board of improvement of a drainage district and one of its commissioners, and under which the services contracted for were performed and were reasonably worth the amount of the compensation allowed and collected by the commissioner. A suit was instituted by a taxpayer to recover the sums paid the commissioner,

who insisted on the trial and on appeal to this court that, under the rule in *Spearman* v. *Texarkana, Frick* v. *Brinkley* and *Smith* v. *Dandridge, supra,* he should be allowed to retain the compensation on a *quantum meruit.* The statute under which the board of improvement of the drainage district acted did not in express terms declare contracts between the board and its members null and void, but required the commissioners to make oath that they would not directly or indirectly be interested in any contract made by the board. Under that state of case, we held that it amounted to an express prohibition, and that to permit a recovery upon rights growing out of such contract would in effect abrogate the statute. A statement from the case of *Bank of United States* v. *Owens,* 2 Peters 527, was there quoted with approval: "No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is of itself illegal."

In the instant case, by the act of March 25, 1931, *supra,* it was expressly provided that "any contract with any member of the school board for the transportation of children, or to drive a bus, shall be null and void." It will be seen therefore that on and after that date the contract and the performance of it was in direct violation of the plain terms of the statute, regardless of how necessary and beneficial the service was to the district.

It is insisted, however, that the facts in this case distinguish it from the cases above cited, since the contract in its inception and its performance by Curtis was not in violation of any statutory inhibition, and therefore his services, after March 25, 1931, would be referable to the time when he began to perform such services, and he ought still to recover under a *quantum meruit.* We cannot accept the conclusion reached by the appellee. It must be remembered that whatever right to compensation Curtis had could not be based upon the contract,

for, in its very inception, it was illegal on sound grounds of public policy, and his right to compensation was not referable to the contract, but to the services rendered.

It seems to be the general rule that, where a contract is lawful when made and a law afterwards rendered the performance of it unlawful, the contract is to be considered at an end, and, as the statute puts an end to the contract, there can be no legal recovery, even where the services under it are performed, as it is contrary to the policy of the law to permit a party to recover for the performance of his own illegal acts. *American Merc. Exch.* v. *Blount,* 102 Me. 128, 66 Atl. 212; *Endsley* v. *Hollingsworth,* 170 Ala. 396, 54 So. 95; *Odlin* v. *Penn. Ins. Co.,* 18 Fed. Cas. No. 10,433; *Buffalo East Side R. Co.* v. *Buffalo Street R. Co.,* 111 N. Y. 132, 19 N. E. 63. In the last case the court said: "The fact that the agreement was made prior to the passage of the act is of no consequence. The parties to the agreement should not be deemed to have intended to cover acts which then or thereafter, within the life of the agreement, might be declared by law to be criminal."

There are some decisions which express the view that, where a contract is valid and not against the then existing public policy when entered into, no subsequent act of the Legislature can render it invalid, on the principle that, if a contract conformed to public policy when made, a change in that policy will not avoid it. But our research has disclosed no decision holding that, where a contract is in its inception contrary to public policy, although the subject-matter is not in itself wicked or immoral, services performed under it may be recovered for on a *quantum meruit* rendered after a time when, by legislative enactment, such contract is declared to be null and void. It is difficult to perceive, upon consideration of the general rule last stated, how upon any state of a case this doctrine can be sustained, for to do so would call upon courts to render nugatory a positive prohibition of a statute. This cannot be done, and appellee's contention must fall. On the principle announced in *Smith* v.

Dandridge, and its companion cases, the warrants issued to Curtis for his services performed prior to March 25, 1931, are the valid evidence of a just debt, and should be paid; but for the services rendered after the enactment of the statute of March 25, 1931, the prayer of the appellant for an injunction, perpetually restraining the treasurer from paying the warrants evidencing those services, should be granted.

II.

On that branch of the case seeking the injunction against the payment of Mrs. Patterson's warrants, we are of the opinion that the contention of the appellant is without merit. The reasonable inference may be drawn from the testimony that she performed her duties as teacher during the school term, except for occasional times, amounting in the aggregate to ten days, during the month of February. During these times, however, she procured a substitute teacher satisfactory to her superiors, and paid for such services with her own money. It is of no consequence what she paid this assistant per day, and the record on the whole reflects that she substantially complied with her contract, and her warrants should be paid.

It follows from the views expressed that the decree of the chancellor must be reversed, and the case remanded, with directions that a decree be entered in accordance with this opinion.

COMMERCIAL CASUALTY INSURANCE COMPANY *v.* MCCULLEY.

Opinion delivered March 28, 1932.

O. A. Featherston, for appellant.

P. L. Smith, for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for the defendant that there is no liability under the terms of the policy because the plaintiff was thrown from the platform of the train on which he was riding, and because a part of his injuries were sustained by being struck by a passing automobile after the train had jerked him onto the adjacent highway.

We have copied clauses 1 and 14 under which liability is claimed in our statement of facts, and need not repeat them here. We think that a reasonable construction of the clauses referred to show liability upon the part of the company. The plaintiff was a passenger riding in a

car of an interurban railway provided for passenger service. He had paid his passage, and, when the train stopped, walked out on the platform to observe the country. He was an able-bodied man and had a right to do this. It will be observed that he was on the platform of the car when he was thrown off by the car being started with a sudden jerk. This brought him within the terms of the policy. It did not make any difference that a part of his injuries were received by being struck by a passing automobile after he had been thrown from the platform of the car onto the adjacent highway. The proximate cause of his injury was being thrown from the platform of the car by the sudden starting of it. *Ætna Casualty & Surety Company* v. *Sengel,* 183 Ark. 151, 35 S. W. (2d) 67.

It is next insisted that the allowance of $100 attorney's fee was excessive. The plaintiff recovered the sum of $250. The case was tried by the circuit court sitting as a jury. It had already been tried in the justice court. The circuit court could tell from the conduct of the parties that the case would be appealed to the Supreme Court on the merits. The record shows that a motion for a new trial was filed by the company on the same day on which the case was tried, and this indicated that the court knew beforehand that the case would be appealed to the Supreme Court on the merits. While a fee of $100 is liberal for the amount recovered, we cannot say that, under the circumstances, the court abused its discretion in allowing it. If the defendant had offered to pay the amount of the judgment, then the court should have allowed a more modest fee. The statute does not make the liability of the company depend upon its refusal to pay the loss or its good faith in contesting the matter. The statute becomes a part of the contract of insurance and the fee is costs to reimburse the plaintiff for expense incurred in enforcing the contract. *American Liberty Insurance Company* v. *Washington,* 183 Ark. 497, 36 S. W. (2d) 963.

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

MISSOURI PACIFIC RAILROAD COMPANY *v.* RICHARDSON.

Opinion delivered March 28, 1932.

[redacted]

Thos. B. Pryor and *H. L. Ponder,* for appellant.

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

SMITH, J. Appellee recovered a substantial judgment to compensate an injury which he sustained as he was walking across the tracks of the defendant railroad company in Bald Knob, along Elm Street, which crossed the tracks, when he stepped on a small rock or piece of gravel, which caused his ankle to turn and twist his knee in such a manner as to break the cartilage in his knee cap.

We copy from the record his statement as to the manner in which he was injured: "When I got there (at the crossing), there was a gravel train, a work extra, that was on the crossing, and they had cut, I suppose, the Main Street crossing at the old depot. After they cleared the crossing probably six or eight feet, I started across. The work train had gone in on the passing track and let the Memphis train go out on the north Y, and let it connect to the coaches going south. They were spreading ballast, I think, between Bradford and Oliphant. The work extra train began to cut the crossing and let the traffic over, and the various vehicles that had been tied up there started across. I started across, and I stepped over the first pile of gravel that they strowed there, and I stepped over it,

which was about eighteen inches from the rail. I got over that with my left foot, and I stepped with my right foot to get over, and just as I started to make that step this work extra stopped. When they stopped, it created a noise, and, of course, I looked up to see what the noise was, and the car started back. I was standing between the rails, and, before I could get back and when I stepped over, I stepped on this rock."

Appellee described the rock upon which his foot turned as "a liver shape or a kidney shape gravel, a large sized gravel." He stated that "on the outside of the road (where he was injured) there was quite a stretch of them (gravel)." He also testified that the railroad company was using the gravel in raising its tracks, and that dump cars of two kinds were employed. One was a "center dump car," which so opened that the gravel which it contained would be spread in the center of the track between the rails. The other was a "side dump car," which so opened as to spread the gravel it contained on the outside of the rails.

He was asked: "How long had there been rock on that crossing?" And he answered: "At various times there would be a little in spots there, but that evening (the day of the injury) was the only time I ever seen that amount of rock there." He was asked: "How large was this particular gravel?" and he answered: "Something like as big as my fist."

He was interrogated in regard to a written statement he had signed relating to his injury, and, on his motion, this writing was introduced in evidence. This statement contained the recital that "This rock, in size, was something like a three-inch rock, such as would fall off a gravel train," and the further statement that "I remember that I saw these rocks scattered along before I reached there, but the particular rock that caused my ankle to turn had rolled off a little ways from the bunch."

Appellee had previously been employed by the railroad company for seventeen years in the bridge and building department, and was thoroughly familiar with

the work in connection with which the gravel was being used.

A witness introduced by appellee testified that some of the gravel were as large as eggs, and he had noticed them along the track for a week or ten days before appellee was injured.

The cause was submitted to the jury under instructions which declared it to be the duty of the railroad company to maintain its crossing in a safe condition for use by the public. The duty of railroads in this respect has been frequently defined in numerous decisions of this court, and no useful purpose would be served by reviewing them, as the instructions appear to conform to the law thus announced.

We are of the opinion, however, that appellee's injury was a mere accident for which the railroad company should not be held liable. The work in which the railroad company was engaged—that of spreading ballast—was both proper and necessary, and was in progress at the time of appellee's injury, and the probability that a pedestrian would be injured by the presence of one of these small stones appears to us to be too remote to predicate a cause of action thereon.

It has been frequently stated by this and other courts that, in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. *St. Louis, K. & S. E. R. R. Co.* v. *Fultz,* 91 Ark. 260, 120 S. W. 984; *Ultima Thule Ry. Co.* v. *Benton,* 86 Ark. 289, 110 S. W. 1037; *Helena Gas Co.* v. *Rogers,* 104 Ark. 59, 147 S. W. 473; *St. Louis, I. M. & S. Ry. Co.* v. *Copeland,* 113 Ark. 60, 167 S. W. 71; *Miller* v. *M. P. Ry. Co.,* 9 La. App. 477, 121 So. 241; *Meeks* v. *Graysonia, N. & A. R. R. Co.,* 168 Ark. 966, 272 S. W. 360.

If it be said that the jury was warranted in finding that it was negligence for the railroad company to permit particles of gravel to fall from its train, we are, neverthe-

less, of the opinion that the probable injury of appellee was not a consequence which ought to have been foreseen, and there is no liability unless the testimony suffices to sustain a finding that such a consequence should have been anticipated.

In the case of *Lee* v. *Central Railroad & Banking Co.*, 86 Ga. 231, 12 S. E. 307, it was said by the Supreme Court of Georgia: "It cannot be incumbent on railroad companies, or any one else, in such a world as this, to keep the whole face of the earth on which servants and employees are to execute their functions clear of every object that may cause an employee to slip up or be thrown down. Such a rule would require that farmers should keep their premises clear of corncobs; for a cob, when stepped upon, may roll under the foot and produce a fall. So of small stones, and sometimes sticks or other rubbish."

In the case of *Atchison, T. & S. F. Ry. Co.* v. *Calhoun*, 213 U. S. 9, 29 S. Ct. 321, the Supreme Court of the United States quoted from Pollock on Torts, 8th ed., 41, as follows: "If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things."

We conclude therefore that appellee's injury was the result of a mere accident for which the railroad company should not be held liable.

The judgment must therefore be reversed, and, as the case has been fully developed, it will be dismissed. It is so ordered.

NORTH BRITISH & MERCANTILE INSURANCE COMPANY *v.* EQUITABLE BUILDING & LOAN ASSOCIATION.

Opinion delivered March 28, 1932.

[redacted]

Verne McMillen, for appellant.

J. A. Watkins, for appellee.

SMITH, J. Joe Selz owned a house and lot in McGehee, which he mortgaged to the Equitable Building & Loan Association, hereinafter referred to as the association. He sold the property to Daugherty, who took out a fire insurance policy in the sum of $2,500, payable to the mortgagee, the association, as its interest might appear. The history of the title to this property is not clear, but it appears that Selz was indebted to a bank in McGehee which failed, and, when the assets of the bank were sold by the State Bank Commissioner, they included the equity of Selz in this property, which was sold to Roscher, subject to the mortgage to the association, and Roscher, for the consideration of $50, executed a quitclaim deed to the property to Mrs. White.

Daugherty assigned the insurance policy to Roscher, who appears not to have assigned it to Mrs. White. The insurer was not advised of these transfers of the property and assignments of the policy covering it.

Default was made in the payments due the association, and a suit to foreclose its mortgage had been brought, in which all the parties above named were made defendants, and on October 25, 1930, while this suit was pending, the insured property was damaged by fire.

The association advised the insurance company of the fire, and the insurer referred the claim therefor to Scott, its adjuster, for settlement.

Several letters were exchanged and conversations had between Scott and the attorney for the association. In one of these conversations Scott expressed the opinion that the fire damage amounted from $2,200 to $2,250, but the attorney insisted that the damage was greater than the face of the policy. When this difference of opinion arose, Scott asked the attorney to have an estimate of the damage prepared. The insurer appears to have been within its contractual rights in making the demand of proof of loss. The estimate was made, and the report thereon showed a fire damage greater that the face of the policy. This proof of loss was furnished within the sixty days allowed by the policy for making settlement thereof. The insurance company does not appear thereafter ever to have denied its liability for the full amount of the policy, and appears to have been concerned only in so making payment as to discharge its liability to all claimants under the policy.

As we understand the record before us, Scott offered to make a draft payable to the association, and to all persons who had at any time owned the title to the insured property after the issuance of the insurance policy, but this was not satisfactory to the attorney. On January 2, 1931, the attorney wrote Scott a letter, which recited substantially the facts hereinabove set forth in regard to the title. It was stated in this letter that "the indebtedness of the association is far in excess of the amount of the insurance, and I hope that your insurance company will find it proper to make a check to the building association without mentioning the names of the other parties, as that would cause us to have to bring suit in order to get rid of them. I see no reason why it should be necessary to place their names on the check, as they have no interest whatever."

Scott answered this letter under date of January 5, 1931, and the liability of the insurance company for the face of the policy was conceded and its intention to pay

declared. This letter refers to the foreclosure proceeding at the time of the fire, and suggests action be taken to protect the insurance company against the claims of all parties to this proceeding. Scott, for the insurance company, expressly waived any defense against liability arising out of changes of ownership of which the company had not been advised, and, by way of settlement, made the following proposition: "We can secure possibly the signatures of Mr. Roscher and Mrs. White to a draft after its issuance, but we will also have to secure their signature to a proof of loss before the draft can be issued, unless you go into court and secure a judgment and an order of the court for this money to be paid over to the Equitable Building & Loan Association. Your further advices in regard to this matter will be greatly appreciated." There appears in the record a letter from the attorney for Mrs. White in which demand was made for $100 of the insurance money.

The attorney for the association testified that he regarded the statement of Scott that the fire damage was less than the face of the policy as a denial of liability, and that he felt under no obligation to secure the indorsements of Roscher and Mrs. White to the draft, and he thereafter brought suit in Desha County, where the insured property was located, for the face of the policy, with interest, penalty and attorney's fee. Thereafter the insurance company proposed to file, and did file, in the Pulaski Chancery Court an interpleader's bill, in which all persons herein named were made parties, and it was prayed that all parties be required to make proof of any interest claimed in the proceeds of the insurance policy. This bill appears to have been filed by consent, and for the reason that the matter could be disposed of at an earlier date than would be done by prosecuting the suit in Desha County. Upon filing the interpleader's bill in Pulaski County, the suit in Desha County was dismissed. The association filed an answer to this interpleader's bill, in which it claimed the entire policy and prayed an assessment of penalty, interest and attorney's fee. The

amount of the policy was paid into court, and it was ordered that the same be paid to the association, and, in addition, a penalty and attorney's fee was also allowed, together with interest, and this appeal is from the allowance of the penalty and attorney's fee.

We think, under the facts stated, that it was error to assess a penalty and attorney's fee. The statute allowing a penalty and attorney's fee was not intended to cover cases such as this. There was no failure to pay within the meaning of the statute. The insurer had the right to demand proof of loss, although the adjuster had expressed the opinion that the loss was less than the face of the policy. When this proof was made, and the loss was shown to be greater than the face of the policy, the insurer admitted its full liability and offered to pay, and demanded only that it be protected in its payment against all persons claiming an interest in the policy. This demand was not unreasonable. There was a foreclosure suit pending at the time of the loss by fire, in which it was alleged that the parties thereto had or claimed such interests in the property as required them to be made parties to the foreclosure proceeding. The insurer offered, without suit, to make a check payable to all these parties for the full amount of the policy, or to pay that amount into a court before which all parties were present, and to expedite the settlement thus proposed it later brought, at its own expense, a suit for that purpose, and paid into the court the full amount of its liability. The principles announced in the cases of *North State Fire Ins. Co.* v. *Dillard,* 88 Ark. 473, 115 S. W. 154; *Federal Union Surety Co.* v. *Flemister,* 95 Ark. 389, 130 S. W. 574; and *Massachusetts Bonding & Ins. Co.* v. *Home Life & Acc. Co.,* 119 Ark. 102, 178 S. W. 314, apply.

Under the circumstances herein stated no penalty or attorney's fee should have been assessed, and that portion of the decree is reversed, and that cause of action is dismissed, and the costs of this appeal will be assessed against appellee.

SADLER *v.* FIREMAN'S FUND INSURANCE COMPANY.

Opinion delivered March 28, 1932.

Edward Gordon, for appellant.

John E. Coates, Jr., for appellee.

HUMPHREYS, J. Appellants brought this suit against appellee in the chancery court of Logan County, Booneville District, to reform fire insurance policy No. 12371, issued by it to A. L. George on October 15, 1930, covering improvements on lots 20 to 26, inclusive, in block 32, in the town of Magazine, Arkansas, so as to include a loss payable clause to appellants, executors of the estate of W. V. Higgins, deceased, to whom A. L. George mortgaged said property on March 1, 1927, to secure a loan of $1,000 and interest; and to recover out of the proceeds of said policy said mortgage indebtedness with interest, the statutory penalty of twelve per centum, and a reasonable attorney's fee. It was alleged in the complaint that the understanding between the parties was that said policy should contain a loss payable clause to appellants, executors of the estate of W. V. Higgins, deceased; and that A. L. George, as agent of appellee, negligently failed to write said policy in accordance with the agreement, understanding, and intention of the parties. It was also alleged that the improvements on the lots were totally destroyed by fire on the 30th day of November, 1930.

An answer was filed denying the material allegations of the complaint.

The cause was submitted on the pleadings and testimony, resulting in a dismissal of the complaint.

The record reflects that A. L. George borrowed the sum alleged from W. A. Higgins and executed him a mortgage on said property to secure same, and furnished him a fire insurance policy in appellee's company which expired one year thereafter; that renewal policies were issued each year and kept in the custody of A. L. George, who told appellants that the policies contained the clause agreed upon, when in fact none of them did; that A. L. George was a soliciting agent only of appellee and without authority to write policies; that the extent of his authority was to solicit insurance, send applications received to appellee's general agent, Coates & Raines, at Little Rock, Arkansas, and to deliver the policies when issued and sent to him by the general agent, and to collect the premiums thereon; and also reflects by the weight of the evidence that A. L. George agreed to procure a policy from appellee containing a loss payable clause to appellants as their interest might appear, and that he claimed to have done so in his conversation with them; and that the improvements on said lots were totally destroyed by fire on the 30th day of November, 1930, and that the amount due under the insurance policy was paid to A. L. George, by appellee, on the 26th day of December, 1930, and by him paid to Coates & Raines in settlement of premiums he had collected on other policies.

Appellants contend for a reversal of the decree and their right to a reformation of the policy and of recovery thereunder upon the knowledge of A. L. George of the existence of the mortgage and his agreement to protect appellants as their interest might appear in the policy numbered and referred to above. This position would be tenable, had A. L. George been given authority to agree upon the terms and write policies for appellee, but no such authority was conferred upon him directly or indirectly by appellee. The undisputed evidence showed that A. L. George was merely a soliciting agent of appellee. It has been uniformly held by this court that a solicit-

ing agent has no authority to agree upon terms to be inserted in policies or to change or modify or waive terms contained therein, and that the knowledge of a soliciting agent cannot be imputed to the company he represents. *American Insurance Company* v. *Hampton,* 54 Ark. 75, 14 S. W. 1092; *Mutual Life Insurance Company* v. *Abbey,* 76 Ark. 328, 88 S. W. 950; *American Insurance Co.* v. *Hornbarger,* 85 Ark. 337, 108 S. W. 213; *Pacific Mutual Life Insurance Company* v. *Carter,* 92 Ark. 378, 123 S. W. 384; *Inter-Southern Life Insurance Company* v. *Holzhauer,* 177 Ark. 927, 9 S. W. (2d) 26. Under the authorities cited, appellee was not bound by the knowledge of A. L. George, its soliciting agent, nor by his agreement to insert in the policy a loss payable clause in favor of appellants.

No error appearing, the decree is affirmed.

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* STATE USE ARKANSAS FERTILIZER COMPANY.

Opinion delivered March 28, 1932.

John W. Stayton, for appellant.

Culbert L. Pearce, for appellee.

HUMPHREYS, J. Appellee, a creditor of the estate of S. A. Gregory, deceased, brought this suit in the name of the State of Arkansas for its use and benefit in the circuit court of Jackson County against Arthur Gregory, as administrator of said estate, and his bondsmen, the appellants herein, to recover $248.16 surcharged against the administrator's account in the probate court, for failure to pay said amount to the administrator in succession.

It was alleged in the complaint that appellee's claim in the full amount of $509.62 was allowed and declared a fourth-class claim by the probate court on September 3, 1921; that, on account of the indebtedness of said estate being greater than the assets, said administrator reported to the court that he could pay only 42 per cent. of claims allowed in said class, and that he was thereupon authorized and directed by the court to pay such dividend on the claims allowed, and to obtain and file receipts therefor; that he filed his first and final report on November 3, 1923, showing payment of the 42 per cent. dividend to all the creditors whose claims had been allowed, except appellee; that on January 2, 1924, appellee filed exceptions to the report, which were sustained, and said settlement was surcharged with $248.16 as the amount due it.

To this complaint a general demurrer was filed by appellants, which was overruled, and, appellants saving their exceptions and standing upon their demurrer and refusing to plead further, judgment was rendered against them for the amount of the dividend, from which is this appeal.

Appellant's contention is that the court erred in overruling the demurrer since the complaint was fatally defective, because it did not allege that, after surcharging the settlement, the probate court ordered the administrator to pay over to the use of appellee or to the administrator in succession the sum so found due from him. Appellant overlooks the allegation in the complaint that theretofore an order had been made by the probate court ordering the administrator to pay the creditors, including appellee, 42 per cent. of its original claim, which original claim had been allowed in the full amount of $509.62. The surcharge was the exact amount of the 42 per cent. which the court had authorized and directed the administrator to pay said appellee on September 3, 1921. It was unnecessary to repeat this order, as no change had been made in the amount by the surcharge. This court ruled in the case of *Statham* v. *Brooke,* 140 Ark. 187, 215 S. W.

581, that an order of distribution or an order to pay over, and a failure to comply with, the order by an executor or administrator is what constitutes a breach of the administrator's or executor's bond, and fixes the liability on the bondsmen.

No error appearing, the judgment is affirmed.

LaSalle Fire Insurance Company *v.* Jenkins.

Opinion delivered March 28, 1932.

Buzbee, Pugh & Harrison, for appellant.

Sam E. Montgomery and *Verne McMillen,* for appellee.

Kirby, J. The only question for determination here is whether the statute allowing recovery of penalty and attorney's fee for loss under a fire insurance policy is applicable to the case at bar, in which an automobile was destroyed by fire, the policy herein insuring said automobile against damage or loss by fire.

Suit was brought for damages for destruction by fire of an automobile belonging to appellee, which had been insured by appellant company, and judgment was rendered for the amount sued for with a 12 per cent. penalty and an attorney's fee of $100.

It is contended for reversal that the statute has no application to such a loss as that complained of here, but

only to usual losses by fire under ordinary fire insurance policies, and that this is rather automobile insurance than regular fire insurance.

The statute, § 6155, Crawford & Moses' Digest, provides: "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be, by law collected."

The appellant, the LaSalle Fire Insurance Company, is obviously a fire insurance company in name, and certainly its policy insures against the perils specified therein, defined as follows:

"F. Fire, Lightning and Transportation:

"(a) Fire, arising from any cause whatsoever; and lightning."

The penalty and attorneys' fees are allowed to be recovered under the statute where the fire, life or accident insurance company liable therefor fails to pay after a loss occurs and demand made within the time specified in the policy. No form of policy for fire insurance is specified in our statutes, and, even though the company issuing the policy was not named a fire insurance company, it would be none the less a fire insurance company if it issued policies of fire insurance upon property insuring against loss by fire, etc., and, as such, came within the provision of the statute, without regard to whether it wrote fire insurance exclusively or whether writing fire insurance was its principal business. In other words, if it insures property against loss by fire, it is a fire insurance company within the meaning of said statute.

The statute has been held not to apply to the recovery of a loss by cyclone in *Home Fire Ins. Co.* v. *Stancell,* 94 Ark. 578, 127 S. W. 966, or for loss by theft of an automobile under a policy issued by a fire insurance company in *National Union Fire Ins. Co.* v. *Crabtree,* 151 Ark. 561, 237 S. W. 97. In *National Union Fire Ins. Co.* v. *Henry,* 181 Ark. 637, 27 S. W. (2d) 786, the recovery of penalty and attorney's fees, where the suit was brought on "tornado policy," was denied.

The statute is highly penal, and should not be held to apply to any loss or company that is not therein expressly named, as already said by this court. But this hazard was expressly insured against by a fire insurance company, and the loss having occurred and not having been paid within the time specified in the policy after demand made therefor, the company was liable, of course, to the payment of the penalty and attorneys' fees prescribed by the statute.

The Arizona case relied on in appellant's brief, *Penn. Fire Ins. Co.* v. *Johnson,* 28 Ariz. 448, 237 Pac. 635, holding otherwise, does not seem to be based on sound reasoning and construed a statute of that State in conjunction with a specified form of policy provided for by law, and is without value in determining the question here.

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

METZ *v.* MELTON COAL COMPANY.

Opinion delivered March 28, 1932.

Starbird & Starbird, for appellant.

Pryor & Pryor, for appellee.

MEHAFFY, J. On April 12, 1928, a decree was rendered by the chancellor in vacation, and was filed with the clerk of the Franklin Chancery Court on April 16, 1928. The decree was in favor of the defendant, appellant here. At the same term of court there was an application filed to set aside the decree rendered by the chancellor on April 12th.

On April 6th, the chancellor had set the case for trial on the 12th and directed notice to be served on the plaintiff, or his attorneys. Mr. Grant, attorney for the defendant, wrote to Mr. Williams, attorney for plaintiff, at Ozark. Mr. Williams had lived at Ozark, but had moved from there, and testified that he never received the letter.

The chancellor heard the evidence of the defendant on the 12th, and rendered a default judgment.

Mr. Grant, having written to the attorney for the plaintiff, the court supposed that the notice had been received, and proceeded to hear the evidence of the defendant, and rendered judgment for the defendant and against the plaintiff for $450, and the application was to set aside this default judgment.

The parties entered into the following stipulations:

"STIPULATION.

"It is agreed and stipulated by and between G. L. Grant, attorney for defendant, Carl Metz, and Pryor,

Miles & Pryor, attorneys for Melton Coal Company, plaintiff, that the application to set aside default judgment filed by the plaintiff herein, upon motion of the defendant, be continued until the next term of the court, or to be heard in vacation upon a date to be agreed upon by the parties, and that no execution, garnishment or other process is to be issued upon the judgment rendered in favor of the defendant in the above cause against the plaintiff until after the hearing of the application to set aside judgment filed by the plaintiff herein, said continuance to be granted upon the motion of the defendant in the above court on account of the absence from the State of the attorney for the defendant.

"Witness our hands, this 7th day of July, 1928.

"Pryor, Miles & Pryor,
"Attorneys for Plaintiff.
"G. L. Grant,
"Attorney for Defendant.

"Filed July 9, 1928. Vint Addy, Clerk."

"STIPULATION.

"It is stipulated by and between plaintiff and defendant in this case that the motion to set aside the default judgment in this case may be continued, and that it may be heard by agreement at chambers in Fort Smith, if the chancellor will hear it there, and that all right to question the right of the chancellor to set the judgment aside because it had become final is waived. In other words, the parties here agree to waive any question of the intervention of the term of court.

"Pryor, Miles & Pryor,
"Attorneys for Plaintiff.
"G. L. Grant,
"Attorney for Defendant.

"Filed December 3, 1928. Vint Addy, Clerk."

"STIPULATION.

"It is hereby stipulated and agreed between the parties to this suit and their attorneys that this cause may be submitted at this term of the court and the evi-

dence introduced before the chancellor in vacation at Fort Smith at any time before the.....day of....., 1929, and a decree entered by him after hearing said evidence.

"This the 8th day of July, 1929.

"Pryor, Miles & Pryor,
"Attorneys for Plaintiff.
"G. L. Grant,
"Attorney for Defendant.

"Filed July 8, 1929. J. E. Yates, Clerk."

"STIPULATION.

"It is agreed and stipulated by and between Pryor, Miles & Pryor, attorneys for the plaintiff, and G. L. Grant, attorney for the defendant, that the above cause may be submitted to the Honorable J. V. Bourland, Chancellor, at chambers, in the city of Fort Smith, Arkansas, on December 14, 1929, in accordance with the stipulation herein entered by and between the parties hereto.

"Witness our hands on this the 30th day of November, 1929.

"Pryor, Miles & Pryor,
"Attorneys for the Plaintiff.
"G. L. Grant,
"Attorney for the Defendant.

"Filed December 2, 1929. J. E. Yates, Clerk."

These stipulations were filed in the Franklin Chancery Court. The Honorable J. V. Bourland was chancellor at the time the default decree was entered, and the Honorable C. M. Wofford succeeded Judge Bourland, and was chancellor at the time the decree was entered setting aside the default judgment. The decree setting aside the default judgment was rendered on September 17, 1931.

The decree recited that, the parties having agreed in open court to finish the trial before the chancellor at chambers, in Van Buren, Arkansas, the plaintiff appeared by its solicitors, J. P. Clayton and Pryor & Pryor, and, the defendant appearing by his solicitors, Starbird & Starbird, the trial proceeded upon oral testimony, and

the chancellor, having heard the oral and documentary evidence, and the whole record, as well as the argument of counsel, and being fully advised in the premises, doth find for the plaintiff, and doth further find that the judgment rendered herein on April 12, 1928, ought to be set aside and held for naught, and the plaintiff allowed a trial in the case.

The original case was set for a hearing before the chancellor in vacation on April 6, but the place of the hearing was not designated, and the plaintiff's attorney did not know that the time had been fixed.

On April 6th, the defendant's attorney appeared, but the plaintiff's attorney did not appear, and the chancellor ordered the case set down for hearing on April 12th, and directed that the plaintiff's attorney be notified.

At the beginning of the case Mr. Williams was attorney for plaintiff, and Mr. Partain was attorney for defendant. On April 6, the time set for the hearing, Mr. Grant appeared for the defendant, and he wrote and mailed a letter to Mr. Williams, attorney for the plaintiff, at Ozark. Mr. Williams had lived at Ozark, but had moved to Clarksville, and he testified he had never received the letter from Mr. Grant, and never heard of it until after judgment and execution. Pryor, Miles & Pryor became attorneys for the plaintiff, and Starbird & Starbird, attorneys for the defendant.

Judgment by default was rendered on April 12, against the plaintiff for $450, and was filed with the clerk on April 16. At the same term of court that the judgment was rendered and filed, the attorneys for the plaintiff filed an application to set aside the default judgment, and the stipulations above set out were entered into and filed in court.

Appellant first contends that the decree of the chancellor setting aside the default judgment is not supported by a preponderance of the evidence. It is true that the record entry shows that the case was set down for April 6th, but it was not tried on April 6th, but was postponed

by the chancellor until the 12th, and notice directed to be given the plaintiff's attorney. The evidence shows that Mr. Grant wrote a letter to plaintiff's attorney, advising him that the case would be tried on the 12th, but the evidence does not show, and the court did not find, that Mr. Williams ever received this notice.

It is contended that the evidence on the part of the defendant is positive, and that on the part of the plaintiff is negative. The evidence on the part of the plaintiff, however, is as positive as the evidence for the defendant.

It is next contended by the appellant that the proceeding to vacate the judgment is not authorized by law; that the proceeding should have been by a complaint verified by affidavit, as provided for in §§ 6292 and 6293 of Crawford & Moses' Digest.

This is not a proceeding under above sections of the digest, but is a motion or application filed at the same term of court the judgment was rendered, to set aside a default judgment.

It has been settled by numerous decisions of this court that 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. *Democrat P. & L. Co.* v. *Van Buren County,* 184 Ark. 972, 43 S. W. 1075; *Hawkeye Tire & Rubber Co.* v. *McFarlin,* 146 Ark. 491, 225 S. W. 632; *Wells-Fargo & Co.* v. *W. B. Baker Lumber Co.,* 107 Ark. 415, 155 S. W. 122.

This court has many times held that the trial court may, during the term, vacate its judgment, and that it might do so without notice.

This judgment, however, setting aside the default judgment, was not rendered at the same term of court. The application to set it aside was filed in the same term of court, and it was agreed that it might be tried thereafter in vacation.

In a case note in 60 Am. St. Rep., 639-640, it is stated: "After the lapse of the term at which the judgment is rendered, the power of the court to vacate it on motion is much more restricted than during the term, though we believe no rule can be formulated which will everywhere be recognized as correct, prescribing the precise limits of this power. * * * So during the term notice of an application to vacate a judgment may be given, and it may be granted afterward. There is some conflict of authority upon the subject, but we believe that where a motion is made to vacate a judgment, or notice of such motion is given, within the time in which the court has power to grant it, it is not indispensable that it be disposed of within the term, and therefore that an order vacating a judgment after the term or after the time specified in some statute is neither erroneous nor void, if the motion therefor was made in due time." Authorities are cited in the case note, supporting the rule above announced.

It is true that this court has many times held that a judgment rendered at one term of court cannot be set aside at a future term of court, and the case again determined, and it cannot be set aside at a future term by consent of parties, where the court is not authorized to act in the absence of such consent, because consent cannot confer jurisdiction.

Our statute, however, expressly provides that a chancellor may deliver opinions and may make and sign decrees in vacation in causes taken under advisement by him at a term of the court, and he may do this by the consent of the parties or their solicitors of record, and when this is done the decree has the same force and effect as if done in term time, and appeals may be taken from decrees rendered in vacation. Crawford & Moses' Digest, § 2190.

This section has been construed by this court, and it has been expressly held that this section authorizes the setting aside of a decree after the term where the application is made during the term. This court said, in con-

struing the above section: "The court had jurisdiction to hear and determine the second petition of the appellees to set aside the sale of June 12, 1925. Although a former petition to that effect had been filed and overruled, this second petition was filed at an adjourned day of the same term of court and on the last day of the adjourned term. The issue was joined by the appellees on this petition, and a hearing thereon was had by consent in vacation. The decree from which this appeal comes so recites. Authority for such procedure is found in § 2190 of Crawford & Moses' Digest. See also *Bickle* v. *Turner,* 133 Ark. 536, 202 S. W. 703; *Davis* v. *Sparks,* 135 Ark. 412, 205 S. W. 803. The court had not adjourned *sine die* at the time the second petition to vacate the sale was filed, and, even though such petition was filed on the last day of the adjourned term, that was sufficient to give the court jurisdiction to hear and determine the issue joined on such petition, and the statute above confers upon the chancellor authority to try causes by consent of parties and to render decrees in vacation." *Wofford* v. *Young,* 173 Ark. 802, 293 S. W. 725.

The application in the instant case was filed at the same term of court, the issue was joined by appellant on this petition, and a hearing thereon was had by consent in vacation. The section above referred to says that the decree in such cases shall have the same force and effect as if made, entered, and recorded in term time.

If this decree had been entered in term time, when the application was filed, it would have left the case in the condition it was before the default judgment was rendered, April 12, with an opportunity to try the case upon its merits, and since, under our statute, the decree rendered in vacation has the same effect, the setting aside of the default judgment by the chancellor left the parties in the same situation they were in before any judgment was ever rendered. They can therefore proceed with the trial of the case as if no judgment had been rendered on April 12, 1928, and, as we held in *Democrat P. & L. Co.* v. *Van*

Buren County, supra, no appeal could be taken from this judgment.

The decree of the chancery court is affirmed.

COOK *v.* BARBER.

Opinion delivered March 28, 1932.

Culbert L. Pearce, for appellant.

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

MCHANEY, J. On March 23, 1931, appellant sued appellee in unlawful detainer, alleging that she was the owner and entitled to immediate possession of a certain house and lot in McRae, Arkansas; that appellee rightfully entered into the possession of said lot under an oral rental contract with her and her husband, but wrongfully refused to pay the rent or surrender possession, and that she is holding over without authority and with force; that due notice and demand in writing had been made for the possession thereof, which was refused; and that the rental value was $15 per month. She prayed judgment for $50 damages and $15 per month for rent from February 1, 1931. At the same time appellant filed bond to obtain immediate possession, which was approved, and writ of possession was issued and served. Appellee filed bond for a like sum to retain possession, with R. L. Ernest as surety, which was approved and accepted. Thereafter appellee filed an answer, denying all the material allegations of the complaint, but alleged in addition that she had rented the property from appellant and her

husband and had paid the rent in advance to June, 1931, at which time she had vacated the property. On July 24, 1931, appellant filed an amended complaint, in which she alleged, in addition to the matters set out in the original complaint, that she had left her household and kitchen furniture in the building rented by appellee for her use, and that, while the property was in her possession same was destroyed by fire. She prayed damages, in addition to the rent, in the sum of $375 for the personal property destroyed by fire.

On a trial the jury found in appellant's favor for the sum of $260 damages to the personal property and $40 for rent. No judgment was entered on the overruling of the motion for a new trial, but thereafter, on September 5, 1931, the court entered a judgment *nunc pro tunc* against appellee in the sum of $260 for damages to the personal property and $40 for rent, making a total of $300, but against her bondsman for the sum of $40 only, the amount of the judgment for rent, and refused to enter judgment against him for the $260 damages to the personal property. Appellant excepted to the refusal of the court to enter judgment against the bond in the sum of $260, and has appealed from that judgment.

Appellant filed no motion for a new trial, and there is no bill of exceptions in the record. The only question presented is the liability of Mr. Ernest as surety on appellee's bond to retain possession for the destruction of the personal property by fire while in her possession. Said bond is conditioned as provided by law as follows: "Now, if the said Opal F. Cook shall recover judgment for the possession of said property in said action, and the said Lynn Barber shall deliver possession thereof to said Opal F. Cook, and shall satisfy any judgment rendered against her therein, then this bond to be void; otherwise, to remain in full force and effect."

We think the court correctly construed the bond not to be bound for the payment of the judgment rendered in excess of the rent. While it provides that he "shall satisfy any judgment rendered against her therein," this

means that he shall satisfy any judgment covering the rental value of the property and any damages accruing to appellant by virtue of the unlawful possession. There would be no more reason for holding the bond liable for the destruction of the personal property than there would be for the destruction of the house. The statute, § 4847, Crawford & Moses' Digest, does not contemplate that the bond shall be liable for the destruction of the property by act of God or other cause not due to the negligence of the principal. Moreover, the bond was given long before the property was destroyed and was not in the contemplation of the parties. Compare *Lacy* v. *London,* 89 Ark. 250, 116 S. W. 207; *Brooks* v. *Buie,* 71 Ark. 44, 70 S. W. 464.

In *Turner* v. *Vaughan,* 152 Ark. 475, 238 S. W. 1059, we said: "We find no authority for holding that mere wrongful occupancy of premises infers liability for injury that may occur from any causes during the period of such occupancy. There must be some relation between the wrongful detention and the loss or injury which occurred during that period. Unless the loss occurs through some negligent or wilful act or omission of the wrongdoer, there is no causal connection between the wrongful act and the injuries to constitute one the proximate cause of the other. It has been held that in actions of ejectment for the wrongful detention of property only such damages to the freehold itself are recoverable which amount to waste."

So here there must be some relation between the wrongful detention and the damages appellant may recover therefor. No such relation is shown to exist in this case, and appellant was not entitled to recover against the bond for such damages. We do not mean to say that the judgment against appellee was proper, as she has not appealed, but appellant is in no position to complain because she obtained relief to which she might not be entitled.

We find no error, and the judgment is affirmed.

CENTURY LIFE INSURANCE COMPANY *v.* BROOKS.

Opinion delivered March 28, 1932.

J. D. Shackleford, for appellant.

Felix L. Smith, for appellee.

BUTLER, J. Suit was brought in the municipal court of Hot Springs by the appellee against the appellant to recover on two insurance policies issued by the appellant on the life of Elnore Brooks, appellee being the beneficiary named in the policies. The appellee recovered judgment in that court on June 17, 1931, and on the same day the appellant filed its motion and bond for an appeal to the circuit court. The transcript of the proceedings in the municipal court was not lodged in the circuit court until October 30, 1931. A motion to dismiss the appeal was filed, and, upon hearing, the court sustained the motion and dismissed the appeal. The action of the court in this respect is here for review.

The suit was brought in the municipal court under act No. 2 of the Acts of 1917, creating the municipal court in and for Garland County, which act, by § 7, provided that appeals from the municipal court should be taken and the transcripts of appeal lodged in the office of the clerk of the circuit court within thirty days after judgment was rendered, and not thereafter; and by § 8 of said act, the general laws relating to procedure in justices of the peace courts, not inconsistent with the provisions of the act or of the general laws, should apply to proceedings in the municipal court.

One of the prerequisites for an appeal is that the applicant, or some person for him, shall make and file an affidavit that the appeal is not taken for the purpose of delay, but that justice may be done him. No such affidavit was made, and the court properly dismissed the appeal. *Merrill* v. *Johnson,* 19 Ark. 647; *Middleton* v. *Clardy,* 166 Ark. 342.

The judgment is affirmed.

TAYLOR *v.* HOLMES.

Opinion delivered March 28, 1932.

M. A. Hathcoat, for appellant.

Cotton & Murray, for appellee.

BUTLER, J. This case was submitted to the trial court upon the following agreed statement of facts:

"That on the 29th day of August, 1931, the intervener, C. C. Holmes, received a draft for $600, indorsed by Fred Mahler, to him, the said draft drawn by the Farmers' National Bank of Sparta, Wisconsin, on the Federal Reserve Bank of Chicago, in favor of the said Fred Mahler. That on the same day, August 29, 1931, the said C. C. Holmes deposited said draft in the People's Savings Bank at Harrison, Arkansas, and that said

bank issued to him a deposit slip, which is here exhibited and made a part of this agreement as exhibit A thereto.

"At the close of business on August 28, 1931, the said C. C. Holmes had on checking account in said bank the sum of only $9.47. That the said C. C. Holmes was a regular customer of said People's Savings Bank. That on the said 29th day of August, 1931, he drew his certain check on said bank for $175, due to a third party, out of the proceeds of said $600 draft, which said check was presented to the bank on the same day and prior to the time when said draft was deposited and was cashed by said People's Savings Bank. That the said C. C. Holmes had previously been permitted to overdraw his account in said bank.

"That the said draft for $600 was immediately forwarded by the said People's Savings Bank to the Bankers' Trust Company of Little Rock, Arkansas, for deposit, and same was credited to the account of People's Savings Bank of Harrison, and said item was sent in the regular course of business by the Bankers' Trust Company to the Federal Reserve Bank of Chicago, where it was paid September 2, 1931, and the proceeds remitted to the Bankers' Trust Company, aforesaid.

"That the intervention herein is made for the purpose of having said sum of $600 established as a preferred claim against the said Walter E. Taylor.

"It is further agreed that, on the 31st day of August, 1930, another check of C. C. Holmes for $7.50 was presented to the bank for payment and was paid by said bank, leaving a balance of only $426.97, to the credit of this intervener in said bank at close of business on August 31, 1931. That no deposit was made by the said C. C. Holmes in said bank subsequent to August 29, 1931, and no other checks were paid and charged to his account except as herein set forth; and the amount of his account in said bank when said bank closed was only $426.97."

The court declared the law to be that the deposit slip issued by the People's Savings Bank to C. C. Holmes constituted a contract between Holmes and said bank,

and that by its terms the draft for $600 was accepted for collection by said bank, the proceeds of which the bank held as a preferred claim under subdivision 6 of § 1 of act No. 107 of the Acts of 1927, and that the balance, after deducting the checks mentioned in the agreed statement of facts, to-wit, the sum of $426.97, should be allowed as a preferred claim. From that finding and decree is this appeal.

It is well settled that the owner of the proceeds of a collection made by an insolvent bank is entitled to have his claim for such preferred to that of general creditors on the theory that the collecting bank is the agent of such owner and the title to the proceeds of the collection remains in the depositor. Act No. 107, § 1, subdivision 6, Acts of 1927; *Taylor* v. *Corning Bank & Trust Co.,* 183 Ark. 757, 38 S. W. (2d) 557; *Taylor* v. *Dermott Grocery & Commission Co., ante* p. 7; *Taylor* v. *First Nat. Bank of DeQueen,* 184 Ark. 947, 43 S. W. (2d) 1078. Where checks or drafts are indorsed and deposited in the usual course of business, and the bank credits the depositor with the proceeds thereof, the relationship of debtor and creditor arises, in the absence of an agreement to the contrary, even where the right on the part of the bank exists to charge back the check if it proves uncollectable. *Taft* v. *Quinsigamond Nat. Bk.,* 172 Mass. 363, 52 N. E. 287; *Downey* v. *Nat. Exchange Bank,* 52 Ind. Ap. 672, 96 N. E. 403; *Sears* v. *Emerson,* 182 Ill. App. 522; *Brusegaard* v. *Ueland,* 72 Minn. 283, 75 N. W. 228; *Mudd* v. *Farmers' etc., Bank,* 175 Mo. App. 398, 162 S. W. 314; *Covey* v. *Cannon,* 104 Ark. 550, 149 S. W. 514; *Calhoun* v. *Sharkey,* 120 Ark. 616, 180 S. W. 216; *Taylor* v. *Dierks Lbr. & Coal Co.,* 183 Ark. 937, 39 S. W. (2d) 724; and in case of insolvency of the bank the depositor becomes a general creditor. *Taylor* v. *Dermott Grocery & Comm. Co., supra; Kansas City Life Ins. Co.* v. *Taylor,* 184 Ark. 772, 43 S. W. (2d) 372; *Tyler* v. *Citizens' Bank,* 184 Ark. 332, 42 S. W. (2d) 385.

The deposit slip mentioned in the agreed statement of facts had printed on its face: "All checks and drafts

are credited subject to payment as per conditions stated on reverse side hereof." The conditions on the reverse side, quoted by appellee as material to the question presented, are as follows: "All checks, drafts and papers deposited subject to payment and on express condition that this bank is not responsible for omission, neglect or default of any bank or subagent employed to collect same, but only for good faith and due care in selection of such bank or agencies." Also the following: "This bank accepts deposits and collections on the following conditions only: (2) items received for collection or credit and not drawn on this bank are taken at depositor's risk, and, should any such items be lost, and should no returns be received within reasonable time, such items may be charged back to the depositor."

Another condition on the deposit slip is: "Should any item be not paid, or any agent fail to remit proceeds therefor, this bank may charge the item back to depositor."

It is the contention of the appellee that these provisions of the deposit slip created the relationship of principal and agent between the depositor and the bank as effectually as if the words, "for collection," had been written on the face of the deposit slip, and this conclusion was reached by the court below. The only question therefore, is, Was the check a general deposit and accepted as cash by the bank, or was it a deposit for collection?

The depositor was a regular customer of the bank with a checking account which at times would be overdrawn. The check was deposited in the usual course of business, and credit was given therefor, and checks drawn against the general account in which it was placed, so that, at the time the bank became insolvent, the depositor was due only the sum of $434.47. By his indorsement of the draft the depositor guaranteed its payment, and the bank had the right to charge the same back to the depositor in the event it was not paid. *K. C. Sou. Ry. Co.* v. *First Nat. Bank of Ft. Smith,* 174 Ark. 447, 295 S. W. 357; *Taylor* v. *Dierks Lbr. & Coal Co., supra.* Therefore

the conditions on the deposit slip gave the bank no right that it did not already have. Whether the deposit was for collection merely or a general deposit depended on the intention of the parties to the transaction, as shown from all of the circumstances in the case. *Ark. Trust & Banking Co.* v. *Bishop,* 119 Ark. 373, 178 S. W. 422. We think the circumstances of this transaction contain nothing to rebut the presumption that the draft was a general deposit, and we find nothing in the language of the conditions printed on the deposit slip that would show that this was not the intention of the parties. *Tyler* v. *Citizens' Bank, supra.*

It follows from what we have said that the trial court erred in its decree, which is therefore reversed, and the cause remanded with directions to allow the claim of the appellee as that of a general creditor.

GATES *v.* BANK OF COMMERCE & TRUST COMPANY.

Opinion delivered June 29, 1931.

Hal L. Norwood, Attorney General, *Walter L. Pope,* Assistant, *David A. Gates,* and *George Vaughan,* for appellant.

John F. Park and *Bridges, McGaughy & Bridges,* for appellee.

HART, C. J., (after stating the facts). It is the settled law that inheritance taxes are not levied upon property, but upon the privilege or right of succession to it. *State* v. *Handlin,* 100 Ark. 175, 139 S. W. 1112; *McDaniel* v. *Byrkett,* 120 Ark. 295, 179 S. W. 491; *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U. S. 69, 46 S. Ct. 256; and *Blodgett* v. *Silberman,* 277 U. S. 1, 48 S. Ct. 410.

These cases sustain the principle that, while an inheritance tax is not upon property but upon the right of succession to property, yet the principle is that the subject to be taxed must be within the jurisdiction of the State, as well in the case of a transfer tax as in that of a property tax. The reason is that the State has no power to tax the devolution of the property of a nonresident unless it has jurisdiction of the property devolved or transferred.

It is conceded by the parties that a right to a refund of the tax depends upon the validity of subdivision C of § 10,218 of Crawford & Moses' Digest. The subsection provides for an inheritance tax upon the transfer of shares of stock of all corporations organized and existing under the laws of the State, certificates of which shares of stock shall be within or without the State.

Counsel for appellee seek to uphold the judgment of the circuit court upon the rule or maxim, *Mobilia sequunter personam,* as applied by the Supreme Court of the United States in several recent cases. In the *Farmers' Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 50 S. Ct. 98, it was held that negotiable bonds and certificates

issued by the State and certain municipal corporations of Minnesota were not subject to an inheritance tax in the State of Minnesota, the owner having died testate and residing in the State of New York. The court applied the rule, *Mobilia sequuntur personam,* and treated the bonds and certificates of indebtedness as localized at the creditor's domicile for taxation purposes. Consequently, it was held that their situs for taxation being in another State, they were taxable there, and not in the State of Minnesota where they were issued. The court proceeded upon the theory that the bonds and certificates of indebtedness were only evidence of the debts; and, when carried by the owner to another State, their situs as debts took the domicile of the owner, and that their testamentary transfer might be taxed only in the State where they were found. The reason was that their legal situs as debts was at the creditor's domicile, and they were taxable as property there. The logical result was that the taxation upon the right of succession to the property must be laid in the State where the owner of the property resided at the time of his death and where the property had its legal situs.

In the case of *Baldwin* v. *Missouri,* 281 U. S. 586, 50 S. Ct. 436, a resident of the State of Illinois died there owning certain bank deposits in banks located in the State of Missouri and certain coupon bonds of the United States and promissory notes on deposit for safe keeping in the State of Missouri. It was held that the State of Missouri could not levy a tax upon the succession to this property because its legal situs followed that of its owner and was in the State of Illinois. The court said that bank deposits were mere credits, and for purposes of *ad valorem* taxation have their situs at the domicile of the creditor only. The certificate of deposit was merely the evidence of title of the owner of the deposit, and he might carry that with him wherever he went. So, too, the notes and United States coupon bonds, under the rule that the situs of personal property follows the

owner, acquired a legal situs in the place where he resided. Under that rule, they were taxable as property at the owner's domicile, which became their legal situs, and the succession tax should have been laid in the State where the owner of these evidences of debt resided. If the evidences of debt had been destroyed, the right of the owner to demand payment of the debts would have remained. The court, in effect, held that the decedent was a creditor to whom the obligors in the various bonds were indebted and to whom the banks in which he had deposited money were indebted. The extent and terms of the obligations were evidenced by the bonds and by the certificates of deposit. The local situs was at the creditor's domicile; and, being choses in action with situs at the domicile of the creditor, they were taxable as property there. Then, too, as said by the court in the case last cited, at that place they pass from the dead to the living, there this transfer was actually taxed. Because they were not within the State of Missouri for taxation purposes, that State had no power to levy a transfer tax.

Again, in *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1, 51 S. Ct. 154, 75 Law Ed. 69, dividends due from a South Carolina corporation were held not subject to a transfer tax in the State of South Carolina where the creditor of the corporation died in Chicago, Illinois, testate, and was a resident of that State at the time of his death. The court said that, although the corporate property was situated in the State of South Carolina, that State had no jurisdiction to impose a transfer tax upon the debt owed by the corporation to a nonresident. In this connection, it may be stated that the payment of a succession tax to the State of South Carolina with respect to the shares of stock owned by the nonresident testator in the domestic corporation in the State of South Carolina was not contested by the executors. This shows that they recognized that the corporation was a creature of the State of South Carolina,

and that the shares of stock were property there under the laws of that State. While there was no adjudication to that effect, still it is worthy of note that the executors recognized this to be the law.

This brings us to a consideration of the question whether the shares of stock in the present case, under the principles of law above announced, had a legal situs in the State of Tennessee where their owner resided and died. In short, the question presents itself, is the situs of the property owned by a shareholder in a State where the corporation exists or at the domicile of the shareholder. Corporate shares of stock are property within the broad meaning of that term. Certificates of stock in the hands of their holder represent the number of shares which the corporation certifies that he is entitled to and are mere evidence of his title. In the case of bonds and certificates of deposit in a bank, the certificates represent but a property in the debt and that follows the creditor's person. Not so in the case of certificates of shares of stock in a corporation. The corporation is the creature of State laws, and those who become its members and shareholders are subject to the operation of these laws.

Under our Constitution, private corporations may be formed under general laws, which may be from time to time altered or repealed. Article 12, § 6, of the Constitution of 1874. So, too, our Constitution makes all property subject to taxation except certain property specifically exempted, about which we have no concern in the present case. Article 16, § 5, of the Constitution of 1874. Corporate property is not exempt from taxation under our Constitution, and § 6 of the same article provides that all laws exempting property from taxation other than as provided in the Constitution are void.

In *Hawley* v. *Malden,* 232 U. S. 1, 34 S. Ct. 201, it was said that undoubtedly the State in which a corporation is organized may provide in creating it for the taxation in that State of all its shares, whether owned by

residents or nonresidents, and *Corry* v. *Baltimore,* 196 U. S. 467, 25 S. Ct. 297, was cited as sustaining the holding. The reason that the State has such power is by virtue of the authority of the statute creating the corporation to determine the basis of organization and the liability of shareholders. If it be said that the situs of the shares of stock of a corporation should follow the owner, then grave inequalities might arise in the matter. Business corporations might be organized in this State almost wholly upon foreign capital with a few shares held in the name of resident directors, and yet none of these shares of stock held by nonresidents, however valuable, would be subject to a property tax. As we have already seen, if they followed the situs of their owner, they may be taxed as property where the owner resided and not in the State where the corporation was created and upon whose laws they relied for the conduct of their business. This would necessarily result in unfair discrimination against resident stockholders. This court is committed to the rule that shares of stock of a domestic corporation organized under the laws of this State and doing business here may be taxed as property in this State. *Harris Lumber Co.* v. *Grandstaff,* 78 Ark. 187, 95 S. W. 772; *Dallas County* v. *Banks,* 87 Ark. 484, 113 S. W. 37; *Dallas County* v. *Home Fire Ins. Co.,* 97 Ark. 254, 133 S. W. 1113; *Fort Smith Lumber Co.* v. *State,* 138 Ark. 581, 211 S. W. 662, affirmed in 251 U. S. 532, 40 S. Ct. 304.

If the shares of stock may be taxed as property, whether held by residents or nonresidents, such shares will remain as property here until the death of the owner and then pass to the successor subject to the transfer laws of this State.

We are of the opinion that the situs of shares of stock of a domestic corporation is permanently fixed by the Constitution and laws under which they are created and transact their business, and that there is no reason to apply the rule that they follow the owner's domicile.

It is urged that a transfer tax might, also, be levied by the State of Tennessee where the testator resided, and thus the shares would be subjected to double taxation. This court is not concerned with that question. The principal issue before us is whether or not shares of stock acquire a situs where the owner resides and should be taxed as property there. If so, then it would seem that a transfer tax should also be levied in the State where the owner resided. On the other hand, if the situs of the property owned by the shareholder in a corporation remains in the State where the corporation was organized and under whose laws it exists and transacts its business, then the situs of the property is where the corporation exists and not that of the domicile of the shareholder. This being so, the transfer tax levied by this State would be valid and enforceable, for the reason that the shares of stock would pass from the dead to the living here.

We think that the shares of stock in a corporation organized under the laws of this State and belonging to a nonresident decedent are property within the jurisdiction of this State and are subject to our laws relating to an *ad valorem* tax on property and to an inheritance tax upon the death of the owner. A recent case holding that shares of stock in a corporation organized under the laws of the taxing State are subject to a transfer or inheritance tax in the case of a nonresident decedent owner is *State ex rel. Attorney General* v. *First National Bank of Boston,* 130 Me. 123, 154 Atl. 103. In that case, the court quoted with approval from *Rhode Island Hospital Trust Co.* v *Doughton,* 270 U. S. 69, 46 S. Ct. 256, the following:

"In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax, of course, may properly be levied by the State in which he resides. So, too, it is well established that the State in which a corporation is organized may provide, in creating it, for the taxation in

that State of all its shares, whether owned by residents or nonresidents."

Therefore, we hold in the present case that the inheritance or transfer tax was collected under a valid statute, and that appellee was not entitled to a refund of it under the provisions of § 12, of act 106 passed by the Legislature of 1929. See Acts of 1929, vol. 1, page 526. We do not think that such an act violates the provisions of the Fourteenth Amendment to the Constitution of the United States. Therefore, the judgment will be reversed, and the cause will be remanded with directions to order to be dismissed the complaint of appellee and for other proceedings according to law.

Opinion on rehearing delivered March 28, 1932.

HART, C. J. On the 29th day of June, 1931, an opinion was delivered in this case in which it was held that shares of stock in a domestic corporation, organized under the laws of this State and doing business here, whether held by residents or nonresidents, are taxable as property in this State; and such shares remain as property here until the death of the owner when they pass to his successor, subject to the inheritance laws of this State. Consequently, the judgment of the circuit court was reversed, and the cause was remanded with directions to dismiss the complaint of appellee. There was a motion for rehearing filed by appellee within the time required by statute; but, by leave of the court, obtained upon the consent of the parties, the cause was passed for further consideration until a case containing a similar question was decided by the Supreme Court of the United States.

On January 4, 1932, the case of *First National Bank of Boston* v. *State of Maine,* upon appeal from the Supreme Court of the State of Maine was decided by the Supreme Court of the United States [284 U. S. 312, 52 S. Ct. 174]. In an opinion delivered by Mr. Justice SUTHERLAND, it was held that shares of corporate stock, like certain other specific intangible property, money, bonds,

notes, and credits can be subject to inheritance tax by one State only. It was further held that shares of stock in a Maine corporation belonging to the estate of decedent, domiciled in Massachusetts, were not subject to an inheritance tax in Maine, because this would be in violation of the Fourteenth Amendment of the Constitution of the United States. A dissenting opinion was delivered by Mr. Justice STONE, which was concurred in by Mr. Justice HOLMES, and Mr. Justice BRANDEIS.

It becomes our duty to follow the opinion of the Supreme Court of the United States because that court held that the exaction of a similar tax was not within the power of the States under the Fourteenth Amendment. Consequently, it is earnestly insisted that a rehearing should be granted, and the judgment of the circuit court should be affirmed.

This, by no means follows for the reason that the record in the case before us shows that the payment of the tax by appellee was voluntary within the meaning of the law, and under our rules of practice our former opinion ordinarily would have been placed upon that ground. We decided the question of the constitutionality of the act merely because of the public interest involved in the matter. *Trammell* v. *Bradley,* 37 Ark. 374; and *McClure* v. *Topf & Wright,* 112 Ark. 342, 166 S. W. 171.

This court has followed the general rule that one who voluntarily pays a tax, imposed by a law unconstitutional in whole or in part, can not recover the amount so paid. *Board of Directors of Crawford County Levee District* v. *Dunbar,* 107 Ark. 285, 155 S. W. 96. For illustrative cases, see notes to 48 A. L. R. commencing at page 1381 and 74 A. L. R., commencing at page 1301. The later cases of *Dickinson* v. *Housley,* 130 Ark. 259, 197 S. W. 25; and *White River Lumber Company* v. *Elliott,* 146 Ark. 551, 226 S. W. 164, follow the same rule; but, under the facts of these cases, the payment of the taxes was held to be involuntary. In the Dickinson case, the increase of valuation by the Board of

Equalization was held to be illegal, and the taxpayer, having paid the amount under protest, was held entitled to recover it from the collector who still had the funds in his hands at the time the suit was brought. In the White River Lumber Company case, payment was held to be involuntary because the collector would have sold the lands of the taxpayer for the nonpayment of the taxes, and this would have constituted a cloud upon his title.

In the present case, the record shows that on March 9, 1928, appellant, by her proper officer, and appellee, by proper representatives, appeared in the probate court of Jefferson County in the matter of the State inheritance tax upon the estate of Nellie Hicks Hunter, deceased. Nellie Hicks Hunter died testate on the 19th day of January, 1927, a resident of Memphis, Shelby County, Tennessee. The court found that there was an inheritance tax due the State of Arkansas in the sum of $7,796.88, and judgment was rendered in favor of appellant against appellees for that amount. The judgment further recites that it being made to appear to the court that said tax has been paid in full, as evidenced by the State Treasurer's receipt with certificate attached, the judgment has been satisfied in full, and that the above-described property is free from all claims of the State of Arkansas on account of said inheritance tax.

The proceedings for the collection of the tax were had pursuant to the provisions of § 10,288 of Crawford & Moses' Digest, which was the law in force at that time for the collection of inheritance taxes. The section provides for the filing of the complaint by the officers of the State whose duty it was to collect the taxes, and that a summons be issued and served on the defendants. The section also provides that the case shall be tried before the probate judge without a jury upon oral testimony or depositions. The section further provides that appeal may be taken from the judgment of the probate court to the circuit court by either party.

No appeal was taken from the judgment of the probate court. On July 9, 1930, appellee filed the present suit in the probate court against appellant. This suit was decided in favor of appellee by the probate court, and was appealed to the circuit court. There the case was tried upon the agreed statement of facts, as will appear from our former opinion and from the statement made above. There was again a judgment in favor of appellee, and appellant filed a motion for a new trial on the ground that the judgment of the circuit court was contrary to law. The case in apt time was brought to this court, and the motion for a new trial filed by appellant in the circuit court raised the question of whether the payment was a voluntary or involuntary one. For the reasons given above, we are of the opinion that the payment was voluntary, made under a mistake of law, but with a full knowledge of all the facts, and can not be recovered.

This was undoubtedly the law at the time the first judgment was rendered in the probate court on March 9, 1928. The Legislature of 1929 passed act 106 for the purpose of amending the inheritance laws of the State of Arkansas. Acts of 1929, vol. 1, page 526. Section 6 of the act made some amendments to § 10,228 of Crawford & Moses' Digest, which is not pertinent to the issue raised by the appeal.

Counsel for appellee bases its right to recover the tax under § 12 of the act 106 of the Acts of 1929 above referred to. That section provides that claims for return of inheritance taxes heretofore or hereafter wrongfully and illegally collected may be made within five years from and after the date of payment of said tax and shall be filed in the probate court having original jurisdiction. It further provides for making the Commissioner of Revenues a party defendant and allows appeal by either party to the circuit court.

We do not think that section was meant by the Legislature to apply to cases like the present one. As we have

just seen, the State and the taxpayer were both parties in the probate court and judgment was rendered for the payment of the tax without objection. The judgment recites that it was satisfied in full by the payment of the tax awarded and by the taking of the State Treasurer's receipt therefor. Hence, as we have already seen, the tax was not wrongfully and illegally collected.

The tax might have been paid by appellee without suit and under protest, or it might have been recovered by suit. The record shows that it was recovered in the latter way. Resort to judicial proceedings on the part of the State against appellee was necessary to collect and enforce the tax. The statute provides for this mode of collection. If appellee had declined to pay it, it necessarily followed that, under the statutory mode of proceeding, it would have had its day in court where it could raise the question of its liability for the tax. If it had paid the tax under protest and for the purpose of preventing a cloud upon the title to its property, it would be entitled to recover under the section just referred to, providing for the recovery of inheritance taxes wrongfully and illegally collected. The mere fact that the act under which the money was paid was unconstitutional in part and the tax for that reason illegally laid is not sufficient to authorize an action to recover back the amount paid under § 12 of act 106, passed by the Legislature of 1929. That act was passed to enable the taxpayer to recover taxes illegally or wrongfully paid without suit, and where they were paid under protest or some act which would be deemed in law an involuntary payment. It was never intended to apply to cases where the taxpayer had paid the tax when he had had his day in court and failed to avail himself of it and thereby give him the right to litigate over again the matter which had become *res judicata* by his failing to appeal and by his voluntary payment of the tax to satisfy the judgment. The motion for rehearing will therefore be overruled.

GRAY *v.* STATE.

Opinion delivered April 4, 1932.

Reinberger & Reinberger, for appellant.

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

HART, C. J. Veo Gray was convicted before a jury charged with the murder of Raymond Cromer in Drew County, Arkansas, and his punishment was fixed at life imprisonment. From a judgment rendered on the verdict he has appealed.

The evidence was legally sufficient to support the verdict. The court tried the case under the usual instructions governing cases of homicide of this kind. It is earnestly insisted, however, that the court erred in allowing certain testimony to go before the jury. Raymond Cromer made a dying declaration as to the circumstances attending the killing, which was reduced to writing by the sheriff. It is not claimed that the dying declaration which was reduced to writing is incompetent, but it is claimed that the dying declaration made by the deceased to his father which was not reduced to writing is incompetent. We do not agree with counsel in this position. Dying declarations, either oral or written, or partly oral and partly written, are competent evidence to go before the jury as to the facts and circumstances immediately at-

tendant upon the homicide. Underhill's Criminal Evidence, 3rd ed., § 180. If any part of the declaration is inadmissible, it may be stricken out on motion of the defendant. This court has uniformly held that such declaration may be admitted to prove the circumstances attending or leading up to the homicide. *Newberry* v. *State,* 68 Ark. 359, 58 S. W. 351; *Rhea* v. *State,* 104 Ark. 176, 147 S. W. 463; *Moore* v. *State,* 125 Ark. 177, 188 S. W. 3.

The admissibility of dying declarations is for the court to determine, and the weight and credit to be given them is for the jury. *Burns* v. *State,* 155 Ark. 1, 243 S. W. 963. The record shows that the dying declaration written by the sheriff and the oral dying declaration made to the father of the deceased were substantially the same. But, if they were not the same, the differences between them would have been merely matters affecting the credibility to be given to them as evidence.

It is next insisted that the court erred in allowing the sheriff to testify that the deceased gave him a red dice, and the deputy sheriff to testify that a match to it was found in the coupe in which the deceased was riding at the time he was shot and killed. We think the testimony was competent. The sheriff was allowed to testify as to the deceased giving him the red dice because it was a matter immediately leading up to his statement about the circumstances of the killing. The deceased also told the sheriff that he would find a similar dice in the coupe in which the deceased was riding at the time he was shot. The deputy sheriff found such a dice, and the testimony was competent as tending to corroborate the dying declaration of the deceased.

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

DuLaney *v.* Continental Life Insurance Company.

Opinion delivered April 4, 1932.

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

Byron K. Elliott, Ralph H. Kastner and *Carmichael & Hendricks,* for appellee.

Smith, J. The General Assembly, at its regular 1931 session, passed an act, No. 235, entitled, "An act to amend § 9968 of Crawford & Moses' Digest for the purpose of raising additional revenue in order to meet requirements and accept benefits from the Federal Government and Other Agencies, for Public Health Purposes." Acts 1931, page 721.

Section 9968, Crawford & Moses' Digest, imposed a tax of two per cent. on the gross premium receipts of certain named insurance companies, in lieu of all other taxes based on such receipts. The amendment of this section effected by act No. 235 was to increase this tax from two per cent. to two and one-half per cent. The remaining portions of act No. 235 appropriate this increase to the uses therein specified.

The Continental Life Insurance Company, an insurance company affected by the provisions of this act, brought this suit in the Pulaski Chancery Court to enjoin

the Insurance Commissioner, whose duty it was to collect the tax, from attempting to enforce its collection against its gross premium receipts for any part of the year 1931 at the increased rate. A tender of two per cent. under the original statute was made. A demurrer to this complaint was filed, which was overruled, and the Insurance Commissioner was ordered to permit the insurance company to pay at the rate provided by § 9968, Crawford & Moses' Digest.

Act No. 235 was approved by the Governor on March 27, 1931, and, as its emergency clause was insufficient to put it in effect upon its approval by the Governor, it is conceded that it did not take effect as a law until ninety days after the adjournment of the legislative session, which was in June, 1931.

The act requires the insurance companies named to file a sworn statement with the Insurance Commissioner of their gross premium receipts in this State for the year ending the 31st of December next preceding the report, and to pay into the State Treasury, on or before the 1st day of March of each year, the tax imposed, the same being in lieu of all other taxes based on such gross premium receipts.

The insistence is that this act is not retroactive in its operation, and that, as practically one-half the fiscal year of 1931 had expired before the act became a law, it has no application to the premium receipts of that year. The chancellor was of opinion that this position was well taken, and granted the relief prayed, and directed that the tax be paid on the two per cent. basis in accordance with the provisions of § 9968, Crawford & Moses' Digest, and this appeal is from that degree.

The power of the General Assembly to pass a tax act retroactive in character is not questioned. The existence of this power was expressly upheld in the case of *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000, where the authorities upon the subject were reviewed. The court there quoted from *Stockdale* v. *Atlantic Insurance Co.,* 20 Wall. (U. S.) 331, as follows: "The right of Congress to

have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. * * *"

It is pointed out, however, that the act construed in *Stanley* v. *Gates, supra,* expressly provided that it should be retroactive, whereas act No. 235 contains no such express declaration, and we are cited to numerous cases in which this court, in conformity with the general rule prevailing everywhere, has held that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.

The question for decision is therefore whether the General Assembly has clearly shown a legislative intention that act No. 235 shall operate retrospectively, and has sufficiently declared that intention to overcome the presumption that there was no such intention.

Upon this question we are cited to the case of *Jefferson Standard Life Insurance Co.* v. *King,* 163 S. E. 653, decided by the Supreme Court of South Carolina March 22, 1932. The Supreme Court of South Carolina there construed an act of the General Assembly of that State to require an additional license fee to be paid by the insurance companies doing business in that State. The relevant portion of that act is contained in § 1 thereof, and, as quoted in the opinion, is as follows: "Section 1. * * * The Insurance Commissioner of South Carolina is hereby authorized and directed to require all insurance companies doing business in this State * * * and not incorporated under the laws of South Carolina, to pay, in addition to the annual license fee now provided by law, a graduated license fee in an amount equal to one (1%) per cent. on the total premiums collected in this State. * * *"

Other portions of the South Carolina act direct the Insurance Commissioner to collect the fee and require

that the act shall be construed as intended to provide for the payment of a fee in addition to other fees required to be paid under existing laws.

In construing this act it was said by the court that: "We have not been able to find, from a careful reading and study of the act in question, any express words requiring that, in the collection of the license fees provided for by it, the statute be given effect and operation prior to the date it was approved by the Governor and became a law—June 16, 1931." In other words, the act was construed as being prospective only because the contrary intention had not been declared by the Legislature. The principle announced in the South Carolina case is not applicable to the act here under review, because of the manifest difference between the South Carolina act and act No. 235.

It is elementary that in the construction of a legislative act we must read it in its entirety, and, when act No. 235 is so read, we are led to the conclusion that, under the test herein stated, it was the legislative intent that the act should apply to the gross premium receipts for the entire year 1931.

We know its legislative history. The first act on the subject was passed in 1913 (Acts 1913, act No. 159, page 675), and levied a tax of one and one-half per cent. on gross premium receipts. It was approved on March 12, 1913, and contained provisions similar to act No. 235 relative to the payment of the tax. Pursuant to the act of 1913 the tax was collected on premiums paid for the entire year in which the act was passed up to December 31st. The reports required by that act were filed on January 1st, or within sixty days thereafter.

The act of 1913 was amended by act 264 of the Acts of 1917 (vol. 2, Acts 1917, page 1362), which increased the tax to two per cent., and the same provisions appeared as to reports of receipts and the payment of the tax thereon, pursuant to which taxes were paid at the increased rate for the entire year in which the act was passed.

This history is entitled to some weight in determining the legislative intent in amending § 9968, Crawford & Moses' Digest, by the act of 1931, which section was amended only by increasing the tax from two to two and one-half per cent. But, disregarding this legislative history, the legislative intent otherwise sufficiently appears to lead to the conclusion which we have reached that act No. 235 applies to the receipts for the entire year 1931.

The State Board of Health was constituted as the agency to put the provisions of the act into effect, and it was contemplated that this should be done as soon as the act became a law. An appropriation was made for this purpose for the fiscal year ending June 30, 1932, and a like appropriation was made for the fiscal year ending June 30, 1933. The money thus appropriated was to be derived from the additional one-half per cent. provided by act No. 235. The fiscal year ending June 30, 1932, began, of course, June 30, 1931, on which last-named date the act was in full force and effect. While the fiscal year of the board of health for which appropriations were made begins and ends on June 30th, the fiscal year for which insurance companies must make reports begins and ends on December 31st. Section 5979, Crawford & Moses' Digest. Both § 9968, Crawford & Moses' Digest, and the amendatory act, No. 235, require reports of gross premiums "for the year ending the 31st day of December next preceding," and the tax thereon is payable on or before the 1st day of March following.

We think the provisions of act No. 235 in regard to the appropriation there made for the fiscal year ending June 30, 1932, during all of which year the act was in full force and effect, clearly manifest the intention that the act was retroactive to the extent of requiring the insurance companies named in the act to report gross premium receipts for the entire year 1931 and to pay the tax thereon at the increased rate.

The decree of the court below will therefore be reversed, and the cause will be remanded with directions to sustain the demurrer.

SHOOK *v.* MORRISON.

Opinion delivered April 4, 1932.

[redacted]

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

Earl Blansett and *John Mayes,* for appellee.

HUMPHREYS, J. This is an appeal from the circuit court of Washington County dismissing the petition of appellants to the county board of education to change the boundary lines of Winslow Special School District No. 9 so as to bring within its boundary all of the territory in Common School Districts Nos. 37, 129 and 145 under the provisions of act No. 156 of 1927 (page 549).

The record reflects that notices of the intention to file the petition for consolidation of said school districts with the county board of education were not posted thirty days before but thirty days after filing the petition. The statute governing the notices to be posted is found in § 8821 of Crawford & Moses' Digest, and is as follows:

"When a change is proposed in any school district, notice shall be given by parties proposing the change by putting up hand-bills in four or more conspicuous places in each district to be affected, one of said notices to be placed on the public school building in each affected district. All of said notices to be posted thirty days before the convening of the court to which they propose to present their petition. Said notices shall give a geographical description of the proposed change."

This court has construed the statute with reference to the time of posting the notices in the recent case of *Texarkana Special School District* v. *Consolidated Special School District No. 2, ante* p. 213, to mean that same must be posted before, and not after, the filing of the petition in order to give the county board of education

jurisdiction to hear and determine the application. It is argued in appellants' reply brief very earnestly that the court should recede from the interpretation placed upon the statute in the case referred to, but the court is of opinion that it correctly construed the statute and adheres to the construction placed upon it in that case.

This case is therefore ruled by the case cited.

No error appearing, the judgment is affirmed.

SMACKOVER JOURNAL *v.* NEWS TIMES PUBLISHING COMPANY.

Opinion delivered April 4, 1932.

J. S. Utley and *Wm. T. Hammock,* for appellant.

Owens & Ehrman, for appellee.

KIRBY, J., (after stating the facts). The statute upon which the action is based, Initiative Act No. 2 of 1914, at pages 1511-15 of Acts of 1915, relating to the publication of a synopsis of the acts of the Legislature, provides for the fees to be paid therefor, the number of newspapers in which the synopsis can be published, and § 12 thereof provides:

"In all counties in which there are cities of the first class, the publications herein provided for shall be made in one established daily newspaper of general circulation, provided such a newspaper exists, and, in the absence of such a newspaper, publication shall be made in a weekly newspaper published in said county."

The language of the statute is plain, requiring that in counties where there are cities of the first class the publication provided for "shall be made in one established daily newspaper of general circulation, provided such a newspaper exists, etc.". This language is plain and mandatory, leaving no discretion to the Secretary of State in counties where there are cities of the first class having a daily newspaper of general circulation to cause such publication to be made in other than a daily newspaper. *Washington County* v. *Davis,* 162 Ark. 335, 258 S. W. 324.

The people had the right to prescribe in said act for the publication of the synopsis and to determine what medium should be used for bringing it to the people's attention; and, having done so, the officer authorized to cause the publication to be made could exercise no discretion about the selection of a newspaper other than as prescribed by the statute for the publication.

Neither is the act violative of the Constitutions of the State nor of the United States; and the publication, having been made contrary to the statute authorizing it, created no valid obligation against the State for its payment, and no error was committed in granting the injunction prayed for. The decree is accordingly affirmed.

AMERICAN RAILWAY EXPRESS COMPANY *v.* H. ROUW COMPANY.

Opinion delivered April 4, 1932.

A. M. Hartung and *Warner & Warner,* for appellant.

D. H. Howell, for appellee.

MEHAFFY, J. The appellee brought this action in the Crawford Circuit Court against the appellant to recover

$1,109.35, damages to a shipment of strawberries from Horatio, Arkansas, to Hartford, Connecticut.

Appellee alleged the delivery of the strawberries to the appellant, and alleged that appellant was negligent in not shipping the berries within a reasonable time, and in not furnishing a properly constructed and equipped refrigerator car, and was negligent in not keeping said car refrigerated, and in allowing the ice to melt in the bunkers. It alleged that the berries were in good condition when shipped, and they arrived in Hartford in a damaged condition, said damages being caused by the negligence of appellant.

It alleged the filing of its claim in writing and the failure and refusal to pay.

Thereafter plaintiff filed the following amendment as a substitute for paragraph three of the original complaint:

"Plaintiff alleges that the defendant allowed and permitted said strawberries, while in its possession and during the course of transportation, to become soft, wet, rotten and otherwise deteriorated, thereby greatly depreciating the value of same, all to plaintiff's damage in the sum of eleven hundred nine and 35/100 dollars ($1,109.35). Wherefore plaintiff prays judgment and relief against the defendant as alleged and set forth in the original complaint."

The appellant filed a demurrer and answer, and the court overruled the demurrer. The answer denied all the material allegations of plaintiff's complaint.

The appellee introduced the express receipt, paragraph four of which is as follows:

"Unless caused in whole or in part by its own negligence or that of its agents, the company shall not be liable for loss, damage, or delay caused by:

"A. The act or default of the shipper or owner.

"B. The nature of the property, or defect or inherent vice therein.

"C. Improper or insufficient packing, securing or addressing.

"D. The act of God."

Appellee then introduced evidence tending to show that the berries were delivered to the carrier at Horatio in good condition, and arrived at Hartford, Connecticut, in a damaged condition; and also evidence that, if they were delivered in good condition in a properly cooled refrigerator car, and arrived at their destination in a damaged condition, the damage was due to the fact that the car did not have proper refrigeration all along the route, and the ice must have melted away at some point.

This was all the evidence introduced on the part of the appellee, and the appellant moved the court to exclude from the jury's consideration any issue of negligent delay in transporting the car, there being no evidence tending to prove such negligence, and this motion was sustained by the court.

The appellant then moved the court to exclude from the jury's consideration any issue respecting negligent failure to ice or reice the car in transit, and the court sustained this motion. The appellant then moved the court to exclude from the jury's consideration any issue respecting defendant's negligence in furnishing said car, or in furnishing an improper or insufficient equipment, and this motion was sustained by the court.

All allegations of specific acts of negligence alleged in the complaint were withdrawn from the consideration of the jury, and the only issue remaining to be tried was the common-law liability stated in appellee's amendment to his complaint.

The appellee, having shown by evidence that the shipment was delivered at Horatio in good condition, and received at Hartford in a damaged condition, and also having shown that this could have been caused only by failure to keep the cars properly iced, the burden was then upon appellant.

It thereupon introduced testimony which tended to show that there was no delay in the transportation of

the berries, and it also introduced evidence tending to show that there was no failure to ice or reice the car. There was no evidence in the case tending to show that the berries were diseased.

L. P. Franks, however, a witness for the appellant, testified that he inspected the car at Horatio and that it was in good condition and properly iced. He testified that the day before the car was loaded it rained. He also testified that part of the berries were water-soaked, some overripe, and some small and knotty.

Another one of the appellant's witnesses, however, C. F. Lamb, agent for the company at Hartford, testified that he inspected the car on its arrival, notified the consignee, and that it was apparent that the berries met consignee's requirements. There was no sign of decay in the berries, which were dry and small, and had cover bruises. This witness inspected the top tiers.

Huntoon, another witness, testified for appellant that he inspected the car at Kansas City on its arrival, and that the bunkers were down about 17 inches. It was necessary to put in, and he did put in, 2,700 pounds of ice.

Another witness for appellant, John Reddick, also testified that the ice was down 17 inches.

Some of the witnesses for appellant testified that they reiced the car to capacity, but did not know how low the ice was when the car arrived.

It is appellant's first contention that appellee wholly failed to establish negligence, and was therefore not entitled to recover. When a shipper alleges specific acts of negligence, the burden is on the shipper to prove the negligence alleged, and that this negligence caused the damage. This suit, however, is based on the carrier's common-law liability, and, when the shipper made a *prima facie* case, the burden shifted to appellant.

The law, however, is well settled that a common carrier, in the absence of an express stipulation in the contract to the contrary, is responsible where goods are received for shipment against all loss or damage except

such as is caused by the act of God, or the public enemy, or from inherent defects or weakness in the commodity shipped; and, when the carrier holds itself out as proposing to provide means of preserving perishable goods, it must exercise ordinary care in the adoption of such means of transportation, and furnishing such equipment. And if the goods were in good condition when delivered and accepted, and found on arrival at destination to be in damaged condition, then the law presumes the damaged condition was caused by the negligence of the carrier. *Mo. Pac. Ry. Co.* v. *Amer. Fruit-Growers Inc.,* 163 Ark. 318, 260 S. W. 39; *American Ry. Express Co.* v. *H. Rouw Co.,* 173 Ark. 810, 294 S. W. 357; *St. L. San Fran. Ry. Co.* v. *Cole,* 174 Ark. 10, 294 S. W. 401; *Amer. Ry. Ex. Co.* v. *H. Rouw Co.,* 174 Ark. 6, 294 S. W. 416; *M. P. Ry. Co.* v. *Fine,* 183 Ark. 13, 34 S. W. (2d) 755; *Cinn.-New Orleans & Texas Pac. Ry. Co.* v. *Rankin,* 241 U. S. 319, 36 S. Ct. 555, 60 Law. Ed. 1022; *Amer. Ry. Ex. Co.* v. *Rhody,* 84 Ind. App. 283, 143 N. E. 640; *Buck* v. *Amer. Ry. Ex. Co.,* 195 Iowa 1024, 192 N. W. 277.

The appellant, however, in the contract of shipment expressly provided that, unless the injury was caused in whole or in part by its negligence, it should not be liable for loss, damage, or delay, caused by: (1). Act or default of the shipper or owner. (2). The nature of the property, or defect or inherent vice therein. (3). Improper or insufficient packing, securing, or addressing. (4). The act of God. There is no evidence in this case that the damage resulted from either of the above causes. There is no evidence of any act or default of the shipper that caused the damage. There is no evidence that it was caused by the nature of the property, or defect or inherent vice. There is no evidence that the damage was caused by the act of God.

There is substantial evidence to sustain the verdict in this case. The credibility of the witnesses and the weight to be given to their testimony were questions for the jury, and not for this court.

Appellant cites a number of authorities to support its claim that when a plaintiff bases his right to recover upon unreasonable delay and failure to furnish proper refrigeration, having relied upon these specific acts of negligence, the burden is upon the shipper. All the questions of negligence, as we have already said, were eliminated by the court at the request of the appellant.

The court excluded from the consideration of the jury any issue of negligent delay, and negligent failure to ice or reice, and negligence in furnishing car or improper equipment, and, after the elimination of these issues, plaintiff's right to recover was based wholly on the common-law liability of the carrier, and, when the appellee proved a delivery of the shipment in good condition to appellant, and proved a delivery at destination in a damaged condition, the presumption arose that the carrier was guilty of negligence, causing the damage.

We are of the opinion that the evidence was sufficient to justify the jury in finding that the carrier was guilty of negligence which caused the injury.

Appellant urges a reversal because the court gave appellee's instruction No. 1, which is as follows: "You are instructed that a common carrier, in the absence of an expressed stipulation in the contract to the contrary, is responsible for goods received for shipment against all loss or damage, except such as is caused by the act of God or the public enemy or from inherent defects or weakness in the commodity shipped; that, when a shipment of perishable goods is received for transportation, it must exercise ordinary care in the adoption of such means of transportation and in furnishing such equipment as will reasonably accomplish the purpose. The above instruction was a correct statement of the law.

Appellant relies on *M. P. Rd. Co.* v. *Fine, supra.* That case, however, was based on specific allegations of negligence, and the instruction complained of in this case told the jury that the carrier must exercise ordinary care in the adoption of such means of transportation and

furnish such equipment as would reasonably accomplish the purpose.

Appellee's instruction No. 2, was a correct statement of the law. It told the jury in effect that if the evidence showed that the strawberries were delivered to the carrier in Horatio in good, sound, merchantable condition, and, if the same arrived in Hartford in a damaged condition, and such damage occurred during the time they were in possession of the carrier, then the plaintiff had made out a *prima facie* case, and the burden was upon the defendant to show that it used ordinary care in the transportation of said berries.

As we have already said, it is a well established rule in this court, and in practically all other courts, that the delivery to the carrier of merchandise in good condition, and the delivery at its destination in bad condition, makes out a *prima facie* case.

Appellant also urges a reversal because the court refused to give its instruction No. 5. This instruction was erroneous because it placed the burden upon the plaintiff to prove the negligence of the carrier.

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

AMERICAN RAILWAY EXPRESS COMPANY *v.* COLE.

Opinion delivered April 4, 1932.

A. M. Hartung and *Warner & Warner,* for appellant.
D. H. Howell, for appellee.

McHaney, J. This is the second appeal of this case. See 183 Ark. 557. Appellee seeks to recover of appellant damages to a car of strawberries shipped from Alma, Arkansas, to Youngstown, Ohio, on May 12, 1929. Three specific grounds of negligence were alleged and relied on for a recovery; first, that there was delay in transportation; second, that an improperly constructed and equipped refrigerator car was furnished; and, third, that the car was not properly iced and re-iced before loading and during transit. There was a verdict and judgment against appellant for $474.91.

On the former appeal we held that there was substantial evidence, sufficient to take the case to the jury, on the question of the icing and reicing of the car. The evidence on this appeal on that question is substantially the same as on the former, and the decision on the former appeal on this question becomes the law of the case on this appeal. *Coca-Cola Bottling Co.* v. *Shipp,* 177 Ark. 757, 9 S. W. (2d) 8.

The court submitted to the jury the question of the negligence of appellant as to delay in transportation and the furnishing of an improperly constructed and equipped refrigerator car, over appellant's objections and exceptions, and refused requested instructions eliminating these questions from the jury's consideration. In these respects the court erred, as there was no evidence to support these declarations. As to the delay in transportation, the undisputed evidence is that the car was loaded and delivered to the carrier at 8:45 A. M., May 12, 1929; that it departed from Alma in Missouri Pacific train 105 at 11:40 A. M. same date, which was the first available train after loading was completed; that it was promptly transported to St. Louis via Little Rock, where it was reiced, arriving there at 7:17 A. M. May 13, where it was again reiced at 9:05 A. M. The movement thus far was by passenger train. While en route to St. Louis, appellee diverted the car to a firm in Cleveland, Ohio, which diversion order was received by appellant at

6:30 A. M. May 13. After reicing, the car moved in the first available train at 2:37 P. M. same date, in Big Four Special for Cleveland, where it arrived at 4:45 A. M. May 14, was placed at 38th Street depot at 5:35 A. M., consignees notified by telephone at 6 A. M. and they accepted delivery at that time, signing the waybill. It was also reiced at that time. On account of the congested condition of the market, consignees did not unload the car, but on May 15 at 2:15 P. M., after advising with appellee by wire, they reshipped the car to themselves at Youngstown. It moved at 9:30 P. M. same date in the first available train and arrived at Youngstown at 11:20 P. M. Consignees were notified in advance of arrival and accepted delivery of the car next morning at 6 A. M. So it will be seen the car moved promptly and on schedule time from the point of origin to destination, and whatever delay there was in Cleveland was caused by appellee and his agents and not by appellant. There was no proof, therefore, of any negligence of appellant in this regard.

As to the car itself, the undisputed evidence is that it was built by the General American Tank Car Company in 1928, was practically a new car, was the latest, most improved and approved passenger refrigerator car known, and was constructed of the best materials and with the best and most experienced labor. It was inspected in the Missouri Pacific shops at Little Rock at the beginning of the berry season in 1929 and found to be in good condition in every respect. It was again inspected by the builder in the fall of 1929 and found to be in good condition with no defects of any kind in its refrigerating apparatus. Its bunker capacity was 12,500 lbs. of ice. There was no proof to show that this car was other than as stated above, so there was no proof that it was defective in any way.

The court therefore erred in submitting the question of appellant's negligence to the jury in these respects because no negligence was shown. The burden was on appellee to do this.

The judgment must be reversed, and the cause remanded for a new trial.

[redacted]

ALWES *v.* RICHHEIMER.

Opinion delivered April 4, 1932.

[redacted]

Chas. D. James, for appellant.

C. A. Fuller and *A. J. Russell, Jr.,* for appellee.

McHANEY, J. On March 27, 1923, Herman Alwes and wife and Tillie N. Seidel, being the owners of a certain piece of property in Eureka Springs, executed and delivered to Frederick U. and Pauline C. Smith their mortgage thereon to secure their three promissory notes of $1,000 each. The first of said notes was paid, and the second and third notes were assigned by the Smiths to appellee Richheimer. The property mortgaged was known as the Commodore Theatre. Thereafter on the 24th day of May, 1923, Tillie N. Seidel, who has since married one Reinach, conveyed her interest in said property to her cotenant Alwes, and on the same day Alwes and wife executed and delivered their note to Mrs. Seidel-Reinach in the sum of $4,000, covering the unpaid purchase money, which was secured by a second mortgage on the same property. Thereafter Alwes and wife conveyed an undivided one-half interest in the same property to William C. Perry, subject to the mortgages of Richheimer and Seidel-Reinach. Thereafter on May 22, 1924, Alwes

and Perry executed and delivered to H. C. Pendergrass a third mortgage on the same real property, subject to the prior mortgages, which purported to cover all the personal property located in the theatre building. Default was made in the payment of Richheimer's indebtedness, and suit was brought to foreclose his mortgage, in which all the other parties in interest were made defendants. Mrs. Seidel-Reinach answered admitting the priority of the Richheimer mortgage and filed a cross-complaint against the other defendants praying a foreclosure of her second mortgage. In the mortgage by Alwes and wife to Seidel-Reinach, after describing the real estate, is found this clause: "It being my intention to convey the grounds upon which the Commodore Theatre now stands together with the building and appurtenances, all in the city of Eureka Springs, county and State aforesaid." And the habendum clause: "To have and to hold the same unto the said Tillie N. Seidel, her heirs and assigns, together with all and singular the appurtenances and improvements thereunto belonging." No personal property was mentioned in either the first or second mortgages.

At the time of the execution of the second mortgage there was located in the Commodore Theatre and attached to it the theatre seats, a number of electric fans, two picture machines and an electrical pipe organ weighing about a ton, drop curtains and other property used and useful in the operation of the theatre, all of which passed to Alwes under the Seidel-Reinach deed, and she prayed a foreclosure of the same property under her mortgage as fixtures, and that same be declared prior and paramount to the Pendergrass mortgage. Appellants Alwes and Perry answered denying the right of Mrs. Seidel-Reinach to a foreclosure on the fixtures. Pendergrass failed to answer either the complaint or the cross-complaint. On a hearing there was no dispute as to the amount due under the first and second mortgages or their priority as to the real estate. The court found for appellees, decreed a foreclosure of the first and sec-

ond mortgages for the sums agreed to be due, ordered a sale of the property, including the fixtures, and that the proceeds of the sale be applied to the payment of the first and second mortgages and the overplus, if any, be applied on the third mortgage of Pendergrass.

The only question presented by this appeal is whether the articles of furniture and fixtures in the Commodore Theatre are fixtures, and therefore a part of the realty, covered by the first and second mortgages, or whether they remain personal property and not covered by said mortgages. The word "appurtenances" is defined in Words and Phrases as follows: "An appurtenance is a thing belonging to another thing as principal and which passes as incident to the principal thing." The thing conveyed in the Reinach mortgage was the real estate described therein together with "the appurtenances and improvements thereunto belonging." As stated above, the property in the Commodore Theatre was attached to it, was appurtenant thereto and was a part of the improvements in the building for the purpose for which it was constructed. The building was built as a theatre or moving picture show, and was suitable for such purpose and for no other without extensive alterations. This court has many times had occasion to determine when personal property becomes a fixture in a building. In *Stone* v. *Suckle,* 145 Ark. 387, 224 S. W. 735, the court held that, where deed to a hotel did not reserve the ceiling fans therein which were necessary and reasonably adapted to the use of the property for hotel purposes, the jury's verdict finding them to be fixtures should be sustained. It was there held that, as between heir and executor, "the rule obtains the most rigor in favor of the inheritance, and against the right to consider as a personal chattel anything which has been affixed to the freehold." And it further said: "The strict rule as to fixtures that applies between heir and executor applies equally between vendor and vendee, and mortgagor and mortgagee." Citing 2 Kent's Commen-

taries (14 ed. p. 346). In that case the court quoted with approval from *Canning* v. *Owen,* 22 R. I. 642, 48 Atl. 1033, 84 Am. St. Rep. 858, which held that electric light fixtures which take the place of gas fixtures in a building, though removable without physical injury to the building, as between mortgagor and mortgagee, were fixtures and a part of the realty, and stated the following: "It is not necessary to impose upon a chattel the character of a fixture that it be so affixed to the realty that it cannot be removed without physical injury thereto, if it has been attached with a view of enhancing the value of the realty and for the purpose of being permanently used in connection therewith. The intention of the owner need not be expressed in words, but must ordinarily be inferred from the nature of the articles affixed, the relation and situation of the parties interested, the policy of the law with respect thereto, the mode of annexation and the purpose for which it was made. The question whether chattels are to be regarded as fixtures depends less upon the measure of their annexation than upon their own nature, and their adaptation to the purpose for which they are used."

A number of cases since that time have followed *Stone* v. *Suckle, supra.* In *Hall* v. *Burns,* 146 Ark. 157, 225 S. W. 227, a kitchen cabinet was held to be a fixture. In *Arkansas Cold Storage & Ice Co.* v. *Fulbright,* 171 Ark. 552, 285 S. W. 12; *Anderson* v. *Southern Realty Co.,* 176 Ark. 752, 4 S. W. (2d) 27, and *McGregor* v. *Cain,* 180 Ark. 746, 22 S. W. (2d) 393, the strict rule which obtains between heir and executor, vendor and vendee and mortgagor and mortgagee was relaxed because those relationships did not obtain and other circumstances and conditions relaxed the rule. *Stone* v. *Suckle, supra,* is cited in 62 A. L. R. 251, where it is stated that the tendency of modern decisions, both English and American, "is against the common-law doctrine that the mode of annexation is the criterion, whether slight and temporary, or immovable and permanent, and in favor of

declaring all things to be fixtures which are attached to the realty with a view to the purposes for which it is held or employed.''

Applying these principles we think the articles enumerated above are fixtures because not only are they attached to the building, but are used and are useful in connection with the operation of the building as a theatre or moving picture show, the only purpose to which it is adapted.

We therefore agree with the trial court that said articles, after being placed in the theatre building and attached thereto, become fixtures, lost their identity as chattels and passed under the first and second mortgages without special enumeration and were subject to foreclosure and sale as a part of the realty.

Affirmed.

KIRBY, J., dissents.

BANKS *v.* STATE.

Opinion delivered April 4, 1932.

Joe T. Robinson, Donham & Fulk, T. D. Wynne, and *Harry Meek,* for appellant.

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

James G. Coston and *J. T. Coston, amici curiae.*

HART, C. J. A. B. Banks was convicted before a jury for receiving or allowing to be received in the American Exchange Trust Company a banking corporation of Little Rock, Arkansas, of which he was president, deposits after he knew that the bank was insolvent. The jury fixed his punishment at imprisonment for one year in the State Penitentiary, and from the judgment upon the verdict the defendant has appealed.

The first assignment of error is that the court erred in refusing to grant the defendant a continuance. The granting or refusing of continuances is within the sound legal discretion of the court, and this court will not interfere where there has been no abuse of that discretion. *Golden* v. *State,* 19 Ark. 590; *Edmonston* v. *State,* 34 Ark. 720; *Jackson* v. *State,* 54 Ark. 243, 15 S. W.

607; *Goddard* v. *State,* 78 Ark. 226, 95 S. W. 476; *Morris* v. *State,* 102 Ark. 573, 145 S. W. 213; *Bruder* v. *State,* 110 Ark. 402, 161 S. W. 1067; *Sease* v. *State,* 155 Ark. 130, 244 S. W. 450; *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d) 946.

While numerous other cases approving the rule have been decided by the court, no useful purpose could be served by citing or reviewing them, because each case depends upon its own particular facts. The indictment in the case at bar was returned on April 27, 1931. On May 27, 1931, the case was set for trial on June 26, 1931. The trial lasted about one week. Numerous witnesses were introduced by the State and by the defendant. Eminent counsel represented the defendant. They were allowed to introduce testimony relative to every phase of the case. There was ample time to have taken the deposition of any witness which might have been desired. There was no reversible error in the action of the court in overruling the defendant's motion for a continuance.

■ The next assignment of error is that the court erred in overruling the defendant's motion to quash the indictment. The record shows that the grand jury duly returned into court the indictment upon which the defendant was tried. Thereafter, on another day of the same term, after obtaining permission of the court, the same grand jury met and heard the testimony of the defendant, A. B. Banks. Thereupon, the grand jury made a written report to the court, stating that it had erred in returning the indictment, and recommended to the prosecuting attorney that a *nolle prosequi* be entered of record. The prosecuting attorney objected, and the court refused to quash the indictment.

There was no error in this ruling of the court. Under our Constitution and laws, a grand jury is an accusing body, and, while an appendage or part of the court, it has no powers as a judicial tribunal. When it returns into court a true bill in a case, its power in the premises is ended until and unless, under orders of the court, the charge is again submitted to it for consideration. The indictment and return thereon of a true bill is a public

record of which the court has exclusive jurisdiction. It cannot be withdrawn from the files of the court and changed by the grand jury. Then, too, when the grand jury returns a bill into court and files it, the court acquires jurisdiction of the case, and the function and power of the grand jury is ended. *Fields* v. *State,* 121 Ala. 16, 25 So. 726; *Gibson* v. *State,* 162 Ga. 504, 134 S. E. 326; Joyce on Indictments (2d ed.), § 128, p. 153; 31 C. J. 587.

■ The next contention relied upon for reversal of the judgment is that under § 717 of Crawford & Moses' Digest, which is a part of our statute regulating banks and banking, the bank in question was not insolvent because there had been no examination made by the bank examiner. Reliance is placed upon that part of the section which provides that a bank shall be deemed insolvent within the meaning of the act upon the existence of the following facts: * * * "3. If, upon examination, it is ascertained that the liabilities of a bank exceed its assets."

It is claimed that under this section it is only the Bank Commissioner who can declare a bank insolvent after examination made, and that, so long as the Bank Commissioner permitted the bank to remain open, it was not insolvent. We do not think so. Our banking act (§ 712, Crawford & Moses' Digest) allows the officers of a bank to close it for insolvency, and § 697 of Crawford & Moses' Digest makes it a felony for any officer to receive or allow to be received deposits in the bank when he knows it to be insolvent. We cannot conclude, in the light of these sections, that it was the intent of the banking act to vest in the Bank Commissioner alone the power to determine when and when not a bank is insolvent. *Raynor* v. *Scandanavian-American Bank,* 122 Wash. 150, 210 Pac. 499, 25 A. L. R. 716.

■ The next assignment of error is that the court erred in allowing the testimony of W. A. Hicks and Sam Wilson to go before the jury. According to the testimony of W. A. Hicks, he was president of the People's Trust Company of Little Rock, and had been since De-

cember 1, 1928. Prior to that time he was active vice-president of the American Southern Trust Company, which was taken over by the American Exchange Trust Company. He was familiar with the ability of the customers of the latter bank to pay their obligations. After the American Exchange Trust Company closed its doors, on account of insolvency on November 17, 1930, witness was one of a committee of three bankers selected to investigate the assets of the insolvent bank. Witness was allowed to make a detailed statement of the large debtors of the bank and to state the value of the securities deposited by them in the bank for the purpose of securing the loans made to them. Among the largest debtors were Caldwell & Company, insurance investment brokers of the State of Tennessee; A. B. Banks & Company, investment brokers, owned and controlled principally by the defendant; Van M. Howell & Co., another investment concern owned and controlled principally by the defendant. Other large debtors of the bank were listed by the witness, Hicks, and his opinion given and taken as to the value of their securities. Without going into detail in the premises, it is sufficient to say that his testimony tended to show that the bank was insolvent on November 15, 1930, and when it failed to open on November 17, 1930.

Sam Wilson was a planter and merchant and a director of a bank in the southern part of the State. He was appointed as liquidating agent for the American Exchange Trust Company when it was taken charge of by the State Bank Commissioner. He made a list of the large debtors of the bank, and his testimony tended to corroborate that of W. A. Hicks as to the value of their securities and in other matters.

We are of the opinion that the testimony was admissible under the principles of law heretofore decided by this court in similar cases. *Cunningham* v. *State,* 115 Ark. 392, 171 S. W. 885; *Skarda* v. *State,* 118 Ark. 176, 175 S. W. 1190, Ann. Cas. 1916 E, 586; *Wilkin* v. *State,* 121 Ark. 219, 265 S. W. 76; *Dover* v. *State,* 165 Ark. 496, 265 S.

W. 76; *Crawford* v. *State,* 184 Ark. 1027, 44 S. W. (2d) 360. The reason is that the business of banking, while a lawful one, is subject to regulation under the police power of the State. Money is the life blood of the nation, and a country's financial system has been generally regarded as the Scylla and Charybdis upon which it is wrecked or voyages to safety. The banking business, from the beginning of our country's existence, has grown to be a part and parcel of a great financial system, and the bulk of the business is transacted through the medium of bank checks and drafts. It is the great business of the country which needs protection, but which needs to be regulated to promote the general public welfare and happiness of the people. A bank does business upon the confidence of the people in its solvency. When the public ceases to have confidence, suspension of business is near. So it can be said that, when a bank is open and doing business with the public, that of itself is in effect a public declaration of solvency. Therefore, if its officers allow deposits to be received when they know the bank to be insolvent, such act is punishable as a criminal offense. The mere fact that, after investigation had been begun, the officers of the bank in question continued to do business, tended to show knowledge of its insolvency on the part of the officers. For an insolvent bank to continue in business is to hold itself out as having responsibility and surplus capital when none exists. To suppress this real or supposed mischief, our Legislature has passed the act under which the defendant was convicted in the present case. It is a matter of common knowledge that the deposits of the banks of the country exceed many times the amount of the actual money in the country. This is so because a large part of the business is transacted by checks and drafts. Hence the solvency or insolvency of banks must of necessity rest upon the value of their securities rather than upon the amount of money on hand. These principles of law have been recognized by well-known textwriters and many adjudicated cases. No particular citation of authority is needed therefore to support it.

If the solvency or insolvency of the bank in question could not be proved by those who have made an examination of the affairs of the bank immediately before or after its officers have closed its doors on account of insolvency, then the statute in the present case might well never have been passed, as it would be practically impossible to convict under it. The deposit in the present case was received on Saturday, November 15, 1931, in the usual course of business, and the bank closed its doors on the following Monday, and has been in the hands of the Bank Commissioner for liquidation as an insolvent bank ever since. A bank is insolvent, within the meaning of the statute, when its assets and property are of such a character and value that it is unable to meet its demands in the usual and ordinary course of business. It is not essential that the bank shall have on hand sufficient cash to pay all of its depositors, or any considerable number of them, on the same day. It is necessary, however, for it to have on hand cash or other available assets to meet the demands that are usually made on it from day to day in the ordinary course of business. *Skarda* v. *State,* 118 Ark. 176, 175 S. W. 1190, Ann. Cas. 1916 E, 586; *Wilkin* v. *State*, 121 Ark. 219, 180 S. W. 512; *Crawford* v. *State,* 184 Ark. 1027, 44 S. W. (2d) 360.

While the defendant introduced testimony tending to show that the bank was not insolvent when the deposit in question was received, we do not deem it necessary to set it out or to comment upon it; for the verdict of the jury must be tested by the evidence on behalf of the State. The testimony of Hicks and Wilson was sufficient to warrant the jury in finding that the bank was insolvent on November 15, 1930, when the deposit in question was received in the usual course of business.

■ The only other matter which need be considered in testing the legal sufficiency of the evidence upon a verdict of guilty is whether or not the defendant knew of the insolvency of the bank at the time the deposit was received. Here again we find the testimony in conflict, but a careful consideration of the evidence for the State,

viewed in the light of the attendant circumstances, warranted the jury in finding that the defendant had such knowledge. In order to find the defendant guilty, it was not necessary to impute to him any fraudulent intent in the conduct of the affairs of the bank; it was only necessary to find that he had knowledge of its insolvency at the time the deposit in question was received.

The record shows that the American Exchange Trust Company was organized in February, 1930, by a merger of the American Southern Trust Company and the Exchange National Bank, both banking corporations in the city of Little Rock. A new bank was formed with a capital of $1,000,000 and a surplus of $500,000. The defendant was president of the American Southern Trust Company and became the president of the newly organized bank, and a member of its board of directors. While he was not chairman of the board, the defendant was usually present at its monthly meetings and presided at such meetings. Prior to this time, commencing in the year 1900, the defendant organized various insurance companies for the purpose of conducting a fire, accident and life insurance business. These companies acquired considerable capital, which was invested by them in banks over the State. At the time the American Exchange Trust Company became insolvent, it was affiliated with about 48 other banks in the State. The defendant controlled all these banks as well as the insurance companies referred to above. He also conducted the negotiations for the purchase of the assets of some of his insurance companies by Caldwell & Company, of Nashville, Tennessee. The record shows that he kept in close touch with all of these companies; he knew their interlocking relations with each other; he knew that the insurance companies had invested largely in stocks in the various banks under his control; he was the guiding star and the principal owner of two investment companies which turned out to be wholly insolvent, and which were organized for the purpose of investing in stocks and bonds. Both these companies were indebted to the American Exchange

Trust Company in large sums at the time it closed its doors.

This is not a case where the defendant was ignorant of the banking business and could not have known of the bank's insolvency, had he made an examination of its affairs, nor is it a case where he paid no attention to the business, and did not on that account know its true condition. He did not have to depend upon statements made by the officers of the bank in active charge of its affairs with regard to its financial status. It is not a case where the bank became insolvent because of an earthquake or some sudden and unexpected casualty. It may be true that the defendant relied upon other officers of the bank more or less for detailed information with regard to its financial condition, but he knew the connection of the bank with the various other forty-eight banking institutions in the State; he knew in a general way of their condition; he knew of the condition of the various insurance companies with which he was connected, and all the way through had active management and control of these institutions. He knew of the failing confidence of the public in the bank on account of his sale of assets to Caldwell & Company, and must have known in a general way that the bank was gradually becoming insolvent; he knew beforehand that his bank was being investigated by the Clearing House Association of Little Rock.

It is claimed for the defendant that, from time to time, he put large resources of his own in the bank for the purpose of protecting its depositors and preventing the bank from becoming insolvent. This was proper testimony to be considered by the jury, and doubtless was so considered in fixing his punishment. Under our statute, the guilt or innocence of the defendant in cases of this sort does not depend upon a fraudulent intent. The gist of the offense is that he allowed deposits to be made, knowing that the bank was insolvent. The very fact that from time to time he put large amounts of money and securities of his own into the bank to protect the bank indicated a knowledge on his part that he knew that the

bank was in failing condition. At least the jury might have so found.

We have carefully considered all of the testimony in the record and are of the opinion that, if believed by the jury, the testimony on behalf of the State warranted the verdict of guilty. The judgment of the trial court is therefore correct, and it is affirmed.

McHaney, J., disqualified and not participating.

Giese *v.* Jones.

Opinion delivered April 4, 1932.

E. L. Carter and *S. J. Reid,* for appellant.

Isaac McClellan and *Wm. J. McClellan,* for appellee.

Smith, J. Appellant alleged in his complaint that he was the owner of certain lands, therein described, which were in Road Improvement Districts Nos. 1, 2 and 7 in Grant County, Arkansas, respectively, and that he acquired his title through a foreclosure sale of a mortgage duly assigned to him, which had been executed by Benton B. Moore. He alleged that these lands had been sold to the respective districts for the nonpayment of the road improvement district taxes due and delinquent thereon for the year 1925, and that, after the sale thereof to the respective districts, they were sold by the districts to W. K. Jones, who was the business partner of Moore, and that such purchases were in legal effect mere redemp-

tions. Testimony was offered as to the business relations of Jones and Moore, but we find it unnecessary to determine whether Jones purchased the lands from the districts for the benefit of Moore.

Plaintiff alleged that these tax sales were void for various reasons, and, among others, that the decrees of sale were rendered upon insufficient notice; were defective in character; that no jurisdiction was conferred upon the court to render the decrees of sale, and the sales were therefore alleged to be void. Plaintiff made a tender of the amount paid for the lands by Jones, the same being the amount for which the lands had been sold by the commissioner of the court to the respective improvement districts.

The decrees of sale under which the lands were sold to the districts were rendered November 14, 1925, but by reason of certain statutes extending the period of redemption, no deeds were made by the commissioner to the improvement districts until 1930, and soon thereafter the districts executed the deeds to Jones here attached.

Plaintiff alleged that the decrees pursuant to which these deeds had been made were void for the reasons hereinafter discussed, and he prayed their cancellation, and that he be permitted to redeem said lands. The court denied the relief prayed and dismissed the complaint as being without equity, from which decree is this appeal.

Road Improvement District No. 1 was created by special act 48 of the Acts of 1915 (Acts 1915, page 136). Districts Nos. 2 and 7 were organized under the provisions of act 338 of the Acts of 1915 (Acts 1915, page 1400), which appear as § 5399 *et seq.*, Crawford & Moses' Digest.

Section 16 of special act 48, creating District No. 1, provides the procedure for enforcing the payment of delinquent assessments of benefits. It directs the board of commissioners to enforce such payment by chancery proceedings, and requires that they give notice of the suit filed for that purpose by the publication of a notice of the pendency of such suit "by publication weekly for

four weeks before judgment is entered for the sale of" delinquent lands, etc., in some newspaper published in Grant County. This section also contains the form of the notice so to be published, and there provides that: "All persons and corporations interested in said lands are hereby notified that they are required by law to appear within four weeks and make defense to this suit, or the same will be taken for confessed, and final judgment will be entered directing the sale of said lands * * *."

Act 338, under which Districts Nos. 2 and 7 were created, provides a procedure similar, in the essential respects hereinafter discussed, for the collection of delinquent assessments of betterments in these districts, except that the notice of the suit is to "be given by publication weekly for two consecutive weeks before judgment is entered for the sale of said lands in some newspaper in said county having a general circulation therein." Act 338 contains a form of notice in practically the identical language employed in act 48, and recites, as does the last-named act, that: "All persons, firms or corporations interested in said property are hereby notified that they are required by law to appear within four weeks and make defense to said suits or the same will be taken for confessed, and final judgment will be entered directing the sale of said lands for the purpose of collecting said taxes, * * *."

It thus appears that both acts require that notice for four weeks be given landowners of the pendency of the suit by the publication of the notice of delinquency.

The decree of sale under which the delinquent lands in District No. 1 were sold recites that notice of the pendency of the suit was given by publication as follows: "The first publication thereof was made on the 22d day of October, 1925, the second on the 29th day of October, 1925, the third on the 5th day of November, 1925, and the last on the 12th day of November, 1925."

In the decree rendered in the suit brought by the commissioners of District No. 2 it is recited that the

notice was published on October 22, 1925, on November 5, 1925, and on November 12, 1925.

In the decree rendered in the suit brought by the commissioners of District No. 7 it is recited that the notice was published October 22, 1925, October 29, 1925, November 5, 1925, and November 12, 1925.

It thus appears, from the face of each of these decrees, that the four weeks' notice required by law had not been given in any case when the decree of sale was rendered. *Pope* v. *City of Nashville,* 131 Ark. 429, 199 S. W. 101.

It is true, of course, that the instant case is a collateral attack on these decrees of sale, and it is insisted that these decrees of a superior court of record cannot be thus collaterally attacked.

We are cited to numerous cases in which it has been held that, after the confirmation of a sale has been made by the court ordering the sale, all defects and irregularities in the conduct of the sale are cured, and every presumption will be indulged in favor of their regularity.

Among the numerous cases to this effect is that of *Fiddyment* v. *Bateman,* 97 Ark. 76, 133 S. W. 192, where it was held (to quote a headnote): "Where an overdue tax decree recited that due notice was given by publication of warning order as required by law, it will be presumed on collateral attack that due notice was given, though the proof of the warning order was defective in failing to show that the newspaper in which the publication was made had a *bona fide* circulation in the county and had been regularly published therein for one month before the date of the first publication of the warning order, and was also defective in failing to show the date of the second insertion of the warning order."

There was offered in evidence in that case an affidavit of the proof of publication of the warning order, pursuant to which the decree had been rendered, according to the recitals of which the notice given did not conform to the requirements of the law under which the proceeding was had. It was there said: "No statute forbids

the introduction of parol testimony to prove the publication of notice in cases of this kind, and the decree recites: 'And it further appearing to the satisfaction of this court that the clerk of this court caused the said order to be published as required by law, and did give the notice required by law, and that the proof of which notice, verified and proved as required by law, was filed,' etc. Such recital that notice has been given is evidence of that fact. Section 4425, Kirby's Digest. And, as the court said in *Clay* v. *Bilby,* 72 Ark. 408, 78 S. W. 749, 1 Ann. Cas. 917: 'If the decree or judgment does not exclude the conclusion, the presumption is that sufficient and competent evidence was before the court to sustain its findings as to the publication of notice. *McLain* v. *Duncan,* 57 Ark. 49, 53, 20 S. W. 597; *Scott* v. *Pleasants,* 21 Ark. 364; *Porter* v. *Dooley,* 66 Ark. 1, 49 S. W. 1083; 1 Bailey, Jurisdiction, § 1728, and cases cited.' The law only required a copy of said order to be published for two insertions, and a like omission in an affidavit in a case of this kind except as to date of second insertion has been held to be a mere irregularity which did not affect the jurisdiction of the court or the validity of the decree. The omission in this affidavit could not amount to more than an irregularity, within the meaning of the decision in *Clay* v. *Bilby, supra,* and cases cited."

But it is to be remembered that, while the sales were confirmed by the court in the instant case, they were made pursuant to a special statutory power prescribing the conditions upon which the decrees of sale might be rendered, and the decrees do not recite merely that proper notice of the proceedings had been given. On the contrary, the decrees affirmatively recite the notice which was given in each case, and it appears, from the face of each decree, that the notice required by law was not given. There is therefore no presumption that legal notice was given, because the decrees themselves exclude that presumption.

In the case of *Crittenden Lbr. Co.* v. *McDougal,* 101 Ark. 395, 142 S. W. 836, it was said: "This is a collateral attack upon a domestic judgment of a court of general

jurisdiction. It is well settled that every presumption will be indulged in favor of the jurisdiction of such court, and the validity of the judgment which it enters. Unless it affirmatively appears from the record itself that the facts essential to the jurisdiction of such court did not exist, such collateral attack against the judgment rendered by it will not prevail. A judgment or decree entered upon constructive service by publication will be given the same conclusive effect and will be entitled to the same favorable presumptions as judgments on personal service. It is true that a judgment may be attacked collaterally where, by the record, it is shown that there was want of jurisdiction in the court rendering it, either of the subject-matter or of the person of the defendant."

In the instant case, as we have said, it is shown by the record of the decrees themselves that there was a want of jurisdiction of the court rendering them, and they may therefore, as was held in the case last cited, be collaterally attacked. *Boyd* v. *Roane,* 49 Ark. 397, 5 S. W. 704; *Price* v. *Gunn,* 114 Ark. 551, 170 S. W. 247, L. R. A. 1915C, 158; *Oliver* v. *Routh,* 123 Ark. 189, 184 S. W. 843; *Jones* v. *Ainell,* 123 Ark. 532, 186 S. W. 65; *Simpson* v. *Reinman,* 146 Ark. 417, 227 S. W. 15; *Road Imp. Dist. No. 4* v. *Ball,* 170 Ark. 522, 281 S. W. 5

Inasmuch as the decrees here attacked show, upon their face, that they were rendered without giving the notice required by law, they are subject to collateral attack, and were void as having been rendered upon an improper notice. The decree of the court below will therefore be reversed, and a decree will be entered permitting appellant to redeem the lands as prayed.

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

Opinion delivered April 4, 1932.

C. T. Carpenter, for appellant.

Chas. D. Frierson, for appellee.

Archer Wheatley, amicus curiae.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Poinsett County dismissing appellants' petition for a writ of mandamus to compel the commissioners of Drainage District No. 7 of Poinsett County to pay appellants' judgment against it out of the revenues of said district.

The only two questions of importance involved on the appeal under the pleadings and testimony are: First, whether appellants' right to have their judgment satisfied out of the revenues of said district is superior and paramount to liens created on said revenues for money with which to construct levees and other improvements incident to said district; second, whether mandamus is an available remedy.

Appellants' judgment was obtained for the value of lands taken by the district under the power of eminent domain vested in it. For a full statement of the facts under which said judgment was based and the judgment itself, reference is made to the case of *Keith* v. *Drainage District No. 7 of Poinsett County,* reported in 183 Ark. 384, 36 S. W. (2d) 59. Compensation for lands thus appropriated is guaranteed by the Constitution of 1874, art. 2, § 22, which is 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."

This provision of the Constitution is impliedly written into and becomes a part of every mortgage, bond, or conveyance of real estate thus acquired for the purpose of obtaining money to make improvements incident to

any district. The property and revenues arising therefrom by taxation or otherwise carries the burden of paying the owners for real estate thus appropriated. This rule or principle of law was announced in the case of *Organ* v. *Memphis & Little Rock Railway Co.*, 51 Ark. 235, 11 S. W. 96, which principle finds support in the great weight of authority.

The trial court found in the instant case that the commissioners had revenues sufficient to pay the judgment of appellants, but that they had been pledged to the payment of bonds issued and sold to procure money with which to build levies and make other necessary improvements, and declared as a matter of law that the bondholders were preferred on account of such pledge over the judgment obtained by appellants. The finding of fact that there are sufficient revenues to pay the judgment of appellants is supported by the weight of the testimony. The finding of fact that the commissioners of the district pledged the revenues to the payment of the bonded indebtedness is also supported by the weight of the evidence. The declaration of law by the court to the effect that the bondholders' lien on the revenues of the district were superior to appellants' judgment claim was erroneous. In so declaring, the court disregarded the constitutional guaranty, as well as the rule announced in the Organ case, *supra*. Appellants' judgment was a lien on the revenues of the district paramount to the lien of the bondholders.

It clearly appears from this record that the remedy now invoked is the only adequate remedy available to appellants. According to the record before us, the remedy by execution proved fruitless and will continue to do so. The only lands owned by the district are tax title lands that no one seems willing to buy. It is argued, however, that mandamus will not lie against the commissioners because it is discretionary with them as to which claimants they will prefer and pay out of the revenues. They have no such discretion. It was their duty to pay for lands taken for the purposes of the dis-

trict out of the revenues derived by taxation in the district, under the constitutional provision quoted above, to the exclusion of all claimants thereto not in their class.

On account of the error indicated, the judgment dismissing appellants' petition is reversed, and the cause is remanded with direction to the circuit court to issue a writ of mandamus compelling the commissioners to pay appellants' judgment out of the revenues of the district.

SMITH and MCHANEY, JJ., dissent.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* ROSS.

Opinion delivered April 4, 1932.

Allen May, J. R. Burcham, Chas. Frierson, Jr., and *Chas. D. Frierson,* for appellant.

Wm. F. Kirsch, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the insurance company, under the policy and application therefor, upon default in the payment of premiums without any further written request for "automatic premium loan" had the right to charge the delinquent premiums against the insured as such "auto-

matic premium loans," and, having done so, even if it had no such right without the written request, its action having been acquiesced in by the insured, the beneficiary was thereafter precluded from recovering anything under the lapsed policy upon the theory that, if it had issued extended insurance instead of payment of premiums under the "automatic premium loan" provision, the policy would have been continued in force until after the death of the insured.

The parties both evidently understood and construed the contract alike in the application of the "automatic premium loans" to the payment of premiums, the insured being regularly notified thereof and making no objections whatever to such procedure; and their construction of the contract is entitled to great weight in the correct interpretation. *Craig* v. *Golden Rule Life Ins. Co.,* 184 Ark. 48, 41 S. W. (2d) 769.

The insured paid very few premiums except with the benefit of the "automatic premium loan," and was repeatedly notified of the failure to pay such premiums and finally of the lapse of the policy almost two years before his death. He evidently recognized the correctness of the claims of his failure to pay the insurance premiums when due and the application by the appellant company of the "automatic premium loans" to their payment, and made no objection whatever at any time to such procedure nor any protest or objection to the correctness of the company's notification of the lapse of the policy on September 24, 1928.

Certainly this was acquiescence in the application of the "automatic premium loans" by the company to keep the insurance in force as well as in the correctness of its notification of the forfeiture of the policy because of the failure to pay the premiums, and was binding on the beneficiary who must stand in the shoes of the insured and be bound under the terms of the policy issued.

She could not, therefore, upon learning after insured's death that the application of the cash surrender value of the policy at a particular time during its life

to the purchase of extended insurance, instead of its being used for the payment of premiums under the "automatic premium loan" provision, as was done with acquiescence of the insured, change the application of the cash surrender value to the purchase of extended insurance in order to keep the policy in force beyond the date of the insured's death, entitling her to recover thereon. *Mass. Mut. Life Ins. Co.* v. *Jones,* 44 Fed. (2d) 540.

It follows that the court erred in holding otherwise, and must be reversed on that account, and, the cause appearing to have been fully developed, it will be dismissed. It is so ordered.

ALTMAN-RODGERS COMPANY *v.* ROGERS.

Opinion delivered April 4, 1932.

Miller & Yingling and *Buzbee, Pugh & Harrison,* for appellant.

Tom W. Campbell, for appellee.

MEHAFFY, J. The appellee brought suit in the White Circuit Court against the appellants to recover damages for an injury received on October 23, 1930.

Appellee was employed by appellant as nightwatchman at appellant's mixing plant in White County. He went on duty on October 23d about six P. M. His working hours were from 6 P. M. to 6 A. M. Appellee kindled a small fire about 50 yards from the crane where he was injured, and then went down to the detour where A. O. Lyles was on duty, detouring traffic.

In performing his duties, appellee would make trips about the premises at intervals, and, in connection with the performance of his duties, he carried a lighted lantern. Appellant's equipment included a crane, which was mounted on caterpillar tracks and operated by means of a gasoline motor. Underneath the rear part of the crane was a gasoline tank of about 50 gallons capacity. This tank had to be filled from the inside of the crane.

Under the tank was a place from which gasoline could be drained out of the tank by unscrewing a three-eighths inch plug from a drain cock. The gasoline tank was filled from ten-gallon cans, which were kept in the oil house of appellant, about 50 yards from the crane. Appellant also had a five-gallon water bucket which was used to fill the radiator of the crane.

While the appellee was with Lyles at the barricade, appellee's seventeen-year-old son, Herbert Rogers, and Robert Akin drove up in a Ford car. Appellee got in the car with them and drove down to the mixing plant. At about 7:30 or 8:00 appellee took his lantern and went to the crane, and a quantity of gasoline was either spilled or poured on him, and was ignited, and appellee was severely burned. He was carried to the doctor's office and then taken to the hospital at Beebe, where he remained until December 24, 1930.

It is appellee's contention that a can partly filled with gasoline was negligently left at the crane, and that this fell on him, pouring gasoline over him, which was ignited by the lantern that he was carrying.

It is the contention of the appellant that appellee got burned while getting gasoline out of the tank under

the crane, for the purpose of supplying his son's car; that the employee, who it is alleged put the gasoline on the crane, was not engaged in labor on October 23 for the appellant, and that the witness who moved the gasoline can was not at the time working for the appellant, and that appellant was guilty of no negligence in connection with the accident and injury, and is not liable to the appellee.

There was a verdict and judgment for the appellee, and the case is here on appeal.

Appellant's first contention is that there is no substantial evidence to show that appellee's injuries were caused by any negligence on the part of the appellant.

W. H. Rogers, who is not a relative of the appellee, testified that he lived at Jacksonville, and worked for the Altman-Rodgers Company in October, 1930, and was working for appellant on the 23d day of October, 1930, the day appellee was injured; that he was batching up the material, and that between five and six o'clock that evening he went to get his raincoat, which was lying on the crane; that there was a 10-gallon can sitting on the crane about half full of gasoline. He had to pick up the can and move it over to get his raincoat. It was a 10-gallon can, and open at that time; the sides of the can were straight. This witness then, on cross-examination, described the openings in the crane, the situation and the place where the gasoline can was sitting, and he was cross-examined at length about the bucket or can that was on the crane, and whether the one exhibited was the same or a different one.

E. L. Walker, one of the appellants, testified that he was working for appellant company at the time of the injury; that appellant company owned a filling station near the cranes, and that he attended to the filling station; was their gasoline man, and that it was his duty to furnish gas and oil for all the trucks and machines, and to check up when they needed it; that he usually filled the tank about 5:30, or around quitting time; that he was at the

Altman-Rodgers place on the afternoon of October 23; that the mixer did not run that day, but that he was there and filled up the tank and filled up some trucks; that on the evening of October 23 he filled the gasoline tank on the crane; that he carried the gasoline from the filling station to the crane in a 10-gallon can. About the time he got through filling the tank, he had some left; the can was about half full; that it was his custom to carry any gasoline that he had left in the can to the filling station, but on that day he left the can sitting on the crane, where Rogers said he moved it to get his raincoat; that about the time he got through filling the tank some one called him, and he stepped off and carelessly forgot the gasoline can; that he did not intend leaving it there; that was the same evening that appellee got burned.

W. H. Rogers also testified that after the appellee was injured he became nightwatchman on November 6 after the accident; that in February he moved into the office and found some time sheets under Stallcup's desk rolled up in a bundle; he had heard the talk that Walker was not working on October 23, and that he and Pitts Morris, who was there with him, got to talking about it and looked at these time sheets, and saw that Walker had four hours on October 23d.

It appears therefore that there was substantial evidence to submit to the jury the question as to whether Walker, at the time he left the gasoline, was in the employ of the company in the performance of his duties. It is true that this evidence was contradicted by appellant's witnesses, who testified that Walker was not working that day. Wherever the evidence is in conflict, it is the province of the jury to determine the weight of the evidence and the credibility of the witnesses, and this question was submitted to the jury under proper instructions.

This court does not pass on either the credibility of the witnesses or the weight to be given to their testimony. If there is substantial evidence to support the verdict of the jury, this court cannot set aside the ver-

dict, although it might appear that it was against the preponderance of the evidence.

Appellant contends that appellee got burned while getting gasoline out of the gasoline tank underneath appellant's crane for the purpose of supplying the Ford car in which his son, Herbert, had driven up from Beebe. There is no evidence to support this theory. In fact, the evidence introduced by appellant contradicted this theory.

The evidence of young Rogers and Akin was introduced by appellant, and their evidence contradicts this idea, and also contradicts the idea that some one else was stealing gasoline, and, when appellee went to the crane, gasoline was thrown on him. Both these witnesses testify that there was nobody present at the crane, and Alexander testified that he was where he could see the crane and saw no one about the crane. It is contended, however, that there were persons there, because witnesses testify as to statements made by appellee immediately after the accident.

The undisputed proof shows that appellee was severely burned, and witnesses, including the nurse at the hospital, testified that it was the most severe burn they had ever seen. The jury had a right to believe the appellee when he said he did not make these statements.

However, if he had made the statements and admitted it, this fact would simply have gone to his credibility as a witness, and the jury might still believe that he told the truth when he testified on the witness stand.

Appellant introduced an article in the Arkansas Democrat in which it was stated that somebody was at the crane stealing gasoline, and that they threw the gasoline over appellee.

Appellee testified that he never wrote the article, that he never authorized any one to write it, and that he knew nothing about it and did not make the statement.

It does not appear from the evidence why the doctor and nurse wanted to get a statement from appellee at

the time, when they knew he could not sign it, and his condition was such that the nurse admits that he had to lie down before he could complete his statement. She said he was sitting up in bed when he started the statement. The notary public says that he not only did not sign the statement, but that he did not swear to it, and that he could not raise his hand, and it does not appear why the doctor and nurse brought in a notary public for the purpose of taking his statement when he was in this condition, but, if he had made and signed the statement, and had admitted that he did, yet the jury had a right to believe his evidence, in which he described his condition, and told how the accident occurred.

The nurse, although she testified about discussing with appellee the statement published in the Democrat, finally admitted that she did not read it to him, that he did not at any time state that he authorized the article, nor that he had any knowledge of it; that she did not read it to him, and did not tell him anything about it.

Dr. Sloan, whose statement was introduced by appellant, testified about appellee's condition when he was at the hospital; that he came there between 7:30 and 9 o'clock on the evening of October 23, and remained in a semi-conscious condition about 48 hours, and he had considerable delirium after that. His mind was clear after he got over the shock, but he had considerable delirium all the way through, and that delirium periods kept up until some three or four weeks before he left the hospital. The burns were not healed when he left the hospital.

Appellant introduced evidence as to finding pliers, supposed to be used to take the plug out of the gasoline tank, and introduced a can and bucket, and also evidence that the gasoline had burned right under the tank where the gasoline could be drained out, and that there was no sign of fire on the side of the crane.

It is contended by appellant that appellee was stealing gasoline, and that it was ignited from his lantern,

and that this caused the injury to appellee. They also contend that some one else was stealing gasoline and threw the gasoline on appellee, and that this was the way it occurred.

The jury might have believed that appellee could not, under the evidence in the case, have been getting gasoline from the tank, and after getting the gasoline screwed the plug in tight. They certainly would not have believed that he put the plug in tight, as appellant's witnesses say, after the burn, and they might have believed that, if other persons had got the gasoline and screwed the plug in tight before appellee got there, they would not have waited and thrown the gasoline on him, but would have gone on away with it.

All these are questions, however, of fact, and it was the province of the jury to determine where the truth lay.

It is next contended by the appellant that the court erred in refusing to submit to the jury the special interrogatories. They were as follows:

1. Was the plaintiff injured by a can of gasoline turning over on him, which had been left in doorway of the crane?

2. Was the plaintiff injured by gasoline thrown on him by some unknown person or persons?

3. Was the plaintiff injured as a result of removing gasoline from the gasoline tank of the crane?

Each one of the requests were covered by the court's instructions to the jury, to which no objection was made by appellant.

It was within the discretion of the trial court to submit to the jury the special requests or not, and the court did not abuse its discretion in refusing to require the special findings. *L. R. & Ft. Smith Ry. Co.* v. *Pankhurst,* 36 Ark. 371, 378; *Surridge* v. *Ellis,* 117 Ark. 223, 174 S. W. 537; *Southern Life Ins. Co.* v. *Roberts,* 173 Ark. 903, 294 S. W. 14; *Stanley* v. *Smith,* 135 Ark. 502, 205 S. W. 889.

The appellant does not complain about the instructions of the court nor the amount of the verdict.

We find no error, and the judgment is affirmed.

SHAVER *v.* LITCHFIELD CLOTHING COMPANY.

Opinion delivered April 4, 1932.

C. O. Raley and *Walter L. Pope,* for appellant.

Ward & Ward, for appellee.

BUTLER, J. The Litchfield Clothing Company, appellee, brought suit against John B. Shaver, appellant, under his trade name of Shaver Mercantile Company, for the amount due on a bill of merchandise, and from a judgment in favor of appellee Shaver has appealed.

The facts, as stipulated in the court below, are as follows: "That the defendant being justly indebted to the said plaintiff in the sum of $239.19 for goods sold and delivered to him by the plaintiff issued and delivered to the plaintiff his check in payment of said debt drawn on the Randolph State Bank of Pocahontas, Arkansas, for said sum and forwarded said check to the plaintiff at Litchfield, Kentucky; that said check was postdated for September 1, 1930, and was sent to the plaintiff; that the plaintiff immediately delivered said check to its attorneys, Forgey & Verdier, of St. Louis, Missouri, who had this claim for collection at the time, and that on the 30th day of August, 1930, said attorneys, Forgey &

Verdier, sent said check by United States mail to the Randolph State Bank for payment by proper exchange if said bank had funds to pay the same, and if not payable that said check be returned to them immediately. That said check was received by the said Randolph State Bank, but the bank did not cash it and did not return it as directed; that on September 23, 1930, plaintiff's attorneys wired the defendant herein that he would have to take up said check as the bank had not remitted. That on the 23rd day of September, 1930, plaintiff's attorney wrote the Randolph State Bank asking for returns on said check and followed soon after with a wire threatening to take the matter up with the State Bank Examiner if it was not paid or returned to them; that, in answer to this, the Randolph State Bank replied that they did not have said check and knew nothing of it; that said attorneys for the plaintiff thereupon wrote the defendant advising him that the bank could not locate the check.

"A copy of the letter forwarding said check to the Randolph State Bank, and a copy of the letter of the Deputy Bank Commissioner notifying Forgey & Verdier that said check was in the files of the Randolph State Bank are attached herewith as Exhibits A and B. It is further stipulated that at all times from August 30, 1930, to November 5, 1930, the date the Randolph State Bank closed, Shaver Mercantile Company, the drawer of said check, had sufficient funds in the Randolph State Bank to pay the same; that neither the payee of said check nor its agents, Forgey & Verdier, ever requested that said check be protested for nonpayment and took no action against said bank to compel the payment of said check.

"That the Randolph State Bank became insolvent and was taken over by the State Bank Commissioner on the 5th day of November, 1930, and has been liquidated by said commissioner. That the check of the defendant was found in the files of said bank after it was taken over by said commissioner and now appears therein, but

was not paid, and still remains unpaid. That the plaintiff has not received payment for said debt in any other way than by said check above mentioned, and it is further agreed that said check has not been honored by said Randolph State Bank and remains unpaid in so far as this plaintiff's account is concerned against the defendant herein."

In 5 R. C. L. at page 514 is the following declaration: "According to the prevailing view, it is negligence in the holder of a check to send it direct to the drawee residing in a distant place for payment; and the holder is responsible for any loss occasioned by adopting such a course."

In the case of *Anderson* v. *Rodgers,* 53 Kan. 542, 27 L. R. A. 248, where a check was mailed directly to the drawee bank on the 12th day of December and which remained open for business on the 13th and closed on the 14th, and where on the 13th the bank returned the check to the sender with a notation of "no funds," but where it was admitted that the drawer had more than enough funds in the bank to his credit to pay the check, the court, in reversing the judgment of the lower court against the drawer, said:

"The Hamilton County Bank, therefore, selected the drawee of the check as its agent for collection. That this was negligence is well settled by the authorities. It is said in Daniel on Negotiable Instruments (Vol. 1, § 328a): 'For the purposes of collection, the collecting bank must employ a suitable subagent. It must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittances be made therefor. It is considered that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself.' This proposition is sustained by abundant authorities. *Drovers' Nat. Bank* v. *Anglo-American Packing & Provision Co.,* 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855; *German Nat.*

Bank of Denver v. *Burns,* 12 Colo. 539, 21 Pac. 714; *Merchants' Nat. Bank of Philadelphia* v. *Goodman,* 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728; *First Nat. Bank of Evansville* v. *Fourth Nat. Bank of Louisville,* 6 C. C. A. 183, 56 Fed. Rep. 967; *Farwell* v. *Curtis,* 7 Biss. 160, Fed. Cas. No. 4, 690.

"It is insisted that inasmuch as the check was forwarded in due time, and came into the hands of the drawee, which refused payment, and returned the check with the statement: " 'No funds in bank,' the defendant was not injured by the mode of presentment; that an answer of 'No funds' sent by mail is as effectual as refusal to pay as though made across the counter at the bank. Where due presentment is not made, the burden of proof is upon the holder of the check to show that the drawer has not suffered injury. *Little* v. *Phoenix Bank,* 2 Hill 425; *Ford* v. *McClung,* 5 W. Va. 166; 2 Parsons, Bills & Notes, 71; 2 Dan. Neg. Inst. § 1588; *Daniels* v. *Kyle,* 1 Ga. 304."

In closing the opinion, the court in that case said:

"The request in this case by letter was not an ordinary demand of payment, calling for current funds, but was a request for Kansas City Exchange, which the drawee would of course be at perfect liberty to refuse. In cases of this kind a hardship necessarily results to one party or another. Courts, in their decisions, must be guided by fixed rules. The plaintiff, having trusted in the good faith of the Ritchfield Bank by sending the check to it, must bear the burden of the loss occasioned by its failure occurring after the day on which regular presentment should have been made."

It is the opinion of the majority that an application of these principles to the facts exonerates the appellant from the payment of the debt, and that the trial court erred in holding otherwise. The judgment will therefore be reversed, and the cause remanded with directions to enter judgment for the appellant.

The writer and Mr. Justice SMITH do not agree with the opinion reached by the majority.

LEONARD *v.* LUTHER.

Opinion delivered April 4, 1932.

Hal L. Norwood, Attorney General, *Robt. F. Smith,* Assistant, *John C. Ashley, J. Paul Ward* and *Ben B. Williamson,* for appellant.

Hugh U. Williamson and *Coleman & Reeder,* for appellees.

BUTLER, J. This action is a proceeding for a writ of mandamus to compel the appellees to deliver to appellant's deputy the tax books and other records belonging to the collector's office in and for Stone County. From a denial of the prayer of appellant's petition is this appeal.

We pass over the motion to dismiss the appeal for alleged failure to comply with rule 9 of this court, preferring to dispose of the case upon its merits.

The facts as stipulated in the court below are:

"That Sam Johnson is the legally elected and qualified sheriff of Stone County, Arkansas, having been elected at the November general election, 1930, for the term to expire December 31, 1932.

"That on the 19th day of November, 1931, the court made an order suspending the said Sam Johnson from office as sheriff and collector by the circuit court of Stone County, after five indictments had been returned against him by the grand jury of said county. A copy of which order is attached hereto and made a part hereof.

"That the said Sam Johnson has never been tried on any of said indictments, but that the same are pending for trial at the May term, 1932, of said circuit court.

"That on the 25th day of November, 1931, after the suspension of the said Sam Johnson on the 19th day of said month, the Governor of the State appointed and commissioned W. M. Brewer as sheriff and collector of Stone County, Arkansas, to serve as such during the suspension of the said Sam Johnson from the said office pending his trials on said indictments.

"That the said W. M. Brewer made his bond as sheriff and also made bond as collector, said bonds having been filed and approved on the 15th day of December, 1931. A copy of said bond being hereto attached and made a part hereof.

"That the said Sam Johnson, the duly elected collector, failed to file his bond as collector before or by the first Monday in January, 1932, as provided by § 10,031 of Crawford & Moses' Digest, and has never filed any bond up to this time.

"That the plaintiff, Roy V. Leonard, is the duly elected, qualified and acting Treasurer of State for the State of Arkansas.

"That the plaintiff, John B. Gower, was appointed by State Treasurer, Roy V. Leonard, in writing on the 21st day of January, 1932, as special deputy State Treasurer to collect the taxes of Stone County, Arkansas, for the current year, pursuant to § 10,034 of Crawford & Moses' Digest.

"That on the 22d day of January, 1932, the said Roy V. Leonard, as Treasurer of the State of Arkansas, made demand on the said T. E. Luther, the duly elected and qualified, acting county clerk of Stone County, Arkansas, and also the said W. M. Brewer, for all taxbooks, records, papers, receipts and moneys belonging to the collector's office of Stone County, Arkansas, for the year 1932, upon which the taxes for the year 1931 had been extended, and from which the taxes for the year 1931 were to be collected, and that the said T. E. Luther and the said W. M. Brewer, each and both, refused said demand, and refused to turn over said records, books, papers and moneys and still refuse to do so."

In addition to this stipulation appellee Brewer testified as follows: "I was appointed sheriff and collector in November, 1931, and made a sheriff's bond at that time. I didn't make a collector's bond until December 15th. That is the only bond I filed as collector. I was not reappointed collector after the first Monday in January. I have never filed another bond. I have never been reappointed collector."

■ The validity of the appointment of the appellee Brewer by the Governor depends upon whether or not there was a vacancy in the office of collector of

revenues for Stone County on the date of his appointment. The authority for the circuit court to suspend Sam Johnson from the performance of his duties as collector of revenues must be found in § 27 of art. 7 of the Constitution and in the enabling act to that section, now § 10,035 of Crawford & Moses' Digest.

Section 27, art. 7, Constitution: "The circuit court shall have jurisdiction upon information, presentment or indictment to remove any county or township officer from office for incompetency, corruption, gross immorality, criminal conduct, malfeasance, misfeasance or nonfeasance in office."

Section 10,335, Crawford & Moses' Digest: "Whenever any presentment or indictment shall be filed in any circuit court of this State against any county or township officer for incompetency, corruption, gross immorality, criminal conduct amounting to a felony, malfeasance, misfeasance or nonfeasance in office, such circuit court shall immediately order that such officer shall be suspended from his office until such presentment or indictment shall be tried. Provided, such suspension shall not extend beyond the next term after the same shall be filed in such circuit court, unless the cause is continued on the application of the defendant."

It was decided in the case of *Patton* v. *Vaughan,* 39 Ark. 211, that "article 7, § 27, of the Constitution of 1874, empowering circuit courts to remove county and township officers upon indictment, etc., and the act of March 9, 1877, to regulate filling of vacancies in office, relate to the elective township and county officers provided for by the Constitution. * * * The only constitutional or statutory provisions to which we have been referred as bearing on this subject are § 27 of art. 7, of the Constitution of 1874, vesting jurisdiction in the circuit court to remove county and township officers upon indictment or information and the act of March 9, 1877, to regulate the filling of vacancies in office. But these

obviously relate to the elective county and township officers created by the Constitution itself."

In *Falconer* v. *Shores,* 37 Ark. 386, it was said: "Before the adoption of the present Constitution the office of collector of taxes was statutory. The statute in force when the Constitution was adopted provided that the sheriff of each county should be *ex-officio* collector, and before entering upon his duties as collector should give bond before the first Monday of January of each year, etc. Gantt's Digest, §§ 5157-9.

"Section 46, article 7, of the Constitution provides that the qualified electors of each county shall elect one sheriff, who shall be *ex-officio* collector of taxes, unless otherwise provided by law, for the term of two years, thereby leaving the office of collector under legislative control.

"A person who is sheriff and collector, under existing laws, holds two distinct offices, and is required to give bond as sheriff and also to give bond as collector. Ex parte *McCabe,* 33 Ark. 396."

"It is well settled that where the Constitution creates or recognizes an office, and declares that the incumbent may be removed in a specified manner or for specified reasons, the Legislature cannot constitutionally provide by statute for his removal for any other reason or in any other manner." Throop on Public Officers, p. 343, quoted in *Speer* v. *Wood,* 128 Ark. 186, 193 S. W. 785.

In the case of *Remley* v. *Matthews,* 84 Ark. 598, 106 S. W. 482, the facts were that Strong, the regular acting sheriff and *ex-officio* collector of Chicot County, was suspended from office on the 20th day of October, 1906, pending his trial on eighteen indictments which had been returned and filed against him charging him with malfeasance in office. The Governor appointed E. P. Remley as sheriff to act during the vacancy caused by the suspension of Strong. Remley filed his bond and oath of office and entered upon the duties thereof. He failed to

make a collector's bond prior to the first Monday in December, 1906. Strong also failed to give a collector's bond within the time prescribed by law, and on March 8 following resigned his office as sheriff while still under indictment. On March 9, 1907, Remley was again appointed sheriff by the Governor and filed his bond as collector on the 13th of March, 1907. A special election was called for the election of sheriff to be held on April 15, 1907, at which C. M. Matthews was elected sheriff and duly commissioned, and, having duly qualified on the 29th day of April, demanded of Remley the office of collector of Chicot County and the books and papers belonging thereto. This was refused, and the question before the court was, who was entitled to the office of collector—whether Matthews by virtue of his election at the special election, or Remley by virtue of his appointment on the 13th day of March, 1907?

In holding that Remley was entitled to the office, and not Matthews, this court said: "Strong failed to give the bond of collector within the time prescribed by law, and upon a certificate by the clerk to that effect the Governor appointed Remley to that office, pursuant to § 7042 of Kirby's Digest. This was a valid appointment, for § 46, art. 7, of the Constitution leaves the office of collector under legislative control. *Falconer* v. *Shores,* 37 Ark. 386. In that case the court said: 'Upon the failure of a sheriff to give bond as collector of revenue within the time prescribed by law, the Governor is required, upon notice of such failure from the county clerk, to declare the office vacant and fill it by appointment.'

"We are now brought to consider the length of his term. As we have seen, appellant was appointed pursuant to § 7042 of Kirby's Digest. Section 7044 provides that he shall hold the office until the next general election, and until his successor is elected and qualified. In the case of *Alston* v. *Falconer,* 42 Ark. 114, it is held that where a person is appointed collector pursuant to the statutes, *supra,* he is by law entitled to hold it until

the next general election and until his successor is elected and qualified."

On the authority of these cases, it appears to be the contention of counsel for the appellant that the office of collector of revenues is not an elective county office within the meaning of § 27, art. 7, and therefore a sheriff, acting *ex-officio* as collector, although suspended pending the hearing of indictments returned against him, may continue to perform the duties of collector of revenues during the time of his suspension as sheriff; that is to say, the order of the court temporarily removing him as sheriff does not remove him as collector, and consequently an appointment by the Governor of one to serve as sheriff does not carry with it the right to qualify and act as collector.

The cases heretofore cited are relied on to support this contention and especially that of *Lemley* v. *Matthews, supra.* In none of these cases was the point here involved before the court, and they do not justify the contention made. The language in *Lemley* v. *Matthews* thought to warrant the interpretation suggested by counsel is:

"Section 7993 provides for the removal of such officer upon conviction. It will be observed that Strong was not removed from the office of sheriff, but was only suspended pending the indictments against him. Remley was appointed sheriff on the 20th day of October, 1906, under § 7995 of Kirby's Digest, authorizing the Governor to temporarily appoint an officer in the place of the suspended officer.

"This presents for our consideration the question, who was entitled to qualify as collector of the revenue of Chicot County in 1906, Strong or Remley?

"In the case of *Crowell* v. *Barham,* 57 Ark. 197, 21 S. W. 33, Cockrill, C. J., said: 'The offices of sheriff and collector, though usually exercised by the same person, are as separate and distinct as though held by different incumbents. Ex parte *McCabe,* 33 Ark. 396;

Falconer v. *Shores,* 37 Ark. 306. If the sheriff became collector by reason of qualifying as sheriff, there would be strong ground for contending that his general deputy was also deputy collector, as was held in the case of *People* v. *Otto,* 77 Cal. 45, 18 Pac. 869. But under our statute the sheriff becomes collector only when he qualifies as collector. He has the right by virtue of his office to become collector, but he may forfeit the right without forfeiting the office of sheriff. In that event the law authorizes the substitution of another in the office.'

"It seems clear then that Strong, and not Remley, had the right to qualify as collector; for the reason that Strong was still sheriff. He did not cease to be sheriff because of his suspension pending the indictments against him.

"Strong's suspension from the office of sheriff only disabled him from discharging the duties of the office, and did not take away the office itself. Only a removal from office could do that. He was still the sheriff, and by virtue of holding that office had the right to qualify as the collector of revenue."

It is true the order of suspension did not remove the sheriff from office or divest him of any of its incidents among which was the right to act as collector of revenue (*Vaughan* v. *Kendall,* 79 Ark. 584, 96 S. W. 140), but it did serve to render the incumbent incapable of functioning for a time and until the disability was removed. As the giving of a bond is a prerequisite to the performance of the duties of collector (§ 10,028, Crawford & Moses' Digest), and the failure to file it in the time prescribed works a forfeiture of the office (§ 10,031, Crawford & Moses' Digest), it was necessary, in order to preserve his right to resume his duties after the disability of suspension is removed, to make and file the collector's bond. This he still had the right to do, although incapable of acting for a time, and this was all the court meant to say in the language quoted from *Remley* v. *Matthews, supra,* when interpreted in the light of the point decided. It

did not intend to say that upon the filing of such bond he was entitled to perform the duties of collector, notwithstanding his suspension as sheriff, or that Remley, had he qualified as collector, could not.

The case at bar does not present the question of the power of the circuit court to remove a collector of revenue as such, but its power to suspend a sheriff under indictment. As the right to collect the revenues is an appanage of the office of sheriff, his suspension carries with it a vacancy for the time in the office of collector which he fills *virtute officii.* Therefore, the order of suspension of the sheriff made by the court created a vacancy in the office of collector, because there remained no one authorized by law to perform its duties during the disability of the sheriff. In this situation § 10, 338, Crawford & Moses' Digest, becomes effectual: "Whenever any officer shall be suspended from office on account of any presentment or indictment pending against him, the Governor may temporarily appoint an officer in his place, who shall hold until the disability of the officer so suspended is removed, or an election to fill the vacancy occurs, in case there is a judgment of removal."

Johnson failed to make and file his collector's bond, although he was entitled to do so after the order of suspension to preserve his rights as collector, in the event of the removal of his disability. The failure on his part was not certified by the clerk to the Governor, and, no appointment being made to fill the vacancy occasioned by such failure, the Treasurer of State deemed the situation that contemplated in the second sentence of § 10,034 of Crawford & Moses' Digest, which is as follows: "And if from any cause there shall be no collector of taxes in any county of this State, after the expiration of fifteen days from the time fixed by law for such collection to commence in any year, any taxpayer of such county, resident or nonresident, may, at any time before the time fixed by law for the regular collections to close, pay the amount of the State taxes, and of the general county taxes, poll

taxes, district school taxes, taxes levied to pay interest on bonds issued, or to be issued, by a county, city or town in compromise of indebtedness existing at the adoption of the Constitution of 1874, road taxes, levee taxes and municipal taxes directly into the State Treasury, and the receipt of the Treasurer of the State therefor shall be as effective for all purposes as if made by a county collector."

Appellant, State Treasurer, on this assumption, by special deputy, appellee Gower, demanded of the county clerk and W. M. Brewer, the taxbooks on the 22 day of January, 1932.

The appointment of appellee Brewer as sheriff during the disability of Johnson carried with it all the incidents appertaining to that office among which were the duties of collector and entitled him to perform the same upon the giving and filing of a collector's bond, which he did. The failure of Johnson to file the collector's bond, while working a forfeiture of the office as to him, did not vacate the appointment of Brewer, this appointment remaining effective during the disability of Johnson and until the vacancy was filled in the manner provided by law: §§ 10,031 and 10,038, Crawford & Moses' Digest. There was, therefore, a collector of taxes on the 22d day of January, 1932, the date of appellant's demand for the tax books, and there was no necessity for the evocation of § 10,034, *supra.*

This case does not involve the question of removal or suspension of one holding the office of collector of county revenues by virtue of appointment when a vacancy occurs by the failure of the sheriff to make a collector's bond, or where the office is created by the Legislature separate from the office of sheriff, and we are not required to say what authority would exist for the suspension or removal of the officer under that state of case.

It is suggested that we take judicial notice that the aggregate amount of the taxes to be collected in Stone County is greater than $15,000, and it is argued that

since the collector's bond filed by the appellee Brewer is for that amount only, it is therefore void on its face. This question appears not to have been raised in the court below, either on the trial or in the motion for a new trial, and therefore cannot be considered here. It may be observed, however, that if the bond was defective for any reason, the method is clear for its remedy. Section 10,028, Crawford & Moses' Digest.

It is our opinion that the trial court correctly denied the appellants' petition, and the judgment is affirmed.

McLean *v.* Fort Smith.

Opinion delivered April 11, 1932.

Cravens & Cravens, for appellant.

George W. Dodd, for appellee.

HART, C. J., (after stating the facts). To sustain the judgment, counsel for appellees invoke the power given by the Legislature to municipalities to destroy buildings which have become nuisances. Special reliance is placed upon our former decisions to the effect that the rights of property, like other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the Legislatures, under the governing and controlling power vested in them by the Constitution, may think

necessary and expedient. *McKibbin* v. *Ft. Smith*, 35 Ark. 352. In that case it was claimed that an old building was being repaired. The undisputed facts, however, showed that the only integral portion of it remaining was part of the wall left standing which was used in the new building. The court said that, as under the facts the building was completely destroyed and another building had been erected on the lot, there was no liability against the officers of the city for razing the old building. This rule was under the well-established principle that, under the police power of the State given to municipalities, they might establish fire zones, and prohibit the construction of wooden buildings within such districts. It would naturally follow that new buildings of the prescribed character could not be constructed under the guise of repairing old ones.

The court reaffirmed the doctrine of *Harvey* v. *Dewoody,* 18 Ark. 252. In that case the officers of the town were sued for tearing down the plaintiff's house. They justified under an ordinance declaring the house to be a nuisance. They set up facts which tended to justify their plea. Among other things, it was alleged that the house had not been occupied by tenants for a long time, and that it was being used by the public as a privy; that its use, condition, and situation were such as to endanger the health and property of the citizens of the town. These facts were admitted to be true by a demurrer filed to the answer by the plaintiff. Proper notice was given the plaintiff under the ordinance to abate the nuisance. Therefore the court held that the matters set up in the answer demurred to were sufficient to bar the action of the plaintiff. Consequently, it was held that the demurrer was properly overruled by the court below, and the judgment of the circuit court was affirmed.

In the case of *McKibbin* v. *Ft. Smith, supra,* the court recognized the law to be that, where a building has been removed by a police officer under an ordinance when, in fact, the owner had not in its erection violated any ordinance of the town inhibiting it, he may recover damages

against the town for the removal, or have an injunction against the threatened removal, as the case may be.

In both the cases above cited, the facts were undisputed that the erection and use of the buildings constituted a nuisance, and the question was therefore one of law for the court.

Here the facts of the case as to whether the building constituted a nuisance are in dispute, and call for application of the well-established doctrine that no man can be summarily deprived of his property or the use thereof. The right to abate public nuisances is a common-law right, and is derived from the necessity of the case. It is akin to the right of destroying property for the public safety in case of a devastating fire. Where the facts are in dispute, the authorities cannot justify on the ground of present necessity. *Hutton* v. *Camden,* 39 N. J. L. 122, 23 Am. Rep. 203; *People ex rel., Copcutt,* v. *Board of Health of the City of Yonkers,* 140 N. Y. 1, 35 N. E. 1, 23 L. R. A. 481, 37 Am. St. Rep. 522.

In the latter case, after reviewing the authorities on the question, the court said: "The result of these authorities is that whoever abates an alleged nuisance, and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril; and, when his act is challenged in the regular judicial tribunals, it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy, and is founded upon fundamental constitutional principles."

This principle of law has been expressly approved by this court in *Ward* v. *Little Rock,* 41 Ark. 526, and *Lonoke* v. *C. R. I. & P. Ry. Co.,* 92 Ark. 546, 123 S. W. 395, 135 Am. St. Rep. 200. In both of these cases the court quoted with approval from the opinion of Mr. Justice Miller in *Yates* v. *Milwaukee,* 10 Wallace (U. S.) 497. After saying that the mere declaration by the city council that a certain structure was a nuisance did not make it

so unless it in fact had that character. The learned justice said further: "It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws, either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."

In the present case the facts relative to whether the building was a nuisance or not were in sharp dispute, and the court should have submitted that question to the jury.

Inasmuch as the case must be remanded for a new trial, we call attention to the state of the record on the question of notice. No notice was ever served on the plaintiff, and no copy of the ordinance was posted on the premises. Giving therefore to the ordinance its utmost legal effect, still the proceedings under it must be regarded as entirely void because it does not appear that jurisdiction was acquired over the plaintiff by giving the notice prescribed by the ordinance.

It follows that the court erred in directing a verdict for the defendants, and for that error the judgment must be reversed, and the cause remanded for a new trial.

PHOENIX UTILITY COMPANY *v.* SMITH.

Opinion delivered April 11, 1932.

Buzbee, Pugh & Harrison, for appellant.

Arthur Cobb and *Murphy & Wood*, for appellee.

SMITH, J. Appellee sustained a serious injury on May 28, 1930, by being thrown from an engine and being dragged by the engine along the track upon which the engine was being run. He recovered a judgment against appellant to compensate his injury, from which is this appeal.

No question is raised here as to appellant's liability, it being insisted only for the reversal of the judgment appealed from that appellee's cause of action had been compromised and settled before the case was tried in the court below.

After his injury, appellee was treated at his home by a physician furnished by appellant, his employer, until June 2, when he was carried to a hospital, where, on June 4, he was operated on for double hernia. On June 13, which was nine days after the operation, appellant's adjuster visited appellee at the hospital for the purpose of settling his claim for damages.

Appellee stated that he was not ready to settle and would not be until he had consulted his doctor. The adjuster said: "You see the doctor, and I will return next Friday," which was June 20. On the 20th Dr. Tribble, who had performed the operation under employment by appellant, called on appellee at the hospital, and appellee said to him: "Doctor, the insurance adjuster was over Friday, and I would like to know how long it will be before I will be able to go back to work." According to appellee, the doctor answered: "You will be able to go back to work in three months. You will be just as good as you ever were, or may be stronger." Later in the day the adjuster called on appellee and asked: "Are you ready to settle?" and appellee answered: "I guess I am; I saw the doctor." The adjuster asked: "Are you ready to leave the hospital?" and appellee answered: "I don't know; I never asked about leaving the hospital." The adjuster said he would see Dr. Tribble, and he left the hospital, but soon returned and reported to appellee that

he had seen Dr. Tribble and that the doctor had said that appellee would be all right in three months, and that appellee could leave the hospital, and he did leave the hospital on that day, having been in the hospital about sixteen days after his operation.

Dr. Tribble testified that the operation was a proper and perfect one, and admitted that he had told appellee that he would be all right in three months and able to do his work as well as ever, unless there was some complication, and that recovery from such an operation was usually complete in three months.

Appellee testified that he and the adjuster figured what his wages would be for three months, if he were working, and, as the amount was slightly less than $400, they agreed upon a settlement for that amount.

It was the insistence of appellee in the court below that he relied upon and was misled by the statement of appellant's physician that he would be well and able to resume work within three months, whereas at the time of the trial from which this appeal comes in November, 1931, he was still suffering pain and was unable to work.

The jury returned a verdict for appellee in the sum of $3,000, less the $400 previously paid, and judgment was rendered accordingly.

The issue of fact in the case was submitted in an instruction given at the request of appellant, which reads as follows: "You are instructed that, before the plaintiff is entitled to recover in this case, he must first avoid the release executed by him, and that to avoid that release the burden is on the plaintiff to show by a preponderance of the evidence that Dr. Tribble told him, as his unqualified opinion, that he would be fully recovered from his injuries in three months, and that at the end of three months he would be able to go back to work, and that he had not so recovered at the end of that time; and, unless he discharges that burden, the release he executed is a valid release and your verdict must be for the defendant."

This instruction was as favorable as appellant could ask, as this court has frequently held that a release is not binding on the releasor where the physician of the party responsible for an injury represents to the injured person that his injuries are temporary, when, in fact, they are permanent, and the injured person executes the release relying upon such statement of the physician of the party responsible for the injury. *St. Louis, I. M. & S. Ry. Co.* v. *Hambright,* 87 Ark. 614, 113 S. W. 803; *Francis* v. *St. Louis, I. M. & S. Ry. Co.,* 102 Ark. 621, 145 S. W. 534; *Kansas City Southern Ry. Co.* v. *Armstrong,* 115 Ark. 128, 171 S. W. 123; *St. L., I. M. & S. Ry. Co.* v. *Morgan,* 115 Ark. 529, 171 S. W. 1187; *C., R. I. & P. Ry. Co.* v. *Smith,* 128 Ark. 223, 193 S. W. 791; *F. Kiech Mfg. Co.* v. *James,* 164 Ark. 137, 261 S. W. 124; *St. L.-S. F. Ry. Co.* v. *Cox,* 171 Ark. 103, 283 S. W. 81; *Sun Oil Co.* v. *Hedge,* 173 Ark. 729, 293 S. W. 9; *M. P. Rd. Co.* v. *Elvins,* 176 Ark. 737, 4 S. W. (2d) 528; *K. C. S. Ry. Co.* v. *Sanford,* 182 Ark. 484, 31 S. W. (2d) 963.

There is no contention that Dr. Tribble intentionally deceived appellee or practiced any fraud upon him, but the testimony supports appellee's contention that he relied upon the doctor's opinion as to his recovery, and that the doctor was mistaken in his prognosis.

The judgment of the court below must therefore be affirmed, and it is so ordered.

[redacted]

BAER *v.* ARKANSAS STATE HIGHWAY COMMISSION.

Opinion delivered April 11, 1932.

[redacted]

G. L. Grant, G. T. Fitzhugh, L. T. Fitzhugh and *R. W. Wilson,* for appellants.

Hal L. Norwood, Attorney General, *Claude Duty,* Assistant, and *Sam Rorex,* for appellee.

HUMPHREYS, J. These are cases consolidated for the purposes of trial, brought separately in the second division of the Pulaski Circuit Court by appellants against the Arkansas State Highway Commission to recover from it for damages on account of personal injuries received by the several appellants on account of the alleged negligence of the employees of appellee while engaged in repairing certain State highways. The action sounded in tort.

Demurrers were filed to the several complaints on the ground that appellee was and is not liable in damages for the negligence of its employees.

The court sustained the demurrers to the several complaints and dismissed same, from which is this appeal.

This court ruled in the case of *Highway Commission* v. *Dodge,* 181 Ark. 540, 26 S. W. (2d) 879, that highway contractors might maintain actions against the State Highway Commission for the amount due under their highway construction contracts. The ruling was based upon the construction of the statute creating the commission. The majority of the court interpreted the statute as authorizing the institution and maintenance of that class or character of suits. It was not ruled in that case that suits sounding in tort might be instituted and maintained against the Arkansas State Highway Commission, as that act created no such authority. After a careful examination of the statute creating the commission, a majority of the court find no authority therein for the institution and maintenance of suits for torts against said commission. It is the opinion of a majority of the court that the Arkansas State Highway Commission cannot be sued for damages resulting from the negligence of its employees when engaged in the construction or repair of State highways. The writer and Mr. Justice MEHAFFY do not concur in this view, but agree with the Chief Justice on this point in his dissenting opinion.

The judgment is therefore affirmed.

BUTLER, J., (concurring). In *Arkansas State Highway Commission* v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879, Justices KIRBY, MCHANEY and the writer registered our dissent. In that case we did not express the reasons for the dissent, but it was on the ground that in our opinion the Arkansas State Highway Commission was an agency of the State, and therefore the Legislature was without power to authorize it to be made defendant in the courts of the State.

As the General Assembly is the representative of the sovereign, it would unquestionably have the power to permit citizens to sue the State in its courts, unless its authority was limited in this respect by express prohibition of the Constitution. I think this is what the Constitution has done. Article 5, § 20, provides: "The State of Arkansas shall never be made defendant in any of her courts." As the State can only act through its agents, it necessarily follows that a suit against any agency of the State would be a suit against the State itself, which the General Assembly is not authorized to permit by reason of the section of the Constitution, *supra.*

I therefore concur for the reason stated.

I am authorized to say that Mr. Justices KIRBY and MCHANEY agree with the views above expressed.

SMITH, J., (concurring). In the case of *Arkansas State Highway Commission* v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879, we considered the right of one who had contracted with the State Highway Commission to maintain suit on his contract. Three members of the court were of opinion that the suit was against the State and could not be maintained for that reason. Two of the judges were of opinion that, while the suit was against the State, the State might be sued with her consent, and that this consent had been given, and therefore the suit could be maintained. Justice MEHAFFY concurred with me in the view that the Constitution contained a prohibition against the State being made a party defendant to any suit, and that the Legislature had no power to waive this exemption, but we were also of the opinion that the particular suit

was not one against the State. This opinion expressed the view that the suit was a proceeding wherein permission had been given to one who had contracted with the State Highway Commission to maintain an action thereon in the courts of Pulaski County to have his rights thereunder adjudged, and to receive satisfaction of any judgment there recovered out of a special appropriation with reference to which the commission had authority to contract. In other words, a juristic entity had been created, with a limited power of making contracts relating to roads forming a part of the State highway system, and the courts of Pulaski County were constituted as an agency to determine differences arising out of these contracts between the contractors, on the one hand, and the State Highway Commission on the other. There would have been no authority to maintain these proceedings, had the Legislature not conferred it.

It was said in the opinion which I there wrote that: "The Highway Commission was given no authority in the acts to which we have referred to make contracts in the name of the State. Its authority was limited to the making of contracts relating to the specific appropriations which had been made to discharge the contracts which the commission was authorized to make." It was there also said that: "A judgment rendered pursuant to this act would not be a 'judgment against the State.' It would be only an adjudication that the sum adjudged was due on the contract out of which the litigation had arisen, to be paid out of the appropriation made for this and other purposes."

The substance of the views expressed in my opinion was that suits might be maintained only so far as they were authorized by the legislation on the subject.

It was recognized by the Legislature in subsequent legislation that rights might accrue to others, as well as to the contractors engaged in the work of construction, etc., as to which persons there would be at least a moral obligation to make compensation. In recognition thereof, the 1929 session of the General Assembly passed

act No. 232, entitled, "An act for the protection of the employees of the State Highway Commission." Acts 1929, page 1072. This is a comprehensive act making provision for compensation "for accidental injuries or death suffered in the course of employment of said commission within this State."

But there is no legislation of which I am advised authorizing suits like those here involved. These plaintiffs allege no contract with the Highway Commission nor that they were injured while engaged as employees thereof. They allege only that they were injured through the negligence of persons who were employees, and I find no provision in the law whereby they may be compensated.

No one would have the right to sue the Commission, either upon contract or for tort, and to demand compensation out of these special appropriations unless the act making the appropriations had so provided. There may be as much right morally for the travelers on the State's highways, as were the plaintiffs in the instant case, to be compensated for the tort as there is for the contractor to be compensated upon his contract, but the answer to that contention is that the Legislature has not so provided. Neither would have any right to sue unless that right was expressly given, and only such recoveries, payable out of these special appropriations, may be had, as are authorized by the Legislature.

We recently had before us a case in which an employee of the city of Little Rock sought to recover compensation against the city for an injury sustained through the negligent failure of his superior to inspect a defective light pole owned and used by the city upon which he was employed. Briefs were there filed which contained a most exhaustive review of the authorities, in which it was insisted that our decisions upon the subject of the liability of governmental agencies for the negligence of their employees was contrary to the overwhelming weight of authority. That was a suit, not against the State, but against a city of the State, and, without attempting to

decide whether our previous decisions were contrary to the weight of authority or not, we adhered to them. We there said: "From the foregoing cases (our own there cited) 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." *Little Rock* v. *Holland,* 184 Ark. 381, 41 S. W. (2d) 383. Certainly the sovereign State has as much immunity from suit as has one of its cities, and, no provision having been made for the maintenance of suits like the instant one, or for the recovery of compensation thereon, the demurrer was properly sustained.

HART, C. J., (dissenting). Mr. Justice HUMPHREYS and myself think that the State Highway Commission is an agency of the State, and not a separate body corporate.

We do not, however, construe our constitutional provision that the State of Arkansas shall never be made defendant in any of her courts to mean that she shall never be defendant. If so, the word "made" might just as well not have been used.

We construe the provision to mean that a State which consents to be sued may prescribe the court, the terms, and conditions. The extent of the recovery and manner of proceedings are to be governed by the statutes giving the right to sue the State.

Our views are expressed in a more extended way in our concurring opinion in *Arkansas State Highway Commission* v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879. It is no answer to say that this view would be but declaratory of the well-settled principle of constitutional law that a sovereign State is incapable of being sued without some legislative provision authorizing such a proceeding. *Auditor* v. *Davies,* 2 Ark. 494.

Other constitutional provisions are but declaratory of existing rights. To illustrate, the provision that private property shall not be taken for public use without just compensation is implied from the nature and struc-

ture of our government, and is generally regarded as founded in the fundamental principles of natural rights and justice, and as lying at the basis of all wise and just government, independent of all written constitutions or positive law. *Cairo & Fulton R. Co.* v. *Turner,* 31 Ark. 494, 25 Am. Rep. 564.

It seems anomalous to us to say that the framers of the Constitution meant to say that the State, through its Legislature, could not provide the particular court or courts in which claims might be established, but could provide for their establishment before the Highway Commission or other board or court of claims. Such course would be unnecessarily cumbersome and expensive, and less in keeping with the dignity of the State than to allow itself to be sued in its own constitutional courts upon such terms and conditions as its legislative body may prescribe.

"When a State does abdicate this attribute of sovereignty and permits itself to be sued, the citizen who benefits by such an act of grace acquires no vested right thereby, but simply a privilege voluntarily granted by the State, which may be hedged about with terms and conditions, and may be withdrawn as freely as it was given." Re Hooper, 179 N. Y. 308, 72 N. E. 229.

We do not think that the act limits claims to those founded on contract. If the Highway Commission negligently injures a person in the construction of the State highways, there would be the same liability under the act as where it took or injured property, or committed a breach of contract relating to road construction.

Mr. Justice MEHAFFY agrees to this construction of the act.

MILLS *v.* SURRATT.

Opinion delivered April 11, 1932.

George W. Clark, for appellant.

George F. Hartje, for appellee.

KIRBY, J. Appellants brought this suit for the balance claimed to be due under a lease-with-option-to-purchase contract and asked for a receiver to take charge of a crop of corn raised on the premises and sell same, and out of the proceeds pay the debt to plaintiff with costs, etc.

The lease or rent contract was filed as an exhibit to the complaint, and the testimony shows that the lessees had not attempted to carry out the option contract, and it was undisputed that $185 was due under the rent contract. Defense was made on the ground that the lessors had agreed to accept in payment of the rent corn at $1 per bushel, and a written memorandum, signed by the lessor, was introduced in evidence, which reads as follows:

"I will pay J. H. Surratt $1 per bushel for good, sound corn delivered to my barn in Conway on this land payment contract to 1933. 4-12-28. W. B. Mills."

The appellees contended that they had the right to pay the rent in corn, and offered the memorandum in support of it. Appellants denied having given him any such right, and insisted that the memorandum was only an agreement to accept corn at $1 per bushel "on this land payment contract to 1933"; that no corn had been tendered upon the contract for payment of the land, nor had any payments thereon ever been made. There was some other testimony introduced about the meaning of the contract, which was objected to as an attempt to change or vary the terms of a written contract by parol testimony.

The memorandum does not appear to be ambiguous, nor uncertain in meaning, and the court should have construed it in accordance with its obvious meaning, an agreement to accept the corn on the land payment contract. The uncontradicted testimony shows that no payments were made on "the option-to-purchase contract," nor was any tender made of the corn under said option contract; and the court erred therefore in holding that the memorandum signed by the lessor bound him to the acceptance of corn at $1 per bushel in payment of the rent for the land, and in effect requiring a specific performance of it by him.

The burden of proof was upon appellees, and the court's finding was contrary to the weight of the testimony.

There is no merit in appellees' contention that the record does not contain all the testimony heard in the trial. According to the decree and the chancellor's certificate, it contains the evidence taken in open court in the hearing of the cause, and "the same is by the chancellor found correct" and signed and approved as constituting the bill of exceptions and transcript in the case. It makes no difference that this certificate of the chancellor appears below his signature to the decree and order granting the appeal, since it is in the transcript before the clerk's certificate of authentication thereof.

The decree is accordingly reversed, and the cause remanded with directions to enter a decree in accordance with this opinion for the amount of the rent due, less the proceeds of the sale of the corn attached. It is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY *v.* REMEL.

Opinion delivered April 11, 1932.

Thomas B. Pryor and *Daggett & Daggett,* for appellant.

Pace & Davis, for appellee.

MEHAFFY, J. The appellee on June 3, 1930, was in the employ of the appellant as a brakeman on a freight train running from North Little Rock, Arkansas, to Pop-

lar Bluff, Missouri. While in the service of appellant as such brakeman, he was engaged in switching a part of the train at Newport, Arkansas, and was thrown from one of the cars and injured.

The appellee was at the time of the injury engaged in interstate commerce and was assisting in operating a train which was carrying interstate commerce, and the suit was therefore brought under the Federal Employers' Liability Act, and a recovery for his injury sought under the provisions of that act.

Appellee alleged that he was injured by the carelessness and negligence of the appellant; that there were about 60 cars in the train when it reached Newport, Arkansas; the train headed in on a side track, cut off about 35 cars, went through a switch at the north end of the passing track out on the main track.

It was discovered that the main line was occupied, and it became necessary to back the 35 cars again into the passing track.

The appellee, in the performance of his duty, was riding on the last car to protect the train as it backed into the passing track. It was alleged that, on account of the carelessness and negligence of the engineer, E. J. Zimmerman, in stopping the train in an unusual and violent manner, appellee was thrown from said car to the ground, and injured in such a way that he will never be able to do or perform manual labor.

He was thrown with such violence and force that it resulted in an injury to his spine, spinal column, and spinal cord, crushing and breaking, among other injuries to the spine, the first lumbar vertebra, thereby obliterating the space between the first and second lumbar vertebrae, also narrowing the space between the first lumbar and the vertebra above it, causing said spinal column to become displaced and out of line at and below the place of injury, also injuring and producing a malformation of the second lumbar vertebra, also otherwise fracturing and injuring the second, third, and fourth lumbar vertebrae, fracturing the ninth and eleventh ribs on the left

side, resulting in a paralysis of the bladder and bowels and other organs of the body, including his lower limbs. His nervous system was shattered, his injuries making a permanent physical wreck of him.

At the time he received the injury, he suffered great and excruciating pain of body and anguish of mind, and will continue to so suffer throughout the remainder of his life. At the time he was injured he was 39 years of age, was strong and able to perform, and was performing, hard manual labor for a livelihood, and was earning $250 per month; that, on account of said injury, he will not be able to do or perform labor of any kind in the future; that he had been damaged in the sum of $75,000, for which he prayed judgment.

The appellant answered, denying all the material allegations in the complaint as to negligence, and as to his injuries, and interposing the defenses of contributory negligence and assumption of risk.

At the trial it was admitted that the appellant is a corporation; that it was engaged in interstate commerce at the time of the alleged injuries, and that the appellee was engaged in interstate commerce at the time of the accident.

There was a verdict and judgment for $60,000, and this appeal is prosecuted to reverse said judgment.

The appellant's first contention is that the evidence is insufficient to sustain the verdict in favor of appellee, and that the court erred in refusing to give appellant's instruction No. 1, which instruction directed a verdict for the appellant. Appellant states that, under the Federal Employers' Liability Act, Congress took possession of the field of employer's liability to employees engaged in interstate commerce by rail; that all State laws on the subject are superseded, and that the rights and obligations of every plaintiff invoking the provisions of the act are dependent upon it and applicable principles of common law as interpreted by Federal courts, and that therefore the character and sufficiency of evidence to establish negligence is not subject to control of the State.

It is argued that the injury complained of must have resulted in whole or in part from the negligence of one or more of the employees, and that proof of such negligence is essential to recovery. This statement of the law by appellant is correct.

This court, in a recent case, said: "This suit is brought under the Federal Employers' Liability Act, and, since this act does not define negligence, the question of whether the acts complained of amount to negligence, is to be determined according to the common law, and according to the rules prevailing in the Federal courts as to what constitutes negligence under the common law. However, there is no difference between the decisions of the Federal court and of this court as to what constitutes negligence." *Mo. Pac. Rd. Co.* v. *Skipper,* 174 Ark. 1083, 298 S. W. 849; *St. L.-San Francisco Ry. Co* v. *Smith,* 179 Ark. 1015, 19 S. W. (2d) 1102.

In the case of *St. L.-S. F. Ry. Co.* v. *Smith, supra,* relied on by appelant, it is stated that the rule governing the State courts is well stated in the case of *C. M. & St. P. Ry. Co.* v. *Coogan,* 271 U. S. 472, 46 S. Ct. 564. The Supreme Court of the United States in that case said: "It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line, the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. * * * The fact that deceased was run over and killed at the time and place disclosed has no tendency to show that his foot was caught. * * * The record leaves the matter in the realm of speculation and conjecture. That is not enough."

Neither this court nor the Supreme Court of the United States will sustain a verdict based on speculation and conjecture.

The evidence in this case shows that the appellee was about forty years of age at the time of the trial, had been in the service of the appellant since 1910, and had been in the service altogether about 23 years, 21 of which he was a brakeman. At the time of his injury, he was swing brakeman on a train of about sixty cars, and rode the engine from Bald Knob to Newport. When the train went into the passing track at Newport, according to his testimony, he got off the engine and caught back at the last car. The train pulled up in the passing track and stopped, clearing the crossing. After cutting off the cars, the train pulled up at the north end of the yard. Appellee was on the rear car with his right foot in the stirrup. The train could not get out far enough to get the rear car of the cut by the switch, so they could shove them into track 3. When the engineer stopped, appellee got off the car on the ground and walked around the end of the car. The engineer blew three short blasts of the whistle, meaning that he was going to back up, and then appellee looked around and could not see any one. Appellee got on the rear car to keep any one from being injured by backing up. He does not know exactly how far he backed, but he says that all at once a jar and a noise and all came together, and he was thrown doubled up in a knot, and fell on the rail ahead of the cars. He was riding on the last car from the engine with his right foot in the stirrup and left foot on the end of the grab-iron, and when the jar came, it all came at once. He tried to stay on, but was jerked off on the ground.

He was at the time where his duty required him to be. The train did not make an ordinary stop, but a very violent one, and he testified that he knew the engineer did not use the right brake on that cut of cars. Trains like that are equipped with two brakes, an independent and an automatic brake. The independent brake affects the engine and tender only; the automatic brake affects the whole train. The automatic brake should be used in operating a train with 35 cars. If used, it sets the brakes on all the cars at the same time. All the brakes take

hold at the same time. The purpose of using the automatic brakes is to avoid jerking and hard stopping. If the independent brake is used, it will make a hard stop and jerk. It glues the engine to the rail, and the cars go along by themselves, and, of course, when they get to the last car, they will surely jerk like a whip.

Appellee could tell from the way the cars were stopped that the stop had been made by the use of the independent brake. If the automatic brake had been used, it would have applied the brake on the entire cut of cars.

When the independent brake was applied, the cars ran out as long as there was slack, and then jerked back. That was what threw him off. Appellee said at the time the cars were moving when he got on more rapidly than he was walking. They were moving at about the rate of five miles an hour. There is a difference in the action of the train when the independent brake is used from its action when the automatic brake is used.

Appellee testified that he had a right to believe that the engineer would handle the train so as not to jar him off, and that the engineer should have done so; that it was his duty to do so, but he did not do it; that appellee had no reason to suspect that he would stop as he did.

Appellee also testified that it was not the custom and not usual and proper to stop the train violently like it was stopped when he was injured.

H. L. Walker testified that he worked for the appellant from 1919 to 1928 as switchman and brakeman; that he was familiar with the character of trains and engines that appellee worked on. The engine was the heaviest type of freight engine running into Little Rock. He testified at length about the rules with reference to stopping trains, and said that the rules required that, when stopping a long train, while backing at a moderate or low speed, to use a light reduction; keep the engine brakes from applying, and continue to use steam. The object is to prevent the slack from running out harshly. He testified the easiest way to control a train is with the automatic brake. The engine brake applies only on the

engine and tender; that the use of the independent brake in backing a train of 35 cars would make a severe stop, and the further it goes back, the more severe it is, and the last car gets the hardest jolt; it is a violent stop, and that is not the ordinary way to stop a train.

This witness testified at length about the use of the automatic brake and independent brake, and when asked if he would not expect the use of the independent brake ordinarily in that kind of movements, he answered that he would not when they had the air lined up, because it is a very severe jolt. He was then asked: "But ordinarily he would?" and he answered, "No, sir; ordinarily he would not."

M. Dumas, a witness, also testified that he had been in the service of the Missouri Pacific for 12 years, but that he was not employed now. He is familiar with the character of engines and trains used on through freights. He testified as to the effect of the use of the independent brake, and said it would be awful severe; that it would be hard to stay on; would be dangerous, it would come with such a jerk. He testified that he would not expect the engineer to stop the train, such a train as appellee was injured on, with an independent brake; that they were not supposed to use the independent brake except in emergency cases.

J. W. Bernard, employed by the Missouri Pacific from 1899 to 1929, testified that he was familiar with the kind of service being performed at the time of the accident, and that the proper brake for the engineer to use was the automatic; that stopping with the independent was very severe. He was asked: "When you have your train, and the air is coupled up through the train, the instructions are to use the automatic brake?" and he answered, "Yes, sir." He stated that the way to use an independent brake to stop a train was to apply it very gradually, and give it time to let the slack run out easily. If you jam on the independent brake, the slack will run out suddenly and jerk the rear end.

P. G. Steed, another witness, formerly employed by appellant as locomotive fireman and engineer, testified that in a back-up movement involving 35 cars, the engineer should use the automatic brake. In such movement it was the duty of the brakeman to be on the last car, and the engineer should know he was there. He testified on cross-examination that, when the air is coupled up, the automatic must be used; that you would use the independent brake handling a light engine or a very light bunch of cars.

E. J. Zimmerman testified for the appellant that he was the engineer at the time of the accident, and used the independent brake in making the stop; that he made a light application and then made a further application and stopped. He and a number of witnesses testified that the stop made at the time of appellee's injury was the ordinary stop, and, in effect, that it was not negligence.

Appellant says that the case of *Ft. Smith S. & R. I. Rd. Co.* v. *Moore,* 172 Ark. 353, 289 S. W. 6, was reversed by the Supreme Court of the United States on the authority of *C. M. & St. P.* v. *Coogan.* The Supreme Court of the United States, in reversing the case, stated that it was reversed on authority of *Gulf, Mobile & No. Rd. Co.* v. *Wells,* 275 U. S. 455, 48 S. Ct. 151, and *C. M. & St. P. Rd. Co.* v. *Coogan.* We have already called attention to the Coogan case.

In the other case given as authority for reversal of the Moore case, the Supreme Court of the United States expressly stated that there was no evidence that the engineer knew or should have known that Wells was not on the train, but was attempting to get on after it had started, and was in a situation in which a jerk of the train would be dangerous to him.

In the instant case, the engineer knew where appellee was, and knew he was in a situation in which a jerk of the train might be dangerous.

The court also said, in the Wells case, that the statement that there was a jerk was mere conjecture, and the court, continuing, said: "In short, we find that, on the

evidence and all the inferences which the jury might reasonably draw therefrom, taken most strongly against the railroad company, the contention that the injury was caused by the negligence of the engineer is without any substantial support. In no respect does the record do more than leave the matter in the realm of speculation and conjecture."

In the instant case there is evidence to the effect that the automatic brake should have been used, and that appellee was where his duty required him to be, on the last car, and that the engineer knew he was there. There is therefore substantial evidence of the negligence of the engineer causing the injury to appellee. A verdict will not be sustained either by the Supreme Court of the United States or this court on speculation or conjecture, nor where there is only a scintilla of evidence, but the rule in both courts is that there must be substantial evidence upon which to base the verdict. It is also the rule, not only in this court, but in the Supreme Court of the United States, that, if there is substantial evidence, it is then a question for the jury, and the rule in both courts also is that the burden is upon the plaintiff to prove negligence, and also that the negligence was the cause of the injury.

Appellant calls attention to many authorities to the effect that proof of negligence proximately causing the injury is a prerequisite to recovery. This court has always held that the burden is on the plaintiff, not only to prove negligence, but that the negligence caused the injury.

We have not set out the evidence in detail, but have referred to it sufficiently to show that there was substantial evidence upon which to base the verdict.

In this case, as we have already said, there is evidence tending to show that the engineer was guilty of negligence, which caused the injury, and nothing need therefore be said about the doctrine of *res ipsa loquitur*.

It is next contended that the appellee cannot recover because he assumed the risk. If the evidence of the witnesses that it was improper to use the independent brake

instead of the automatic, and that this independent brake was applied suddenly, so as to cause a violent jerk, when the stop could have been made in the ordinary way, then of course the appellee did not assume the risk. An employee does not assume the risk of the negligence of the master or its servant, the engineer. In fact, the act under which this suit is brought authorizes a recovery if the injury is caused in whole or in part by the negligence of the master or its servants. The employee would not assume the risk of the negligence of the master unless he knew of its existence.

According to the evidence of the appellee, he was in a perilous position, and the engineer knew it. Of course, the evidence on the part of the appellant is in conflict with this, but, wherever the evidence is in conflict, its weight and the credibility of the witnesses are questions for the jury.

The question of a continuance or a postponement of the case was within the sound discretion of the trial court, and it does not appear in this case that the court abused its discretion. The appellant knew about the evidence that it wanted in ample time to have been prepared with its evidence, and it was during the progress of the trial that appellant asked for the postponement, and asked that plaintiff be directed to send a telegram to the Mayo Clinic.

This court has often held that the granting or refusing a postponement is within the sound discretion of the trial court, and the manner of procedure and the rules regulating the conduct of a lawsuit must necessarily be largely within the discretion of the trial court.

It is finally contended by the appellant that the verdict of the jury is excessive. Appellee was 39 years of age, was healthy and strong, and able to work all the time, and was earning $250 per month. He had been working for the company for a number of years; was in the hospital for a long while; the injury was very painful; appellee cannot sleep the whole night through, or do any work, and has been confined to his house for

a long while; he has no control over his bowels or urine, and no feeling in that part of his body; he never had any trouble with his bladder or urine before, or his bowels, and it appears from the evidence that he will not only be unable to perform any work and earn anything in the future, but that he will necessarily suffer pain and inconvenience for the rest of his life.

He has a fractured spine, the first lumbar vertebra is badly crushed, and his spinal cord pinched. Some of his ribs were broken, and as a result of the injury he has no feeling in the lower part of his body, and no control over his kidneys or bowels.

The evidence of the physician was to the effect that he would never be any better, but gradually grow worse, without hope of recovery, and that he will continue to suffer pain.

The amount of recovery in a case of this sort should be such, as nearly as can be, to compensate the injured party for his injury. The suit is for compensation, and compensation means that which constitutes or is regarded as an equivalent or recompense; that which compensates for loss or privation remuneration.

It appears from the evidence that the injuries received are very severe. However, the undisputed evidence shows that in 1914 or 1915 the appellee was severely injured in an accident and was at that time in the hospital several months, receiving treatment for his injuries.

There is evidence tending to show that his injuries at that time were severe, and resulted in the loss of control of bowels and bladder, and partial paralysis from the waist down. He afterwards gained control of the bowels and partial control of the bladder. There was some evidence tending to show that the injury received in 1914 or 1915 affected his spine.

We have considered carefully all the evidence with reference to his injuries, and have reached the conclusion that a judgment for $60,000 is excessive, and that it should be reduced to $40,000.

The judgment is therefore reduced to $40,000, and affirmed for that amount.

Opinion delivered April 11, 1932.

[redacted]

George M. Booth, W. J. Schoonover and *Walter L. Pope,* for appellant.

W. P. Smith and *H. L. Ponder,* for appellees.

McHANEY, J. Appellant, a judgment creditor of one Davis and his bondsmen on a forthcoming bond, sued appellee Warner who is the sheriff of Lawrence County, and the other appellees who are the bondsmen on his official bond, to recover the sum of $428.85, the amount for which an execution was issued against said Davis and his bondsmen, on the ground that the execution was not returned within sixty days, as provided by § 4360, Crawford & Moses' Digest. There were three executions issued on said judgment, the first on November 7, 1929, upon which the officer made the following return: "This writ of execution came to my hand on the 7th day of November, 1929, at ten o'clock A. M., and is hereby returned unsatisfied, there being nothing pointed out to levy on." This return did not show the date on which the indorsement was made nor when it was filed, but the

clerk's execution docket shows that he noted the return as of the 17th day of January, 1930, a period of more than sixty days after its issuance. The second execution was issued January 17, 1930, and the indorsement of the return made by the officer is as follows: "This writ came to my hands on the 17th day of January, 1930, at two o'clock P. M. On the 16th day of March, 1930, I hereby return the said execution unsatisfied, there being nothing pointed out to levy on." This return showed on its face that it was returned within the sixty days, but the clerk's execution docket noted its return as of April 1, 1930, a period of more than sixty days according to the clerk's docket. The third execution was issued on April 2, 1930, and upon this execution a levy was made on certain real property owned by one of the bondsmen on Davis' forthcoming bond. The property was advertised and sold to one of the attorneys for appellant for a nominal sum. The following return was then made on the proof of publication which was attached to the execution: "There being no one present to bid on this property, it was knocked off to George M. Booth, for costs plus $1, he being attorney for Southern Finance Corporation. Signed W. E. Archer." Mr. Archer was the deputy sheriff who handled all the executions and made the sale. The case was submitted to the court sitting as a jury, and a finding was made "that the different executions issued for the collection of the judgment sued on herein were properly returned by R. B. Warner, sheriff of Lawrence County to the clerk of the circuit court of Lawrence County within the time and for the manner as provided by law." The court further found that as to the last execution certain lands were levied upon, properly advertised and sold to George Booth, for which a certificate of purchase was made out and delivered to and retained by him, and that appellant was not entitled to recover in the action. Judgment was entered accordingly.

The sheriff and his deputy, Mr. Archer, were permitted to testify over objections that they had made return of the executions in apt time; that it was their prac-

tice to do so, and that they were careful not to let them go by; that the clerk kept a box in his office in which papers of this kind were deposited by the sheriff and his deputies to be filed by the clerk; that they were sure these executions were deposited in the box in the clerk's office within the sixty days from the date of their issuance; and that the clerk's execution docket erroneously stated the date later than the actual return. We fail to see why this evidence is not competent, even though it tends to contradict the entry made by the clerk in his execution docket, especially so since the clerk himself did not testify that he entered the return date in his docket the day the writs were actually deposited in his office. It might be that the clerk did not enter them into his docket until some time later and noted the return as of the day he made the entry. At any rate we do not think the entry made by the clerk is conclusive of the fact as to when the return was made and not subject to contradiction by the sheriff. The first execution did not show the date of the return in the indorsement by the sheriff, but the second one did and it is reasonable to suppose the sheriff would return the writ to the clerk's office on the date of the indorsement made. As to the third execution, the return shows it was executed by making a levy and sale of the property, and in all probability could not have been returned within the sixty days because the sale had to be advertised and made according to law. This court has many times held that the statute under which this action is brought is highly penal, and that it should not be applied except in cases coming clearly in its purview. *Mayfield Woolen Mills* v. *Lewis,* 89 Ark. 488, 117 S. W. 558, 16; same case, 97 Ark. 149, 133 S. W. 590; *McIlroy Banking Co.* v. *Mills,* 178 Ark. 741, 11 S. W. (2d) 481.

Since the case was tried before the court as a jury, its finding and judgment will not be disturbed by this court, unless there is no substantial evidence to support it. The testimony of the sheriff and his deputy, being competent, constitutes substantial evidence that the returns made on the different executions were made in apt

time. Of course, the clerk's docket was evidence of the facts shown, but it was not conclusive evidence on the sheriff.

Affirmed.

SMITH *v.* THOMAS.

Opinion delivered April 18, 1932.

McKay & Smith, for appellant.

J. E. Hawkins and *A. B. Vaughan,* for appellee.

HART, C. J. The appellee brought this suit in equity against the appellant to obtain a decree for a debt due and a foreclosure on a mortgage on real estate to secure the same. Appellant denied owing the debt sued for, and as a further defense claimed that the consideration for the mortgage was an agreement not to prosecute her for a crime.

Appellee, J. A. Thomas, was a merchant and Ada Smith, appellant, was his customer for the years 1927 and 1928. In the first part of the year 1928 she gave him a mortgage on real estate to secure her indebtedness for the year 1927 in the form of a promissory note for $400, and for further supplies to be furnished her during the year 1928. The chancellor found that the appellant was indebted to the appellee in the sum of $322.09, and rendered judgment for that amount. A decree of fore-

closure on the real estate was also entered of record. The facts will be sufficiently stated in the opinion. The case is here on appeal.

According to the testimony of appellee and his bookkeeper, Ada Smith was indebted to them in the sum of over $400. They gave an itemized list of the articles of merchandise furnished her and told in detail of the transaction between them. While their testimony is contradicted by that of Ada Smith, the chancellor was the judge of the facts, and it cannot be said that his finding in favor of the appellee on this branch of the case is against the weight of the evidence. No useful purpose could be served by setting out in detail the facts testified to by the parties. Suffice it to say that the testimony is in conflict, and under our settled rules of practice we cannot disturb on appeal the findings of fact made by a chancellor unless they are clearly against the preponderance of the evidence.

Further defense to the suit was that the chief consideration of the note was an agreement not to prosecute the appellant for a crime. The general rule is that it is to the interest of the public that the suppression of a prosecution for crime should not be made a matter of private agreement. Hence a settlement by such transactions is contrary to public policy and void. In the instant case, however, according to the testimony of the appellee, he did not agree not to prosecute the appellant for the crime of disposing of mortgaged property. He told her that he would prosecute her if she did not pay him. Later he did prosecute her for disposing of mortgaged property. He never did agree not to prosecute her if she would pay him. He had a right to use every legal means available to collect his claim. *Goodrum* v. *Merchants' & Planters' Bank,* 102 Ark. 337, 144 S. W. 198, Ann. Cas. 1914 A, 511.

The chancellor found under the facts that there was no contract tending to stifle a criminal prosecution, and the appellee, as above stated, had the right to use all legal means to collect his claim. This did not amount to com-

pounding a criminal offense. *Shattuck* v. *Watson*, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551; *Ellis* v. *First National Bank of Fordyce*, 163 Ark. 471, 260 S. W. 714.

No other grounds for reversal of the decree are urged upon us. The result of our views is that the decree of the chancery court was correct, and it will therefore be affirmed.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY *v.* SPEER.

Opinion delivered April 18, 1932.

Powell, Smead & Knox, for petitioner.

Surrey E. Gilliam, for respondent.

HART, C. J. The Connecticut General Life Insurance Company filed in this court an application for a writ of prohibition against W. A. Speer, judge of the Second Division of the Union Circuit Court, to prohibit said court from exercising jurisdiction in a suit brought against the petitioner by Walter J. Williams.

The record shows that Williams brought suit in said circuit court against the Connecticut General Life Insurance Company to recover upon two contracts of insurance which were issued under what is called the "group insurance" plan.

The Connecticut General Life Insurance Company was organized and doing business under the laws of Connecticut. It issued a group or master policy of insurance to the Gulf Oil Corporation of Pennsylvania, and its subsidiary corporations. The Gulf Refining Company of Louisiana was one of the subsidiary corporations. The master policy contains in detail the terms upon which the insurance is issued.

In one of the contracts sued on, the premiums were paid by the Gulf Oil Corporation of Pennsylvania without any reference to any amounts to be collected from the employees of the oil corporation.

On the second contract sued on, the employee signed an application in blank form which reads as follows:

"Application

"No..... Date.....

"I hereby apply for Contributory Group Life Insurance in amount now or hereafter applicable to my class provided for in the policy issued by the Connecticut General Life Insurance Company and rider dated November 1, 1929, to the Gulf Oil Corporation of Pennsylvania, agreeing to be bound by the rules governing this insurance, and I authorize the Gulf Oil Corporation of Pennsylvania and/or subsidiaries and/or affiliated companies, to deduct in advance the necessary amount per month from my pay, to apply towards premium for said insurance.

"I reserve the right to rescind the order in writing at any time.

"(Signature).....'"

This application or deduction blank was presented to Williams while at work on a lease in Union County, Arkansas, by an employee of the Gulf Refining Corporation of Louisiana. The insured, Williams, was working for the latter company at the time he signed the application. The insurance company had nothing whatever to do with the matter.

Service was had in the suit on the insurance contract upon petitioner in the manner provided by statute

for suing foreign corporations doing business in this State.

The insurance company appeared only for the purpose of quashing the service of summons upon it, and the ground therefor was that it was a foreign corporation; that it was not authorized to do business in the State of Arkansas; and that it had not done business in said State.

It is first sought to establish jurisdiction in the circuit court in the suit on the insurance contract by the agency of the oil corporation in taking applications for insurance for its employees.

We have not set out the master contract of insurance in detail and do not deem it necessary to do so. It is sufficient to say that similar contracts of insurance under the group plan have been construed not to constitute the insured as agent of the insurer to solicit applications for insurance from its employees. *Duval* v. *Metropolitan Life Insurance Co.*, 82 N. H. 543, 136 Atl. 400, 50 A. L. R. 1276; and *Leach* v. *Metropolitan Life Ins. Co.*, 124 Kan. 584, 261 Pac. 603.

In one of the contracts the employer paid all the premiums and costs of handling the insurance for its employees. In the other deduction was made from the wages of the employees signing the application to pay a part of the premium. Under these circumstances the employer was not the agent of the insurance company, and had no authority to act for it.

The fact that the employees of the oil corporation were to be insured did not create the oil corporation the agent of the insurance company. It was merely one of the terms or conditions upon which the insurance company would issue a policy at the request of the employer. By the terms of the policy, the insurance company looked to the employer for the payment of the premiums. It did not make any difference to the insurance company that the oil corporation might collect a part of the premiums from its employees. The employee was insured because

he made application through a contract executed for his benefit by the oil corporation with the insurance company.

The contract was executed and the whole transaction had beyond the limits of the State of Arkansas, and the rights of the parties were fixed by that contract. As above stated, the insurance company was not concerned with how many of the employees of the oil corporation made application for insurance. That was a matter between the oil corporation and its employees. Therefore, under the authorities above cited, we are of the opinion that the petitioner was not doing business within the State of Arkansas nor was it attempting to carry on its insurance business in this State.

It is next insisted that, under § 6061 of Crawford & Moses' Digest, the employees of the Gulf Refining Company of Louisiana became agents of the insurance company by securing applications in the blank form above set out to be issued to the employees of the company in the State of Arkansas.

The section reads as follows: "Effect of agent soliciting insurance. Any person who shall hereafter solicit insurance or procure applications shall be held to be soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding; and whenever any agent of a corporation or association shall do any of the acts named in § 5978 within this State, said corporation or association shall be subject to the jurisdiction of the courts of this State by service named in § 6063, whether said corporation or association has complied with the requirements of said last-named section or not."

This section of our statute was passed by the Legislature in 1895 and was borrowed from a statute passed in the State of Iowa in 1880.

It is the settled law of this State that, where the Legislature adopts a statute of another State, which has been construed by the courts of that State, it will be held that that interpretation was also adopted. *Nebraska*

Nat. Bank v. *Walsh,* 68 Ark. 433, 59 S. W. 952; *Hanson* v. *Hodges,* 109 Ark. 479, 160 S. W. 392; *McIlroy* v. *Fugitt,* 182 Ark. 1017, 33 S. W. (2d) 719.

The Iowa statute was construed by the Supreme Court of that State on December 20, 1888, which was before our Legislature passed our statute. In *St. Paul Fire & Marine Ins. Co.* v. *Shaver,* 76 Ia. 282, 41 N. W. 19, the court said:

"The purpose of the statute was to settle, as between the parties to the contract of insurance, the relation of the agents through whom the negotiations were conducted. Many insurance companies provided in their applications and policies that the agent by whom the application was procured should be regarded as the agent of the insured. Under that provision, they were able to avail themselves, in many cases of loss, of defenses which would not have been available if the solicitor had been regarded as their agent, and many cases of apparent hardship and injustice arose under its enforcement, and that is the evil which was intended to be remedied by the statute, and it ought to be so interpreted as to accomplish that result."

The same construction was placed upon it in the latter case of *Jemison* v. *State Insurance Company,* 85 Iowa 229, 52 N. W. 185.

Hence the Legislature will be held to have adopted the construction placed upon the statute by the Supreme Court of the State of Iowa.

The result of our views is that, under the allegations of the petition, the circuit court is about to exercise judicial power over a nonresident corporation which is not authorized to do business in this State, and which has not attempted to do any business here.

No service of process can be legally had on the petitioner in the Union Circuit Court. Therefore prohibition is the proper remedy. *Order of Railway Conductors of America* v. *Bandy,* 177 Ark. 694, 8 S. W. (2d) 448; *Metzger* v. *Mann,* 183 Ark. 40, 34 S. W. (2d) 1069.

From the views we have expressed, it follows that petitioner had no adequate remedy at law, and the writ of prohibition should be granted.

It is so ordered.

[redacted]

McCown *v.* Edwards.

Opinion delivered April 18, 1932.

[redacted]

Frauenthal, Sherrill & Johnson, for appellant.

B. E. Isbell, for appellee.

Smith, J. On February 27, 1928, the probate court of Sevier County, Arkansas, appointed L. D. McCown as guardian of Helen Marjorie Kiser and Elmer Kiser, minors. On March 28, 1928, McCown received $1,500 for the use of each ward, which he deposited on the same day in separate savings accounts with the Bank of DeQueen, of which institution he was the president. The money remained on deposit, less certain expenses of maintenance

and support of the minors, until October 4, 1929, when McCown applied for authority to lend the money to a bank on interest at four per cent., to be paid semi-annually. The petition for this order recited the inability of the guardian to obtain satisfactory loans to be secured by real estate, and, upon hearing the petition, the probate court found and ordered "that it would be better and safer for the guardian to continue for the present and until the further orders of this court to lend the money of his wards to a bank at the customary rate of 4 per cent. per annum, and that such disposition of such funds would be more profitable to the estate than the purchase of government bonds." Upon this finding it was ordered that the guardian lend the money to a bank at four per cent. "until such time as the court may by proper order direct him to invest the same in real estate, as provided by law."

Thereafter the guardian appears to have allowed the money to remain on deposit in the bank of which he continued to be president, and upon which he regularly collected interest, calculated at four per cent., semi-annually. He made reports thereof in his annual settlements, which were approved by the probate court.

These deposits remained in the bank until it closed its doors on July 15, 1930, when it was taken over by the State Banking Department as an insolvent institution.

On September 8, 1930, the probate court made an order removing McCown as guardian of each of the wards, and appointed E. K. Edwards as his successor, and, after ascertaining the amount due each ward, respectively, directed McCown to pay over the money so found due to his successor. McCown failed to comply with this order, whereupon suit was brought by Edwards as guardian for the use of each minor against McCown and the surety on the guardian's bonds.

An answer was filed by McCown and his surety, which did not question the amounts alleged to be due the respective wards, but which did deny any liability therefor, for the reason that the guardian had disposed of

the money as directed by the probate court, and he claims immunity from liability by virtue of the orders of the probate court.

Conflicting testimony was offered at the trial from which this appeal comes as to whether safe loans of this money might have been obtained with real estate as security, and McCown testified that he considered the deposit of this money in the bank as the safest and best disposition he could make of it. He testified that he regarded the bank as solvent, even at the time the decision was reached by himself and other officers of the bank to close its doors. He testified that the depositors commenced withdrawing their deposits in an unusual manner, and that this run continued in increasing volume for several days, and that the bank was unable to meet these unusual withdrawals, and that on the afternoon of July 14, 1930, the decision was reached not to reopen the bank on the following day, and it did not reopen the next day. At the time the bank closed its doors there was on hand in cash a sum of money in excess of the joint deposits of his two wards, but McCown did not withdraw these deposits, for the reason, as stated by him, that he believed the bank would later be able to reopen for business.

Judgment was rendered in the court below against McCown and his surety for the amount of these deposits, and this appeal is from that judgment.

Various reasons are assigned for the affirmance of this judgment, but we discuss only one of them, as, in our opinion, it is conclusive of this case. McCown deposited this money as soon as he received it, and allowed it to remain on deposit until October 4, 1929, when he obtained the order to lend it to the bank, yet nothing was done to change the relation of the bank to this money. It continued as an ordinary deposit. Of course, this deposit created the relation of debtor and creditor, but the court's order contemplated something more should be done, and that was that a loan of this money should be made to the bank. There is a vital distinction between a loan to a

bank and a deposit with a bank. In one case security may be, and usually is, exacted. In the other security may not be given by the bank. The power of a bank to borrow money and to give security for it is unquestioned; while the power of a bank to give security for an ordinary deposit has been expressly denied. The difference between the power of a bank to secure a loan as distinguished from the power to secure a deposit was pointed out in the case of *Arkansas-Louisiana Highway Imp. Dist.* v. *Taylor,* 177 Ark. 440, 6 S. W. (2d) 533. We there quoted from *Divide County* v. *Baird,* 55 N. D. 45, 212 N. W. 236, 51 A. L. R. 296, as follows: "The doctrine that there is no difference between a loan and a deposit we cannot accept in all its implications. It is true that in law the two transactions have many characteristics in common; but so have other business deals which, nevertheless, are not identical in all their legal incidents. The striking fact remains, a fact which this court cannot ignore, that a real difference between a deposit and a loan has always been assumed, as a matter of custom, in the banking business itself, and in all legislation dealing with the subject since statehood."

We do not again review the authorities, as the conclusion of the court is declared in the fourth headnote in the case above cited, which reads as follows: "While a bank may pledge its bills receivable to secure loans, it may not do so to secure deposits." That holding was reaffirmed in the case of *Arkansas County Road Imp. Dist. No. 5* v. *Taylor, ante* p. 293.

It is not the policy of the law to permit a guardian to loan the money of his ward without security. There is a mandatory statute to the contrary. By § 5059, Crawford & Moses' Digest, it is provided that "* * * such guardian shall, under the direction of the court, loan the same to such person as will give good security therefor, and such money shall be loaned on such time as the court shall direct."

Preference is given by § 5061, Crawford & Moses' Digest, to loans on real estate, and direction is there

given to make loans that "can be obtained on unincumbered real estate security, and then not more than to the extent of one-half of the value thereof."

If such loans, approved first by the guardian and thereafter by the court, cannot be obtained, the guardian may, if so directed by the court, deposit the funds of his ward in a bank, provided interest is agreed to be paid at a rate which is as high or higher than can be obtained on bonds of the United States. *Lee* v. *Beauchamp,* 175 Ark. 716, 300 S. W. 401.

The guardian must not only act in good faith, but he must act pursuant to the orders of the probate court. In discussing this duty, it was said in the case of *Parker* v. *Wilson,* 98 Ark. 553, 136 S. W. 981, that: "The statute contemplates that it shall be done under the direction and orders of the probate court. It is true the guardian may assume the responsibility and loan it without an order of the court, but in such case he acts at his own peril. If he imprudently loans the ward's money upon inadequate security, without having first procured an order of the court to loan it, he must suffer the loss occasioned thereby, even though he may have acted honestly in the matter." See also *Alcorn* v. *Alcorn,* 183 Ark. 342, 35 S. W. (2d) 1027.

In the case of *Lee* v. *Beauchamp, supra,* where the guardian was held liable only for the amount of interest received from a bank upon the deposit therein of his ward's money, the facts were that the guardian had endeavored to obtain real estate loans for his ward, and the court had refused to approve applications for real estate loans which he had received, and, failing to obtain such loans, the guardian had deposited the money in bank, upon which the interest paid "was as high, or probably higher rate of interest than would have been obtained if the funds had been invested in United States bonds." Section 5066, Crawford & Moses' Digest.

In the case of *Harper* v. *Betts,* 177 Ark. 977, 8 S. W. (2d) 464, 60 A. L. R. 484, the facts were that the deposit in a bank believed to be solvent was made "until he (the

guardian) could obtain an order of court with reference to the disposition thereof." But within three weeks after the deposit was made, and before any other disposition of the funds could be made and approved by the court, the bank failed. Under those circumstances, we held it would be unreasonable to charge the guardian with neglect of duty or failure to comply with the law.

Here, however, the guardian made an ordinary deposit of the money of his wards in a bank of which he was president, where it remained without any authority of the probate court from March 28, 1928, the date of the deposit, until October 4, 1929, when he obtained the order of the court to lend the money to the bank. Thereafter the character of the transaction as a deposit, and not a loan, as the probate court had directed, remained unchanged, and the guardian—the president of the bank—allowed the deposit to remain in the bank, although he knew its failing circumstances and did not withdraw the deposits after the decision had been reached not to reopen the bank the following day, although the bank had sufficient funds on hand the day before it closed to have paid these deposits.

Under these facts we conclude that the court below was warranted in finding, as it did find, that the guardian had not sufficiently complied with the law and the orders of the probate court to be granted immunity from the loss of the money of his wards, and the judgment of the court below must be affirmed, and it is so ordered.

ELLIS *v.* GANN.

Opinion delivered April 18, 1932.

John R. Duty, W. A. Dickson and *Price Dickson,* for appellant.

Earl Blansett and *John W. Nance,* for appellee.

HUMPHREYS, J. This is an appeal from the circuit court of Benton County dismissing the petition of appellants to the county board of education to consolidate School Districts Nos. 1, 2, 15, 34, 101, 109, 111, 114, 121 129 and 136 into one district under the provisions of act 156 of the Acts of 1927 (page 549).

Appellants contend for a reversal of the judgment of dismissal of their petition upon the alleged ground that the circuit court acquired no jurisdiction of the cause by appeal from the county board of education. A motion was filed in the circuit court to dismiss the appeal for want of jurisdiction, which was overruled over the objection and exception of appellants, and their exception has been preserved in their motion for a new trial.

It is argued that, although act 183 of the Acts of 1925 provides that any one who feels aggrieved by the final order of the board of education may appeal to the circuit court within thirty days from the date thereof by filing an affidavit that the appeal is not taken for delay and by filing an appeal bond, and that, although this was done, yet the circuit court acquired no jurisdiction because it does not appear in the record that the appeal was granted by the board of education. It does appear that the affidavit was directed to the board of education, and that the order granting the appeal was signed by the president of the board. The statute does not provide that each member or a majority of the board members sign an order granting an appeal; so, when signed by the president, it will be presumed that the board granted the appeal, and that the board was in session when the appeal was granted, nothing to the contrary appearing. The

method of appeal is sufficiently set out in the statute and was specifically complied with. The circuit court properly overruled the motion to dismiss the appeal.

Many questions are argued by appellants in support of their contention that the trial court erred in dismissing its petition for a consolidation of the districts which we deem unnecessary to consider, as it was proper to dismiss the petition for the reason, if no other, that the notice required by § 8821 of Crawford & Moses' Digest was not posted thirty days before the petition was filed with the board of education. It has been decided in several recent cases that the posting of the notice for thirty days under said section was a prerequisite to filing the petition with the board. *Texarkana Special School District* v. *Consolidated School District No. 2, ante* p. 213; *Shook* v. *Morrison, ante* p. 522.

No error appearing, the judgment is affirmed.

BOURLAND *v.* SOUTHARD.

Opinion delivered April 18, 1932.

George W. Dodd, for appellant.

Simmons & Lister and *A. M. Dobbs,* for appellee.

MEHAFFY, J. This suit was begun by property owners in Paving District No. 11 of the city of Fort Smith against the Board of Improvement and Henry C. Lane, as collector of the district. The appellees who brought this suit are owners of real property in the district, and brought the suit for themselves and others similarly situated.

The appellants, who were defendants below, are Fagan Bourland, mayor; Earl Henderson, commissioner No. 1, and W. H. Vaughan, commissioner No. 2, of the city of Ft. Smith, who constitute the board of improvement for said district.

The district was organized to pave certain streets, and benefits were assessed and levied against the property of appellees and others, and appellees have paid all their assessments.

The bonds which were sold have all been paid, the district does not owe any debts, and it has on hand $1,200 or more which belong to the taxpayers of the district who paid the last assessment, among whom are the appellees.

It was alleged that the appellants had failed and neglected to make this distribution, and failed and neglected to petition the chancery court for an order directing what disposition to make of said funds. Appellees alleged that the appellants had wrongfully and illegally expended certain funds of the district amounting to $300. It was alleged that the accounts of the district were complicated, and the amount of funds which should remain in the district could not be correctly determined without an accounting. It was also alleged that the appellants, unless restrained, would continue to wrongfully expend the funds of the district to pay the general expenses of the city.

The appellees asked for an accounting and a refund of the money belonging to the taxpayers, an injunction against further expenditures, and appellants be required to distribute the amounts due to taxpayers. The answer denied all the material allegations of the complaint as to liability.

Fort Smith has a commission form of government, organized under act No. 13 of the Acts of 1913. That act provided for the election of a mayor and four commissioners. In 1917 there was an amendment reducing the number of commissioners to three.

The act providing for commission form of government, among other things, provides that the mayor and commissioners elected shall constitute the respective boards of improvement for any and all improvement districts in the city operating under the provisions of the act, and shall discharge and perform all duties required of any board or boards of any improvement district or districts, but shall receive no compensation as members of such board or boards.

They are required to take separate oaths as members of the boards of improvement, and each of them is also required to make a bond for the benefit of all improvement districts. The act also requires that the records, papers and contracts of the improvement district shall be kept separate from the records, papers, contracts and property of the city, and that the funds, accounts, and deposits of the improvement districts shall be kept separate.

It is also provided in act No. 13, *supra,* that every board of improvement district shall quarterly print in pamphlet form a detailed and itemized statement of all receipts and expenditures of each respective district with proper vouchers for all payments, and cause to be filed with the clerk of the circuit court not less than 100 copies of such report, 10 copies of which the said clerk shall furnish to the city library, 5 to each daily newspaper published in the city, and retain 5 in his office.

The same section which provides for this detailed and itemized statement also provides that any taxpayer may, within six months, file exceptions to such report in the chancery court. It provides for an examination of such report and account, and that the chancery court shall disallow any and all unjust, illegal, or improper charges and credits.

The chancery court found that there were $1,300 of the funds of the district in the hands of the commissioner that should be distributed to the taxpayers, and directed that said amount be distributed to the taxpayers who had paid the last and final assessment of benefits, in such proportion as said sum of $1,300 bears to the amount of the last and final assessment of benefits, less a reasonable sum to be charged for the distribution thereof, and less cost of the action.

The chancellor also found that the appellants owed $216 of money wrongfully expended by the commissioners.

There was no appeal taken from the order and decree of the court for a distribution of the funds on hand, but this appeal is prosecuted to reverse the judgment for $216.

Since there is no appeal from the decree for the distribution of the $1,300, this part of the decree is not before us for consideration. The only question for our consideration being whether appellants were liable for the $216 which they were adjudged to pay.

The authority to levy and collect assessments on real property in towns and cities, is found in § 27 of article 19 of the Constitution. That section reads as follows: "Nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected; but such assessments shall be *ad valorem* and uniform."

Numerous questions are discussed by counsel which are not now properly before this court for consideration. The right of the taxpayers to a distribution, the time within which the court should close the affairs of the district and order a distribution, the power and right of the board after the lapse of a reasonable time, are all settled by the decree of the court ordering a distribution from which there is no appeal.

The question for us to determine is whether the commissioners had the right to expend any of the funds of the improvement district to pay a part of the salaries of certain officers in the employ of the city or to expend the funds for any purpose other than the cost of construction, engineering and legal services.

The provision of the Constitution above referred to authorizes assessments on real property under such regulations as may be prescribed by law.

Section 5656 of Crawford & Moses' Digest provides for the plans for improvements, and, among other things, provides: "For this purpose said board may employ such engineers and other agents as may be needed, and may provide for their compensation, which, with all other necessary expenditures, shall be taken as a part of the cost of improvement."

The commissioners could not lawfully expend any money collected from the taxpayers except that which was necessary, as a part of the cost of construction. When Improvement District No. 11 was formed under the Constitution and laws, a majority of the taxpayers agreed to it. A majority must have consented in order to form a district.

Under the law existing at that time they consented to assessments which were necessary in the cost of the construction of the improvement, and the taking or appropriating of any part of the assessments collected for any other purpose would be a violation of the Constitution.

This court, in discussing a special act of the Legislature, with reference to funds of an improvement district, said: "The majority of the court are of the opinion that

the special act of the General Assembly is unconstitutional, as authorizing a diversion of funds collected for one purpose to be appropriated to another use, as an improvement district organized to construct streets has no authority to use funds collected for that purpose to thereafter appropriate any portion thereof for purposes of repair, and the special act did not confer that authority because it was not based upon the consent of the taxpayers of the city, as required by the Constitution. In other words, to create an improvement district for the purpose of building or repairing streets in a city, the consent of the taxpayers must first be obtained in the manner provided by law, and the authority conferred by the original petition under which the district was formed could not be subsequently enlarged by legislative enactment to which the taxpayers had not consented." *Paving Dist. No. 5* v. *Fernandez,* 142 Ark. 21, 217 S. W. 795. This same case was before this court again where the question of distribution was discussed at length, but that question, as we have said, is not involved here.

While this court has held that the provision of the Constitution that no money arising from a tax levied for one purpose shall be used for any other purpose has no application to assessments in improvement districts, it is stated: "The basis of our decision in that case was that the consent of owners of property to the construction of the original improvement being necessary under the Constitution (art. 19, § 27), funds arising from taxes levied on benefits could not be used for any other purpose without the consent of the owners of the property." *McAdams* v. *Henley,* 169 Ark. 97, 273 S. W. 355, 41 A. L. R. 629.

This court held that the property owners in a local improvement district had interest in the funds of the district, and that it was an impairment of their vested rights for the Legislature to enact a law to divert the funds to uses other than for the benefit of the owners. Of course, if the Legislature could not pass such a law, the law-making body of the city could not.

Again this court said: "In short, improvement district taxes can only be levied to the extent that the benefits conferred are equal to or exceed the amount of the special taxes levied. Therefore, so far as improvement districts are concerned, we conclude that the individual landowners have vested rights which cannot be impaired by subsequent legislative enactment." *Bauer* v. *North Ark. Highway Imp. Dist. No. 1,* 168 Ark. 220, 270 S. W. 533.

This court has many times held that the only theory justifying local assessments on real property is that the real property assessed is benefited in an amount equal to or greater than the assessment. There is therefore no authority for collecting assessments for any purpose other than the construction of the improvement, and this includes incidental expenses that are necessary to making the improvement.

The commissioners cannot therefore lawfully expend any of the money of the improvement district for general expenses of the city or for paying employees or officers of the city. If they could require the improvement district to pay any part of the expenses of the city, they could require it to pay all. The taxpayers of the district can be required to pay the assessments only because their property is benefited equal to the amount they have to pay.

It is contended by the appellant, however, that the appellees were guilty of laches in failing to take timely exceptions to the report of the board. The law requires the board of improvement to cause to be filed with the clerk of the circuit court certain numbers of copies as mentioned above, of the report, and the same section provides that any taxpayer may, within six months, file exceptions to such report. Acts 1913, p. 82, § 23.

The evidence shows that the report was not filed with the clerk of the circuit court, and it is sufficient to say that the taxpayer had a right to assume that he could file any exceptions or bring a suit within six months after the filing of the report at the place where it was

required to be filed, and, as no such report was filed with the clerk of the circuit court, the taxpayer would not be required to file exceptions to said report.

This court has said that notices of this kind are for the benefit of the landowners, and that giving of the notice is jurisdictional. The giving of the notices provided for in the act authorizing a commission form of government is for the benefit of the landowner, and he is not guilty of laches in failure to bring a suit within the time mentioned in the statute, when the report was not filed with the clerk as required by law. See *Sudberry* v. *Graves,* 83 Ark. 344, 103 S. W. 728.

It is finally contended that the chancellor gave judgment for two or three small items improperly, and that the decree for $216 should have been for not more than $191. The amount of the money erroneously expended was a question of fact, and we cannot say that the finding of the chancellor was against the preponderance of the evidence.

It is urged that the method employed by the commissioners in the city of Ft. Smith is reasonable and economical. This appears from the evidence to be true, and, so far as the evidence shows, the affairs of the district have been properly administered with the exception of appropriating certain sums of money belonging to the district for the payment of city expenses, and this, as we have already said, it could not lawfully do.

The decree of the chancery court is affirmed.

STORTHZ *v.* FULLERTON.

Opinion delivered April 18, 1932.

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

Coleman & Riddick, for appellee.

McHaney, J. On the former appeal of this case, *Fullerton* v. *Storthz,* 182 Ark. 751, 33 S. W. (2d) 714, this court reversed the decree of the trial court and held that the purchase money note given by Thane Lumber Company to appellant and by him indorsed to the order of the Bradley Investment Company was a sale and not a payment of the note. It was further held that the note in the hands of appellee was a valid and subsisting obligation, and should share ratably with the other two purchase money notes held by appellant in the security of vendor's lien on the timber conveyed. For a statement of the facts on the former appeal, see 182 Ark. 751, 33 S. W. (2d) 714.

On a remand of the case, appellant filed a new bill which he says in reality is a creditor's bill. He alleged his judgment against Thane Lumber Company, insolvent; that the security is insufficient to discharge his debt; that Bradley Investment Company contracted with Thane Lumber Company to pay appellant the amount of the note in controversy, and that it could not lawfully buy said note because it had agreed to pay it; that, the Bradley Investment Company having bought the note in violation of its agreement, "it acquired title thereto without beneficial interest but strictly as trustee *ex maleficio* for the benefit of Thane Lumber Company"; that appellee is not an innocent purchaser of the note from the Bradley Investment Company, and that as assignee his title is impressed with the same trust, to the end that the beneficial interest of Thane Lumber Company in said note be subjected to the payment of the deficiency which

will be due appellant after a sale to enforce his lien on the timber. The trial court denied the relief prayed, and this appeal followed.

The basis of the relief sought is somewhat involved and difficult of comprehension. It is stated by counsel that: "This second bill was filed in the hope that this court would welcome an opportunity to cure, in a manner not conflicting with the principles of *res judicata,* what, we respectfully submit, was a bad decision." It is well settled that on a second appeal the judgment on the former appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former suit, and also of those which might have been, but were not presented. *Shackleford* v. *Arkansas Baptist College,* 183 Ark. 404, 36 S. W. (2d) 78. And this is true whether we may now think the former decision was right or wrong. *St. L., I. M. & S. R. Co.* v. *York,* 92 Ark. 554, 123 S. W. 376; *Coca-Cola Bottling Co.* v. *Shipp,* 177 Ark. 757, 9 S. W. (2d) 8.

It is argued on this appeal that appellant is entitled to reach the lien note in appellee's hands by equitable garnishment or creditor's bill on the ground that appellee is not an innocent purchaser thereof from Bradley Investment Company, which was precluded from purchasing same because of its agreement with Thane Lumber Company to pay it for its account, and that therefore appellee is a trustee *ex maleficio* for the benefit of the latter company. The further argument is made that, if he be wrong in the above contention, credits derived from a foreclosure proceeding in the federal court by appellee, as assignee of Bradley Investment Company against Thane Lumber Company, should be applied to the satisfaction of the note in controversy. We do not discuss the merits of these arguments. They either were or could have been made on the former appeal and are now *res judicatae.*

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

MORGAN *v.* SCOTT-MAYER COMMISSION COMPANY.

Opinion delivered April 18, 1932.

Buzbee, Pugh & Harrison, for appellant.

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

BUTLER, J. In the case of *D. D. Adams* v. *W. O. Scroggins,* pending in the chancery court, the proceeds of a quantity of assets involved in that litigation were

deposited in the registry of the court. S. R. Morgan acquired the interest of a number of the parties to the litigation who were entitled to a part of this fund. Numerous parties intervened from time to time, among others the Scott-Mayer Commission Company, which, in its intervention, alleged that it was the owner of a valid and subsisting judgment against S. R. Morgan obtained in the Pulaski Circuit Court on October 16, 1922, on which there remained unpaid a sum which, together with the accrued interest, amounted to $1,019.75 on the date of the intervention. A certified copy of the judgment was attached to the intervention as exhibit A thereto.

Further allegation was made that Morgan was the owner of the assets involved in the litigation then pending in the chancery court in the aforesaid case of *Adams* v. *Scroggins,* and that certain sums of money were on deposit in the registry of the court subject to be disbursed to the said Morgan. The intervention concluded with a specific prayer that the Pulaski Chancery Court fix and declare a lien in favor of the intervener upon any money involved in the litigation and a general prayer for all other legal and equitable relief to which the intervener might be entitled.

On July 20, 1931, the court rendered a decree adjudging the rights of the several interveners in the action and, on the intervention of the commission company, rendered a personal judgment in its favor against Morgan in the sum of $1,019.74, declaring the same to be a lien upon all the property of the said Morgan.

On September 11, 1931, the commission company obtained from the clerk of the Pulaski Chancery Court a writ of execution on the aforesaid judgment which was executed by levying upon a certain automobile, the property of S. R. Morgan. In order to discharge this execution, Maude Wade Morgan, who claimed to be the owner of the automobile, executed a bond with sureties, the condition of which was that she should interplead "before the next term of the court to which the order of execution in this action is returnable and will prosecute

to judgment without delay her interpleader for the property attached in this case and claimed by her," and, in the event that the property should be found to be that of S. R. Morgan, that she would deliver the same to the sheriff, etc.

On October 5, 1931, the Pulaski Chancery Court, on motion of the appellant, entered an order amending the judgment of July 20, 1931, eliminating the personal judgment rendered against S. R. Morgan and substituting in lieu thereof and the lien given therein the following: "The court finds that Scott-Mayer Commission Company has a judgment against S. R. Morgan which it obtained in other courts, and that it is entitled to a lien against any funds of the estate belonging to, or which might belong to, S. R. Morgan in the amount thereof, to-wit, $1,019.74."

On the 15th day of December, following, the commission company appeared in court and filed its motion to set aside the decree of October 5, 1931, setting up, among other things, that said amended decree was rendered at a subsequent term of the court and without notice to it. On the 18th day of December, Maude W. Morgan filed her intervention claiming the automobile. To this intervention a demurrer was filed, and on the 23d day of December, 1931, the court entered an order finding that the decree entered October 5, 1931, was after the term at which the decree of July 20 had been entered, and that said last-mentioned decree "truly speaks the finding of the court at that time." The court found that Maude W. Morgan had failed to intervene within the time nominated in the bond, and had made default.

The demurrer to the intervention was treated as a motion to dismiss, and was sustained. The court then found that the automobile had been delivered by the sureties to the sheriff of Pulaski County, and exonerated them from further obligation on the bond, ordering that the commission company proceed with the sale of the car under execution, and rendering a judgment against Maude W. Morgan and her sureties on the bond for costs.

That part of the decree of the court awarding personal judgment against S. R. Morgan and dismissing the intervention of Maude W. Morgan is here on appeal.

The appellants first contend that that part of the decree of the Pulaski Chancery Court of July 20, 1931, rendering a personal judgment against S. R. Morgan on the intervention of the Scott-Mayer Commission Company was erroneous. It is insisted that no summons was issued on the intervention, and no defense interposed by Morgan to the prayer of the intervention. There is no recital in the decree that any evidence was heard, and the court therefore should not have granted any relief beyond that sought in the prayer of the intervention, which was for a lien on the funds of Morgan then in the registry of the court. The court erred in rendering a personal judgment, the appellants contending that there was no foundation in the allegation to support a personal judgment. They cite and rely on the case of *Wilson* v. *Overturf,* 157 Ark. 388, 248 S. W. 898, to support the contention made. It is further insisted that, since the judgment was erroneously made, there was no foundation for the execution, and that it was wrongfully issued.

It is further suggested by the appellant that, if the judgment of July 20, 1931, was not a nullity, the execution issued was without warrant because not authorized by the terms of the decree of July 20, 1931. The position taken by the appellant on these questions is without foundation. In the case of *Wilson* v. *Overturf, supra,* the court held that a judgment by default must be responsive to the allegations of the complaint, as the default after service of summons admits only the allegations of the complaint, and that these must be sufficient to support the judgment. This is the settled rule, *Thomas* v. *Hickman,* 164 Ark. 469, 262 S. W. 20; *Shelton* v. *Landers,* 167 Ark. 638, 270 S. W. 522, but it has no application to the case at bar, because this was not a judgment by default. The decree of July 20, 1931, recites: "And S. R. Morgan, being present in person and submitting himself to the jurisdiction of the court in this case, and all parties an-

nouncing ready for trial, the court finds, etc.,'' and he must be deemed to have acquiesced in the judgment then rendered.

Although prayer for a judgment was not included in the specific relief asked, the statement of facts, and not the prayer, constituted the cause of action, and the court may grant any relief that the facts pleaded and the general prayer may warrant where the element of surprise does not exist. *Alberson* v. *Klanke,* 177 Ark. 288, 6 S. W. (2d) 292. The judgment of the circuit court pleaded in the intervention was a cause of action which warranted the rendition of a judgment in the Pulaski Chancery Court, although there was no specific prayer for such judgment. Where there is a prayer for special relief and also a prayer for general relief, the court may give to the complainant under his general prayer any relief warranted by the facts alleged. *Cook* v. *Bronaugh,* 13 Ark. 183; *Rogers* v. *Brooks,* 30 Ark. 613; *Ashley* v. *Little Rock,* 56 Ark. 391, 19 S. W. 1058; *Waterman* v. *Irby,* 76 Ark. 551, 89 S. W. 844. The court therefore properly rendered a personal judgment, and it was not necessary, in order to warrant the issuance of an execution, that the judgment direct that one might be issued, as the issuance of an execution is authorized by § 4253 of Crawford & Moses' Digest, providing that an execution may issue upon any final judgment, order or decree of a court of record for a liquidated sum of money and for interest and costs, or for costs alone.

We take judicial knowledge that the April term of the chancery court had expired before October 5, 1931, and therefore the court had lost control of the decrees rendered at the April term, except for the causes mentioned in §§ 1361 and 6290 of Crawford & Moses' Digest. This case does not fall within any of the exceptions in those sections, and they therefore have no application, and the only ground on which the decree of October 5 could be justified was on the theory that the judgment then being entered was the judgment of the court on July 20, 1931, and that the order was made now for then. If

there was any testimony introduced on the hearing of the motion for the judgment *nunc pro tunc* of October 5, none has been preserved in the record, and to justify such an order that testimony must be clear and so decisive in its nature as to overcome the recitals of the written judgment sought to be corrected, (*Midyett* v. *Kerby,* 129 Ark. 301, 195 S. W. 674; *Turnbow* v. *Baird,* 143 Ark. 543, 220 S. W. 826), and on the hearing of a petition for a judgment *nunc pro tunc* the trial judge may indulge his personal recollection as to the judgment sought to be corrected. *Bertig Bros.* v. *Grooms Bros.,* 164 Ark. 628, 262 S. W. 672. We must therefore indulge the presumption that the trial court's finding "that the decree of July 20, 1931, truly speaks the finding of the court at that time" was supported by the testimony in the case or the personal recollection of the judge. Moreover, it may be observed that the order of October 5 was in effect an entirely different judgment from that entered on July 20. The power of the court by order *nunc pro tunc* could not be invoked, as it had then no power to change or revise the judgment, since that power could not be used to correct errors or mistakes, but only to state what was actually done and which had failed to be properly recorded. *Evans* v. *U. S. Anthracite Co.,* 180 Ark. 578, 21 S. W. (2d) 952. The court therefore correctly held that it was without authority to render the decree of October 5, 1931, in so far as it sought to change the decree of July 20, 1931.

■ From what has been said, it follows that the contention of Maude Wade Morgan that there was no valid decree of July 20, 1931, upon which to base an execution, and that the execution, moreover, was not valid because there was no authority in that decree for the issuance of an execution, cannot be sustained. It is further insisted, however, on her part, that, if the decree properly recited a judgment against S. R. Morgan, and there was a valid execution thereunder, the decree of October 5, 1931, excused her from filing her intervention; that, when filed, it alleged facts which, if true, entitled her to retain the automobile, and that the court erred in sustaining

the demurrer to her intervention, and should have permitted her to introduce testimony in support of the allegation.

The answer to this contention is that she was in default before October 5, 1931, and that order, as conceded by counsel, was obtained without any notice to her adversary and after the time when the decree of July 20, 1931, had become final. In order to obtain the discharge of an execution, she obligated herself to intervene before the next term of the court. This she failed to do, and she cannot justify this default by the void order of October 5, 1931. The court had before it her intervention and the motion to set aside the order of October 5, 1931, from the 15th of December until the 23d of December, and it then disposed of these motions with the rest of the case. Considering the record before us, we cannot say that the court erred. The decree therefore, both as to S. R. Morgan and Maude Wade Morgan, is affirmed.

KIRBY, J., dissents.

COPELAND *v.* UNION INDUSTRIAL LOAN CORPORATION.

Opinion delivered April 25, 1932.

H. M. Jacoway and *Lee Miles,* for appellant.

Wills, Wills & McLees, for appellee.

SMITH, J. Appellee instituted suit on September 11, 1930, in the municipal court of the city of Little Rock against R. E. Copeland and N. E. Douglas on a note which they had signed as sureties for J. W. Deavers, which note was payable to appellee's order.

An answer was filed, in which Douglas alleged that his name had been forged, and Copeland answered that he had signed the note upon condition that Douglas would also sign it, and that it should not be delivered until he had done so. The answer further alleged that, on October 18, 1930, written notice had been served upon appellee, signed by both Copeland and Douglas, demanding that suit be brought against Deavers as the principal in said note, but that such suit had not been brought, and that they had been exonerated by this failure to sue.

Douglas testified that he did not sign the note. Copeland admitted that he did sign the note, but testified that it was agreed between himself and Deavers that the note would not be delivered to the payee unless and until Douglas had signed it. It was not shown, however, that appellee was advised of this agreement between Copeland and Deavers, nor was it shown that appellee was advised that the signature of Douglas was not genuine.

On behalf of appellee, it was shown that there was a balance due upon the note; that Deavers died in May before the institution of suit the following September, and that he left no estate, and there was no testimony that there had been any administration upon his estate. Upon this testimony the court rendered judgment in favor of Douglas and against Copeland, from which judgment Copeland has appealed.

The agreement between Copeland and Deavers that the note should not be delivered unless Douglas signed it, of which agreement appellee was not advised, constituted no defense in favor of Copeland, who did sign it. *Saxon* v. *McGill,* 179 Ark. 415, 16 S. W. (2d) 987; *White-Wilson-Drew Co.* v. *Egelhoff,* 96 Ark. 105, 131 S. W. 208;

Williams v. *Morris,* 99 Ark. 319, 138 S. W. 464; *J. R. Watkins Medical Co.* v. *Warren,* 150 Ark. 542, 234 S. W. 618; § 7780, Crawford & Moses' Digest; § 8296, Crawford & Moses' Digest.

The notice served upon appellee to sue Deavers as principal was given pursuant to §§ 8287 and 8288, Crawford & Moses' Digest, which read as follows:

"Section 8287. Any person bound as surety for another in any bond, bill or note, for the payment of money or the delivery of property, may, at any time after action has accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor and other party liable.

"Section 8288. If such suit be not commenced within thirty days after the service of such notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, such surety shall be exonerated from liability to the person notified."

It is insisted that the failure to sue Deavers pursuant to the demand that this be done exonerated the sureties. But we do not think so.

It will be remembered that Deavers was dead when the notice was served, and for this reason the sections of the statute above quoted do not apply.

At volume 2 of Brandt on Suretyship and Guaranty (3d ed.), § 778, in a discussion of statutes similar to those above quoted, it was said: "Another statute provided that a surety might, by writing, require 'the person having such right of action forthwith to commence suit against the principal debtor and other parties liable.' Held, a surety could not, after the death of the principal, exonerate himself by notifying the creditor to present his claim against the estate of the principal. The case was not within the meaning of the statute."

The case of *Hickam* v. *Hollingsworth,* 17 Mo. 475, was cited in the note to the text quoted. This case construed certain sections of the statutes of Missouri, from which our statute was obviously borrowed. Indeed,

we acquired the statute by virtue of the fact that the Territory of Arkansas was organized out of territory originally a part of the Territory of Missouri, and the act of Congress approved March 2, 1819, "* * * establishing a separate territorial government in the southern part of the Territory of Missouri," provided, in § 10 thereof, "That all the laws which shall be in force in the Territory of Missouri, on the fourth day of July next, not inconsistent with the provisions of this act, and which shall be applicable to the Territory of Arkansas, shall be, and continue, in force in the latter territory, until modified or repealed by the legislative authority thereof." Steele & M'Campbell's Digest, Laws of Arkansas Territory (1835), page 36.

The Missouri statute appears in a Digest of the laws of the Territory compiled in 1818, page 368, and was amended by an act approved February 5, 1825, which was after the admission of Missouri to statehood. Vol. 2, Digest, Laws of Missouri (1825), page 735.

A comparison of this act with our present statute leaves no doubt as to the origin of our existing statute.

Sections 8287 and 8288, Crawford & Moses' Digest, were brought forward from §§ 1 and 2 of chapter 137 of the Revised Statutes of Arkansas (1838), page 722, this chapter being entitled "Securities," and it there appears as having been approved December 18, 1837, which was shortly after the admission of this State into the Union. The identity of these sections with the statutes of Missouri construed in the case of *Hickam* v. *Hollingsworth, supra,* becomes apparent when the same are compared.

We feel constrained therefore to give much deference to this Missouri case, although it was not decided until 1853, which was subsequent to the enactment of our present statute, it being an amendment of a Missouri statute, which we acquired by virtue of the fact that the Territory and State of Arkansas had been formed out of territory once a part of the Territory of Missouri. Inasmuch as the decision of the Supreme Court of Missouri was not rendered until after our statute had been

enacted, it is not controlling upon us. *Townes* v. *Krumpen,* 184 Ark. 913, 43 S. W. (2d) 1083. Yet, in view of the history of the legislation, we read the Missouri case with great deference.

In the case of *Cathcart* v. *Robinson,* 5 Peters (U. S.) 264, Chief Justice MARSHALL said the rule had been uniformly observed by the Supreme Court of the United States, in construing adopted statutes, to accept the construction of the statute made by the courts of the country by whose Legislature the statute was enacted, if rendered prior to its adoption. He there also said: "But, however we may respect subsequent decisions, and certainly they are entitled to great respect, we do not admit their absolute authority." Lewis' Sutherland Statutory Construction, (2d ed.) vol. 2, page 785; *Northcutt* v. *Eager,* 132 Mo. 265, 33 S. W. (2d) 1125.

The Missouri case to which reference has been made arose under facts substantially identical with those of the instant case, and it was there held (to quote the headnote) that: "Under the act concerning 'securities' (R. C. 1845), a surety cannot exonerate himself from liability by notifying the creditor, after the death of the principal debtor, to present the demand for allowance against his estate, and his failure to do so within thirty days. A case where the principal is dead is not within the meaning of the statute." See also *Davis* v. *Gillilan,* 71 Mo. App. 498.

In view of the fact that this decision was rendered subsequent to the adoption by this State of the statute there construed, it is not controlling, but, when given the deference which its sound reasoning and the history of the legislation there construed entitle it to, we feel constrained to follow that case, and we therefore hold that our statute has no application in a case like this, where the principal was dead when the notice to sue was served.

The judgment of the court below was based upon this construction of the statute, and, as we concur in that view, the judgment must be affirmed, and it is so ordered.

LACEFIELD *v.* TAYLOR.

Opinion delivered April 25, 1932.

Carmichael & Hendricks, for appellant.
H. B. Stubblefield, for appellee.

SMITH, J. Appellant filed an intervention in a suit brought by the State Bank Commissioner to wind up the affairs of the Travelers' Building & Loan Association as being insolvent. The intervener alleged that on November 18, 1929, he obtained a loan from the association of $5,000 on the regular and usual plan of subscribing for $5,000 worth of stock, to be paid for in monthly instalments, in addition to the interest. These payments, which are called dues, amounted to $15, plus interest, and were regularly paid for a period of twenty-five months, when the association was taken over by the Bank Commissioner in the suit filed to wind up its affairs. The intervener made a tender of the balance due on his loan, less the dues paid, and prayed that the receiver of the association be required to accept this tender in satisfaction of his loan and be directed to cancel the mortgage which

he had given to the association to secure it. A demurrer to the intervention was sustained, from which decree is this appeal.

The case presented involves the construction of § 7 of act 236 of the Acts of 1931 (page 726), which is entitled "An act to amend act 128 of the Acts of 1929 for the supervision and operation of building and loan associations." This section reads as follows:

"Section 7. That § 11-c is hereby added to act 128 of the Acts of 1929 as follows:

"Section 11-c. Repayment of loans in voluntary or involuntary liquidation. Any borrower from a domestic building and loan association which shall be in voluntary or involuntary liquidation or which has been legally declared insolvent, who, at the time of such liquidation or insolvency, is indebted to the said association, shall be charged with the amount due on said loan and/or advance, and any other indebtedness due said association by such borrower, at the time of liquidation or insolvency, and shall be given credit on his loan and/or advance for the amount theretofore paid on his stock, bond, investment certificate, membership certificate, or other evidence of shares, as the case may be, less any fees, fines, or penalties due said association by such borrower."

It is apparent that this section changes the rule announced by this court in the case of *Courtney* v. *Reap,* 184 Ark. 112, 40 S. W. (2d) 785. In that case a borrowing member of an insolvent building and loan association sought the relief which the section copied above is intended to afford. The question there presented was stated as follows: "* * * The main question is the right of set-off, or whether the appellant (the borrowing member) is entitled to any credit for dues paid on the value of her stock against the loan." The opinion sets out the procedure under which building and loan associations operate, and it is not contended that there is any difference in the facts between that case and the instant one. The relief there prayed was denied upon the authority of the earlier cases of *Hale* v. *Phillips*, 68 Ark. 382, 59 S. W. 35,

and *Taylor* v. *Clark*, 74 Ark. 222, 85 S. W. 231. It was there conceded that the relief prayed could not be granted unless those cases were overruled, and this we were asked to do, but we declined to do so. In reaffirming those cases, we said: "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 nonborrowing 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 advantage of § 7, above quoted, to the borrowing member is apparent. It enables him to terminate his relation with the association without loss, although it is insolvent. He is given full credit for all dues paid, and is required only to pay the difference between the total amount of dues paid and the amount of his loan. It is equally as apparent that this preference is given at the expense of the investing stockholder, as sufficiently appears from the opinion in *Courtney* v. *Reap, supra,* and the whole system of mutuality is destroyed.

In support of the decree of the court below sustaining the demurrer to the intervention, it is insisted that § 7 is not retroactive, and does not apply to existing contracts. It is also insisted that, if it is retroactive, it is unconstitutional, as impairing the obligation of existing contracts, the validity of which had long been recognized under the decisions of this court.

We recognize the seriousness of the question as to the constitutionality of the act if it is held applicable to existing contracts, but we find it unnecessary to decide that question, for the reason that, in our opinion, the act is not retroactive, and does not apply to contracts existing at the time of its passage.

It is not expressly stated in the act that it shall be retroactive, nor does that intention otherwise sufficiently appear to compel that construction. In the recent case of *Dulaney* v. *Continental Life Ins. Co., ante* p. 517, we recognized that an act might be retroactive in its operation, although that intention had not been expressly declared by the Legislature, but we said this could not be true unless the provisions of the act were such as to clearly show that intention.

The case of *Mosaic Templars of America* v. *Bean,* 147 Ark. 24, 226 S. W. 525, announces the rule which this and all other courts consistently follow that all statutes will be construed as having only a prospective operation unless the Legislature expressly declares or otherwise shows a clear intent that it shall have a retrospective effect.

As appears from the facts herein stated, § 7 of the act of 1931, if retroactive, affects contracts existing at the time of its passage, and in the case of *Rhodes* v. *Cannon,* 112 Ark. 6, 164 S. W. 752, we quoted from the case of *City Ry. Co.* v. *Citizens' St. R. R. Co.,* 166 U. S. 557, 17 S. Ct. 653, as follows: "A statute should not be construed to act retrospectively or to affect contracts entered into prior to its passage unless its language be so clear as to admit of no other construction." We there also quoted from our own case of *Beavers* v. *Myar,* 68 Ark. 333, 58 S. W. 40, where it was said: "An act of the Legislature will not be construed to have a retrospective effect if susceptible of any other construction."

In the case of *Dulaney* v. *Continental Life Ins. Co., supra,* we were of the opinion that the legislative purpose in passing the act there construed would have been

defeated had the act there involved not been construed as being retrospective.

Such is not the case here. The Legislature knew that many building and loan associations were then operating, and would continue in business, and the act may be construed as applying to contracts entered into after it became a law.

The act was approved March 27, 1931, and as it contained no emergency clause, it did not become a law until ninety days after the adjournment of the session of the General Assembly at which it was enacted. *Dulaney* v. *Continental Life Ins. Co., ante* p. 517; *School Dist. No. 41* v. *Pope County Board of Education,* 177 Ark. 982, 8 S. W. (2d) 501; *Crowe* v. *Security Mortgage Co.,* 176 Ark. 1136, 5 S. W. (2d) 346.

In addition to the presumption that an act is not intended to be retroactive, we have the presumption that the General Assembly did not intend to enact an unconstitutional law, and it is a settled rule of construction that legislation will be so construed as to be constitutional if that construction may be fairly and reasonably given. *Board of Commrs. Rd. Imp. Dist. No. 9* v. *Furlow,* 165 Ark. 60, 262 S. W. 991; *Standard Oil Co. of La.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753; *Commrs. of Broadway-Main St. Bridge Dist.* v. *Quapaw Club,* 145 Ark. 279, 224 S. W. 622.

While we have said that we do not feel required to pass upon the constitutionality of § 7 if held to be retrospective, there is such grave doubt of its constitutionality, if so construed, that we cannot fail to take this fact into account in determining whether there was indeed a legislative intent that it should be so construed.

We therefore hold that the section is not retroactive, and that the demurrer was properly sustained, and the decree is therefore affirmed.

KIRBY, J., dissents.

PULASKI MINING COMPANY *v.* VANCE.

Opinion delivered April 25, 1932.

Robinson, House & Moses and *Frank Bird,* for appellant.

Carmichael & Hendricks, for appellee.

KIRBY, J., (after stating the facts). It is insisted by appellant that the court erred in holding the lease invalid as being executed by the Commissioner without authority of law, and also in declaring the suit could be maintained by the appellees.

The conveyance of the lands upon which the Ex-Confederate Home was already constructed was made by

individuals, trustees for the establishment of the home, for the use of soldiers of the Confederate Army. It will suffice to say that the deed conveying the lands to the State conveyed the whole title without any trust being imposed upon the State, the grantee, for the maintenance of the home thereafter that could be enforced to prevent the disposition of the lands by the State.

The statute, which it is claimed authorized the lease made by the Commissioner of Revenues, is § 6789, Crawford & Moses' Digest, as amended by act 212 of 1929, and reads as follows:

"Section 6789. Hereafter it shall be unlawful for any person, firm, company, corporation or association to take sand and gravel, oil and coal, or other minerals from the beds or bars of navigable rivers and lakes, or from any and all other lands held in the name of the State of Arkansas, without first procuring the consent of the Commissioner of Revenues. Such consent may be withheld unless such person, firm, company, corporation or association shall agree in writing to keep an accurate record and account of all sand and gravel, oil, coal and other minerals taken by him or them from said rivers and lakes, and from any other lands owned by the State of Arkansas, and render to the said Commissioner of Revenues at the end of each month an itemized, verified statement of all the number of cubic yards of sand and gravel, and gallons of oil and tons of coal and other minerals taken out each day during the month. At the time of making such statement the person, firm, company, corporation, or association shall pay into the State Treasury two and one-half cents for each cubic yard of sand and five cents per cubic yard of gravel so taken, and one-half cent for each gallon of oil and six cents per ton of coal, and, if any other valuable minerals be found in such rivers, lakes or under other lands owned by the State of Arkansas, any firm, company, corporation or association taking the same out shall make a contract with the Commissioner of Revenues stating the amount due the State of Arkansas under said contract."

This section makes it unlawful to take sand and gravel, oil and coal, and other minerals from the bed and bars of navigable rivers and lakes, "and from any and all other lands owned by the State of Arkansas," or "held in the name of the State of Arkansas," or "under other lands owned by the State of Arkansas." It provides also the procedure for obtaining the consent of the Commissioner of Revenues therefor and for payment for such minerals taken from the said lands owned by or held in the name of the State of Arkansas, or under lands owned by the State of Arkansas.

Appellant insists that these phrases necessarily include any lands owned by the State or held in the name of the State, and authorized the Commissioner of Revenues to dispose of the minerals thereon or thereunder; while appellees insist that the "lands of the State" under the provisions of this statute would be such as are included within the chapter 107, Crawford & Moses' Digest, which it has authority to sell.

It was the evident purpose of this statute to allow the sale and disposition of these minerals from the bed and bars of navigable rivers and lakes and any other lands owned by or held in the name of the State of Arkansas—"lands of the State" being such as are included within the said chapter 107 of the digest of the statutes—and the meaning could not be extended to lands that were in fact owned by the State already dedicated to other uses with improvements thereon. The lands here constituted one of the State's charitable institutions, and there was no intention of the Legislature, under a proper construction of any of the language used in said act, to authorize the disposition of minerals under the foundations or grounds of the buildings constituting its charitable institutions, or its Capitol, for instance. These lands, while owned by the State, are a part of such institutions, and no fair construction of such statute gives authority for the disposition of minerals that might be found under the buildings or within the grounds of such institutions.

The parties to the lease evidently doubted that authority was granted by the statute for the disposition of the minerals made in the execution of the lease therefor, since the Governor and the Attorney General were required to approve the lease and did do so, although the statute does not require it done. Such approval could give the lease no greater validity than it had already as executed by the Commissioner under the authority of the statute, which does not require the execution and approval of the lease by them. Neither could the Commissioner execute a valid lease of the minerals, as was attempted to be done in this case, since the statute, neither by express words or necessary implication, granted him the authority to make such disposition of minerals under a part of the grounds and foundations of the buildings of one of the State's charitable institutions. The Legislature could have done so, of course, the State having the title to the property, but it did not, and, if there was any such intention, it is not fairly deducible from the language of the statute, which should use such language as shows an unmistakable intention to authorize it done—too plain to admit of construction.

Neither did the court err in refusing to dismiss the suit as one that could not be prosecuted by the appellees as taxpayers and eligible to be inmates of the charitable institution and beneficiaries of the use of it. It was not necessary for the appellees to first request the Attorney General to bring the suit and then allege his refusal to do so in order to proceed, since the law does not require a vain thing done, and the Attorney General was a party to the lease, having given his approval thereto as shown by the lease exhibited with the complaint. *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380.

It makes no difference that the lease does not appear to have been improvidently made, or without due regard for the protection of the improvements in the mining of the minerals, nor whether the purpose was good in attempting to dispose of the minerals for the better maintenance of the home, and in providing increased comforts

for the inmates thereof, since the statute did not authorize its execution.

The lease having been executed without authority, it was necessarily void, and the court did not err in so holding. The decree is accordingly affirmed.

SCHOOL DISTRICT NO. 45, POPE COUNTY, *v.* MCCLAIN.

Opinion delivered April 25, 1932.

C. C. Wait, for appellant.

Robert Bailey, for appellee.

MCHANEY, J. School District No. 45, until the passage of act No. 169 of 1931, p. 476, was a common school district in Pope County with a board of three directors, composed of C. B. Wait, Jr., E. E. Easley and B. F. Beaumont. In June, 1930, director Easley left Arkansas for Oklahoma, either temporarily or permanently, and an election was called under § 8914, Crawford & Moses' Digest, to fill the vacancy caused by the removal of director Easley, and held on July 6, 1930. At this elec-

tion Lee Carns was elected, took the oath of office as such, and his election certified to the county board of education. At a meeting held in September the county board of education declared the election void, and refused to recognize him as director. The appellee was teaching the school in the district during the year 1930-31, and on April 9, at a meeting of the board, of which all the directors were notified and at which directors Beaumont and Carns were present, Wait being absent, a contract was made with appellee to teach a seven months' school in 1931-32, beginning July 6, for two months, with an intermission, and five months to be taught in the fall and winter, at a salary of $90 per month. At the regular school election in May, 1931, after the above contract had been entered into, a new board of six directors was elected under the provisions of act 169 of 1931, and this new board refused to permit appellee to teach the school, or to recognize her contract with the old board. She thereafter brought this suit to recover $630 as damages for breach of the contract. At the time of the trial only two and one-half months of the school term had elapsed, and the court instructed a verdict against appellants for $225, the salary that had accrued at the time of the trial, and refused to permit a recovery for the four and one-half months still to run. Upon this verdict judgment was entered, from which both parties have appealed.

Appellants demurred to the complaint, which was overruled, and this is assigned as one of the grounds of error on the direct appeal. The basis of the demurrer is act 169 of 1931. It is contended that, by reason of said act, which became effective on March 25, 1931, all districts having either more or less than six directors were left without a governing body from the effective date of said act until the third Saturday in May, when the regular election for directors was held and six new directors were elected for each such district in the State. This contention is untenable, as it is manifest from said act that the Legislature did not intend to remove the directors of such school districts until the new directors were elected, in

accordance with § 43 of said act. Said section provides that the school directors in all districts which were not dissolved by the provisions of said act, "the school directors now in office, shall continue to serve until the next annual school election." School District No. 45 was not dissolved by the provisions of said act, and the directors thereof continued to serve as such until the election in May. The court properly overruled the demurrer.

On the merits of the case, we are of the opinion that the court correctly directed a verdict in appellee's favor, unless director Carns was not a director, and that the action of the board in making the contract with appellee is void. We are of the opinion, however, that Carns was a *de facto* director, if not *de jure,* and that appellee was not required to inquire into his authority to act in order to preserve the validity of her contract. We have had occasion to pass upon the same or similar questions in the cases of *Gardner* v. *North Little Rock School Dist.,* 161 Ark. 466, 257 S. W. 73, and *Carroll* v. *Leeman Special School District,* 175 Ark. 274, 299 S. W. 11. The reasoning adopted by the court in these cases applies with equal force here.

On the appeal of appellee, all that need be said is that she was not entitled to recover the full amount she would have earned under the contract at the time this case was tried because she may have since that time obtained other employment which would reduce the amount of her recovery subsequent to the trial.

The case will therefore be affirmed, both on the appeal and the cross-appeal.

TRAVELERS' PROTECTIVE ASSOCIATION OF AMERICA *v.* STEPHENS.

Opinion delivered April 25, 1932.

[redacted]

Jones & Jones, for appellant.

Will Steel and *Frank S. Quinn,* for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for the defendant that the court should have directed a verdict in its favor. We do not agree with counsel in this contention. Under the evidence adduced by the plaintiff, the injury was brought about without the agency of the insured, and it was accidental, although the injury might have been intentionally inflicted by the negro. According to the testimony of the plaintiff, which was corroborated by his companion, he was accidentally cut while trying to separate the negro and his companion. He did not see any knife or other weapon in the hands of the negro. There was apparently no danger in trying to separate them. The negro was a small man, and the conduct of the plaintiff in trying to separate them was the natural result of any one with human impulses. Hence the injury was accidental, within the meaning of the policy. We have set out its terms in our statement of facts, and we need not repeat them here. *Maloney* v. *Maryland Casualty Co.,* 113 Ark. 174, 167 S. W. 845; *Ætna Life Ins. Co.* v. *Little,* 146 Ark. 70, 225 S. W. 298; *Mutual Benefit Life & Accident Association* v. *Tilley,* 176 Ark. 525, 3 S. W. (2d) 320; *Pacific Mutual Life Ins. Co.* v. *Ware,* 182 Ark. 868, 33 S. W. (2d) 46.

It is next contended that the court erred in giving, at the request of the plaintiff, instruction No. 1. It reads as follows: "You are instructed that the terms 'accident' and 'accidental means,' as used in the policy sued upon and in the constitution and bylaws of the defendant association, are used in their ordinary popular sense, as meaning happening by chance; unexpectedly taking place; not according to the usual course of things, or not

as expected. If you find from a preponderance of the evidence that the injury received by the plaintiff happened by chance, or unexpectedly took place, or was not according to the usual course of things, or was not as expected, then you will find that said injury was the result of accident and comes within the terms of the insurance contract, unless you find from a preponderance of the evidence that it falls within one or any of the exceptions in the contract." It is contended on the part of the defendant that there is a technical difference between the term "accident" and the term "accidental means," as used in the policy sued on and in the constitution and bylaws of the association.

Where the provisions of a policy of indemnity are reasonably susceptible of two constructions consistent with the object and purpose of the contract, one favorable to the insurer and the other to the insured, that will be adopted which is favorable to the insured. It has been the settled policy of this court since the beginning of its construction of contracts of insurance to hold that the policy should be liberally construed so as not to defeat, without necessity, the claim for indemnity. The reason is that such policies are written on printed forms prepared by experts employed by the insurance companies for that purpose, and the insured has no voice in the matter. Hence it is fair and reasonable that, where there is ambiguity, or where the policy contains language susceptible of two constructions, that which will sustain the claim and cover the loss should be adopted. *Providence Life Assurance Society* v. *Reutlinger,* 58 Ark. 528, 25 S. W. 835; *American Bonding Co.* v. *Morrow,* 80 Ark. 49, 96 S. W. 613, 17 Am. St. Rep. 72; *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493; *Home Mutual Benefit Association* v. *Mayfield,* 142 Ark. 240, 218 S. W. 371; *Great American Casualty Co.* v. *Williams,* 177 Ark. 87, 7 S. W. (2d) 775; *National Equity Life Ins. Co.* v. *Bourland,* 179 Ark. 398, 16 S. W. (2d) 6; *Fowler* v. *Unionaid Life Ins. Co.,* 180 Ark. 140, 20 S. W. (2d) 611; *Southern Surety Co.* v. *Penzel,* 164 Ark. 365, 261 S. W. 920.

In this connection, it may be stated that the whole policy and the constitution and bylaws of the association must be construed together, and every part read in the light of the other provisions. The constitution and bylaws are expressly made a part of the policy. It would be unreasonable for the court to give a construction to the contract which it is manifest was not contemplated by the parties when the policy was issued and which would defeat the evident object of the contract of insurance. If the association had wished that the terms "accident" and "accidental means" should have had different meanings, the contract of insurance should have given the insured warning of that fact. The court correctly instructed the jury in accordance with the principles of law above announced. If the association used the terms "accident" and "accidental means" as synonymous, it cannot now complain that the court gave them the same construction.

It is also contended that the court erred in submitting to the jury the question of total disability. The first ground for the contention is that two claims were presented to the association. The first one was presented on January 19, 1931, which was a few days after the injury was received. In that claim partial disability only was asked for by the plaintiff. The second claim was filed on February 14, 1931, and was for total disability. There is no inconsistency in this respect. As we have already seen, insurance policies are framed by the insurance companies with great care with the view of limiting their liability as much as possible, and usually impose conditions on the insured to be performed in a particular manner. These provisions are strictly construed against the insurer. Here the plaintiff gave notice within the time required by the policy. According to his testimony, when he made the claim for partial disability, he did not know that he was wholly disabled. He did not make any claim for total disability until he had ascertained and believed that he was wholly disabled. It would be at variance to the principles of law and justice

to hold that his honest act in attempting to comply with the terms of the policy by giving notice as required by it should deprive him of what he was honestly and reasonably entitled to under the terms of the policy. *American Life & Accident Association* v. *Walton,* 133 Ark. 348, 202 S. W. 20.

The second ground of their contention is that there is no evidence upon which to base a submission of the question of total disability to the jury. Our decisions support the view that provisions in accident policies for indemnity in the event the insured is totally or wholly disabled do not require that the accident shall render the insured absolutely helpless, but such provisions are construed as meaning such a disability as renders him unable to perform the substantial and material acts of his business or occupation in the usual and customary way. *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029; *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Missouri State Life Ins. Co.* v. *Snow, ante* p. 335; *Mutual Benefit Health & Accident Association* v. *Bird, ante* p. 445. As pointed out in the Spencer case, our rule on this subject is in accord with the general trend of authority. It is claimed by counsel for the defendant that other decisions of our court are somewhat at variance with the rule announced in the cases cited. We do not think so, but no useful purpose could be served by pointing out in detail the differences in the cases. Isolated sentences of a particular case may always be used in apparent contradiction of expressions announced in other cases by the same court where the facts are different. Each case must be construed with reference to the particular facts, and all the cases on a given subject must be read in the light of each other. When this is done, it does not appear to us that we have ever varied from the rule announced in the cases above cited. If any mistake was made, it was in the application of the rule itself to the facts of the particular case.

There are certain exceptions to the risk as appears from the constitution of the association. They may be summarized as follows:

"1. Received while under the influence of intoxicating liquor or narcotics;

"2. From fighting or wrestling;

"3. From a hazardous adventure or an altercation;

"4. From intentional injury;

"5. While fighting, resisting arrest, or violating the law."

It is not claimed by the defendant that the plaintiff was under the influence of intoxicating liquor or narcotics as provided in subdivision 1. The contention of the defendant as to the other four subdivisions with regard to whether the injury was received while the plaintiff was fighting or engaged in a hazardous adventure, or from an intentional injury, was submitted to the jury under instructions prepared by the defendant in its own behalf. The jury found that issue in favor of the plaintiff, and no useful purpose could be served by setting out and reviewing the instructions in detail.

It is strongly insisted by the defendant that the court erred in allowing the plaintiff to recover for total disability for 104 consecutive weeks, as provided in the policy, when the trial of the case took place a shorter period of time. Defendant's contention now is that it was entitled to a reduction of the amount recovered to the value at the time the trial was had. We do not agree with defendant in this contention. The defendant denied that it was liable to the plaintiff in any amount under the terms of the policy. It did not offer to pay him the weekly indemnity for total disability as long as such disability should continue. It sought to defeat his claim altogether. The jury only allowed the plaintiff to recover for the period of time provided for in the policy. In railroad damage cases recovery for permanent disability is allowed for a period of time according to the life expectancy of the plaintiff shown by mortality tables prepared by insurance companies. In the case at bar

defendant was only required to pay for the time it agreed to do so in its contract of insurance.

Finally, it is insisted that there is no testimony upon which to base the question of total disability because the physician only gave it as his opinion that the plaintiff was wholly disabled. The plaintiff was engaged in the business of buying and selling secondhand automobiles. In the course of his avocation he was required to repair and put in condition the secondhand cars before he would sell them. He had a small business and performed most of the labor himself. According to a reputable physician, he examined plaintiff in June after the injury and found adhesions. The knife cut caused a serious wound. The plaintiff had a hemorrhage in the pleural cavity between the lungs and the wall. Adhesions caused him to breathe heavily and suffer great pain when he performed manual labor. That condition would prevail until removed by surgical operation, and the physician considered it permanent. By adhesions witness means the pleural sac growing together, which would lessen the ability of the plaintiff to do manual labor. Under these circumstances, the jury had a right to consider the opinion of the physician and to find that the plaintiff was not capable of pursuing his usual avocation within the meaning of the rule announced above.

Other assignments of error are urged for the reversal of the judgment, but we believe that they are fully covered by the principles of law above announced and do not merit a separate discussion.

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

MISSOURI PACIFIC RAILROAD COMPANY *v.* WHELEN SPRINGS GRAVEL COMPANY.

Opinion delivered April 25, 1932.

[redacted]

R. E. Wiley, for appellant.

Rose, Hemingway, Cantrell & Loughborough, Coleman & Riddick, Gantt and *J. S. McKnight,* for appellees.

KIRBY, J. The appellees filed petitions with the Railroad Commission to require the Missouri Pacific to allow them $3 per car for switching cars by the gravel company's locomotives in and between the gravel plants and the carrier for the transportation.

The gravel plants are at various distances from, and are connected with, appellee's railroad, by private spur tracks. Each of the gravel companies owns switch tracks and locomotives which they use in their plant, and which are also used in switching cars onto the tracks of appellant.

The spur tracks were constructed by the gravel company, the rails being leased from the carrier.

The gravel companies alleged that in their switching they were doing part of the line haul, which the carrier was obligated to do, and claimed that they should

either have an allowance for that service performed for the carrier or that the carrier should be required to perform the switching.

The carrier contended that the service done by the gravel companies was a special service, and denied that the Railroad Commission had any jurisdiction to compel the service, or compensation in lieu of it. It claimed that it extended the service in so far as it participated at all under special contract for a private industry spur agreement, and that no part of the service was transportation service which it could be compelled to perform.

The Railroad Commission on its own motion instituted investigation into the question of reasonableness of requiring all carriers by rail either to perform the switching service, or to compensate the gravel companies for performing the switching service, and also to investigate questions of discrimination, and ordered other carriers to be made parties.

The carriers all filed responses, claiming that the Railroad Commission had no jurisdiction, and that, if the Commission had jurisdiction, the switching for which allowance is claimed was no part of the transportation service, but was interplant operation for which no allowance should be made. The carriers also alleged that the enforcement of the allowances would work an illegal discrimination, and they also contend that the Commission's order is void because its findings defeat instead of support the allowance.

Evidence was introduced, both by the appellees and appellant, and the Commission, after hearing the evidence, ordered that appellant either perform the service of delivering empty cars to the gravel pits of petitioners, and haul the loaded cars from the pits, or pay to the petitioners $2.50 per car for each loaded car handled, the order to become effective February 10, 1931.

The Missouri Pacific Railroad Company appealed to the Pulaski Circuit Court, where the case was heard, and the circuit court entered the following order:

"The court, being well and sufficiently advised as to all matters of law and fact arising herein, is of the opinion that the order of the Arkansas Railroad Commission should be in all things approved and affirmed.

"It is therefore considered, ordered and adjudged by the court that the order of the Arkansas Railroad Commission in this cause be, and the same is, hereby in all things approved and affirmed, and the defendant, Missouri Pacific Railroad Company, be, and it is hereby directed and ordered by the court to comply with the same."

From this judgment of the circuit court the railroad company has appealed to this court.

It is contended by the appellant that the Railroad Commission was without jurisdiction to order the allowances for two reasons: first, because such allowances are not within any subject-matter over which the statute gives the Commission jurisdiction; second, the service is a special one, pursuant to contract, which contract the Commission has no jurisdiction to compel.

The first question for our determination is whether, under the evidence in this case, the Railroad Commission had jurisdiction to try the case and make the order.

Counsel on both sides have filed exhaustive briefs, and cited numerous authorities, which we have carefully considered, but which we do not deem it necessary to review here.

Our statute provides that the Commission shall make rules and regulations in respect to receiving, hauling, transporting and delivering of freight and express. Section 1649 of Crawford & Moses' Digest.

Section 1650 of Crawford & Moses' Digest authorizes the Commission to make and establish all needful rules and regulations, general and special, and for furnishing cars.

Act No. 124 of the Acts of 1921 also gives the Railroad Commission authority to regulate carriers.

These statutes were construed and the authorities reviewed in the case of *Kansas City Southern Ry. Co.* v.

Ark. Railroad Commission, 175 Ark. 425, 299 S. W. 761. In that case the court, among other things, said:

"The comprehensive jurisdiction vested in the Railroad Commission by act No. 124, *supra,* which, as above set forth, extends to and includes all matters pertaining to the regulation and operation of trains and all other jurisdictions possessed by the Arkansas Railroad Commission under the Constitution and the laws of Arkansas in force on March 31, 1919, unquestionably confers jurisdiction on the Railroad Commission to correct all abuses that then existed, or might in the future obtain, by virtue of any act of the Legislature covering the special matters designated by act No. 149, as amended by act 338 of the Acts of 1907, and all other matters pertaining to the regulation of all common carriers, railroads, etc., set forth in act 124 of the Acts of 1921."

The Railroad Commission would have the power to require the carrier to construct and maintain such switches and spur tracks as are reasonably necessary to properly serve the public, and if a carrier uses the private tracks of shippers for its purpose, the Railroad Commission would have the same right to regulate the switching on these tracks that it would on tracks which belonged to the carrier. The carrier, of course, could not be required to use the tracks of the shipper, nor could the shipper be required to permit the use of its tracks. That, as stated by the appellant, is a matter of contract between the parties. They, however, could not lawfully contract in such a manner as to discriminate against others. They could not so contract as to make the freight rates of the shipper either greater or less than the regular rates.

"The Commerce Act prohibits the payment of rebates, and its command cannot be evaded by calling them differentials or concessions, nor by taking the money from the railroad itself or from a company that is proved to be the same as the railroad. Otherwise nothing would be easier than for lumber companies to charter a railroad, collect freight as a railroad, but pay it out as a

lumber company to shippers." *Fourche River Rd. Company* v. *Bryant Lumber Co.*, 230 U. S. 316, 33 S. Ct. 887.

It is to prevent rebates, abuses and unjust discriminations that the Railroad Commission was created, and the laws creating the Commission and prescribing its powers and jurisdiction are to be liberally construed to effect the purposes for which they were created.

It is true that a common carrier cannot be required to receive freight on or along a private switch. The order of the Railroad Commission which was affirmed by the circuit court does not order the carrier to receive freight on a private switch. What the order does is to require the railroad company to do the switching, which is a necessary part of the transportation, or to pay the shipper for such service.

Appellant cites and quotes from *Fairview Coal Co.* v. *Ark. Central Ry. Co.*, 159 Ark. 649, 252 S. W. 920, 32 A. L. R. 191, to sustain its contention that it cannot be required to receive freight on a private switch. The court in that case, however, said: "Where a railroad company furnishes sufficient facilities of its own for the receipt and delivery of freight, there is at common law no duty resting upon it to receive or deliver freight upon a private siding or spur track."

The carrier, however, must furnish sufficient facilities of its own, or it may use the facilities furnished by the shippers, but in either event it must either do that part of the switching which is a necessary part of the transportation, or pay the shipper a reasonable compensation for the switching.

In speaking of the power of the Commission, it has been said: "And in dealing with the interest of the wider public we do not feel that the action of the Commission should be hampered or influenced by the necessity of considering the effect of the improvement on the local public, when its effect on the wider public of which the local public is a part will be beneficial." *West* v. *Philadelphia-B. & W. Rd. Co.*, 155 Md. 104, 141 Atl. 509.

The Commission, before making the order in this case, on its own motion brought in the other railroads of the State so as to consider the entire question.

"The railway company owes a duty to the shipper, to the public, and to itself. The Commission is authorized by statute to supervise the practice and regulations of railroad companies, and make such orders in connection therewith as it determines to be reasonable." *Halliday* v. *Public Utilities Commission,* 118 Ohio St. 269, 160 N. E. 713.

While there is some conflict in the evidence in this case, there is substantial evidence to show that the switching mentioned in the Commission's order is a part of the line haul, and a service to be performed by the carrier, and while, as contended by appellant, the Railroad Commission would have no authority to compel it to use the private tracks of the shipper, the Commission does have authority to determine whether the public necessity and convenience requires the establishment of spurs and switches, and there is nothing in the law to prevent it from using the switches and spurs of others. It may either do this or provide facilities of its own.

It is next contended by the appellant that, if the Commission had jurisdiction, the switching for which allowance was made is no part of the transportation service. As we have already said, while there is some conflict in the evidence, there is substantial evidence to support the finding that the switching was a part of the transportation service.

It is also contended by the appellant that the allowance will work an illegal discrimination. There is no evidence in the record, however, tending to support this contention.

It is finally contended that the order is void because the findings of the Commission defeat, instead of support, the allowance. We do not agree with appellant in this contention.

It is true that the Commissioner's order stated that it was not clear how much of the service was plant facil-

ity, etc. The Commission stated, however, that there was enough service which should properly be done by the carrier to amount to $2.50 per car, and the evidence of appellant's witnesses is to the effect that this is cheaper than the carrier itself could perform the services.

The Railroad Commission had jurisdiction; there is sufficient evidence to support its finding, and the judgment of the circuit court is affirmed.

OZARK SCHOOL DISTRICT NO. 56 *v.* WICKES CONSOLIDATED SCHOOL DISTRICT NO. 79.

Opinion delivered April 25, 1932.

Duke Frederick, for appellant.

Lake, Lake & Carlton, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Polk County setting aside an order of the county board of education entered on July 2d, revoking its previous order of May 15, 1931, dissolving Ozark School District No. 56 and annexing the territory thereof to the Wickes School District.

The order consolidating the two districts was made at a called meeting of the board with only three out of five members present. The record reflects that the two absent members were not notified, and had no knowledge, of said meeting. Section 35 of act 169 of the Acts

of 1931 of the General Assembly relative to special or called meetings of the board of education is as follows:

"The county board of education shall meet on the third Tuesday in March, June, September and December of each year, and at such other times as meetings may be adjourned to, or on call of its chairman, county superintendent of schools, or any two members of the board. Notice of such call meetings to be given in writing to each member of the board."

The statute is mandatory, and its provisions must be strictly obeyed in order to give validity to a called meeting or acts performed by a board of this character at such meeting. The statute was not followed, and therefore the order consolidating the districts on May 2, 1931, was void. *School District No. 42* v. *Bennett,* 52 Ark. 511, 13 S. W. 132; *Burns* v. *Thompson,* 64 Ark. 489, 43 S. W. 499; *Dierks Special School District* v. *Van Dyke,* 152 Ark. 27, 237 S. W. 428.

The board had inherent authority at any subsequent valid meeting to expunge from its record void orders theretofore entered by it, even on its own motion. The power or authority to enter an order necessarily implies power or authority to vacate a void order.

The trial court took the view that the board of education was without authority to set aside upon motion an order once made by it. We think to the contrary, and have no doubt whatever that a board of education may set aside one of its void orders and thereby clear its erroneous record.

On account of the error indicated, the judgment is reversed, and the cause is remanded with directions to the trial court to affirm the order of the county board of education setting aside its order of May 15, 1931, consolidating said districts.

ARKANSAS POWER & LIGHT COMPANY *v.* KILPATRICK.

Opinion delivered April 25, 1932.

Albert Walls, C. H. Moses and *J. W. House,* for appellant.

T. C. Trimble, W. W. McCrary, Jr., and *T. C. Trimble, Jr.,* for appellee.

MEHAFFY, J. On July 6, 1931, George Kilpatrick, Jr., seven years of age, was severely injured inside the substation of the Arkansas Power & Light Company in Lonoke, Arkansas. Suit was brought against the Arkan-

sas Power & Light Company for the minor by his father as next friend, and suit was also brought by George Kilpatrick, Sr., for the loss of services of the child, and for medical and hospital expenses.

There is no dispute about the injury to the child, nor the extent thereof. He was badly injured and suffered the loss of his right arm below the elbow; he was severely burned about his feet, and suffered the loss of part of three toes.

It was alleged that the appellant was engaged in the electric power business, furnishing electricity to the town of Lonoke, and, as such distributor of electricity, it negligently maintained a substation within the corporate limits of the town of Lonoke, said substation being connected with high-power tension wires of more than 1,300 volts. Appellant's substation is located a short distance west of the Bransford gin, and appellee alleged that appellant negligently inclosed the substation by a light net and barbed-wire fence on property upon and about which children are accustomed to play, its surroundings being attractive to children, and that this fact was well known to the appellant; that on the sixth day of July, 1931, George Kilpatrick, Jr., in passing said property, was attracted to same, and the fence surrounding the substation was inadequate, insufficient, and negligently constructed, and enabled the said George Kilpatrick, Jr., to climb through same and into said inclosure, where the transformers and high-tension wires were located, said property being unguarded; that George Kilpatrick, Jr., was seven years of age, and unaware and unwarned of the danger concealed in the wires; he, childlike, climbed upon said transformers, and came in contact with said uninsulated high-tension wires, and was severely injured.

It is unnecessary to describe the injuries or the extent thereof, because there is no dispute about the extent of the injuries.

The appellant answered admitting that, as a distributor of electricity, it maintained a substation within

the corporate limits of Lonoke, and that the substation was connected with a transmission line, and that the substation is a short distance west of Bransford's gin. It denied all the allegations of negligence, and alleged that its substation was properly and carefully maintained, so built as to render it impracticable for people to climb over and into the inclosure; that the gate was kept securely fastened, and that George Kilpatrick, Jr., climbed over a seven- or eight-foot fence, and through barbed-wire over into the inclosure, and then, by means of a board or plank, elevated himself sufficiently high to come in contact with the transmission line of appellant, which was charged, and which caused the injury.

The substation was located within the corporate limits of the town of Lonoke, and near it there were dwelling houses where families and children lived. There was also located near the substation the gin and a rock pile, and east of the station, a light pole. There was also in the vicinity of the station an old water tank, a sawdust pile, and a cottonseed hull pile. Just west of the station was a handle factory.

When the boy was injured, John Hastings heard his scream and ran to the place and rescued him. When Hastings got to the substation, the gate was not locked, and had no hinges on it, but was supported by two wires, one at the top and one at the bottom. He pushed the gate down to get in.

Witnesses testified that they had seen neighborhood boys playing around the tile pile; that they played around there all summer. They also played on the hull pile. There was a trail down alongside the substation to the hull pile, and the sawdust pile was just northwest of the hull pile. The fence wire was loose, and there were four loose wires on top of the hog wire, which could be separated two feet by pulling them apart. The hog wire at the bottom was fastened to posts, but was loose.

After the accident signs of danger had been placed on the tank. There is also a willow tree between the gin

and substation. During the summer children played on the sawdust, cotton bales and hull pile.

On the morning of the accident there were two boys at the substation, Kilpatrick and Grubbs. It was a common thing for children to play in the territory around the substation.

One witness had prepared a map from which he testified, showing the location of the switch track, substation, willow, etc., but the map was not introduced in evidence.

Witnesses for appellant testified that they had never seen any children playing around the substation, but they had seen them around the old mill shed and willow trees. There was a bird's nest in the pole in the northwest corner of the substation. The wires carrying 1,300 volts were not insulated.

There was a verdict and judgment for $10,000 in favor of George Kilpatrick, Jr., and verdict for $2,000 in favor of George Kilpatrick, Sr. The case is here on appeal.

Appellant contends, first, that the substation was not attractive to children, and that it was error to try the case on the theory of an attractive nuisance.

In support of this contention, it cites and relies on 20 R. C. L. 83, 84 and 89. It is contended that, to render an instrumentality an attractive nuisance, it must appear, first, that the instrumentality must be of such a character as to render it attractive to children; second, it must be shown that appellant knew or should have known that a child would make use of the instrumentality; and, third, it must be shown that the defendant failed to provide guards of protection to the instrumentality.

The sections referred to state the rule to be that it must ordinarily appear that the instrumentality was alluring to youth, appealing to childish instincts of curiosity and amusement, and that it was situated in a place open to and frequented by children; that it was easily accessible to children, and that it constituted a peril.

It is, however, stated in the same sections referred to by appellant that children, wherever they go, must be

expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution toward them must calculate upon this and take precautions accordingly.

So far as we know, no authorities hold that the instrumentality must necessarily, of itself, attract children to the place. If it is such an instrumentality as that small children, because of their curiosity or for their amusement, would be likely to be injured when attracted to the place by the situation or by other things in the immediate locality of the instrumentality, then children injured by the instrumentality are entitled to recover, although they might not be attracted to the place by the dangerous instrumentality alone.

The general rule is well stated in C. J. as follows:

"It has been held that one who maintains on his premises a dangerous instrumentality which is not itself attractive, but is placed in such immediate proximity to an attractive but not dangerous situation or condition as to form with it an attractive and dangerous whole, is liable for injuries to a child thus attracted to the danger." 45 C. J. 766.

The undisputed evidence in this case shows that the dangerous instrumentality, the substation, was within the corporate limits of the town of Lonoke; that in the immediate vicinity of the substation was a rock pile, a hull pile, willow trees and cotton bales; that near the substation were a number of homes, and that the children frequently played around these places, and the appellant was bound to know this.

Appellant calls attention to a number of other cases, but, so far as we know, none of the recent cases are in conflict with the rule above quoted from Corpus Juris.

Appellant contends that it is thoroughly established that Kilpatrick, the injured boy, and the Grubbs boy climbed over the fence at the northeast corner of the substation.

The evidence does not show how the boy got inside the inclosure and came in contact with the electric wire.

The evidence shows that the fence wires were loose, could easily be separated so as to leave a space of two feet between them, and the boy may have gotten through the fence or he may have climbed over it.

Nothing would be more natural than for children, the age of the injured boy to get inside the fence of the station, either out of curiosity for amusement, or to get at the bird's nest, which the evidence shows was in a post in the corner of the fence. Children the age of the injured boy, going on to other's property, are not trespassers. Adult persons would be trespassers, but, even where adults are on the property of others by invitation and are injured by the dangerous instrumentality maintained by the owner of the land, they may recover.

It is the general rule that the maintenance of a dangerous instrumentality that is attractive to children, or the maintenance of such instrumentality at a place made attractive to children, is an invitation to children to come upon the premises, and they are not trespassers in so doing; in other words, the children attracted to the place are in the same situation that adult persons are in going on the premises by invitation.

The Iowa court said: "This brings us to the question, What constitutes an invitation? These authorities hold that one who maintains upon his place, and permits to remain exposed, something dangerous when approached or used, and of such an attractive character that he knows, or, as a reasonable prudent man should know, will invite the attention of children and draw them to it, because of their sportive and playful natures, impliedly invites them to come; that in exposing such an instrumentality, with the knowledge that it will attract children, he occupies the same position when they come as if he had beckoned them and they followed. We are not here discussing the question of contributory negligence on the part of the child. We will assume the child is too young to be chargeable with negligence. We are not dealing with a trespassing child, for no one is a trespasser who comes by invitation of the owner. As the

cases of attractive nuisance seem to rest upon the thought that, exposing anything of a character that appeals to children's nature, and by appealing draws them to it, is, in its very nature, an implied invitation to them to come. It is not material in an inquiry of this kind whether the children had been accustomed to come or not; whether it had remained a long time or a short time." *Wilmes* v. *Chicago, Great Northern Ry. Co.,* 175 Iowa 101, 156 N. W. 880, L. R. A. 1917F, 1024.

"By common knowledge, very young children are liable to trespass, and be wholly ignorant of wrong-doing, or substantially so. Is there not a duty owing to such children as to such situations—a duty even within the broad lines of the principle stated—though they be wrongdoers, which may be actionably breached, and especially so in a case of their being where they have a right to be, as in this case? The common instincts of mankind suggest that. Sound policy would seem to demand it, and the courts in general, and this court in particular as to situations analogous to the one in hand, uphold it.

"Conservation of child-life and safety as to artificial perils is one of such importance that ordinary care may well hold every one responsible for creating or maintaining a condition involving any such, with reasonable ground for apprehending that children of tender years may probably be allured thereinto." *Kelly* v. *Southern Wisconsin R. Co.,* 152 Wis. 328, 140 N. W. 60, 44 L. R. A. (N. S.) 492.

It is next contended that George Kilpatrick was injured as a result of his own act in climbing over the fence into the substation. As we have already said, the evidence does not show how he got into the substation; whether he climbed through the wires or over the fence, but no matter how he got there, a child of his age could not know that there was any danger in going where he did.

Danger from electricity is different from danger from a pond or other things which children know about. Elec-

tric force cannot be seen, and, for that reason one who handles a deadly agency like electricity must exercise care commensurate with the danger.

"When one, through the instrumentality of machinery, can accumulate or produce such deadly force as electricity, he should be compelled to know that the means of its distribution are in such condition that those whose business or pleasure may bring them in contact with it may do so with safety." *Maysville Gas Co.* v. *Thomas,* (Ky.) 75 S. W. 1129; *Thomas* v. *Maysville Gas Co.,* 108 Ky. 224, 56 S. W. 53, 53 L. R. A. 147; *Ark. P. & L. Co.* v. *Cates,* 180 Ark. 1003, 24 S. W. (2d) 846.

"The plaintiff's right to recover is predicated on the doctrine, so often announced by the courts, that, where an owner permits anything dangerous which is attractive to children, and from which injury may be anticipated, to remain unguarded on his premises, he will be liable if the child attracted to the place is injured thereby. That doctrine has been discussed in numerous decisions of this court, and several of them have applied it so as to allow recovery for damages." *Foster* v. *Lusk,* 129 Ark. 1, 194 S. W. 855.

This court has had the question of attractive nuisance before it many times, and has uniformly held that whether the dangerous instrumentality was attractive to children was a question for the jury. *Nashville Lbr. Co.* v. *Busbee,* 100 Ark. 76, 139 S. W. 301; *St. L., I. M. & S. R. Co.* v. *Waggoner,* 112 Ark. 593, 166 S. W. 948; *Central Coal & Coke Co.* v. *Porter,* 170 Ark. 498, 280 S. W. 12; *Brinkley Car Works* v. *Cooper,* 75 Ark. 325, 87 S. W. 645.

This court has many times held that the questions of negligence and contributory negligence are for the jury. Every one knows that children seven or eight years old are not only likely to go onto the premises of another, where there is anything attractive to them, but will climb and go to places like this substation, and that they would not know there was any danger.

Appellant calls attention to numerous cases, but the doctrine of attractive nuisance has been before this court

so many times, and the rule is so well settled, that we do not deem it necessary to review or discuss the authorities referred to.

It is finally contended that the court erred in giving appellee's requested instruction No. 1, which reads as follows: "The court instructs the jury that, if you find from the testimony in this case that the defendant maintained a substation for receipt of electricity, which it knew to be dangerous, and said defendant was guilty of negligence in not maintaining a proper fence around said substation, and same was located on premises about which children would congregate and play, which the defendant knew, or by exercise of reasonable care should have known, that children would congregate and play around and about the premises, and would likely be attracted onto said premises and injured by electricity received at said substation, if not properly inclosed; and if you further find that said plaintiff was attracted to said substation and injured by electricity conveyed through defendant's wires at said substation, and in doing this he exercised such care and prudence as may be reasonably expected of a boy of his age, intelligence and maturity, then this would be such negligence on the part of the defendant as would render it liable to plaintiff for damages by reason of the injuries sustained."

The appellant argues, first, that the instruction does not require the negligence of defendant to be a contributing or proximate cause of the injury. The instruction, we think, is not open to this objection.

It is stated by appellant that the instruction submitted the question of appellee's attraction to the station without evidence to support it. We think the evidence is ample to show that the children were in the habit of playing in the immediate locality of the substation, and the appellant knew this, and, as we have already said, it was a question for the jury, not only whether the appellant was guilty of negligence, but as to whether the substation was such as to attract children.

There are some other objections pointed out to the instruction, but we have carefully considered the instruction and all of appellant's objections to it, and have reached the conclusion that the court did not err in giving this instruction. *St. L., I. M. & S. R. Co.* v. *Waggoner,* 112 Ark. 593, 166 S. W. 948; *Brinkley Car Works & Mfg. Co.* v. *Cooper,* 75 Ark. 325, 87 S. W. 645.

Our conclusion is that the evidence was sufficient to sustain the verdict, and that there was no error committed by the court in instructing the jury.

The judgment is therefore affirmed.

SMITH, J., (dissenting). The various houses, buildings, hull piles, etc., to which the majority refer as being in the neighborhood of the substation, were, with it, situated upon a plot of ground four blocks in area without intervening streets. In other words, there would have been four blocks had there been intervening streets to so divide the land.

The transformer where the child was burned was located in an inclosure about eighteen by twenty feet, with a high fence around it, this inclosure being on this four-block area. No witness testified that any child had ever been seen within this inclosure. The father of the injured boy testified that it had never occurred to him that a child would play within the inclosure where the transformer was located. This was, of course, because of the presence of the fence. Why, then, should any such danger have been anticipated by any other person? Children did play upon these four blocks and on the various objects thereon, as stated by the majority, but no one had ever seen a child within the inclosure containing the transformer.

There was testimony to the effect that the gate was not kept locked, and was fastened only with two twisted wires, one at the top and the other at the bottom of the gate. But the majority opinion recites the fact that the man who first reached the boy found the gate fastened, and that he was required to push it down to obtain

access. Just what force was required to accomplish this purpose is not shown. But the condition of the gate is unimportant, as it is certain that entrance to the transformer was not had through the gate.

The fence enclosing the transformer consisted of three strands of a mesh wire, each strand being twenty-six inches wide, which made a mesh fence six and one-half feet high. There is no contention that access was obtained through the mesh, as they were too small to make that possible. Above this wire fence four strands of barbed wire extended outward on cross-arms, so that the entire fence was about ten feet high. It was these barbed wires above the mesh fence which could be extended so that an intervening space of two feet would exist between them.

No witness saw the boys enter the inclosure. The injured boy was not offered as a witness, and the testimony of his companion, offered by defendant, was excluded on account of his youth. The offer was made to show by this excluded testimony that the boys climbed the fence to get a bird's nest, and later climbed down into the inclosure. This bird's nest was in a corner post (a sawed-off telephone pole) of the inclosure, but it was not shown that the defendant was previously aware, or should have been, of the presence of this bird's nest. However, the complaint is not made that the bird's nest was an attractive nuisance. It would require an unusual degree of care to prevent boys from climbing trees and posts in search of birds' nests.

The only affirmative testimony as to how the boys entered the inclosure—the testimony of the Grubbs boy being excluded—was furnished by defendant. A number of witnesses testified on behalf of defendant to the effect that there were footprints on the posts and braces. The injured boy wore shoes. His companion was barefooted. A witness testified that he observed "one foot-print on the angle brace that came up at the side of the corner post, and this brace had showed the print of a foot where

some one had climbed up the brace to get on the inside of the substation."

It appears, therefore, even with the testimony of the Grubbs boy excluded, that entrance to the inclosure was obtained by climbing over the fence at the post where the bird's nest was. There would even then have been no danger had not the injured boy, with the aid of the plank, after getting into the inclosure, climbed upon the transformer, where he could reach the wire. It is true this wire was not insulated, but why should it have been, if it was in a place where there was no reason to anticipate that it could be reached, even by a child?

The law of attractive nuisances is exhaustively annotated in a note to the case of *United Zinc & Chemical Co.* v. *Van Britt,* 36 A. L. R. p. 28. The annotations extend from page 34 to page 294, and this exhaustive review is summarized as follows: "To recapitulate: To make out a case against the person responsible for the danger, there must appear: First. That the injured child was too young to understand and avoid the danger. Second. That there was reason to anticipate the presence of such children, either because of some attraction on the premises, or because the danger was in some place where children had a right to be. Third. That there was a strong likelihood of accident. Fourth. That the danger was one other than those ordinarily encountered. Fifth. That the precautions not taken were such as a reasonably prudent person would have taken under the circumstances."

Under these tests, it occurs to me that a case of liability was not made. It is, no doubt, true that the injured child was too young to understand and appreciate the danger, but there was no reason to anticipate that he would climb over the fence, and it occurs to me that the precautions taken to prevent this were such as a reasonably prudent man would have considered sufficient.

In 45 C. J., page 682, at § 185 of the chapter on Negligence, it is said: "A property owner is not re-

quired to make his premises 'child proof' by providing all possible safeguards against the entry of children, but he fulfills his full duty when he provides such safeguards as would reasonably prevent injury to a child of ordinary and normal instincts, habits and training; and if he has provided such safeguards, he is not liable for injury to a child who had overcome the obstacles and succeeded in reaching a place of danger." The numerous cases cited in the note to the text just quoted fully sustain the text.

I do not review the cases cited by the majority to distinguish them from the instant case, but the distinction exists. For instance, the majority quote from the case of *Wilmes* v. *Railroad,* 175 Iowa 101, 156 N. W. 880, L. R. A. 1917F, 1024, in which case the Supreme Court of Iowa said: "We are not dealing with a trespassing child, for no one is a trespasser who comes by invitation of the owner." How can it be said that there was any invitation here, even to a child, where there was a ten-foot wire fence to keep all persons off the premises?

The same court said in the case of *Anderson* v. *Fort Dodge, D. M. & S. R. Co.,* 150 Iowa 465, 130 N. W. 391, that "To say that a property owner must guard against such injury to a trespassing boy simply because it is possible for him in a venturesome spirit to climb into the zone of danger would be intolerable."

It occurs to me that the majority opinion makes one possessing or operating an instrumentality, which might attract and injure a child, an insurer that the child shall not be injured by requiring such precautions to be taken that an injury is not possible.

This is very difficult, if not impossible, in the operation of any business in the conduct of which a child might be injured, and imposes a much higher degree of care than the law exacts.

It is my opinion that such precautions were here taken as the law requires, and that liability was not established, and a verdict should have been directed in defendant's favor, and I therefore dissent.

TAYLOR *v.* CORNING BANK & TRUST COMPANY.

Opinion delivered April 25, 1932.

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

E. B. Downie, Shields Goodwin and *Oliver & Oliver,* for appellee.

MEHAFFY, J. This is the second appeal in this case. The decision on first appeal is in 183 Ark. 557, 38 S. W. (2d) 557, where the facts are stated.

The only question in this case now is whether interest should be paid on a prior or preferred claim against an insolvent banking institution.

Appellee cites and relies on § 7360 of Crawford & Moses' Digest. That section provides for allowing interest on judgments from the day of signing the judgment. It, however, has no application here.

The claim is against the Bank Commissioner in charge of the American Exchange Trust Company, a banking institution hopelessly insolvent. While this claim is a prior or preferred claim, every other depositor has the same right as a depositor holding a preferred claim, except the right to be paid first, but, unless the banking institution or Commissioner has sufficient funds to pay all the depositors, no interest can be paid on any claim.

Appellee also cites and relies on *Arkansas Southern Ry. Co.* v. *German Nat. Bank,* 85 Ark. 136, 107 S. W. 668, but the court in that case was not dealing with an insolvent banking institution, and, under our statute judgments draw interest after the signing of the judgment, but the above case does not hold that interest may be allowed in a case like this.

Appellee next calls attention to 33 C. J. 213, § 79, and 33 C. J. 215, § 82. These sections simply state the law to be that judgments bear interest, and, as a general rule, this is true.

Appellee next refers to *Bank of Roxie* v. *Lampton,* 104 Miss. 427, 61 So. 452. That case was tried on an agreed statement of facts, and the court said: "It is manifest from the agreed statement of facts that the appellant was wholly without fault in the matter, and that the Pike County Bank & Trust Company was simply the victim of Caston's fraudulent conduct." The court in that case allowed interest. Caston was acting president of the Bank of Roxie, and acting cashier of the Pike County Bank & Trust Company, and committed the frauds mentioned in the case, but the facts in that case are different from the facts in the case at bar.

The general rule is that, unless there are sufficient funds to pay all the depositors, no depositor is entitled to interest on his claim. *Clark Sparks & Sons Mule & Horse Co.* v. *American Nat. Bank,* 230 Fed. Rep. 738; *Shaw* v. *McCord,* Tex. Civ. App. 18 S. W. (2d) 200; *State ex rel. Fant,* v. *Browne,* 156 S. C. 181, 153 S. E. 133, 69 A. L. R. 443.

In the case of *People* v. *American Loan & Trust Co.,* 172 N. Y. 371, 65 N. E. 200, VAN, J., in delivering the opinion of the court, said: "If the assets are sufficient to pay all, including interest, it must be paid, for, as against the corporation itself, interest should be allowed before the return of any surplus to the stockholders." It may be admitted that these remarks were unnecessary to the disposition of the case then under consideration,

but the rule thus asserted appears to us to be so eminently just and so well supported by other authority that we now have no hesitancy in adopting it as the rule that should be adhered to in disposing of questions of this character. It is not only in accord with the views expressed in the case of *Sickles* v. *Herold,* 149 N. Y. 332, 43 N. E. 852, but those expressed in *Nat. Bank of Commonwealth* v. *Mechanics' Nat. Bank,* 94 U. S. 437; *Richmond* v. *Irons,* 121 U. S. 64, 7 S. Ct. 788; *Mahoney* v. *Bernhard,* 63 N. Y. Supp. 642; *Wheeler* v. *Miller,* 90 N. Y. 353." See *Eastman* v. *Farmer's State Bank of Olivia,* 175 Minn. 336, 221 N. W. 236; *Leach* v. *Sanborn State Bank of Sanborn,* 210 Iowa 613, 231 N. W. 497, 69 A. L. R. 1206.

A depositor in a bank which has become insolvent is not entitled to interest on his claim unless the assets are sufficient to pay all the depositors.

The decree of the chancery court is reversed, and the cause dismissed.

ARKANSAS POWER & LIGHT COMPANY *v.* CONNELLY.

Opinion delivered April 25, 1932.

Rose, Hemingway, Cantrell & Loughborough and *Elmer Schoggen,* for appellant.

Caviness & George, Neil Bohlinger, Sam T. Poe, Tom Poe and *Donald Poe,* for appellee.

McHaney, J. E. C. Connelly, for himself and as father and next friend of his infant son, Harold Connelly, brought this action against appellant to recover damages for personal injuries sustained by said infant by being struck by a street car of appellant on West Eleventh Street in the city of Little Rock. A trial resulted in a verdict and judgment for himself in the sum of $1,500 and as next friend for the infant in the sum of $3,500.

Three general assignments of error are relied upon for a reversal of these judgments: 1, that the court erred in the admission of testimony; 2, in the instructions; and, 3, in refusing to direct a verdict for it at its request.

We discuss these assignments in the reverse order. At the conclusion of the testimony for appellees, and again at the conclusion of all the testimony, appellant requested a directed verdict in its favor on the ground that the evidence was insufficient to support a verdict against it, either for the infant or the father. The court refused these requests, and they are now pressed for our consideration. This assignment must be overruled if there is any substantial evidence to support the verdict, viewing it in the light most favorable to appellees. A brief statement of the evidence viewed in this light follows: On March 30, 1931, Mr. Connelly, a widower, with his twin children three years and nine months of age, a nurse and housekeeper, and a young lady, lived at the corner of West Eleventh and Washington streets in Little Rock, on the south side of West Eleventh. One of appel-

lant's double lines of street car tracks is on West Eleventh and occupies a large portion of said street which is not paved. On the north side of this street, between Peyton and Washington, there is a large ditch which has been covered with plank or bridges to afford ingress and egress to the property on the north side of the street, except for about 100 feet east of Washington, where the ditch is not covered. On the above date, Mr. Connelly left the home to go to town, and at that time the children were playing in the front yard with some neighbor children, all being in the immediate custody of the nurse of the latter children. Shortly thereafter said nurse took them all across the street (and, of course, across the car tracks) in a northeasterly direction to a sand pile in the front of a neighbor's yard, where they were playing. The Connelly nurse and housekeeper discovered their absence, saw them across the street, and called them home. They started home in obedience to the call, but one of appellant's street cars, traveling west, struck Harold, knocked him down, ran over his right foot and cut or mashed off three toes, part of a fourth toe and otherwise bruised and injured him. The car traveled a car length or more before stopping after striking the child. At that time of year the children at the sand pile could have been seen by the motorman on the street car for a considerable distance east, and the child in the street could have been seen for a block or more east of the place of injury. The child, in going home, went across the ditch on the plank covering, and was going in a southwesterly direction and traveled some distance in the street before reaching a danger point on or near the track and could have been seen by the motorman, if a proper lookout had been kept, in ample time to have avoided injury to him. An eyewitness to the accident says the motorman, as he came down the street, was looking to the south, and apparently talking to a passenger who was standing on the car. Failure of the motorman to keep a proper lookout was the ground of negligence alleged and relied on, and that he saw, or by the exercise of ordinary care could have seen,

the child in time to have averted the injury. We think the evidence sufficient to take the case to the jury, both as to negligence and the proximate cause of the injury. But appellant says the testimony of the eyewitness who says the motorman was looking to the south is demonstrably false, because she could not have seen what she says she saw. We think appellant is mistaken in this argument. She stopped her car at the corner of Washington and Eleventh and could have seen the incidents testified to. At any rate, her credibility was for the jury. There was therefore substantial evidence before the jury, and appellant must fail on this assignment. It is insisted, however, that Mr. Connelly cannot recover in his own right because of the contributory negligence of Mrs. Kirker, the nurse and housekeeper, who was his agent in the care and custody of the children, because she called them to come home when a street car was approaching in plain view, and because she left them unattended in the front yard. This question was submitted to the jury under proper instructions, and it was a question for the jury under all the circumstances. We cannot say as a matter of law that she was negligent, as it is not certain that she saw the car.

Appellant also assigns error in the giving of instructions 1, 2 and 3 for appellee, in modifying and giving as modified appellant's No. 16, and in giving the second paragraph of appellee's No. 29.

Instruction No. 1 for appellees is as follows: "Gentlemen of the jury, this is a suit brought by Harold Connelly, an infant, by his father and next friend, E. C. Connelly, and by E. C. Connelly in his individual capacity, against the Arkansas Power & Light Company. The suit is for damages which the plaintiffs allege they sustained by reason of the negligent injury of the infant plaintiff, Harold Connelly, by a street car in Little Rock, on March 30, 1931." It is said that this instruction tells the jury that this was a "negligent injury," and had the effect of withdrawing from the jury the question of appellant's negligence, making it peremptory to find for appellees

in some amount. We do not think the instruction is open to this objection, but is a simple statement of the purpose of the lawsuit. It does not say that plaintiffs sustained a negligent injury, but that they "allege" they sustained damages by reason of the negligent injury to Harold. In other words, it is stated that plaintiffs seek to recover damages and allege that Harold received a negligent injury. This is not tantamount to saying that Harold did receive a negligent injury, but only that they allege such to be the fact.

We have examined carefully the arguments made against instructions 2 and 3 and do not find them open to the objections made. We do not set them out, as no useful purpose could be served thereby.

Instruction No. 16, as requested by appellant, is as follows: "You are instructed that street cars, from the necessity of the case, must have and do have the right-of-way on tracks where they alone can travel, and this right-of-way is superior to that of ordinary vehicles and travelers. This paramount or better right to the use of their tracks does not give them the right to exclude travelers who may move along or cross the tracks at any time and place where such traveling does not interfere with the progress of the street cars. But where there is a conflict between a street car and a traveler, the traveler must yield the right-of-way. This requirement of the law is to subserve the public convenience and accommodation, and it is your duty to bear these reciprocal rights in mind in determining the care required of the parties." The court gave said instruction, and, in connection therewith, added the following, at the request of appellees. "The rights of the plaintiff, Harold Connelly, and defendant street car company to use that part of the street occupied by the street railroad tracks are equal and reciprocal. The plaintiff, in walking on the path along or on the part of the street occupied by the street railroad track, had as much right, if in the exercise of ordinary care, to go along such part of the street, when not occupied by a street car, as he had to go along any other

part of the street, and plaintiff was not a trespasser in doing so. In the exercise of the reciprocal rights to use that portion of the street occupied by the street railroad tracks, the plaintiff and defendant company are also under reciprocal duties. The rights of each in using that portion of the street occupied by the street railroad tracks must be exercised with due regard to the rights of the other, and in such a careful and reasonable manner as not unreasonably to abridge or interfere with those rights, and so as to avoid injury, the one to avoid inflicting injury, the other to avoid being injured."

It is argued that the modification given at the request of appellees is in conflict with that part of the instruction requested by appellant. We do not think so. When carefully analyzed, the instruction as a whole, including the modification, states the rule correctly as to the respective rights of the street car company and other travelers on the street over which the car tracks pass. The law is clearly stated by this court in *Hot Springs Street Railway Company* v. *Johnson,* 64 Ark. 420, 42 S. W. 833; *Little Rock Railway and Electric Co.* v. *Sledge,* 108 Ark. 95, 158 S. W. 1096 Ann. Cas. 1915B, 682; and *Pankey* v. *Little Rock Ry. & Elec. Co.,* 117 Ark. 337, 174 S. W. 1170. We do not quote from these decisions, but the latter part of the instruction complained of is taken substantially from the latter case.

The latter part of instruction No. 29 given on behalf of appellees, authorizing a recovery by Mr. Connelly of the "amount he has paid or will have to pay in the future for doctor's bills, medicine bills, hospital bills, and nurse's bills by reason of the injury to his infant son, Harold Connelly, and also the loss of services which he may sustain in the future by reason of the injury to his infant son, Harold Connelly, if any, to be shown by the evidence," is objected to on the ground that it includes loss of services by his infant son, whereas there is no evidence that the infant would be able to earn less money by reason of the injury than he would have otherwise. The proof shows that Mr. Connelly had incurred expenses of

approximately $750 and that another operation will be necessary to remove a portion of one of the toes, which will cause additional expense in the future of an unknown amount. It will be seen therefore that very little recovery, if any, was allowed by the jury for loss of services. But, conceding that some portion of the verdict for $1,500 in favor of Mr. Connelly was for loss of earning capacity, we think the boy's condition, lack of development along with his brother, and the nature and extent of his injuries, all of which was before the jury, were sufficient to justify the jury in allowing some recovery on this account.

It is finally urged that the court erred in admitting certain incompetent prejudicial testimony. We have examined the errors assigned in this respect and find them without merit. Conceding them to be erroneous, they were not prejudicial as the facts testified to were established by other witnesses. We find no error, and the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* RILEY.

Opinion delivered April 25, 1932.

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

Murphy & Wood, for appellees.

BUTLER, J. On the 28th day of March, 1930, two model T Ford cars, loaded with students of the Hot Springs Junior High School, left the school grounds at the noon hour to be driven about the city during the noon intermission. There was no understanding between the two groups of students, each acting independently, but the common purpose was to return in time to be present at school at the termination of the noon recess. The first car to leave the school grounds was a Ford sedan driven by Paul Pittman, 15½ years old. In this car was another boy, 15 years of age, and three girls, two of them 13 and one 14 years old. In the second car, which left the school grounds within a short interval and continued behind the first car at a little distance, was Ewell Johnson, the driver, who was seventeen years old, and two other boys, one 14 and the other 15 years of age. The two cars were driven about the town for a short time and finally entered

upon Washington Avenue, which runs from east to west. They turned west on this street, thinking it would lead them to a street by which they could return to school, and, after going a short distance, ran into an excavation or cut in which the railroad of appellant company ran, with the result that one of the boys was killed and the other students injured to a greater or less degree.

Eight separate suits were brought against the appellant company to recover damages because of the injuries sustained, which suits were consolidated for trial in the court below, and as consolidated are here on appeal from verdicts and judgments in favor of the appellees.

In the complaints the allegation of negligence against appellant was that it made an excavation across Washington Avenue about thirty feet deep, and as many wide and left the same unprotected and unguarded. It was further alleged that, while driving along Washington Avenue, and in the exercise of ordinary care, by reason of the negligence of the appellant in leaving the cut unprotected, the automobiles fell into the cut, demolishing them and causing the injuries to the occupants thereof.

The appellant answered, denying the allegation of negligence, and set up as an affirmative defense (1) that the accident was occasioned by the contributory negligence of the drivers and the occupants of the cars, and (2) that whatever injuries were sustained were due to the negligence of the city of Hot Springs in not placing a barricade or guard to warn persons using the street of the existing danger.

The evidence introduced tended to establish the following facts; Prior to the year 1900 Washington Avenue and Hendrick Street had been laid off and established, and in that year the predecessor of the appellant company obtained the right from the city to lay its track or railway through the city and across the intersection of Washington Avenue and Hendrick Street. Washington Avenue running east and west and Hendrick Street crossing it approximately at a right angle. The line of railway at this point ran about north and south, and at the

intersection of the two streets a deep cut was made, taking a part of Hendrick Street and crossing Washington Avenue. After the excavation was made, Washington Avenue seems not to have been worked westward, but was maintained as a street eastward, being worked for a number of years by laborers with pick and shovel to within a short distance of the cut, estimated at from 35 to 65 feet. After the city procured road machinery the street was worked with tractors and graders. The last time it seems to have been worked was about two or three months before March 28, 1930. Within a short distance of the cut, on either side of Washington Avenue, houses had been built which had been standing for many years, and on the date of the accident in question the roadway was smooth and adapted to vehicular traffic, but had small hills and valleys between, there being two small hills with an intervening valley just before reaching the cut. The crest of the last hill was about 65 feet from the cut.

Forty-two assignments of error were presented in the motion for a new trial, and are argued by appellant in its brief. It will be impracticable to take up and discuss each of these assignments in detail or to review all of the testimony. To do so would unduly extend this opinion, and such evidence as is necessary for an understanding of the case will be briefly set out.

Exception was saved to the qualifications of one of the jurors on the panel because it was shown upon his examination that he was a member of the board of aldermen of the city of Hot Springs. The exception to the competency of the juror was based on the theory that the negligence of the city was the proximate cause of the injuries, and, as the city was interested, the fact that the juror was an alderman disqualified him. It is not necessary to say whether or not this juror was disqualified, for there is no showing of prejudicial error, since it is not shown that the appellant had exhausted all of its peremptory challenges. *Polk* v. *State*, 45 Ark. 165; *St. L., I.*

M. & S. R. Co. v. *Aiken,* 100 Ark. 437, 140 S. W. 698; *Caughron* v. *State,* 99 Ark. 462, 139 S. W. 315.

Certain exceptions were saved to the ruling of the court on the admission of the testimony of the witness Annen and of witnesses who were permitted to testify that the two boys who were driving the cars were careful and competent drivers. Annen was asked the question if while he was city engineer he did anything to protect travelers on the avenue from the dangers of the cut, and answered that he did nothing. The court held this testimony immaterial, and refused to admit it. The action of the court was proper because Annen had no connection with the city at the time of the accident or for a considerable period before, and it is also undisputed that neither the city nor the appellant company placed any barricade or danger signal to warn the public of the existence of the excavation before March 28, 1930.

On the question of contributory negligence of the occupants of the cars, the allegation was made that the drivers were incompetent because of immature age and lack of experience. This raised the question of competency, and it was not error on the part of the court to permit witnesses who were acquainted with the skill and experience of the drivers of the cars to testify that they were careful and competent drivers. This was not an expression of a mere opinion, but of the knowledge of the witnesses acquired from full opportunity to observe. *Bush* v. *Brewer,* 136 Ark. 246, 206 S. W. 322; *Cahill* v. *Bradford,* 172 Ark. 69, 287 S. W. 595.

Exceptions were saved to the instructions given by the court at the request of the appellees, and also to the court's refusal to give a number of instructions asked by the appellant. The objections made to the instructions given for the appellees and those refused on behalf of the appellant appear to be based mainly on the theory that the appellant was not culpable because it was the duty of the city authorities to safeguard the streets for the traveling public, and that such omission absolved the appellant from blame. We are of the opinion that there

was no error in this regard. If there was negligence on the part of the city, it was not an intervening efficient cause, but a concurrent one. We think that the instructions given at the request of the appellant fully and fairly presented to the jury the issues properly to be submitted to them.

A statement of the applicable law is made in the case of *St. L. & C. R. Co.* v. *Aven,* 61 Ark. 141, 32 S. W. 500, where, in speaking of the duty of railroads to travelers on highways which are crossed by their lines, the court said: "They are not insurers of the safety of travelers, and are not bound to provide against everything that may happen on the highway, 'but only for such things as ordinarily exist, or such as may be reasonably expected to occur.' Where no danger may be anticipated, on account of the peculiar location of the highway, no vigilance is required for protection against liability for injuries; but where the road, bridge, or other public highway, by reason of its proximity to or construction over excavations, declivities, streams of water, or other places of peril, is manifestly so unsafe as to imperil the life or body of the traveler, it is the duty of the corporations or persons whose duty it is to keep it in repair to do whatever is practicable and reasonable to avert the threatened danger. If rails, guards or barriers be reasonably necessary for that purpose, and practicable, it is their duty to construct and maintain them in the places needed."

The evidence in this case is undisputed that the appellant and its predecessor operated the railroad for many years through a deep cut across Washington Avenue at its intersection with Hendrick Street, during all of which time it failed to erect any barrier at the edge of the cut across the avenue or to place any danger signal to warn approaching travelers of the presence of the cut. There is also evidence tending to show that this street was used by horse-drawn vehicles before the age of the automobile, and for some time before the injuries to the children on March 28, 1930, it was adapted to travel by automotive vehicles. This raised the question

as to whether or not the appellant should have anticipated danger to travelers, and whether its failure to erect danger signals or other safeguards was negligence. This issue, we think, was properly presented to the jury in instructions given on motion of the appellees.

The appellant argues that, because its line of railroad and the excavation were lawfully made on due authority from the city of Hot Springs, therefore there was no obligation on its part to warn of the existence of the excavation, but that this was the duty of the city. This contention is unsound. In *Strange* v. *Bodcaw Lumber Co.*, 79 Ark. 490, 96 S. W. 152, 116 Am. St. Rep. 92, a drain over a highway crossing was dammed by the permission of the county judge, so that a pond was formed on each side of the highway into which drain a horse fell and was drowned. The case was defended on the ground, among others, that the pond was made under rightful authority, and that to protect travelers on the highway the defendant would be obliged to enter on the same to erect protecting barriers, which it had no authority to do. In dismissing this contention, the court said:

"The fact that the pond was put there by permission of the county judge does not alter the case, for the permission of the county judge cannot authorize acts dangerous to the public, or relieve the defendant from the consequences of its own negligence. Nor is it any defense for defendant to say that it had no authority to enter on the public highway to erect guard-rails or barriers. If the danger to travel on the highway from this pond was of such a nature as to make it necessary to erect barriers to protect the public from danger, then the defendant would either have to erect the barriers or drain the pond. But it is not shown that it applied for permission to erect barriers, nor is there any ground to believe that a request of that kind would have been denied had it been made to the proper authorities, so we need not speculate upon what would have been the position of defendant if, before the accident happened, it had applied for permission

to erect barriers between the pond and the highway, and this permission had been refused."

This position taken by the appellant that it was the duty of the city authorities to safeguard the highway and its failure to do so exonerates the appellant is not tenable. Assuming that it was the duty of the city to warn those traveling west along Washington Avenue of the danger ahead, its failure to do so did not relieve the appellant from responsibility, for it was its active agency which brought into being the dangerous situation, and it was bound to take cognizance of the natural consequences to those traveling along the avenue who might be ignorant of the situation and have no warning as they approached. *So. Exp. Co.* v. *Texarkana Water Co.,* 54 Ark. 131, 15 S. W. 361; *City Elec. Ry. Co.* v. *Conery,* 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *St. L. S. W. Ry. Co.* v. *Kendall,* 114 Ark. 224, 169 S. W. 822; *Jenkins* v. *Midland Valley Ry. Co.,* 134 Ark. 1, 203 S. W. 1. In these cases the general rule is stated that, where the negligent act of two persons concur to produce an injury, the author of either negligent act is liable to the injured party for the damages sustained. See also *Jonesboro, L. C. & E. R. Co.* v. *Wright,* 170 Ark. 815, 281 S. W. 374.

On the question of contributory negligence of the drivers and occupants of the cars, the testimony is in conflict. There was testimony on the part of the appellant tending to show that the cars were being driven from 25 to 30 miles an hour without heed as to the way ahead, and that driving beyond the end of the avenue and into the cut was the result of excessive speed and heedless conduct. On the other hand, there was testimony of the occupants of the cars themselves, corroborated by the testimony of other witnesses, to the effect that they were driving not faster than fifteen or twenty miles an hour, looking ahead, and that they were unacquainted with Washington Avenue and ignorant of the excavation across it; that their view was obscured by the crest of the

hill until they reached its summit and then first saw the cut; that they did all they could to check the speed of the cars and avert the disaster; that the brakes were applied, but the momentum already acquired and the nature of the ground was such that the cars "slided" down into the cut. This presented a question of fact as to whether or not the drivers and occupants of the cars were in the exercise of ordinary care, which question the jury considered under proper instructions.

The amount of the damages awarded to the several parties injured and to their parents is not questioned, and as we find no error, and the testimony is sufficient to support the verdicts, the judgments must be affirmed. It is so ordered.

BINGHAM *v.* MCGEHEE.

Opinion delivered May 2, 1932.

Starbird & Starbird, for appellant.
John Mayes and *G. L. Grant,* for appellee.

HART, C. J. Petition for mandamus against a county superintendent of schools to require him to countersign a school warrant under the provisions of an act of the Legislature of 1931. The defense to the suit was that the warrant was illegally issued. The writ was granted, and the county superintendent has appealed. As defined by our statute and construed by this court, mandamus will issue whenever the refusal or failure of an officer to act in a matter, in which it is his plain duty to act, may deprive one of his legal rights. Crawford & Moses' Digest, § 7021. *Maddox* v. *Neal,* 45 Ark. 121; *Snapp* v. *Coffman,* 145 Ark. 1, 223 S. W. 360; *Arkansas State Highway Commission* v. *Otis & Company,* 182 Ark. 242, 31 S. W. (2d) 427. As a general rule, the writ will only be issued where the petitioner has a legal right, is entitled to a specific remedy to enforce it, and the officer whose duty it is to afford that remedy withholds it. *Board of Improvement* v. *McManus*, 54 Ark. 446, 15 S. W. 897.

In *Shackleford* v. *Thomas*, 182 Ark. 797, 32 S. W. (2d) 810, the court again said that mandamus only lies to compel an officer to do that which it is his duty to do without it, and cannot be used to compel the performance of that which is not lawful. The Legislature of 1931 passed a very comprehensive act for the organization and administration of the public common schools. Acts of 1931, page 476. Section 141 provides that the board of directors of each school district are authorized to draw warrants on the county treasury for all funds to be disbursed by them, and that such warrants be countersigned by the county superintendent. The warrant in question in this case was in regular form and signed by the president and secretary of the school board. It was for $100 for legal services to appellee, and was presented by him to the county superintendent to be countersigned. The latter refused to countersign the warrant, and it is the claim of appellee that there was an absolute duty on him to countersign the warrant, and

in its performance the county superintendent had no discretion. We do not agree with this contention under the facts shown by the record.

On the first day of October, 1931, a resolution was adopted by the board of directors to hire a lawyer to prevent the school district from being consolidated with another school district in Crawford County. There were six directors, and all of them but one attended the meeting. The remaining director admits that he was given notice to attend it. The resolution as adopted does not state what lawyer was to be employed, nor what his fee should be. On the 10th of October, 1931, the election for the consolidation was held. On the 16th day of October, 1931, the president and secretary of the board signed a warrant for $100 in favor of appellee and delivered it to him. There was no other meeting of the board after October 1st, and no further direction was given about the issuance of the warrant except that contained in the resolution referred to above. According to the testimony of appellee, he performed some services in the way of investigating the law before the election was held and before he was employed. He admits that he was employed on the 16th day of October, 1931, when the warrant was delivered to him. He had not been paid for his services, and does not remember which one of the directors employed him. He recollects that several members of the board came to his office about the matter at different times, but does not remember their names. There is nothing in the record tending to show that all of them went to his office and ratified the power given to employ a lawyer to represent the district at the special meeting held on October 1, 1931.

As we have already seen, mandamus cannot be used to establish a right, but may be used to enforce a right after it is once established. The resolution which was adopted by the board on October 1, 1931, did not authorize the president and secretary to employ a lawyer and to pay him a stipulated sum. Hence the president and secretary and such other members as co-operated with

them individually did not have authority to hire appellee and issue a warrant to him for $100. That could only be done at either a regular or called meeting of the board. The want of authority in the premises cannot be supplied by any attempted ratification by only a part of the directors.

If the issuance of the warrant was illegal because not done in a manner prescribed by law, the writ of mandamus could not be had to compel the county superintendent to countersign the contract. His action under the facts proved was not arbitrary. It follows that the court erred in granting the writ of mandamus, and for that error the judgment must be reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion. It is so ordered.

DAY *v.* STATE.

Opinion delivered May 2, 1932.

J. D. Cook, Jr., P. P. Bacon and *J. D. Cook,* for appellant.

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

SMITH, J. This appeal is from a judgment sentencing appellant to life imprisonment upon a conviction for the crime of murder in the first degree, alleged to have been committed by killing Walter Harris, who at the time he was killed was the sheriff of Miller County.

At the time of the killing, appellant, who was nineteen years of age, was engaged in the manufacture of intoxicating liquor, in violation of the law. He had been previously convicted of a violation of the National Pro-

hibition Law in the United States District Court, and was under probation by order of said court to Sheriff Harris.

Having information that appellant had resumed the making of liquor, the sheriff, with three deputies, went to appellant's still to arrest him on the afternoon of July 28, 1931. When the officers came to within a hundred yards of the still, they could hear the persons there employed about the still, and the officers separated. The sheriff and one deputy came up to the still on one side, while the other two officers approached the still from the opposite side. The still was in a thicket, through which a branch or small creek ran. A negro man, who apparently was acting as a lookout, came out of the thicket, and was ordered by the sheriff to halt. This command was repeated, when the negro began to run, and the sheriff shot him, but no other shot was fired by the sheriff, according to the testimony on behalf of the State.

The officers entered the thicket, and as the the sheriff got to the edge of the thicket near the still, appellant opened fire upon him, firing four times, and one of these shots killed the sheriff. The officers could not see the man who was firing, as he was crouched and concealed in the foliage of the thicket.

Appellant admitted firing the shot which killed the sheriff, but he testified that he did not know that the parties who had come upon him and his associates were officers. He testified that he heard shooting, and saw the negro fall, and, when he looked to see where the shot came from, he saw a stooping man pointing a gun at him through the bushes. The man fired, and the shot from the gun knocked his hat off, whereupon he drew his pistol and commenced firing, and continued to do so until the man fell. He then ran away without knowing that he had shot an officer.

At appellant's request, the court gave an instruction numbered 6½, which reads as follows: "You are instructed that, if you believe from the evidence that the defendant was placed in the position, at the time of the

killing, in which his life was imperiled by the deceased, and he slew him without having any notice of his official character, and the killing was apparently necessary to save his own life, or to prevent his receiving a great bodily injury, then the killing of deceased was homicide in self-defense; nor does it matter that deceased was legally seeking to arrest defendant, if the defendant had no notice of the fact, or reasonable grounds to know that he was an officer; and, if you so find, it is your duty to acquit the defendant."

This instruction presents the law as favorably to appellant as he had the right to ask, but it is insisted that it was nullified by another, numbered 17, which was in conflict with it. This instruction reads as follows: "If you find from the evidence in this case, beyond a reasonable doubt, that the defendant was engaged in operating a still, and that deceased, as sheriff, went to such still for the purpose of arresting such person or persons as were operating the same, and that, while advancing on such still for such purpose, he was shot and killed by the defendant, at a time when he had not fired on the defendant; and if you further find from the evidence, beyond a reasonable doubt, that the defendant intentionally shot and killed the deceased under such circumstances for the purpose of preventing his arrest by the deceased, you will find the defendant guilty of murder in the first degree. And if you find these things to be true from the evidence, beyond a reasonable doubt, then you are told that it is not necessary that the defendant should have known the particular identity of the deceased at the time."

We think there was no conflict in these instructions. The one declares the law applicable to the facts as appellant contends them to be; the other announces the law applicable to the case which the State's testimony tended to establish. It was appellant's contention that a murderous assault was made upon him and his associates by persons who did not disclose their identity as officers, and who were not known to be officers, and that appellant

fired the fatal shot to repel this unlawful assault. On the other hand, it was the theory of the State that the negro was shot to prevent him from escaping, and that appellant immediately thereafter commenced firing at a man known by him to be the sheriff, and that his purpose in firing was to prevent an arrest being made.

As tending to show that appellant could have seen and did know at whom he was firing, testimony was offered to the effect that an officer stood at the place where the sheriff fell, and another at the place where appellant stood when he fired, and that persons thus placed could have seen and recognized each other. The admission of this testimony is assigned as error, and the case of *Vance* v. *State,* 70 Ark. 272, 68 S. W. 37, is cited to sustain this assignment.

The facts in the two cases are not similar. In the Vance case one attorney for the State, representing the deceased, and another attorney for the State, representing the defendant, gave, under the direction of a State's witness, "a sort of dramatic representation of the tragedy." It was there said: "We can very easily see that a defendant might be irreparably injured by having his actions presented in that way before the jury by unfriendly actors not under oath and paid to prosecute him, and if the record fully presented a case of that kind it would certainly be a serious question as to whether it would not call for a reversal and a new trial. But, though the record is a little vague on that point, we conclude from it that the court only permitted the witness to illustrate the relative positions and the distance between the parties at the time of the shooting. We are not certain that it shows more than this, and we cannot therefore say that there was error. We, however, call attention to this point, for it seems to us that there is room enough for all needful display of the dramatic powers of counsel in the regular walks of the profession, and that it is unnecessary, and even unsafe, to go further, and tread more or less on the domain of the witness."

Here the point at issue was whether appellant could have seen the man who shot, and therefore have known who the man was, and that this man was an officer, the sheriff, and well known to appellant as such. To establish this fact, a witness was permitted to testify that, standing where appellant stood when he fired, he could have seen and recognized a man standing where the sheriff fell. We think this testimony was competent.

An objection somewhat similar was made to the admission in evidence of a plat showing the location of the scene of the tragedy and of the participants therein. This plat was drawn by one who was not present at the time of the shooting but who had later visited the scene, but the accuracy of the plat was established by witnesses who were present, and we see no objection to its use in enabling witnesses who were present to better illustrate their testimony.

Testimony was offered over the objection of appellant, to the effect that he stated that he had once been shot by officers who raided a still which he was operating, and that he did not intend for this to happen again, and that, if officers came down upon him again, he would fight it out with them. The witness so testifying stated that appellant had reference to prohibition enforcement officers. In our opinion, this testimony was competent. The defense was predicated upon the proposition that appellant did not fire to resist arrest, but to repel an assault, and that he had been fired upon by persons not known by him to be officers. It is true appellant's threat was not directed against the sheriff specially, or against any other particular officer. But it was a threat against any and all officers who might attempt to arrest him, and tended to show his intention in firing the fatal shot, and that it was fired pursuant to his intention to resist officers attempting to arrest him.

In the case of *Stoddard* v. *State,* 169 Ark. 598, 276 S. W. 358, we quoted from 28 A. & E. Enc. of Law, 145, as follows: "No particular words are necessary to convey

a threat. Any language which shows this, either on its face or in connection with the circumstances under which it was spoken or written and with the relations of the parties, is sufficient, though it consists merely of innuendoes and suggestions."

In the case of *Tolliver* v. *State,* 183 Ark. 1125, 40 S. W. 421, we said: "At page 732 of Underhill's Criminal Evidence (3d ed.) it is said: 'Under certain circumstances the vague and uncertain threats of the accused may be shown to prove the condition of his mind at the time of the crime. The rule is applied to his declarations that he is going to kill somebody, without mentioning any names, or that he is going to make trouble, or that he is going to shoot some one, or similar indefinite threats which indicates that he is in an ugly frame of mind and disposed to commit some crime, though not the particular crime for which he is on trial.' The numerous cases cited in the note to the text quoted fully sustain the law as stated, among these being an Arkansas case, which does not appear as having been published in our official reports."

Appellant insists that such remarks as he made in this connection did not refer to the sheriff or to any other officers except Federal officers Quillian and Weaver, who had shot him on a previous occasion. But we think this was a question of fact for the jury.

The court refused to admit testimony to the effect that the deceased sheriff had killed more than one man in making arrests, but the court admitted testimony concerning the general reputation of deceased as being a violent and impulsive man. There was no error in this ruling. The reputation of the deceased for violence could not be properly proved by specific acts of violence to third persons. Underhill's Criminal Evidence (3d ed.), page 724. In the case of *Hardgraves* v. *State,* 88 Ark. 261, 114 S. W. 216, it was held (to quote the headnote in that case) that, "In a prosecution for murder, it is not competent to show the violent and dangerous character of the

deceased by evidence of isolated facts or particular acts of violence." That holding was reaffirmed in the later cases of *Shuffield* v. *State,* 120 Ark. 458, 179 S. W. 650; *Biddle* v. *State,* 131 Ark. 537, 199 S. W. 913, and *Jett* v. *State,* 151 Ark. 439, 236 S. W. 621.

Objection was also made to the testimony of a witness, who had been engaged with appellant in making the liquor, that appellant constantly carried his pistol while employed about the still. But we think this testimony was competent as bearing upon appellant's mental attitude in regard to not being rearrested for his illegal conduct.

Appellant offered to prove by the physician who attended the negro that the wound inflicted upon the negro by the sheriff was of a dangerous character, and, when asked by the trial judge what the purpose of the question was, appellant's counsel answered: "It shows the wantonness of the assault by the officers on the defendant, and that the attack upon the negro was made regardless of the consequences to him, and shows that the sheriff used no caution and was impulsive in shooting him, and I think it is material." The prosecuting attorney remarked that "the sheriff had a right to shoot the negro under the circumstances detailed in evidence." Appellant's counsel remarked: "Well, now, the defendant thinks he did not have such a right; so, there you are." The judge then stated: "The court holds the sheriff did have a right to shoot the witness, Joe Watson, under the circumstances, and the objection is sustained."

Objection was made to this remark, and the court was asked to withdraw it, whereupon the judge said: "I will do that gentlemen. I will qualify the statement by saying that the sheriff had the right to shoot the witness, Joe Watson, if, under the circumstances as outlined by the witness, Joe Watson, and as outlined by the other witnesses, the sheriff was undertaking to arrest him, and if it occurred or appeared to the sheriff, in the reasonable exercise of his duty as sheriff, that it was necessary to shoot him to arrest him."

We think it would have been better for the court to have excluded the testimony as to the character of the negro's wound without comment, but the amended statement of the court is not an incorrect declaration of the law. The sheriff had the right to shoot an escaping felon "if it occurred or appeared to the sheriff, in the reasonable exercise of his duty as sheriff, that it was necessary to shoot him to arrest him." Section 2377, Crawford & Moses' Digest; *Carr* v. *State,* 43 Ark. 99; *Thomas* v. *Kinkead,* 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68; *Green* v. *State,* 91 Ark. 510, 121 S. W. 727; *Jett* v. *State,* 151 Ark. 439, 236 S. W. 621.

The cause was submitted to the jury upon the conclusion of the argument at about 7:30 P. M. on December 10, 1931, but, on account of the lateness of the hour and of the illness of a juror, the consideration of the case was not taken up by the jury that night. The condition of the juror became more serious, and a doctor was called to attend him. Upon being advised of the juror's illness, the trial judge called at his room on the following morning, but it affirmatively appears that the judge's visit was intended solely to ascertain the juror's condition and his ability to proceed in the case, and there was no discussion whatever of the merits of the case between the judge and the juror. We think there was no error in this.

When the court was convened, the judge made a statement in open court concerning the juror's condition, and no request was made that the jury be discharged. On the contrary, it was agreed that the other members of the jury should repair to the room of the sick juror, and that if a verdict was agreed upon it might be received in the juror's room. The jurors met and deliberated upon the case in the room of the sick juror, and, when it was announced that a verdict had been reached, the court and its officers and the counsel in the case, together with appellant, went to the room where the sick juror was in bed in a house two blocks away from the courthouse, where the verdict was received and the jury was discharged.

The juror's illness developed into pneumonia, and he died a few days later.

It is insisted that this was prejudicial error calling for the reversal of the judgment pronounced upon the jury's verdict, although appellant had consented to the court's action in the matter.

In the case of *Mell* v. *State,* 133 Ark. 197, 202 S. W. 33, L. R. A. 1918D, 480, the court adjourned, over the objection of the defendant, to a hotel to hear the testimony of a witness who was too ill to be present in court. We there said that there were jurisdictions in which it had been held that this might be done unless prohibited by statute, but that it was not permissible under our practice when objection was made, and we reversed the judgment in that case on that account.

The case of *Carter* v. *State,* 100 Miss. 342, 56 So. 454, Ann. Cas. 1914A, 369, was cited among other authorities, as having so held. It was said in that case that: "If the defendant had consented to the proposition to go with the court and jury to the place where the witness was, and there take her testimony, and if her testimony had in this manner been taken, we do not think the defendant could have objected to the irregularity. But that is not the question before us. In this case the defendant's application for a continuance was refused; one of the grounds of the refusal being that he declined to accept the proposition of the court to go with the jury to the place where the witness was confined by sickness, and there take her testimony. Such a proposition was, we think, no answer to his application for a continuance, and should not be considered in determining his right to a continuance."

It thus appears that the Supreme Court of Mississippi would have held that the irregularity in the proceeding was not prejudicial, had the defendant consented, as the record in the instant case shows was done.

In the case of *Jackson* v. *State,* 102 Ala. 76, 15 So. 351, it was held by the Supreme Court of Alabama that a

verdict was void which had been delivered to the judge outside of the courthouse, but it was not there shown, as it was here, that the defendant had consented that this should be done.

It was held by this court, in the case of *McVay* v. *State,* 104 Ark. 629, 150 S. W. 125, that a defendant who was convicted of murder in the first degree had the power to waive the presence of the trial judge during the progress of the argument of the case and to consent to the argument being proceeded with in the absence of the judge.

In the case of *Davidson* v. *State,* 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436, which was also a capital case, it was held that the defendant had the right to waive his presence in court upon the return of the verdict, and that the verdict might be returned in his absence with his consent.

We therefore hold that, having consented, appellant was not prejudiced by the reception of the verdict at a place other than the courthouse.

It is insisted that it was error to permit the jury to proceed after one of its members became ill, as he was entitled to have his case considered and decided by jurors in normal condition. This objection was not made at the trial; indeed, it appears that appellant consented that it should be done.

The physician who attended the juror was interrogated by counsel for appellant concerning the juror's condition, and testified as follows: "Q. A man as sick as he was, in your opinion was he capable and competent of deliberating upon serious and important matters? A. Yes, sir. Q. You think he was? A. Yes, sir."

It is also assigned as error that the trial judge interviewed the sick juror in the absence of his fellows, and in the absence of appellant and his counsel. But there is incorporated in the record a statement by the trial judge to the following effect. When he was advised of the juror's illness, he called at his room to inquire as to the

juror's condition. He told the juror that unless he felt perfectly able to continue to serve as a juror he would be discharged, but he was assured by the juror that he felt able to continue his duties as a juror in the case. The judge further stated: "At that time the jury had not commenced its deliberations, and upon being assured by both the nurse and the doctor, in addition to the statement of the juror, that the juror was rational, and that for him to stay in that room in the bed and deliberate, take part in the deliberations of the jury, was not detrimental to his chance for recovery, and upon the appearance of the juror to me at that time, and the statement of the juror that he was able and willing to proceed, the jury was told to commence its deliberations whenever they saw fit to begin their deliberations."

It would, of course, have been improper, under these circumstances, for the trial judge to have discussed with the juror any question of law relating to the verdict to be returned, but this he did not do. *Wacaster* v. *State*, 172 Ark. 983, 291 S. W. 85; *Shue* v. *State*, 177 Ark. 605, 7 S. W. (2d) 315; *Phares* v. *State*, 158 Ark. 156, 249 S. W. 551.

The judge's conversation with the juror related only to the physical and mental condition of the juror, for the purpose of ascertaining whether the jury should be discharged. We conclude therefore that there was no prejudicial error in this incident. *Spence* v. *State*, 180 Ark. 1123, 24 S. W. (2d) 331.

It is also insisted that prejudicial error was committed in refusing appellant a preliminary trial. This feature of the case was inquired into in a *habeas corpus* proceeding brought to require a preliminary hearing, which the court refused to order.

It appears that at this time the defendant had been indicted, and that he was immediately thereafter put to trial. It also appears that there had previously been no preliminary trial for the reason that appellant's father had requested that, pending appellant's trial, he be re-

moved from the county and confined elsewhere on account of the inflamed condition of the public mind arising out of the killing, and it does not appear that appellant or his counsel had demanded a preliminary examination prior to his indictment.

It was held in the case of Ex parte *Anderson,* 55 Ark. 527, 18 S. W. 856, that one who has been committed to jail by a coroner for the crime of murder, upon an inquisition conducted in his absence, was not entitled to be taken before a magistrate for preliminary examination.

The purpose of the preliminary examination is to determine whether an accused person should be held to await the action of the grand jury, so that he may not in the meantime be unlawfully deprived of his liberty. No useful purpose would have been served by holding a preliminary examination. It is provided by statute that: "If, however, the magistrate is of opinion, from the examination, that there are reasonable grounds to believe the defendant guilty of the offense charged, he shall be held for trial and committed to jail, or discharged on bail if the offense be bailable." Section 2932, Crawford & Moses' Digest.

Section 2934, Crawford & Moses' Digest, provides that: "Justices of the peace shall have no power to admit to bail in capital offenses, murder or manslaughter."

A justice of the peace would have been without authority to admit appellant to bail upon an examining trial before indictment returned, if there were reasonable grounds to believe he was guilty, even of manslaughter, and he had already been indicted for the crime of murder in the first degree. A justice of the peace would therefore have had no jurisdiction of the case. Ex parte *Kittrell,* 20 Ark. 499; *Bass* v. *State,* 29 Ark. 142; Ex parte *Graham,* 150 Ark. 236, 234 S. W. 176.

A motion was filed to quash the indictment upon the ground that the jury commissioners who selected the grand jury which returned the indictment and the petit jurors who tried the case were not sworn, and that there

was no affirmative showing that § 6344, *et seq.,* Crawford & Moses' Digest, relating to the manner in which jury commissioners shall perform their duties, were complied with. The record does not affirmatively show that the jury commissioners were sworn or that the statute defining the manner in which their duties shall be performed was complied with, but there was no showing to the contrary, and the presumption must be indulged that the statute was substantially complied with.

Similar contentions were made in the case of *Brewer v. State,* 137 Ark. 243, 208 S. W. 290, but in overruling them it was there said: "It is true that the record in the present case does not contain the orders of the court showing these facts, but, as we have just seen, the presumption is that the grand jury was organized in accordance with the requirements of law unless the contrary shall be made to appear affirmatively by the record. It may have been in the present case that the docket of the circuit judge showed that he had appointed jury commissioners, and that he had selected the grand jury in the manner prescribed by the statute, but that these orders had not been entered of record." It was there said that, under our system, there are two modes by which a grand jury may be selected. One is pursuant to the provisions of the statute; the other in the exercise of the court's inherent power; so that juries may be impaneled, even though the jury commissioners wholly fail to perform their duty.

Certain other errors are assigned, but they relate to matters which have been definitely decided adversely to appellant's contentions and require no further discussion.

Upon the whole case we find no error prejudicial to appellant, and the judgment must be affirmed. It is so ordered.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
v. MATTHEWS.

Opinion delivered May 2, 1932.

[redacted]

Thos. S. Buzbee, Geo. B. Pugh and *H. T. Harrison,* for appellant.

Tom J. Terral, and *Gaughan, Sifford, Godwin & Gaughan,* for appellee.

MEHAFFY, J. This suit was brought under the Federal Employers' Liability Act for personal injuries which appellee alleged were caused by the negligence of the appellant.

He alleged that, while in the discharge of his duty as fireman in the defendant's yards on a switch engine, it became necessary for him to mount the tender for the purpose of measuring the oil contained in said tender, and, while he was in discharge of his duties about 9:30 o'clock at night, he stepped in some crude oil that had been carelessly and negligently spilled on top of the tender by agents, servants and employees of appellant; that it was dark, and he was unable to see the crude oil; that as he stepped into the oil he slipped, lost his balance,

and fell forward, so that his left foot caught in the bracket on the edge of the tender, throwing him into the small place between the tender and the engine cab; that he was severely injured, crushed and bruised; that his hips, sides, pelvis and back were badly wrenched, bruised and sprained; that his injuries are permanent; that he suffers, and will continue to suffer the balance of his life, mental and physical pain; that, after receiving his injuries, he continued to work as fireman for about three days, and was then forced to give up his employment on account of the pain being so severe, and go to appellant's hospital, where he remained for about ten days, and where he returned for treatment at intervals over a period of about eight months; that he was told, when he was discharged from the hospital, by appellant's physician and surgeon that he was not permanently injured, but was merely sore and bruised, and that this would leave him after he had returned to work. His condition became worse, and he cannot perform any labor.

Prior to his injury, he was strong and healthy, thirty-two years of age, a locomotive fireman, and able to do the manual labor connected with same; that, as a result of his injury, he is wholly incapacitated and will so continue in the future; that appellant was negligent in failing, refusing, and neglecting to furnish a safe place in which to work; that appellant knew, or by the exercise of care could have known, that crude oil spilled on top of the tender of the locomotive was dangerous and unsafe; that appellant's physician advised appellee to return to work, and relying on this advice, he did return to work, and in so doing, aggravated his condition.

The appellant answered denying all the material allegations of the complaint as to liability and damage, and alleged that the condition, if it did exist, was obvious, and appellee assumed the risk.

Appellant, as a further defense and bar to the plaintiff's cause of action, interposed the defense of a compromise settlement and release.

According to the testimony of the appellee, he was a locomotive fireman for the appellant, a married man, and thirty-two years of age. At the time of his injury, in February, 1930, he was firing on a switch engine at the Biddle yards at Little Rock. He was called to report for duty at 9:30 in the evening. The name of his engineer was Eubanks.

The engine was fired with crude oil, and was filled before appellee went to work. He got there about 9:15 and went to his engine, No. 1823. No one was on the engine when he got there that night. His duty was to get on the engine and look at the supplies, the water, oil and fire-boxes. The oil is measured before the engine starts out, and again when it comes in. The first thing he did when he got to the engine was to look at the fire-boxes and the water in the boiler. He then went to measure the oil. They are supposed to fill the tank before the fireman gets there. He had to get up by the ladder of the water tank. He got up on the engine and looked at the fire-box and water, and then went to measure the oil, and looked at the oil gauge. There was no light on the cab, but he could hold up the rod and see the oil on the rod. As he let the rod down, he turned around and his right foot slipped from under him, causing him to fall between the engine and the tender under the cab. After he had fallen down, he caught the grab iron and pulled himself loose. He then sat down and did not get up any more until around 2 o'clock. He could hardly get up then.

The engineer was absent, and the switchman was not there at the time of the accident. Appellee's brother-in-law came up about the time he fell.

The oil that had spilled was about two inches deep, and on the ledge of the water tank. There was a rim or hip on the side of the engine, and you could not see the oil because there was no light in the cab. If there had been a light in the cab, he could have seen it. Engineers will not leave the light on the cab because it

blinds them, and they took them out. There was a light about 20 feet away, but the raised place on the engine caused a shadow so that he could not tell what was there. They spill oil occasionally, but they always take the engines to the steam hose and wash the oil off. They neglected to do this that night.

Appellee then described his injuries, and his treatment by the appellee's physician and surgeon, Dr. Runyan, and the physician told him he would get all right, to take exercise.

About 15 or 20 days after he was hurt, he tried to work again. The physician told him, that, if he would do this, he could work the soreness out; that he did not think it amounted to anything, and to go back and make a trip or two. He was released from the hospital to go back and work a day or so and then return to the hospital. He made about three trips and was again examined by Dr. Runyan, but he got worse all the time. He made the trips that the doctor told him to because he was poor and needed the money.

After he was taken out of employment by appellant, he drove a truck between Little Rock and Hot Springs for Terry Dairy Company, and got his brother to help him. He could not have done the work by himself. His brother did the loading and unloading. His condition did not improve, but grew worse.

He received the check for $40, but did not see any letter. The mail came and his wife opened it, and brought the check to appellee, and she misplaced the letter. He was in the hospital once before about two months when his thumb was mashed off, and they kept him on the pay roll; sent him a check every month. When check was handed to him by his wife, he thought that they were paying him as they did before, and indorsed the check. The doctor had told him he was going to get all right.

He did not know there was any statement in the check about the injury when he indorsed it. He did not know that there was any release sent to him. He thought

the check was sent as they sent him checks before when he was injured. He did not read it and would not have settled, and would not have cashed the check, if he had known that it was sent to him in final settlement. He did not know how badly he was hurt at that time, and would not have settled then. His wife told him the check was for $40, and he indorsed it, but did not look at the face of it. Witness had signed a statement which was presented to him, introduced in evidence, and read to the jury. The statement signed by him, among other things contained the following:

"When I made this step, I swung down with my right foot, and when I did I missed the upper deck on engineer's side and went down to the lower deck of the engine and at the time I felt a pain in my left groin and hip. The reason that I missed the upper deck was because I was such a large man that the opening between the cab and tank of this engine was not quite wide enough for a man of my size to get down through. I weigh 210 pounds and am broad, and I suppose that the opening between the back of the cab of this engine and the front of the tank was about 16 inches wide."

The statement was dated March 17, but was made earlier. Witness then identified time slips which were introduced in evidence, showing the trips that he made after this injury.

Witness had not taken the engine out of the round house. The hostlers fill the engines with water and oil, take them up and wash them off, and put sand on them, but they did not do it in this instance. The engine was at the place where witness was supposed to get it. The gauge showed it was full of oil. The oil was spilled all over the ground. He did not notice the oil until he had fallen. After he fell he stepped back upon the deck, and there was oil on his feet and hands. Oil was scattered all along on the tank, pretty thick for three or four feet. He discovered the oil by the light when they backed up. If there had been a light on the cab of the engine, he

would have seen the oil and called the round house men to clean it up.

Witness then identified a letter which he had received from the claim agent in which it is stated that on April 5 a draft and release in the sum of $40 on account of his injuries had been sent him.

Several witnesses testified in behalf of plaintiff corroborating most of his statements, and physicians testified about his injuries, and testified that they were permanent.

A number of physicians for the defendant testified to the effect that they did not think the injuries were permanent. A number of other witnesses testified on behalf of the appellant, their testimony being in conflict with some portions of appellee's testimony.

The appellant also introduced the following draft:

"Form 1631-A-5-28-200 bks. No. 74916

"THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY

"$40.00 Little Rock, Arkansas, April 5, 1930.

"Pay to the order of J. O. Matthews forty and no/100 dollars for full settlement of any and all claims growing out of his injuries sustained at or near Biddle, Arkansas, on or about February 27, 1930, while employed as fireman. 30-12080.

"TO CARL NYQUIST, Treasurer,
"The C. R. I. & P. Ry. Co.
"Chicago, Ill.
"(Signed) W. J. Flaherty,
"Inspector & Adjuster."

There was a verdict and judgment in favor of the appellee in the sum of $10,000 less $40.

A motion for a new trial was filed by appellant and an additional motion on the grounds of newly discovered evidence. Both motions were overruled, and the case is here on appeal.

The appellant relies on a release, and states that the evidence was not sufficient to create an issue of fact for the jury's determination as to the validity of the compromise settlement.

In the first place, there is no evidence that any settlement was ever made. The appellant's witnesses do not claim that a settlement was made, or that any agreement was ever made with appellee, except they say that the statement in the face of the check was a settlement.

According to the evidence of appellant's witnesses, appellee not only did not sign the release which he was requested to sign, but positively refused to sign it.

Appellee's testimony is that when the check came, his wife opened the envelope, brought him the check or voucher folded, and told him that it was a check for $40 and he indorsed it. He did not see the release, and did did not see the face of the check. According to his testimony, he thought they were sending him checks as they did when he was injured once before, and for that reason indorsed it without looking at it. He testified that when he was injured once before the appellant kept him on the payroll, and sent him a check every month, and he thought that they were doing the same thing when he received this check.

This evidence about having received checks monthly when he was injured before is contradicted by appellant's witness, the claim agent, but this was a question of fact for the jury, and what appellant calls a compromise was appellee's indorsement of the check which had been sent him, although there is no evidence that any agreement had ever been reached, or that the amount of $40 had ever been discussed or mentioned.

The appellant's witness himself testified that appellee stated he wanted $100 and the witness, the claim agent, declined to give it, and appellee went away. No reason is given by the claim agent for fixing the amount at $40 and sending appellee a check.

Appellant cites and quotes at length from *Odrowski* v. *Swift & Co.*, 99 Kan. 163, 162 Pac. 268, and states that the decisions of the Supreme Court of Arkansas are in harmony with the Supreme Court of Kansas in the case cited. The cases cited in *Odrowski* v. *Swift & Co., supra,* sustain the contention of appellee in this case, and none of them, we think, supports the contention of appellant.

In the case relied on by appellant, the employee alleged that the release was procured by misrepresentations made by the company's physician, but the employee in that case did not testify that he was induced to sign the release because of the statement of the physician, but that he signed it without knowing what it was or without reading it. There was no evidence of any fraud, and he was not indorsing the check, but signing a release, and the court in that case recognized the rule that the modern tendency is to extend, rather than to restrict, the power of courts to grant relief against contracts induced by unfair dealing. But in that case there was no misrepresentation made, no effort to get him to sign the release, but he signed it voluntarily without reading it.

One of the cases cited by the Kansas Court is *Ladd* v. *C. R. I. & P. Ry. Co.*, 97 Kan. 543, 155 Pac. 943. In that case the company's physician examined the injured party and stated to her that he found no bruises or permanent injuries or broken skin, but that her neck was swollen, and directed her to go home and bathe her neck in hot water, to take the swelling out. Some days after this, the claim agent of the railway company went to the home of the injured party, paid her $5, and procured her signature to a release. The court held the release was not binding, and said:

"Authorities are ample to sustain an avoidance of this release on account of the mistake of fact made by the plaintiff." It then cites many cases to support the rule announced.

Appellant cites also 2 Black on Rescission & Cancellation, § 384. This author, however, says in § 389: "In regard to cases of this sort, it is said that settlements made with injured employees immediately after the accident are not looked on with favor by the courts, and that, while the law favors the adjustment of controversies fairly made, yet settlements of claims for personal injuries made with persons who are poor, and without the aid of counsel, or the benefit of independent advice, should be closely scrutinized."

In this case, the undisputed evidence shows that there was no settlement at all.

Counsel also cite and rely on *Kansas City Sou. Ry. Co.* v. *Armstrong,* 115 Ark. 123, 171 S. W. 123. In that case the injured party wrote into the release herself the following: "I understand that I am settling all claims against the Kansas City Southern Ry. Co.", and then signed the release. The court said in that case: "They were expressly contracting with reference to injuries received on a certain occasion, the claim was unliquidated, and the contract shows that the parties intended to settle all matters between them relating to that incident."

In the instant case there is nothing to show that the parties intended to settle. The only claim the appellant makes is that there was a statement in the face of the check that it was in settlement of his injuries, but, as we have already said, the undisputed evidence shows that appellee did not know this. It is also shown that appellee refused to make a settlement or sign a release.

Appellant calls attention to 23 R. C. L. 385-386. On page 395 of 23 R. C. L., it is stated: "A nominal or grossly inadequate consideration for a release will be given serious consideration as affecting the question of fraud in its procurement. When due weight is given to other surrounding conditions, and there is evidence that the consideration is inadequate, it is a circumstance which, in connection with other circumstances, may be

submitted to the jury, and, if grossly inadequate, it alone is sufficient to carry the question of fraud or undue influence to the jury, and where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence on the issue of fraud, but will not, standing alone, justify setting aside a contract or other paper writing on the ground of fraud. And therefore, on the question of fraud *vel non* in inducing an employee to accept benefits from a relief department in release of the master's liability for negligent injuries, his situation, conduct, and surroundings at the time, as well as the amount received, may be considered."

On page 397 of 23 R. C. L. it is stated: "There cannot be a release of a cause of action for personal injuries without unequivocal acts showing expressly or by necessary implication an intention to release. Generally the construction of the release as to the actual intent of the parties presents a question of fact to be determined from the surrounding conditions and circumstances, construed with reference to the amount of consideration paid and the language of the release itself. The amount of consideration paid should have considerable force in determining whether the release was simply paying the releasor for loss of time or some other specific element of damage, or whether it indicated payment of a substantial sum in consideration of which the releasee secured himself against all further developments and the releasor assumed the risk thereof."

This is a statement of the principle of law governing in cases where injured parties sign a release where the act of the party is deliberate. The evidence in the instant case shows clearly that appellee never intended to sign a release for $40.

Appellee also calls attention to 53 C. J. 1213. The statement of the law in this volume, however, is substantially the same as in R. C. L.

Attention is next called to *Texas Co.* v. *Williams,* 178 Ark. 1110, 13 S. W. (2d) 309. In that case, however, the injured party not only signed a release, but was paid a substantial sum, $1,500, and the court stated that he admitted signing the release agreement, but that he signed it without knowing its contents. That was wholly different from indorsing a check as appellee did in this case, and refusing to sign a release. In that case he admitted he signed a release, and was able to read and write, and understand the nature of a contract.

This court, in *Barham* v. *Bank of Delight,* 94 Ark. 158, 126 S. W. 394, said: "The moment the plaintiffs indorsed the check and collected it, knowing that it was offered only upon a condition, they thereby agreed to the condition, and were estopped from denying such agreement." In that case the undisputed evidence showed that the check was indorsed by the party, knowing at the time that it was offered upon condition. He knew what the condition was, he accepted it, and agreed with the other party.

There is no evidence in the instant case tending to show that there was ever any agreement, or that appellee ever saw the face of the check. There is no evidence that he saw the letter said to have been written, or that he saw the release sent to him to sign, or that he knew of the existence of either of them.

This court said in another case: "Of course, if she accepted a sum, however small, as compensation for her personal injuries, or if she had signed the written release with a full knowledge of its contents, she could not recover at all, whether she offered to return the money or not, for a contract, fairly entered into, for the settlement of an unliquidated claim for damages would bar the right to recover more." *St. L. I. M. & S. R. Co.* v. *Smith,* 82 Ark. 105, 100 S. W. 884.

It certainly cannot be contended under the evidence in this case that appellee signed a release with full

knowledge of its contents. If he had been handed a release or had been told it was a release he was signing, or if he had known that he was signing a release, he would be bound whether he read it or not, unless there were other reasons for holding it void, but certainly the mere indorsement of a check would not, of itself, show that the appellee signed a release with a knowledge of the facts.

It was said: "This court has frequently held that a release executed by an injured party, relying upon the mistaken opinion of the physician of the party responsible for the injury, that it was slight and temporary, and not permanent, is not binding upon the party making it." *Mo. Pac. Ry. Co.* v. *Elvins,* 176 Ark. 737, 4 S. W. (2d) 528.

It is true that the plaintiff stated that, if he had known it was a release, he would not have signed it any way, but testimony clearly shows that the company's physicians told him that his injuries were not serious, and he would be well in a few days. It is wholly unimportant whether they were honestly mistaken or not. The presumption is that they were. If they made the statements to appellee, and he relied on them, it would be sufficient ground to set aside the release, even if appellee had known it was a release he was signing. If he did not know it, and simply indorsed the check in the ordinary way, a check like others he had received from the same company, he would have no reason to believe that it contained a release, and the release would not be binding.

It is next contended by the appellant that the undisputed testimony shows that plaintiff assumed the risk. The undisputed testimony shows that he got his engine where he was supposed to get it, that the hostlers had prepared it for him, that he did not know there was any oil on it, and that he could not see it because there was no light. The undisputed evidence also shows that prior to this time, if the hostlers spilled oil, they took the

engine to the steam hose and washed it off. The appellee did not know there was any oil on the engine, and he had no reason or knowledge of facts that would cause him to believe there was any danger.

It is next contended by the appellant that the court erred in the instruction given to the jury at the request of appellee. It is contended that instruction No. 1 given at the request of the appellee was erroneous, and the specific objection to that was that the paragraph in said instruction, submitting the question as to whether or not oil had been spilled, through the negligent acts of agents or servants of the defendant, or had been permitted to remain through the negligence of defendant's agents or servants, for the reason that there was no evidence upon which to submit this issue to the jury. In other words, the specific objection to this instruction is that there is no evidence that appellant was guilty of any negligence in spilling the oil or permitting it to remain there.

The appellee testified that he went to the engine where he was supposed to take charge of it, and that the oil was spilled on it, that the oil was put in by the hostlers, and that when they spilled oil it was their custom to take the engine and clean it off. He testified that Eubanks was his engineer, and neither Eubanks nor the hostler, who put the oil in, and who it was alleged spilled it, nor any other witness was called to contradict this testimony of appellee.

No reason appears why the hostler who put the oil in that night did not testify. There was therefore ample evidence to submit the question to the jury, as was done in instruction No. 1.

No argument is made as to the other instructions. We have carefully considered all the instructions, and reached the conclusion that the court committed no error in giving or refusing instructions.

It is next contended that the court erred in overruling defendant's objection to the argument of plain-

tiff's counsel. There was no prejudicial error committed by the court here. *Pac. Mutual Life Ins. Co.* v. *Ware,* 182 Ark. 868, 33 S. W. (2d) 46; *Ark. P. & L. Co.* v. *Hoover,* 182 Ark. 1065, 34 S. W. (2d) 464; *Booth* v. *Racey,* 171 Ark. 561, 285 S. W. 29; *Black Bros. Lumber Co.* v. *Person,* 163 Ark. 40, 258 S. W. 976; *F. Keich Mfg. Co.* v. *Wallace,* 171 Ark. 647, 286 S. W. 815.

The court did not err in overruling appellant's motion for a new trial. *Jewel Coal & Mining Co.* v. *Whitner,* 170 Ark. 393, 279 S. W. 1031; *N. W. Ark. Farmer's Mutual Tornado Ins. Co.* v. *Osborn,* 180 Ark. 757, 22 S. W. (2d) 387; *Bradley Lumber Co.* v. *Beasley,* 160 Ark. 622, 255 S. W. 18; *Carden* v. *Montgomery,* 171 Ark. 1000, 287 S. W. 183.

There was substantial evidence on which the jury could find that the appellant was negligent, and that appellee indorsed the check in the manner and under the circumstances described by him, and the findings of a jury, if based on substantial evidence, will not be disturbed by this court.

The judgment is affirmed.

UNION SECURITIES COMPANY *v.* TAYLOR.

Opinion delivered May 2, 1932.

W. J. Dungan, for appellant.

Walter Killough, for appellee.

MEHAFFY, J. Appellee brought suit in the Woodruff Circuit Court against the appellant for damages for killing a mule. He alleged that one of appellant's trucks negligently ran over and killed his mule of the value of $250. The appellant denied all the allegations of the complaint.

Fred Swindle testified that some time in January, 1930, a truck of the Dixie Plantation killed a mule belonging to the appellee. Witness was coming from Wynne and saw the truck; he had trailed behind the truck for some distance, and the truck was going from 40 to 45 miles an hour. There was a negro in front of the truck and a man on the inside. He saw the name "Dixie Plantation" on the truck. Witness tried to pass them but was unable to do so. Witness was with appellee when he talked to Gordon, the manager, about the accident.

Gordon said the court would have to settle it, and then later told Mr. Taylor that he would let him know in a few days; he talked favorably about making the settlement. He said something about his truck being in Memphis, and he went back and looked and then said he must have made a mistake, and told Mr. Taylor that he would hear from him in a few days. He did not say who was driving the truck, but Gordon asked witness to look at a big negro, but he could not identify him.

Wesley Bostick testified that he knew the mule that was killed and that it was Mr. Taylor's. He saw it the

next morning. The mule was dragged about 150 or 200 feet. The market value of the mule was $175. Saw the truck and it had "Dixie Plantation" on it. One of the men in the truck was a negro. Went with Taylor to see Mr. Gordon, and Gordon said his truck had not been out. He then went back and looked at his book, and said his truck went to West Memphis. They talked about settlement, but did not agree on a price.

Sam Hunt saw the truck and saw the dead mule; knew it was Taylor's mule, and heard it when the truck hit the mule. The mule was dragged 100 or 150 yards.

Oscar Neal testified that he saw "Dixie Plantation" on the truck.

Isom Maxwell also saw the mule; saw broken glass, and it looked like the mule was hit by a car or truck.

G. G. Doris knew the mule and fixed its value at $125.

The appellee testified that his mule was killed just east of Rolfe School House on Highway No. 64, in Cross County. It was dragged about 100 or 150 feet; went down to the Dixie Plantation to see about it. One time Wesley Bostick went with him and another time Sam Hunt. Fred Swindle went with him once. Talked with the manager, Gordon, and Gordon told him he had a truck with "Dixie Plantation" on it, and did not know of any other truck with that sign. He told appellee that he sent his truck to West Memphis, and he promised to pay for the mule but never did.

C. S. Gordon for defendant testified that he was manager of the Dixie Plantation, which was operated by the Union Securities Company, a corporation; knew nothing about the killing of the mule; that their truck was over there on Christmas day, and that that was the only trip it made; that he let a man, Hardin Mahan, have his truck to move his household goods to some place east of Memphis, and that he made Mahan a price and he paid it, and that Mahan picked up a boy to bring the truck back; that witness could not send any. Mahan intended to do his own driving and come back and get another load. He did not know the negro boy had gone

with him; did not send him; he did not tell anybody he sent a load of negroes to Memphis; told them he sent the truck over with a fellow to move his family; rented him the truck; did not tell Fred Swindle and Mr. Taylor that the truck was out on the day the mule was killed; that Swindle and Taylor were mistaken about it; that the negro boy that Mahan got to go and bring the truck back lives on Gordon's place; told Taylor that, if they were liable, they would pay for the mule, and told Taylor he would let him know.

There was a verdict and judgment for $125, and the case is here on appeal.

The only question in the case is whether there was sufficient evidence to sustain the verdict of the jury.

Appellant contends that the evidence is not sufficient to show negligence on the part of the driver of the truck.

To constitute actionable negligence, there must be, not only lack of care, but such lack of care must involve a breach of some duty owed to the person injured. In other words, negligence is the failure to do something that a person of ordinary prudence would do, or the doing of something that a person of ordinary prudence would not do under the circumstances.

Our statute provides that no person shall drive a motor vehicle upon a public highway at a greater speed than is reasonable and proper, and that, if the rate of speed of any motor vehicle operated on the public highway exceeds 20 miles an hour for a distance of ¼ of a mile, such rate of speed shall be *prima facie* evidence that the person operating such motor vehicle is going at a greater speed than is reasonable.

The violation of the statute is merely evidence of negligence, and is not conclusive. *Pollock* v. *Hamm,* 177 Ark. 348, 6 S. W. (2d) 541; *Fields* v. *Freeman,* 177 Ark. 807, 8 S. W. (2d) 436.

While the violation of the statute is merely evidence of negligence, this court has held that one of the purposes of the statute is to prevent accidents and preserve persons from injury. *White* v. *State,* 164 Ark. 517, 262 S.

W. 338. The evidence in this case shows that the truck, at the time of the accident, was going 40 or 45 miles an hour. This evidence is not disputed. Neither the driver of the truck nor the person who was with him testified in the case. Not only does the undisputed evidence show that the truck was going 40 or 45 miles an hour, but it also shows that the mule was dragged a considerable distance.

The jury were justified in concluding from this evidence that the driver of the truck was guilty of negligence.

In testing the legal sufficiency of the evidence to support the verdict, it must be considered in the light most favorable to the appellee.

It is contended also by the appellant that the undisputed evidence is to the effect that the men in charge of the truck were not employees or servants of appellant, but that Mahan solely was responsible for the driving of the truck at the time. Three or four witnesses testified that Gordon, the manager, stated that he had sent his truck over there. He first stated to the witnesses that it was not appellant's truck, but, after going back and looking at his books, he said that appellant's truck was over there at the time. Gordon denies making these statements, but this was a question of fact for the jury.

He says that the negro boy went with Mahan to bring the truck back, but at the time they took the truck over Mahan was to come back after a second load. If this were true, there would be no reason for the negro to go to bring the truck back, and if the manager's testimony is true, there would be no reason for his going at all.

At least three of the witnesses who testified about what Gordon said were disinterested witnesses. Neither the negro nor Mahan testified.

We think the evidence is sufficient to justify the jury in finding that at the time of the accident the persons in charge of the truck were employees of appellant, and whether they were or not was a question of fact for the jury, to be determined from the evidence.

We find no error, and the judgment is affirmed.

WATER IMPROVEMENT DISTRICT NO. 1 OF BENTON
v. BRINER.

Opinion delivered May 2, 1932.

[redacted]

H. E. Spitzberg and *W. R. Donham,* for appellant.
N. A. McDaniel and *T. N. Nall,* for appellee.

MCHANEY, J. Appellants, Municipal Improvements Districts of Benton, Arkansas, filed suit in the Saline Chancery Court on September 8, 1931, to enforce the collection of delinquent improvement taxes. The complaints for this purpose were signed by M. H. Holleman, as solicitor. The appellee intervened in these suits, alleging that he is the city attorney of the city of Benton,

duly elected, qualified and acting; that appellants are local improvement districts, one the water district, the other a sewer district, organized under the general improvement district laws of the State, and are situated wholly within the corporate limits of said city, which is of the second class; that act 224 of the Acts of 1931 provides that the attorney representing the municipality shall be the attorney for all improvement districts in the city; that appellants attempted to employ said Holleman as attorney to represent them, for which he was to be paid, and that such employment is illegal and without authority of law or of said intervener. The prayer was for an injunction against appellants and Holleman to prevent them from proceeding further as attorney and client, from collecting any further money or fees for representing appellants, etc. Appellants demurred to the intervention, which was overruled by the court, and, on their declining to plead further, decree was entered for appellee, declaring him to be the attorney for said districts and entitled to the emoluments and fees as attorney for said districts from October 16, 1931, from which is this appeal.

It is contended by appellants that act 224 of the General Assembly of 1931 is unconstitutional and void. It provides that, in all cities of the second class and incorporated towns, the attorney representing the municipality "shall be the attorney for all boards and commissioners of all local improvement districts within said city or incorporated town." It further makes it the duty of said attorney to advise with such boards at any time needed "and do all things enjoined upon him by said board of commissioners, and do and perform all legal duties pertaining to said formation and operation of said improvement districts. And shall represent said board of commissioners in all suits brought for or against said board of commissioners." His compensation is fixed at such fees as may be agreed upon, and his total compensation in any one year in all improvement districts is limited to $1,200.

It is said that the act is so vague, indefinite and uncertain that it is impossible to apply it to the affairs of local improvement districts, and that to give effect to the act it will be necessary for them to assume a legislative function. It is further argued that, while it is made the duty of the city attorney to perform all duties enjoined upon him by the boards of improvement, it does not provide that the board shall enjoin any duties upon him, and that it fails to provide any means by which to determine what fees shall be charged by or paid to the city attorney, nor any rule to determine what shall be a reasonable fee in any matter, and that all these things constitute the delegation of legislative authority in violation of article 5, § 1, Constitution of Arkansas. We do not agree with appellants in these contentions. The act was passed in the interest of economy in the organization and operation of improvement districts in cities of the second class and incorporated towns. It provides specifically that he shall represent all improvement districts in such municipalities, both in their formation and operation, and in all suits brought for or against them, and that such fees shall be paid as may be agreed upon, not to exceed $1,200 from "such districts in any one year." This does not constitute the delegation of legislative authority.

Municipal improvement districts are under the supervision and control of the city or town council. They are required to make annual settlements showing all collections or disbursements. Crawford & Moses' Digest, § 5718. On a settlement made, any taxpayer may file exceptions, and, whether filed or not, it is made the duty of the city council to examine same and disallow all unjust charges and credits, if any there be, and the council's adjustment thereof is subject to re-examination in the chancery court. Crawford & Moses' Digest, § 5719. And in suits for the collection of delinquent taxes, the attorney's fee is fixed by the chancery court and taxed as costs against the delinquent property. The city attor-

ney, being a city officer, elected by the people of the whole municipality, was a proper person in the view of the lawmakers to be made the attorney for all such districts, and no doubt the Legislature thought such an act would avoid the payment of extravagant attorney's fees, as is illustrated in *Martin* v. *Street Imp. Dist. No. 324,* 167 Ark. 108, 266 S. W. 941, and *Martin* v. *Street Imp. Dist. No. 349,* 178 Ark. 588, 11 S. W. (2d) 469. Boards of improvement are creatures of the city or town councils by virtue of legislative authority, and the Legislature has the right to prescribe the manner in which they shall perform their duties.

It is also said that the act violates § 4, art. 16, of the Constitution, which provides that the "General Assembly shall fix the salaries and fees of all officers in the State, and no greater salary or fee than that fixed by law," etc. This section of the Constitution has no reference to the fees of an attorney representing improvement districts, and the case of *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45, cited by appellants, is not in point. The Legislature does not fix the fees of the city attorney, nor has it attempted to fix the fees of such attorney while acting for boards of improvement, except to fix the maximum he may be paid annually by all improvement districts. Another objection made to the act is that it is unequal in its application, and restricts the right to contract. Boards of improvement, being the creatures of the city or town councils through legislative authority, may be limited in their right to contract or otherwise by legislative authority.

It is finally insisted that, even though act 224 be constitutional, appellee does not plead facts sufficient to bring him within its provisions. We think appellants are wrong in this contention. The act was approved March 26, 1931. It became effective ninety days after the Legislature adjourned, which would have made it effective sometime in June. By the decree of the court, it was made effective as to appellants October 16, 1931, and they are in no position to complain. The suits brought by Holle-

man were not brought until September 8, 1931. So any contract made with Holleman subsequent to the effective date of the act was without binding force, and appellee had the right to have it so declared.

Affirmed.

MID-WEST COAL COMPANY *v.* HENSON.

Opinion delivered May 2, 1932.

Holland & Holland, Vincent M. Miles and *W. L. Curtis,* for appellant.

Cravens & Cravens, for appellee.

MCHANEY, J. Apparently because of an explosion in its coal mine, in which several lives were lost, in February, 1928, and in order to evade, if possible, liability therefor, the Mama Coal Company, a corporation, surrendered its charter on April 23, 1928. It did not own the mine, but leased same from the Western Coal and Mining Company, which lease had expired, or was about to expire. It did own some mining equipment. On the same day, and at the same meeting of stockholders convened to authorize a surrender of its charter, appellant, Mid-West Coal Company, was organized with the same stockholders, who subscribed for and were issued stock in the same amounts as in the Mama Coal Company, with the exception of Valentine Vervdck. He was killed in the explosion, and the stock held by him in the Mama was issued to his widow, Augustine Vervdck. The new com-

pany, Mid-West Coal Company, procured a new lease, took possession of the mine, machinery and equipment with the knowledge and consent of everybody concerned, and continued in the possession and use thereof until this suit was brought by certain creditors of the Mid-West for the appointment of a receiver on February 13, 1930. A receiver was appointed, and, with the consent of the corporation, took charge of the property. On March 21, the receiver filed his report and inventory of the property, showing cash on hand of $197.42 and personal property invoiced at the value of $12,596.47. A few days later he applied to the court for permission to sell the property at private sale, in which all the appellants joined, with the exception of Mr. W. L. Curtis, who was made trustee for the Mama company on dissolution. The court refused to permit a private sale, ordered the property which had been inventoried by the receiver to be advertised for sale, and that the two highest bids be submitted to the court. It was advertised, and at the sale appellee Henson bid $6,200, and one Graham bid $6,000. Report was made to the court of these bids, and the Henson bid was accepted, and the report of sale approved and confirmed on April 15, 1930, he having paid his bid in cash. A bill of sale was executed and delivered to him at the court's direction. Thereafter, on April 26, 1930, appellants, Curtis and Augustine Vervdck, intervened, setting up certain claims to the property sold to Henson, and asking that the sale be set aside. On May 5, appellant Templeton intervened therein for the same purpose. The court vacated its order of confirmation of sale. Thereafter a number of motions, demurrers, answers and cross-complaints were filed, and on a final hearing the court dismissed all interventions, confirmed the sale, and the case is here on appeal.

We think the court correctly confirmed the sale. The creation of the new corporation, the Mid-West Coal Company, with the same stockholders owning and holding the same number of shares as in the old, amounted to sub-

stantially the same thing as changing its name from Mama to Mid-West Coal Company. It was simply an effort to evade possible liability for personal injury, but, whether it succeeded in that purpose or not, the Mid-West Coal Company was in effect a continuation of the Mama Coal Company. All the interveners were cognizant of all the facts, and not only participated therein, but consented thereto. They stood by, with full knowledge, permitted a *bona fide* sale by the receiver to an innocent purchaser for value, and Vervdck and Templeton actually petitioned the court to permit the receiver to make a private sale. Templeton was the president of the Mama Coal Company. They permitted the sale to be advertised, the property sold, the sale confirmed, and the purchase money paid without objection, and with full knowledge of all the facts. They are therefore estopped from questioning the validity of said sale. There are so many facts in this case calling for the application of the doctrine of estoppel that we do not review them all. What we have said shows conclusively that it would be so manifestly inequitable and unconscionable to permit appellants to come in and upset a sale under such circumstances as to make the citation of authorities a work of supererogation.

The decree is correct, and is therefore affirmed.

[redacted]

CONTINENTAL LIFE INSURANCE COMPANY *v.* MAHONEY.

Opinion delivered May 2, 1932.

[redacted]

Pace & Davis, for appellant.

Chas. W. Mehaffy, for appellee.

BUTLER, J. The appellee was appointed by the Pulaski Chancery Court as commissioner to sell certain real property under foreclosure proceedings, and was directed by the court to publish the time, terms and place of sale in some newspaper published in Pulaski County, Arkansas, having a *bona fide* circulation therein. The appellee selected a publication in Little Rock, known as *The Daily Legal News,* in which to publish the notice, and this suit was instituted to restrain him from publishing the notice in that paper, on the ground that *The Daily Legal News* was not a newspaper having a *bona fide* circulation within the meaning of § 6807 of Crawford & Moses' Digest, providing that all advertisements and orders of publication required by law or order of any court, etc., "shall be published in some newspaper and having a *bona fide* circulation in the county in which the proceedings are had."

In the court below it was stipulated that *The Daily Legal News* is printed and published in the city of Little Rock, Pulaski County, is a member of the Associated Court & Commercial Newspapers of the United States, and has been classified in the post office at Little Rock as second-class mail matter since December 15, 1931. It is not a subscriber to the Associated Press News, and has no correspondents and reporters outside of the city of Little Rock. It only occasionally publishes news of a general nature, but specializes in news relating to the courts, real estate, statistical news and that concerning business transactions in Pulaski County. It carries notice of incorporation matters filed in the county clerk's office and the office of the Secretary of State, and publishes a list of marriages and births in Pulaski County, the daily market report, local weather forecast, a list of automobile licenses issued, building permits, and notices of fires occurring in the city of Little Rock. It is published daily excepting holidays and Sundays, and its subscription rate

is $20 per year. It is a four-page publication, 14 x 11 inches in size, with four columns to each page. It has three hundred and four subscribers confined to business and professional men and associations of that character. It is mailed to twenty cities other than Little Rock and North Little Rock and to eleven other states, and is carried for sale at Peckham's News Stand on Main Street in the city of Little Rock. It is estimated by the publishers that around a thousand persons have access to, and read, the paper each day, but it is not shown how many of the papers are sold from the news stand.

The above is a summary of the stipulation, which contains sufficient facts to show the character of the publication. Upon these facts the court found that *The Daily Legal News* was a newspaper within the meaning of the statute and the order of the court, and denied the relief prayed.

After an examination of the authorities called to our attention by the appellant and the appellee, we are of the opinion that the contention of the appellant ought to have been sustained, and that the trial court erred in holding otherwise. The primary purpose for the printing of legal advertisements and notices of sale of property under orders of a court is to give to the notice the widest publicity practicable. Therefore the definition of a newspaper, within the meaning of the statute, is to be taken in its popular sense, which is one to which the general public would resort in order to be informed of the news and intelligence of the day, and which is published at stated intervals and carries reports of those happenings of general importance and interest to the ordinary individual. *Kerr* v. *Hitt,* 75 Ill. 51; *Lynn* v. *Allen,* 145 Ind. 584, 44 N. E. 646, 33 L. R. A. 779, 57 Am. St. Rep. 223; *In re* Herman, 183 Cal. 153, 191 Pac. 934; *Hanscomb* v. *Meyer,* 60 Neb. 68, 82 N. W. 114, 48 L. R. A. 409, 83 Am. St. Rep. 507; *Times Printing Co.* v. *Star Publishing Co.,* 51 Wash. 667, 99 Pac. 1040, 16 Ann. Cas. 414.

An examination of the cases cited by the appellee, and particularly those contained in the annotation at

page 542, 68 A. L. R., discloses no case that departs from the general definition as stated above. In *Kerr* v. *Hitt, supra,* in holding that a certain publication was a newspaper of general circulation, the court in effect said that, although the chief object of the publication was printing notices of legal news, yet it contained besides this other items of news of general interest; and in *Pentzel* v. *Squire,* 161 Ill. 346, 43 N. E. 1064, 52 Am. St. Rep. 373, it was held that a weekly publication containing reports of decisions of various courts and a digest of cases, but also containing news of a general nature of current events and of general importance to the public, was a newspaper within the meaning of a statute similar to ours. In all the cases upon which the appellee relies, the courts, in holding a publication to be a newspaper in which publication of legal notices was authorized, was such a one as carried "literature of a general kind and a limited amount of general news and current events," and, "besides court proceedings, short telegraphic dispatches of general interest."

As stated in 20 R. C. L., at page 203, cited by the appellant: "It is difficult, if not impossible, to determine with clearness and exactness where the lines of demarcation should be drawn between a newspaper, in a legal and common acceptation of the term, and the numerous publications devoted to some special purpose, and which circulate only among a certain class of the people, and which are not within the purview of statutes requiring publication of legal notices in some newspaper."

We think the test in determining the question is whether or not the publication regularly carries the record of events occurring of general interest to the public as a whole, and those publications which do carry such items might be properly designated as newspapers, although some special purpose or class of happenings be the chief object to which the publication is devoted. The reason for the test we have suggested becomes apparent when the object for which notices are printed is con-

sidered, *i.e.*, that they be given wide and general publicity, and publications cannot reasonably be expected to be generally read when they have no news of general interest, but are restricted to events of interest only to a few classes. There are numerous cases which support this view, among which are the cases cited, *supra*, and *Beecher* v. *Stevens*, 25 Minn. 146; *Reagan* v. *Duddy*, 25 Ky. 1664, 78 S. W. 430; *Times Printing Co.* v. *Star Publishing Co.*, 51 Wash. 667, 99 Pac. 1040, 16 Ann. Cas. 414.

An examination of a copy of *The Daily Legal News*, which is exhibited, shows that that particular issue carried no news items of a general nature, and it was stipulated that "it only occasionally publishes news of a general nature" This stipulation, when considered in connection with the news in which the paper specialized and the subscription price of $20 per year, warrants the conclusion that it was intended for only limited circulation among certain classes of our citizens, and is devoted to a special purpose, and therefore is not a newspaper as contemplated by the statute. Having concluded that *The Daily Legal News* is not a newspaper, it is unnecessary to determine whether it had a circulation within the meaning of the statute.

For the error indicated, the decree is reversed, and the cause remanded with directions to grant the relief prayed.

WIZARD, INC., *v.* FELDMAN.

Opinion delivered May 2, 1932.

A. M. Coates, for appellant.

Bevens & Mundt, for appellee.

BUTLER, J. The appellee, Herman Feldman, is engaged in the wholesale supply business in the city of Helena, Arkansas, and purchased from the appellant, Wizard, Inc., a quantity of insecticide called "Flyded." He signed a written order for the merchandise, which was accepted by the appellant, and the merchandise shipped on March 1st, in accordance with the terms of the order, and received by appellee in due time. The total sum for the goods ordered was $603.04, due within thirty days. Payment not having been made within this time, suit was instituted, and defense was made that the merchandise was purchased with the express agreement that it was to be held by Feldman for the account of the appellant, which agreed to send its representative to Helena for the purpose of putting on an advertising campaign, and with the further agreement that the merchandise was to be sold to the trade by the representative of the seller. It was alleged that the latter failed to comply with this agreement, which breach Feldman pleaded as a complete defense.

Subsequently, by amended answer, he interposed the additional defense that the merchandise was sold as a fly-killer, and under an implied warranty that it was fit for the purpose of killing flies, and that it wholly failed and was unfit for the purpose for which it was purchased.

On the trial, this defense was abandoned. There was a verdict and judgment for the appellee, from which judgment is this appeal.

The appellant introduced the original order for the merchandise, which recited that it was sold to the appellee and the purchase price of the same, and that "no terms valid not stated on this order: not subject to countermand." The only testimony for the appellee was that of himself and an employee. They testified that the contract was signed in duplicate, the original being retained by the salesman and a copy given to Feldman; that, before he signed the order, the salesman stated that he would put on an advertising campaign, and that "he would come down and conduct a specialty campaign to sell the goods." They testified that, after having signed the order, Feldman called attention to the fact that there was nothing said in the order about the representative of the seller conducting the specialty campaign, and that the salesman then stated that he was in a hurry then but would write the stipulation regarding the specialty campaign into the order before sending it in. They testified further that the goods were received, that they began to attempt to sell the same, and did sell some of it—how much not being shown by the testimony. The employee stated that it was a small percentage. Both of them testified that the salesman who had taken the order came back to Helena after the goods had been received, and said that he was going out the next morning "to do some work for us, but he didn't do it"; that they received a letter from him in the morning mail to the effect that he was called out of town, but would be back to sell them again; that he never came back.

A letter was introduced in evidence from Feldman to the appellant, dated July 19, 1930, in which, after referring to some previous letters, he stated that he was unable to sell the insecticide, and that in "about a month or more" the salesman came and told the employee he had come to sell that stuff, but had gone away without doing so, and asked that the appellant take back the goods. He complained that the customers would not pay for the goods they purchased—"they don't pay, or they

return it, or they wait till we pick it up"—and in conclusion asked the appellant for shipping instructions, and notified it that he was holding the goods for it.

The court instructed the jury that the burden was upon the defendant to establish the defense set up, namely, "that at the time the contract was entered into between the plaintiff and the defendant that the agent of the plaintiff agreed to insert certain things in the contract, as shown by the evidence, and did not do it as he agreed to do before sending in the order; if you find that the agent agreed to write that into the contract and failed to do it and sent it in, and that the company failed to comply, although you might find that this addition had not been inserted in the contract. If you find the company sent a man here to help them advertise it and sell it; if you find they sent a man here to advertise it and sell it, then you should find for the plaintiff. If you find that the plaintiff took the contract with the agreement with the defendant that he would write that in the order, and that he failed to do it, and that the company failed to send the agent down here to assist the defendant in making the sales, according to the clause to be written into the contract, then you should find for the defendant."

The record shows that counsel for the plaintiff requested the court to orally instruct the jury to the "extent that if Feldman sold a part of the merchandise in question, that such was a ratification of the contract, and they should find for the plaintiff, even though the salesman had agreed to write additional terms in said contract." The court refused "said instruction because the testimony did not show whether the sales were made before the agent came down here and failed to put on the campaign advertising it or after he came."

Upon the instructions given and the testimony adduced, the case was submitted to the jury, which returned a verdict in favor of the appellee. Judgment was entered in accordance with the verdict, from which is this appeal.

It is insisted by the appellant that the testimony of Feldman and the employee is so unreasonable as to make it obviously impossible for it to be true. While it may be improbable, we do not think it is of such a nature as to render it reasonably impossible for it to be true, and, under the settled rule that the jury are the judges of the credibility of the witnesses, we have no right to disregard that testimony, it not being of the character of that rejected by this court in *Waters Pierce Oil Co.* v. *Knisel,* 79 Ark. 608, 96 S. W. 342, and *Platt* v. *Owens,* 183 Ark. 261, 35 S. W. (2d) 358.

It is next insisted that the testimony was incompetent because it tended to vary and add to the written provisions of the order. On the other hand, the appellee contends that the purpose of the evidence was not to vary or contradict the terms of the contract, but to show that the contract offered in evidence by the appellant was not in fact the contract entered into, and, to sustain this position, relies on the cases of *Barton-Parker Mfg. Co.* v. *Taylor,* 78 Ark. 586, 94 S. W. 713; *Pickler* v. *Arkansas Packing Co.,* 112 Ark. 33, 164 S. W. 764; *Worthen* v. *Stewart,* 116 Ark. 306, 172 S. W. 855; *White Sewing Machine Co.* v. *Atkinson & Son,* 126 Ark. 206, 190 S. W. 111; *Case Threshing Mch. Co.* v. *Southwestern Veneer Co.,* 135 Ark. 607, 205 S. W. 978; *Pictorial Review Co.* v. *Rosen,* 171 Ark. 720, 285 S. W. 385; *New Home Sewing Machine Co.* v. *Westmoreland,* 183 Ark. 769, 38 S. W. (2d) 314.

Without reviewing these cases at length, it may be said that they are distinguishable from the case at bar, for in all of them the element of fraud entered into the procurement of contract and were conditions precedent to their validity. Here the contract was not induced by any fraudulent misrepresentation as to character of the article sold. It is unambiguous, executed in duplicate, signed by Feldman, and the copy kept by him. It negatives his contention that the goods were shipped to him for the account of the seller (*Reuter Milling Co.* v. *McKinney,* 170 Ark. 84, 278 S. W. 963), and shows an uncon-

ditional contract of purchase and sale. The testimony relative to the agreement to do specialty work and assist in the sale tended at best to establish merely an independent agreement collateral to the main issue, and was a promissory representation of an intention as to some act in the future. Such representations are not conditions precedent to the validity of the contract, and the failure to perform them does not entitle the buyer to disavow the contract and refuse the payment of the purchase price. Similar representations as in the instant case were considered in the cases of *Whitmore* v. *Scoggin,* 147 Ark. 236, 227 S. W. 610; *Stevens* v. *Chatfield,* 230 Ky. 194, 18 S. W. (2d) 1006; *Stevens* v. *Smotherman,* 223 Mo. App. 1078, 24 S. W. (2d) 670; *Security Savings Bank* v. *Capp,* 193 Iowa 278, 186 N. W. 927; *Marshall Mill Co.* v. *Hintz-Cameron Co.,* 156 Minn. 301; *Fleming* v. *Gerlinger Motor Car Co.,* 286 Or. 195, 168 Pac. 289. And in all of them the views we have reached were adopted. The court therefore erred in its declaration of law, and the judgment is reversed, and the cause remanded.

ELSASS *v.* SOUTHWESTERN TRANSPORTATION COMPANY.

Opinion delivered May 9, 1932.

Holifield & Upton, for appellant.

Carter, Jones & Turney and *Lamb & Adams,* for appellee.

HART, C. J. W. H. Elsass prosecutes this appeal to reverse a judgment on a directed verdict against him in favor of the Southwestern Transportation Company and

Jimmie Creason. According to the evidence on behalf of the appellant, he and his son lived about a mile west of Rector, Arkansas, and had a dog killed by a bus belonging to the Southwestern Transportation Company which was being driven by Jimmie Creason at the time of the accident on October 24, 1930. The appellant and his son were engaged in driving a cow from one place to another. They carried along a collie dog to help them. The dog had been trained to drive stock and was worth $100. Near the scene of the accident the main highway ran parallel with the track of the Cotton Belt Railroad. They drove the cow along the main highway until they reached a byroad where they desired to cross the railroad. The crossing at that place was blocked by a freight train. The son and the cow remained on one side of the highway, and the father went across the public road to talk with a neighbor who was in a wagon and also waiting to cross the railroad. The dog followed the father and took his place under the wagon. They saw the bus which killed the dog cross a railroad spur and approach them at the rate of ten or twelve miles an hour. After the bus crossed the railroad spur, it traveled somewhat slower. When it was opposite the place where the wagon was on one side of the road and the cow on the other, the dog started back across the highway, and, when near the middle of the highway, was struck by the bus and killed.

The testimony on behalf of the father and son was substantially as above stated. The driver of the bus testified that he was driving a Buick coach which was about 18 feet long and 7½ feet wide inside the body. It was a twelve-passenger bus. He slowed down after crossing the railroad spur, and saw the cow and boy on one side of the road and two men with a wagon on the other. The dog was under the wagon, and the driver of the bus did not see it any more until it was struck. He slowed down to pass between the cow and the wagon because he didn't know what the cow or the team would

do. He could not see on the ground near the bus on account of the size of his motor. The dog must have darted suddenly from under the wagon as the bus passed between the wagon and the cow. The wagon was only a few feet away from the side of the road.

The law of the case is stated in *Harris* v. *Hicks,* 143 Ark. 613, 221 S. W. 472, where it was held that, in addition to the requirements of our statute limiting the speed of motor cars and requiring the driver to stop on approaching a frightened horse, an automobile driver need exercise only ordinary care in operating his car. In the application of this settled principle of law to the facts of the instant case, we do not think the trial court erred in directing a verdict in favor of the appellees. The undisputed evidence shows that, as the driver of the bus approached the place on the highway between where the wagon with the team of horses was on one side of the road and the cow on the other, he slowed down in order to prevent an accident from the horses becoming frightened or the cow coming into the road in front of the bus. When he saw the dog, it was under the wagon, and he could not reasonably anticipate that it would dart suddenly into the road ahead of the bus.

We are of the opinion that the undisputed evidence shows that the killing of the dog was an accident, and that there was no fault on the part of the driver of the bus or on the part of the owner of it. It follows that the judgment of the trial court is correct, and it is therefore affirmed.

NATIONAL SAVINGS & LOAN ASSOCIATION *v.* BEASLEY.

Opinion delivered May 9, 1932.

Owens & Ehrman, Ada Marett Carter and *John M. Lofton, Jr.*, for appellant.

Clary & Ball, for appellee.

HART, C. J. The only issue involved by this appeal is whether or not the chancery court erred in confirming a sale of real estate under a mortgage foreclosure. The record shows that the National Savings & Loan Association brought a suit in equity against Adolph Daniel to foreclose a mortgage on certain lots in the city of Warren, Arkansas. Judgment by default was rendered in favor of the plaintiff against the defendant for $2,434.85 with interest at the rate of nine per cent. per annum from November 1, 1930. The decree provided that, if the judgment was not paid within twenty days, the clerk of the court should be commissioner to make the sale according to the terms of the decree.

The decree was rendered on the 2d day of February, 1931. One of the attorneys for the plaintiff asked the clerk if he would notify plaintiff of the exact date of sale, and he promised to do so. On the 21st day of February, 1931, she wrote him asking for the exact date of sale. She inclosed a self-addressed envelope for reply, and her letter had a return card on it. Having received no reply to this letter, on March 10, 1931, she again wrote the clerk about the matter and did not receive a reply to this letter. She wrote again on April 15, 1931, and received a reply stating that the sale had been made on March 28, 1931. This was duly confirmed by the court over the objection of the plaintiff.

Among the grounds for refusing to confirm the sale, plaintiff set up that the property had been sold for an inadequate price, and that, if it had known the day of sale, it would have had a representative there who would have bid the mortgaged indebtedness for the property. Other evidence for the plaintiff tended to show that the property was worth $2,500, and that it only sold for $750. It

was also shown that the plaintiff offered to relinquish its indebtedness against the defendant if the latter would execute a quitclaim deed to the property. This offer was refused.

It was shown on behalf of the purchaser at the foreclosure sale that the property was not worth more than $1,000. The clerk of the chancery court and his deputy both denied receiving the first two letters written them by the plaintiff's attorney relative to the date of sale. They stated that they certainly would have answered the letters, had they been received. The clerk testified that the plaintiff's attorney might have asked him about notifying the plaintiff of the exact date of sale, but that he did not remember it. He did not deny her testimony. The decree was had at the first term of the chancery court after his election.

A majority of the court is of the opinion that the trial court erred in confirming the sale to the purchaser. They think that the case falls squarely within the principles of law to the effect that, where the sale is for an inadequate consideration and where the circumstances attending the sale work out a harsh result against an interested party, the court should refuse to confirm the sale, although the purchaser himself had been guilty of no fraud or misconduct in the matter. They think that the fact that the commissioner agreed to notify the plaintiff's attorney of the day of sale and did not do so brings the case within the principles of law so often applied by this court. *Moore* v. *McJudkins,* 136 Ark. 292, 206 S. W. 445; *Chapin* v. *Quisenberry,* 138 Ark. 68, 210 S. W. 341; *Bauer* v. *Wade,* 170 Ark. 1020, 282 S. W. 359; *Hawkins* v. *Wood,* 179 Ark. 845, 18 S. W. (2d) 371, and cases cited.

Mr. Justice HUMPHREYS, Mr. Justice BUTLER and the writer are of the opinion that it was the duty of the plaintiff to keep itself informed of the progress of the case, and that it was negligent in not taking other means to ascertain the date of sale after it did not receive a

reply to the letter of March 10, 1931, the sale not having taken place until March 28, following.

It follows that the decree of the chancery court must be reversed, and the cause will be remanded for further proceedings in accordance with this opinion, and not inconsistent with the principles of equity.

AMERICAN BUILDING & LOAN ASSOCIATION *v.* MEMPHIS FURNITURE MANUFACTURING COMPANY.

Opinion delivered May 9, 1932.

Robinson, House & Moses and *W. R. Roddy,* for appellant.

Wilson, Kyser, Armstrong & Allen, for appellee.

SMITH, J. Appellant, a building and loan association, hereinafter referred to as the association, filed a motion to vacate a decree of the Poinsett Chancery Court and to set aside an order approving a sale which had been made pursuant thereto, and from a decree of the court sustaining a demurrer to this motion is this appeal.

From this motion and the exhibits thereto the following allegations appear: H. W. Cole and S. W. Cole had been engaged in business at Marked Tree. Their business house was destroyed, and they made application to the appellant association for a loan of $10,000 with which to rebuild. The application therefor recited that the old building had been, and the new building—which

was to be brick—would be, located on lots 4 and 5, block 2, St. Francis Addition to the town of Marked Tree, and they agreed in the application to execute a deed of trust which would be a first lien on the land and the building then under construction, but not completed. The loan was made and the deed of trust was executed, which described the property as lots 4 and 5, block 2. This instrument was filed for record July 16, 1926, and was duly recorded.

At the time this loan was made the Coles were largely indebted to appellee, the Memphis Furniture Manufacturing Company, hereinafter referred to as the furniture company, and on July 27, 1926, before the completion of the building, they executed a mortgage to appellee furniture company to secure this indebtedness. The land described in this instrument was referred to as tract No. 1 and as tract No. 2. Tract No. 1 consisted of farming lands. Tract No. 2 covered property in the town of Marked Tree and was described by metes and bounds. The description employed included lots 4 and 5, block 2, and other lots in the same block. The mortgage to the furniture company contained the following recital: "That tract 2 is for the purpose of securing an indebtedness of $20,000 to the Memphis Furniture & Manufacturing Company, as evidenced by a promissory note of even date, due on the 27th day of July, 1927, with interest at the rate of 8 per cent. per annum from date until paid. That this mortgage on tract 2, however, is subject and second to a prior mortgage given the Arkansas Building & Loan Association for $10,000."

On August 25, 1930, a suit was filed by the furniture company in the Poinsett Chancery Court to foreclose its mortgage, and the association was made a party thereto. The complaint contained the following allegation: "Plaintiff avers that the real estate hereinabove described, as it is informed, is incumbered by indebtedness owing to the defendant, American Building & Loan Association, which may be secured by a lien superior to the lien of the mortgage first hereinabove mentioned, but plaintiff does not admit that such is true, and calls for

strict proof with respect to the claim of said American Building & Loan Association and the priority of its lien."

The association filed an answer, alleging its prior lien on lots 4 and 5, block 2. When the answer was filed, it was conceded by the attorney for the furniture company that the lien of the association was prior and superior, and the attorney for the association agreed that a decree of foreclosure of plaintiff's mortgage might be entered, provided the rights of the association were protected. The decree was entered on May 4, 1931, which declared the priority of the lien of the association on lots 4 and 5, block 2, and this decree was approved by the respective attorneys before its entry.

Pursuant to this decree, a sale was had by the commissioner appointed for that purpose, at which sale the furniture company purchased lot 6, block 2, for $4,000. This was one of the lots embraced in the description employed in the mortgage to the furniture company. The report of this sale was approved, and the sale confirmed in vacation, that order reciting that it was done by consent of parties. The attorney for the Coles approved this order, but the attorney for the association was not advised of it, and entered into no agreement concerning it.

Before the final adjournment of the term of court at which the decree of sale had been rendered and the report of sale thereunder had been confirmed, to-wit, about July 1, 1931, the association discovered that the building which it had furnished the money to erect had, by mutual mistake of the parties as to the location and boundary lines of lots 4 and 5, block 2, been erected almost entirely on lot 6, block 2, and that only a small portion of the building was located on lot 5, block 2, and that the remainder of lot 5 and all of lot 4 were vacant except for a very small frame building.

The complaint alleged that the full amount of the loan was used in the construction of the brick building, and that it was the intention of all the parties to the deed of trust to the association that this instrument should cover the brick building and the land on which it had been

erected. It was further alleged that "at the time the Memphis Furniture Manufacturing Company took its mortgage, it had knowledge of the first mortgage for the sum of $10,000 covering the brick building, and it was not the intention of the parties executing its mortgage, nor were the agents and employees of the Memphis Furniture Manufacturing Company under the impression at the time, that its mortgage was a first lien on any of the land conveyed by it."

It was further alleged that, at the time of filing its answer, the association was ignorant of the true location of the brick building and believed that it was located on lots 4 and 5, and its agreement for the entry of the decree of foreclosure was induced by this misapprehension, and information to the contrary was not obtained until after the confirmation of the report of sale.

The motion to vacate the decree of sale and the order of confirmation was filed August 15, 1931, and, by way of cross-complaint against the original plaintiff and the defendant, Coles, it was prayed that the deed of trust to the association be reformed to comply with the intention of the parties so as to cover lot 6, block 2, the land on which the brick building was erected.

A demurrer to the motion was heard and sustained on August 28, 1931, an adjourned day of the same term of court at which the original decree of foreclosure had been rendered.

G. O. Campbell was made a party to the original foreclosure proceeding, and filed an answer, in which he alleged that the Coles had previously executed to him a mortgage on lots 2 and 7, block 2, in St. Francis Addition, and that he had acquired the title to these two lots by the foreclosure of his mortgage, which proceeding antedated the execution of the mortgage to plaintiff. Campbell's answer further alleged: "That in executing said mortgage it was the purpose and intention of the grantors and grantees therein that said mortgage should describe and convey lots 3, 4, 5 and 6, in said St. Francis Addition to Marked Tree; that in fact said mortgage extends to

and includes a part of one street in front of the buildings on said real estate and a part of the right-of-way of St. Louis-San Francisco Railway Company, a part of lot 7, owned by this defendant, and a part of Broadway Street, in Marked Tree; that the description as written in said mortgage to plaintiff is erroneous; was by mutual mistake of the grantors and grantee therein, and should be corrected and reformed. A correct plat of said real estate is hereto attached as Exhibit A and made a part hereof, and showing the location of lots 1 to 7, inclusive, and also showing by metes and bounds the description of real estate described in said mortgage executed to the plaintiff."

The court, in the foreclosure decree, found the facts to be as alleged by Campbell, and that it was not the intention of the Coles to include any part of lots 2 and 7, block 2, in their mortgage to the furniture company.

For the affirmance of the decree from which this appeal comes, it is insisted that the decree was entered by the consent of all parties, and that, if any mistake exists as to the true location of the brick building, it should have been discovered when Campbell filed his answer praying reformation of the description employed in the mortgage from the Coles to the furniture company.

It is said that, in sustaining the demurrer, the chancellor announced that he was doing so and denying the relief prayed because it had not been asked in time, and for that reason only.

It thus appears that, while the furniture company mortgage has been foreclosed, and a sale thereunder had, there are no intervening rights of third parties. The furniture company became the purchaser at the sale, and it now claims as owner, and not as mortgagee, and it is very definitely alleged that the furniture company took its mortgage, through which its title was acquired to this property, with knowledge of the prior incumbrance in favor of appellant, which was duly of record.

The power of the chancery court to reform instruments where, through mutual mistake, they do not ex-

press the agreement of the parties, has been often exercised, and is not here questioned. The essence of the furniture company's insistence is that the request comes too late, especially as the decree under which it claims was entered by consent.

Properly considered, the decree was not entered by consent; we think under the facts alleged the consent went only to its form. In any event, such consent as was given was the result of mutual mistake. Under the allegations of the motion, the furniture company took its mortgage with knowledge of the fact that the association had a deed of trust in the sum of $10,000 covering the brick building, and this instrument was of record when the furniture company's mortgage was executed. There is nothing in the pleadings to indicate that the furniture company knew the exact location of the brick building and withheld that information from the association while obtaining its consent to the entry of the decree which would destroy its lien. But, if so, the association would be entitled to the relief prayed under the allegations of the petition. It is to be remembered that the motion was filed at the same term of court at which the decree was rendered, and the rights of no third parties have intervened. It is settled law that courts have control over their orders, judgments and decrees during the term at which they were made, and for sufficient cause may, upon application or upon its own motion, modify or set them aside. *Underwood* v. *Sledge,* 27 Ark. 296; *Democrat Ptg. & Litho. Co.* v. *Van Buren County,* 184 Ark. 974, 43 S. W. (2d) 1075.

The case of *Saleski* v. *Boyd,* 32 Ark. 74, was one in which an appeal had been prosecuted, as the instant case, from the refusal of the chancellor to set aside a decree, a motion to that effect having been made during the term at which the decree was entered, and while it was under the control of the chancellor. In reversing the action of the chancellor, it was there said: "If it appear that the attorney consented to the decree in fraud, or by collu-

sion with adverse counsel, or under a mistake or misapprehension of law or facts, and that the rights and interests of his client were thereby seriously compromitted, the court will open the decree."

There was no avoidable delay on the part of the association in filing its motion, and it is alleged that this was done as soon as the association was advised of the facts.

It is insisted for the affirmance of the decree that the answer of Campbell, hereinabove referred to, should have apprised the association of the mistake before the rendition of the decree. But we do not think so. It was not, and is not, denied that the furniture company had a valid mortgage on lots 3, 4, 5 and 6, and the effect of Campbell's answer was to call attention to the fact that the description by metes and bounds which had been employed not only covered these four lots, but lots 2 and 7 also and a part of a street and of a railroad right-of-way, and that the Coles had lost their title to lots 2 and 7 through the prior foreclosure proceeding. It does not appear that there was anything about the plat which Campbell filed which would have shown the location of the brick building, and Campbell was not at all concerned or interested in this building and prayed no relief having any relation to it. The relief sought and obtained by him was to have his lots 2 and 7 excluded from the metes and bounds description which appeared in the mortgage to the furniture company.

Under the facts alleged the association was entitled to the relief prayed.

The case of *Beckius* v. *Hahn,* 114 Neb. 371, 207 N. W. 515, 44 A. L. R. 78, involved the right of reformation as against general creditors, and the annotator makes the following summary of the numerous cases there cited in his note: "And while equity, as a general rule, will not exercise its jurisdiction to reform a written instrument to the prejudice of the intervening rights of *bona fide* purchasers or incumbrancers without notice of any equity

of reformation, it will exercise jurisdiction in this respect as against subsequent purchasers or incumbrancers who obtained their title or lien with notice of an existing equity of reformation, or who, for other reasons, do not stand as *bona fide* purchasers or incumbrancers for value, in the same manner and to the same extent as it would between the original parties.'' See, also, *Sherwin-Williams Co.* v. *Leslie,* 168 Ark. 1049, 272 S. W. 641.

The decree of the court below will therefore be reversed, and the cause will be remanded with directions to overrule the demurrer.

CROWELL *v.* SEELBINDER.

Opinion delivered May 9, 1932.

Edgar Lee Matlock, for appellant.

R. S. Wilson, for appellee.

SMITH, J. Appellants brought this suit in ejectment to recover from appellees the possession of a lot in the town of Van Buren. Mrs. Emma B. Crowell, who was the mother of appellants, took an estate for life in the lot under the will of her father, with remainder over to her children. After the life estate had vested in Mrs. Crowell, she attempted to convey the fee title to B. J. Brown, and, by mesne conveyances, the title passed to the father of appellees, from whom they inherited the lot.

It is conceded that Mrs. Crowell owned only a life estate, and that appellees acquired such title as she owned. The cause was transferred to equity for an accounting, where the chancellor found that Mrs. Crowell's successors in title had acquired her title in good faith, and that, believing themselves to be the true owners thereof, they had improved the property. Without discussing the testimony, we announce our concurrence in the finding of the court below that appellees and their predecessors in title had color of title to the lot, and, believing themselves to be the owners thereof, had peaceably improved it, thereby enhancing its value, and they are therefore entitled to recover this enhanced value, pursuant to the provisions of § 3703, Crawford & Moses' Digest.

As has been said, the cause was transferred to equity for an accounting as to the value of the rents, on the one hand, and as to the amount of taxes and insurance paid and as to the enhanced value, on the other, and, without making special findings on any of these questions, the court found that appellants were entitled to judgment for the possession of the land, but rendered judgment against them for $959.27, and ordered that no writ should issue for the possession of the lot until this sum had been paid pursuant to § 3704, Crawford & Moses' Digest, and this appeal is from that decree.

The excellent briefs of opposing counsel review many of the cases which have dealt with the legal questions here involved, and which have definitely settled those

questions, except only those relating to proper credits to be allowed for improvement taxes paid.

As we understand the decree, the court allowed appellees credit, not only for the enhanced value of the property, but also for the cost of certain repairs made for the convenience of a tenant who occupied the building which a predecessor of appellees in the title had built, and also allowed credit for certain insurance premiums paid by appellees, and also refused to charge appellees for certain rents for the reason that they had failed to collect them.

In the case of *McDonald* v. *Kenney,* 101 Ark. 9, 140 S. W. 999, the court said that the "Betterment Act" (act 69, Acts 1883, page 106), appearing as § 3703, *et seq.,* Crawford & Moses' Digest, had established an arbitrary standard to adjust the equities between persons who, having color of title to real estate, had in good faith improved it, and had later been evicted because of the failure of their title. That the true owner was allowed to recover rents for the limited period of three years only preceding the recovery of the lands, but that the statute "also arbitrarily allowed all rents issuing from the property during that period, both from the land and the improvements thereon during those three years," and that "the rents are fixed upon a basis of annual periods, and the interest recoverable thereon should therefore be calculated according to such annual periods, beginning at the end of each annual period."

The same case also held that, while the cost of making the improvements may be taken into consideration in arriving at their value, yet the cost is not necessarily controlling. The thing to be ascertained is value, and not cost. This subject was exhaustively considered in the opinion in the case of *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88, and need not be here enlarged upon.

In that case it was said that the allowance for improvements was made upon the ground that they passed into the hands of the person recovering them as a new acquisition, and are only a new acquisition by him to the

extent of their value at the time he recovers or obtains possession of them, and their value at that time is to be allowed, and nothing more. *Summers* v. *Howard,* 33 Ark. 490; *Greer* v. *Fontaine,* 71 Ark. 605, 77 S. W. 56. It was there also said that "the value thereof is based upon the enhanced value which these improvements at the time of the recovery impart to the land."

The cost of the repairs should not therefore have been allowed as a separate item, but should have been considered in conjunction with other testimony tending to show the extent to which the cost of these repairs had enhanced the value of the land.

In the case of *McDonald* v. *Kenney,* 101 Ark. 9, 140 S. W. 999, it was said that, "If the vacant lots had a rental value, the defendants are chargeable therewith also, because they were withholding same from the true owner." We therefore hold that appellees' failure to collect portions of the rent from their tenants in possession does not relieve them from liability therefor. They are liable for such rental value as the property possessed, whether rents were collected or not, for the reason stated in the McDonald case, *supra,* to-wit: "because they were withholding the same from the true owner."

The case of *McDonald* v. *Rankin, supra,* is decisive of appellees' claim for insurance paid. It was there held (to quote a headnote) that: "Where the purchaser of the land at a judicial sale which was subsequently held void insured improvements thereon and collected the insurance money after the property was destroyed by fire, she will not be held to account therefor to the owner of the land, as the insurance contract was a personal one." In the instant case no fire occurred, and the insured buildings stand undamaged by fire, but that fact does not affect the legal principles which control. The insurance contract for which appellees paid was a personal contract for their own benefit, and they therefore have no right to charge the premiums paid to appellants. See also *Roesch* v. *Johnson,* 69 Ark. 30, 62 S. W. 416; *Langford* v. *Searcy College,* 73 Ark. 211, 83 S. W. 944.

The most difficult question presented on this appeal is that of the allowance to be made appellees on account of improvement district taxes paid. The property is in several different improvement districts, in all of which the betterment assessments were distributed over a period of years payable in annual installments.

In the case of *Hicks* v. *Norsworthy,* 176 Ark. 786, 4 S. W. (2d) 897, we said that "the assessments for permanent improvements must be ratably and equitably apportioned between the life tenant and the remainderman," and that holding was reaffirmed in the case of *Kory* v. *Less,* 180 Ark. 342, 22 S. W. (2d) 25, where we said that "no rule could be laid down that would of itself determine the proportion or percentage that each party should pay in all cases." We there cited 21 C. J. 958, and 17 R. C. L. 639, where rules of apportionment were announced which had been arrived at in the construction of statutes peculiar to the jurisdictions in which the cases had originated, but none of which, so far as we were advised, are identical with our own statute. In some of these jurisdictions the special taxes are not based upon enhanced value, while we have uniformly held that our special taxes have no other basis. The thing assessed with us is not the value of the property, but the estimated enhancement in value which will result from the construction of the proposed improvement. While these improvements, theoretically at least, are permanent in character, they usually require maintenance and replacement. The theory of our law is that the improvement, by enhancing the value of the use of the property, will enhance its market value, and it is this enhanced value which we tax in our improvement districts. For instance, a drainage canal makes land more arable and tillable; a sidewalk or a street makes property more accessible; sewerage and water make property more sanitary, and the value of the property which has acquired these facilities is enhanced, and the life tenant, during his possession, enjoys these benefits, and what could be more just and equitable than that he should pay for these benefits

ratably while he is enjoying them. It is a matter of common knowledge that these improvements are paid for with the proceeds of bonds. Our reports are full of such cases, and these bonds are usually payable over a period of twenty years, and but few of them bear interest at a rate less than five per cent. It does not appear equitable to allow the life tenant to enjoy the benefit of the improvement and pay interest only on the annual installments of benefits, thereby imposing upon the remainderman the burden of paying the principal debt, when the improvement, lacking maintenance, might, and in many cases would, be destroyed by age and use.

We are therefore of the opinion that, when the payments for the improvement are distributed over a considerable number of years, as we understand the facts to be in the instant case, a ratable and equitable distribution of this burden requires the life tenant to discharge the annual assessments during each year of his occupancy. A case might arise where, under facts peculiar to it, this would not be equitable, but, in the absence of special equities, we announce this as the rule to be generally applied. This rule appears to us to be equitable in ordinary cases, and possesses the quality of simplicity. There should be a general rule for the determination of such questions, and we think the rule announced will work justice in ordinary cases.

The recognition of the necessity for a general rule to determine the relative rights of the true owner of land and those of an occupant who, believing himself to be the owner thereof and having color of title thereto, has improved it, and thereafter been evicted, led to the enactment of the Betterment Statute under which this case arose. This statute has been referred to in cases construing it as arbitrary, yet it has been consistently upheld and enforced as a fair means of determining conflicting interests of parties litigant, under the conditions stated to which the statute applies, depriving no one of any constitutional rights.

The decree of the court below will therefore be reversed, and the cause will be remanded, with directions to state the account between the parties in accordance with the views herein expressed.

HART, C. J., dissents in part; KIRBY, J., dissents.

SYDEMAN BROS., INC., *v.* WOFFORD.

Opinion delivered May 9, 1932.

I. J. Friedman and *Cravens & Cravens*, for petitioner.

Hill, Fitzhugh & Brizzolara, for respondent.

HUMPHREYS, J. This is a petition by Sydeman Bros., Inc., to this court for a writ of prohibition to prevent the chancery court of the Ft. Smith District of Sebastian County from trying a suit brought by Mrs. Annie B. Whitlow to recover a personal judgment against petitioner for an alleged breach of a lease of her business building in Ft. Smith, and to enforce a lien for the payment of the amount claimed against trade fixtures owned by said petitioner in said city. It is alleged in the petition that about four months before the institution of her suit in the chancery court, the petitioner, a foreign corporation, doing business by permission in the State, had withdrawn therefrom by discontinuing its business therein and notifying the Secretary of the State of Ark-

ansas of such cessation of business, and of its retirement from the State, and that, on account of its withdrawal from the State, the chancery court acquired no jurisdiction of the petitioner by virtue of the summons issued out of said court and served upon the Secretary of State, who was designated by petitioner as its agent for service when it qualified under § 1827 of Crawford & Moses' Digest to do business in the State.

An alleged lease and a breach thereof was made the basis of the suit by Mrs. Whitlow in the chancery court, in which she sought personal judgment against petitioner and a foreclosure of a lien provided for in the lease for rents upon trade fixtures it owned. A good cause of action was stated, but petitioner argues that the chancery court was without jurisdiction to render a personal judgment against it on account of the breach of the lease because service upon its designated agent when it entered the State is insufficient to give the chancery court jurisdiction of its person or corporate body. The solution of this question depends upon whether a foreign corporation may qualify to do business in this State and, after incurring obligations, can withdraw from the State and defeat personal service on its agent in suits to enforce such obligations. According to the weight of authority, it cannot do so. The general rule is well stated in 12 R. C. L., at page 1113, as follows:

"It is generally held that a foreign corporation, which has been admitted to do business within a State upon the condition that it execute a power of attorney for service of process to a general agent or State officer, cannot, after having designated some person for service of process and carried on business within the State, escape from the jurisdiction of the courts of the State over actions brought by residents thereof with whom it has contracted under the permission to do business therein by revoking the power of attorney for service of process and ceasing to do business within the State."

The rule quoted above finds support in 14-A Corpus Juris, 1377.

The chancery court acquired jurisdiction over the petitioner by service upon the Secretary of State in the suit brought by Mrs. Whitlow against it, hence its application for a writ of prohibition is denied.

GENERAL TALKING PICTURES CORPORATION *v.* SHEA.

Opinion delivered May 9, 1932.

George D. Hester, DeWitt Poe and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

J. G. Williamson, Lamar Williamson and *Adrian Williamson,* for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellee in the circuit court of Desha County to recover possession of two Phonofilm sound reproduction boxes, two preliminary amplifiers and fader control, one "B" amplifier and power supply unit, one set of loudspeakers, and tubes necessary to install same in the theatre owned by appellee in McGehee. The things named and sought to be recovered constituted the equipment of a DeForest Phonofilm, or talking-picture machine. It was

alleged that appellant was a nonresident corporation, and that the equipment was of the value of $5,000; that appellant was entitled to the immediate possession thereof, and that appellee was unlawfully detaining same, to appellant's damage in the sum of $1,000. It was further alleged that on the 4th day of February, 1929, appellant leased and delivered to appellee the said property, as an exhibitor, giving appellee a personal, nonexclusive, indivisible license to use said equipment in his theatre in the city of McGehee, for which he agreed to pay the sum of $3,180, evidenced by twelve promissory notes in the sum of $265 each, the first note to become due on April 20, 1929, and one note each month thereafter until the twelve notes were fully paid; that appellee has paid the first two notes, but has failed and refused to pay the notes maturing up to and including March 20, 1930; that appellant has complied with all the terms of the license agreement, and that, by reason of said failure or breach of the contract, it was entitled to recover $2,650, together with the right to the immediate possession of the equipment aforesaid, and damages in the sum of $1,000. The written contract sued upon and notes evidencing the unpaid rentals were attached to the complaint as exhibits.

Appellee filed a special demurrer questioning appellant's legal capacity to sue, and also an answer and cross-complaint in which he admitted that appellant was a nonresident corporation, and alleged that this suit is an action to enforce a contract covering intrastate business done and to be done by appellant in the State of Arkansas, and is a contract the execution of which by appellant constitutes doing business in the State of Arkansas, and that appellant had not complied with the laws of the State of Arkansas authorizing it to do business in this State, and therefore could not maintain this action. In his cross-complaint, he alleged that there was an implied warranty by appellant that the machine was fit for the purposes for which it was leased, and that this warranty had been broken; that appellant had contracted to service the equipment and to send its agent, expert in the mainte-

nance and repair thereof, to make all necessary repairs and replacements on same, which contract appellant had violated; and prayed judgment for $20,508.73 as actual damages sustained by appellee on account of the failure of the DeForest Phonofilm to function and the failure of appellant to service the equipment and to make necessary repairs and replacements on same.

Thereupon appellant amended its complaint by alleging that its place of business is in the city and State of New York; that a few days prior to February 4, 1929, its representative called on appellee and interested him in obtaining from appellant, under its license agreement, the properties described in the original complaint, and that its representative forwarded to appellant, at its place of business in New York, appellee's order for said equipment; that appellee prepared in New York the license agreement referred to in the original complaint, and forwarded it by United States mail to appellee at McGehee, Arkansas; that the same was duly acknowledged by appellee and by him forwarded by United States mail to the State of New York, where the contract was approved and acknowledged by appellant on the 13th day of February, 1929; that, pursuant to said agreement, the property described in the original complaint was shipped to appellee at McGehee, f. o. b., from New York, which transaction constituted interstate commerce, so that the statute of Arkansas relied upon by appellee can have no application; and that the transaction involved was not doing business in the State of Arkansas, but was an interstate commerce transaction.

Appellant filed an answer to the cross-complaint, denying the material allegations therein.

The trial court heard and sustained the demurrer to appellant's complaint, and dismissed same over its objection and exception, and proceeded with the trial of appellee's cross-complaint and appellant's answer thereto, over appellant's objection and exception, which trial resulted in a verdict and consequent judgment in

favor of appellee in the sum of $12,500, from which is this appeal.

Appellant contends that the court erred in sustaining the special demurrer to, and dismissing, its complaint, on the ground that it had not qualified to do business in Arkansas. The effect of the court's ruling was to invalidate the contract as being made in violation of § 1832 of Crawford & Moses' Digest, which provides that a nonqualifying corporation cannot make any contract in this State which can be enforced by it in law or equity. Under the allegations of the complaint as amended, the transaction was interstate and not intrastate. The lease of the talking-picture machine in question was entered into between the parties in the State of New York on a rental basis covering a term of ten years with an undertaking on the part of appellant to ship and install same in appellee's theatre in McGehee, Arkansas, and, after making a test of the proper operation thereof, to supply worn or broken parts and keep the machine in repair for proper functioning. The character of the transaction as to whether interstate or intrastate is necessarily determined by the essence of the contract. The essence of the instant contract was the renting or leasing of a picture machine in New York for shipment to McGehee, Arkansas. The agreement was entered into in New York. It was clearly an agreement for an interstate shipment, and must be classed as interstate commerce, unless that portion of the contract providing for installation, inspection and repairs renders the transaction intrastate. The decided weight of authority is to the effect that an agreement to install machinery or other apparatus at the point of destination will not divest the sale of its character of interstate commerce. The authorities treat installation of the apparatus as a mere incident to the sale or transaction. *Puffer Mfg. Co.* v. *Kelly,* 198 Ala. 131, 73 So. 403; *Milan Milling & Mfg. Co.* v. *Gorten,* 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135; *S. F. Bowser & Co.* v. *Schwartz,* 152 Wis. 408, 140 N. W. 51; *Flint & Walling Mfg. Co.* v. *McDonald,* 21 S. D. 526, 114 N. W. 684; *DeWitt* v. *Berger*

Mfg. Co., (Tex. Civ. App.) 81 S. W. 334; *Wolf Co.* v. *Kutch,* 147 Wis. 209, 132 N. W. 981; *A. Leschen & Sons Rope Co.* v. *Moser,* (Tex. Civ. App.) 159 S. W. 1018; *Vulcan Steam Shovel Co.* v. *Flanders,* 105 Fed. 102; *York Mfg. Co.* v. *Colley,* 247 U. S. 21, 38 S. Ct. 430. In principle, we cannot see why an agreement for inspection and repairs of the machinery after being installed would take the contract of sale or lease out of the protection of the interstate commerce clause of the Federal Constitution.

We are also unable to draw any distinction between a lease and a sale rendering the first an intrastate and the second an interstate transaction. This court held, in the case of *Linton* v. *Erie Ozark Mining Company,* 147 Ark. 331, 227 S. W. 411, that a foreign corporation owning a mine in the State was not doing business in the State in violation of said section of the statute where it had leased the mine.

Appellee argues, however, that, if the court erred in dismissing the complaint of appellant, it was not prejudicial error. The contention of appellee that the only issues in the case were covered by the cross-complaint and the answers thereto is not sound. The issue tendered by appellant's complaint that appellee had breached the contract, and that by reason thereof it was entitled to the balance of the rentals and to $1,000 damages, was not included in the cross-complaint and answer thereto. Had appellant's contract been treated as valid, it might have proved that same was breached by appellee, and recovered the balance of the rents and any damages on account of the breach, and have set off them against any damages appellee might have recovered.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

TAYLOR *v.* O'KANE.

Opinion delivered May 9, 1932.

[redacted]

Rhyne & Shaw, for appellant.

J. D. Benson, for appellee.

McHANEY, J. Appellant, as State Bank Commissioner in charge of the American Bank & Trust Company, insolvent, brought suit against appellee on two promissory notes, and recovered judgment on appellee's confession in open court that he was justly so indebted. The judgment as entered recited "that execution herein be, and hereby is, stayed until January 1, 1932, when execution may issue for one-half of said judgment and execution stayed on the other half of said judgment until January 1, 1933." Thereafter, on June 26, 1931, appellant caused execution to issue on said judgment, but on August 13, 1931, the court ordered same returned as having been improvidently issued. On August 21, 1931, appellant filed motion to set aside that part of said judgment staying execution until January 1, 1932, and 1933, on the ground that same was and is void as being beyond the power of the court, and contrary to law. Appellee demurred to said motion, which the court sustained, and denied the motion to set aside that portion of said judgment, and this appeal followed.

It does not appear that appellant consented that execution be stayed as per the court's order, although he

was represented by counsel at the time judgment was taken, and he made no objection to it on this or any other account. But we think this makes no difference if that portion of the judgment is void. By § 4258, Crawford & Moses' Digest: "No execution shall issue on any judgment or decree, unless ordered by the court, until after the expiration of ten days from the rendition thereof." It is therefore in the discretion of the court to order execution to issue within ten days from the rendition of the judgment, but it does not follow that he has any discretion to stay execution after the lapse of ten days. The statute stays execution for ten days, but the court is given power to order same sooner—not to stay it at all. Another statute, § 4276, provides that "No execution shall be a lien on the property in any goods or chattels, or the rights or shares in any stock, or on any real estate, to which the lien of the judgment, order or decree does not extend or has been determined, but from the time such writ shall be delivered to the officer in the proper county to be executed." But by still another section, § 6299, a judgment of the Supreme, chancery or circuit courts of this State, or the district court of the United States in this State, becomes a lien on real estate owned by the defendant in the county where rendered from the date of the judgment. If the court could stay or postpone execution, as, for example, in this case, the judgment debtor could make way with all chattels owned by him and any real estate outside the county, free from the judgment lien, because no execution could be issued and come to the officer's hands until the period of the stay had elapsed. Courts have not been given such power. One of their functions is to aid in the collections of just debts by orderly process of law, and not to delay same.

Our statutes provide a method by which the court may stay, quash or vacate the writ of execution, §§ 4291-4295, Crawford & Moses' Digest, or the clerk may issue the stay if no writ is in the hands of the officer, § 4294. The method provided in both instances involves the giving of a bond with good security by the judgment debtor, and

therefore preserves the rights of the judgment creditor. This method of staying executions on judgments appears to be exclusive. Having so provided, all other ways are excluded, including the fiat of the court. In *Federal Land Bank* v. *Blackshear,* 183 Ark. 648, 38 S. W. (2d) 30, we held that a court of chancery had no power to postpone sale of property under decree of foreclosure beyond a reasonable time—four to six months at the outside.

Appellee seeks to sustain the judgment on the ground that appellant should have appealed from the original judgment, instead of from the refusal of the court to modify same on motion. We do not think so. That part of the judgment staying execution beyond the time fixed by statute is void, because the court had no power or authority to make it. Being void, it could be attacked collaterally by motion or otherwise, and the court, under its continuing power to amend its records to speak the truth, may, after the lapse of the term, vacate a void judgment, or vacate a void portion of a judgment otherwise valid. *State* v. *West,* 160 Ark. 413, 254 S. W. 828.

The judgment is accordingly reversed, and remanded for further proceedings in accordance with this opinion.

HUDSON *v.* ALLEN.

Opinion delivered May 9, 1932.

Brewer & Cracraft, for appellant.

W. G. Dinning, for appellee.

McHaney, J. Appellant and appellee became partners in the general insurance business at Helena, Arkansas, under the name of the E. M. Allen Company, in May, 1919, and continued as such until July, 1927, when appellant purchased appellee's interest. On July 12, 1927, they entered into a preliminary sale and purchase agreement in which it was stipulated that it was to be replaced with a formal contract of sale signed by both partners. Appellant owned a 45 per cent. interest in the partnership, and appellee, 55 per cent. The purchase price of appellee's interest was $13,500, of which $6,000 was paid in cash and $7,750 was evidenced by a promissory note due October 1, 1928, with 6 per cent. interest. The purchase price was fully paid, in accordance to the terms of the contract, and on October 17, 1928, 17 days after the payment of the $7,750 note representing the balance of the purchase price, appellee filed this suit against appellant to recover 55 per cent. of renewal commissions on premiums of life insurance which he alleged appellant had collected during the period of the partnership, and for which he had not accounted, which amount was alleged to be $4,800. Prior to the formation of the partnership appellant represented the Mutual Life Insurance Company of New York as its agent, and under his contract with it he was entitled to receive certain commissions on renewal premiums on policies written by his agency. On the formation of the partnership in 1919, it was agreed that all commissions on life insurance business, whether renewal or original commissions on policies thereafter to be written, should accrue to the partnership, but renewals on policies previously written were not to become an asset of the partnership. Appellant defended on two grounds: (1), that he had accounted to the partnership for all life insurance commissions on premiums, both original and renewals, collected from life insurance written during the life of the partnership; and (2), that, under his contract with appellee by which he purchased appellee's interest, he had acquired all the assets of the partnership of every kind and description, except the accounts and notes receivable

that were due on or before July 1, 1927, and that the purchase price was not based on inventory, but was a lump sum offer including any differences that had arisen between them regarding life insurance commissions, and that both parties fully understood that the purchase price paid was a full and final settlement covering all disputes between them.

The court found that appellant had failed to account for certain commissions and entered a judgment against appellant for $2,289.11, being 55 per cent. of the amount for which the court found appellant had not accounted. Wherefore this appeal.

We do not discuss the issue as to whether appellant had accounted to the partnership for the commissions on life insurance premiums, as, in view of the decision we make on the other defense of appellant, it becomes unnecessary to do so. The formal contract of sale between them was dated October 26, 1927. This was the agreement contemplated by the preliminary agreement of July 12, 1927. In the formal contract it is provided: "It is specifically understood and agreed that Allen is selling all of his interest in the assets of the E. M. Allen Company of every kind and character, except the accounts and notes receivable that were due on or before July 1, 1927, and also his good will for a period of five years from the date of the signing of this instrument, and also agrees not to enter into the insurance business in Phillips County, Arkansas, indirectly or directly, for a period of five years."

The undisputed evidence shows that no inventory of the assets was made, and that the purchase of appellee's interest by appellant was made on a lump sum basis. The undisputed evidence further shows that, at the time of the execution of said formal contract, and for some time prior thereto, he was contending that appellant had not properly accounted for renewal commissions on life insurance business. Several letters passed between them prior to the execution of the contract of October 26, 1927, and in one of them, dated September 25, 1927, written by

appellee from Chicago, Illinois, to appellant's attorney in Helena, he used this language: "Furthermore, if we are to become technical, then I must insist upon adding to the agreement my proportion of the renewal commissions on life insurance business for the years 1919 to 1926, inclusive, which commissions have never been credited, although I frequently called the matter to Mr. Hudson's attention. I am not willing to believe that he intended to defraud me in connection with these commissions, but certain it is they have not been credited to my account, although statements sent me indicate that settlements were made regularly during that time. Reference to your copy of partnership agreement will convince you regarding these commissions."

We are therefore of the opinion that the final contract of sale of October 26, 1927, was a full and final settlement between the parties, including the claim now in question, and that appellee is in no position now to maintain such action. He signed the contract which specifically stated that he was selling "all of his interest in the assets of the E. M. Allen Company of every kind and character, except the accounts and notes receivable," etc. The commissions on life insurance business became an asset of the partnership, whether accounted for or not. He sold said assets, believing at the time that appellant had not accounted for same, and must be held to have included this asset in the purchase price received by him. *Betts* v. *Brundidge,* 182 Ark. 830, 32 S. W. (2d) 818; *People's Savings Bank* v. *Howson,* 171 Ark. 680, 286 S. W. 865. In this respect this case is unlike that of *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. (2d) 826, where one partner sued for profits fraudulently concealed and afterwards discovered. Other courts have had occasion to construe this same contract between the same parties. See *Allen* v. *Hudson,* 35 Fed. (2d) 330. This claim being an asset of the partnership, one which appellee thought he knew, at the time of signing the contract, had been concealed, if he desired to take action thereon, he should have reserved it in the contract, as he did the accounts

and notes receivable. This not having been done, it must be held to have been included in the broad language of the contract and passed to appellant as the purchaser.

The decree of the chancery court is therefore reversed, and the cause dismissed.

BANK OF MAYNARD *v.* CARROLL.

Opinion delivered May 9, 1932.

George M. Booth, for appellant.

Walter L. Pope and *W. J. Schoonover,* for appellee.

BUTLER, J. Suit was brought by the appellant bank against the appellees, John L. Carroll, Ben Johnson and A. J. Lewis, to recover on a promissory note executed by them March 19, 1927, and due on November 19 of that year. The appellees, Ben Johnson and A. J. Lewis, defended on the ground that they were sureties, and their liability on the note sued on was discharged because of the acceptance by the appellant of a new note executed on December 6, 1928, signed by John L. Carroll and M. L. Carroll, which was secured by a mortgage executed to the bank by the said Carrolls, and that this note was accepted by the bank in full and complete satisfaction of the note upon which they were the signers.

The testimony taken was directed to this issue, and, upon a hearing, the court found that the plaintiff, Bank of Maynard, had accepted in renewal of the obligation evidenced by the note of March 19, 1927, a note for a similar amount signed by John L. Carroll and M. L. Carroll with knowledge on the part of the bank that the said defendants, Lewis and Johnson, would not sign a renewal, and that, in order to secure the payment of the said note, the bank accepted a real estate mortgage executed by them, and declared that "it is the further finding of the court that the taking and accepting of the said renewal note and mortgage was an alteration of the original contract and obligation, and, further, that the transaction amounted to an accord and satisfaction, and that the note for $800, dated March 19, 1927, should be canceled and surrendered to the defendant, Lewis and Johnson." The court thereupon rendered a decree to that effect, from which the plaintiff bank has prosecuted this appeal.

It was in testimony that, after the note of March 19 became due, Johnson and Lewis refused to sign a renewal note and notified the bank of the refusal of their signatures. Ben Johnson testified that he notified the bank to proceed to collect the note or to take additional security; that he thought the note had been settled, because, as he stated, "I thought I had properly and legally notified the bank to either collect the money or renew the note in some other form."

It is not contended, however, by counsel for the appellees that this notification complied with the requirements of the statute (§ 8287, Crawford & Moses' Digest), or that it effected a discharge of Lewis and Johnson from liability, as indeed it did not. Their contention now is the same as that made in the answer, *i. e.,* that the testimony supports the chancellor in his finding that the taking and acceptance of the renewal note and mortgage effected the discharge of appellees from their obligation on the note sued on, and it is their contention here that the decree and finding of the court must be affirmed as

not against the preponderance of the testimony. Counsel agree that the applicable law is stated in 21 R. C. L. 1053, and in this we think they are correct. That statement is as follows: "It is well settled that the acceptance of a security of a higher nature in lieu of, or satisfaction of, one of an inferior nature operates as an extinguishment of the latter; but, where such security is accepted merely as additional or collateral security of a pre-existing debt, it is clear that the doctrine of extinguishment or merger does not apply. Therefore, taking a collateral security of a higher nature, whether from the principal or a stranger, does not preclude the creditor from suing on the first contract, and consequently does not discharge the sureties on it. A mortgage is not a satisfaction but a security for the payment of a debt. It does not merge or extinguish the original debt, but is merely collateral security. Hence the giving of a mortgage or deed of trust of property to secure a pre-existing debt will not of itself, in the absence of an agreement to that effect, extend the time or discharge the sureties of the debtors."

We are of the opinion, however, that the evidence fails to establish that the acceptance of the note of December 6, 1928, and the mortgage securing it, was in lieu of or in satisfaction of the note signed by the appellee. Buel Loftis was the cashier of the bank at the time of the giving of his testimony, and had been working in the bank since before March 19, 1927. On that date Ben Choate was the cashier and remained such until February, 1930. Both of these testified that they were familiar with the transactions out of which this litigation arose, and stated that at no time did the bank enter into an agreement with Johnson, Lewis or Carroll, that the note of December 6, 1928, and the mortgage were to be accepted in lieu of the note of March 19, 1927; that, when that note fell due, negotiations for its renewal were begun, and the bank was informed that Johnson and Lewis would not sign a renewal note, and, when this was ascertained, the renewal note which Carroll and his wife had signed and the mortgage they had given were pinned to

the original note, and the payments of interest subsequently made credited on that note, and the mortgage was not regarded as having any value; it was a second mortgage, and the lands already mortgaged to the New England Securities Company for their value; that the mortgage was not foreclosed because the bank realized that nothing could be made out of it; that no notice had been given the bank by Johnson and Lewis to sue on the note of March 19, 1927, but indulgence was given Carroll because he was a good man, and they were not advised that Johnson and Lewis did not acquiesce in this indulgence.

The appellees, Johnson and Lewis and John L. Carroll, all testified in the case, and all stated that it was their "understanding" that the renewal note was given to, and accepted by, the bank in satisfaction of the note of March 19, 1927, but, when their testimony is analyzed, it does not dispute the testimony of Loftis and Choate to the effect that there was no agreement made by the bank that this note should be so accepted. John L. Carroll was the individual who gave Johnson the information in December, 1928, that the note which he and Lewis were on had been settled. Carroll stated that it was his understanding that the old note was to be canceled; that the mortgage he gave was his voluntary act without request having been made by the bank that he execute it, and he would not have given the mortgage if he had not thought the note first given was to be satisfied and canceled. In answer to the question, however, as to whether or not the bank understood at the time the mortgage was executed that it would be security for the old debt, additional to the names of Johnson and Lewis, he stated: "I don't know what they thought about it, but it was my understanding that the old note would be released when I executed the mortgage." He did not testify as to how he reached this understanding, but did not dispute the testimony of Loftis and Choate to the effect that the bank had not agreed to the cancellation of the note.

Johnson testified that he refused to sign the renewal note, and claimed that after December, 1928, he did not

know that the bank was still looking to him for payment of the old note until June 12, 1930, and that he thought the note had been settled "because I thought I had properly and legally notified the bank to either collect the money or to renew the note in some other form, and I had not heard of the note for so long that I thought it was all settled." When asked if he knew whether the note of December 6, 1928, and the mortgage given to secure the same were taken by the bank in satisfaction of the old note, he said: "Well, I thought it was because it was made a matter of record over a year before I received this notice in June from the bank that the note was not paid"; and in answer to a question as to whether or not any one ever told him that the new note and mortgage were taken in complete satisfaction of the old note, he stated: "Yes, John L. Carroll told me it was." When the specific question, if the bank ever told him that it was taking the note of December, 1928, and mortgage from Carroll in satisfaction of the note signed by him and Lewis, he answered that he construed a letter received from the bank dated March 23, 1928 (which he said was evidently misdated and should have been March 23, 1929), which he exhibited, as to mean "they were not holding me any longer." He also exhibited another letter from the bank of April 27, 1928. Neither of these letters was answered, and he stated that these were the last communications from the bank until the receipt of a letter from it in June, 1930, advising that the bank still held the note signed by him and Lewis and could not carry it any longer, and asking if he would like to take up the note or if suit should be filed. He further testified that on receiving this letter he and Lewis went to the bank and found the note he and Lewis had signed, together with the new note given by the Carrolls and the original mortgage they had given dated February 14, 1929, and showing that it had been filed for record March 22 of that year; that they demanded the original note, which was refused.

The interpretation which Johnson testified he gave to the letter of March 23, 1928, does not appear to us to be justified. That letter and the one written April 27, 1928, which merely called attention to the letter of March 23, preceding, and asked for an answer, were all the letters Johnson stated he received. The letter of March 23, 1928, is as follows:

"Dear Sir: Sometime during the first part of December I turned over to John L. Carroll a new note in the amount of $800 for execution, and he stated to me at that time that you said you had rather not sign any new paper. I then told him that the board of directors insisted on my getting the paper renewed up so it would not be necessary for the bank to carry it as past-due paper.

"I spoke to Herbert about it the other day, and asked him whether John had gotten the paper fixed up, and left it with him to deliver to the bank, and he told me that you still had refused to sign the new note. I will appreciate it if you will write me the exact status of the matter so I may talk with our board about it as they are very insistent in the matter of my getting the paper renewed, as the banking department, or rather the examiner, criticize us severely for allowing paper to run past due in this manner. I shall appreciate a line from you about it."

We can see nothing in this letter to indicate any intention on the part of the bank to accept the new note in lieu of the old, or that the signers of the original note should be released. On the other hand, to our minds it indicates a contrary intention. A. J. Lewis appears to have had but little personal knowledge of the transactions leading up to this litigation prior to his visit to the bank in company with Johnson in July, 1930. The effect of his testimony is that he had been informed by Carroll that the note of March 19, 1927, had been settled, and he was at the time of his testimony denying liability because the Bank of Maynard had taken the mortgage from Carroll, and because of the length of time that had elapsed before he was notified by the bank that the note had not been paid. The inference to be gathered from the testimony of

Johnson and Lewis is that, when they learned that a mortgage had been given to secure the indebtedness, they assumed that this was a discharge of their liability. In order to escape liability, it was necessary for Johnson and Lewis to show by a preponderance of the evidence that the note and mortgage given to secure it were in lieu of the first note and accepted as such by the bank. This, we think, they have failed to do. The decree of the chancellor is against the preponderance of the testimony, and it is therefore reversed, and the cause remanded for further proceedings, in conformity with this opinion, and not inconsistent with the principles of equity.

BENNETT *v.* TAYLOR.

Opinion delivered May 9, 1932.

George M. Bennett and *Evans & Evans,* for appellant.

Rhyne & Shaw and *Sam Rorex,* for appellee.

BUTLER, J. The American Bank & Trust Company, a banking corporation doing business in the town of Paris, entered into a written lease contract by which it leased a certain building in said town for a term of ten years, the lessor to make certain improvements and the lessee to pay a yearly rental of $1,620 at $135 per month.

The improvements were made according to the agreement, and the bank entered on the property and occupied the same, paying the rental as stipulated for about five years, when it became insolvent and was taken over by the State Bank Commissioner for liquidation. For about a year the deputy bank commissioner in charge of the liquidation occupied the premises and paid the rent at the rate of $135 per month, until the first day of May, 1931, at which time, acting under instructions from the banking department, he notified the appellant, the executrix of the lessor (then deceased) of his intention to abandon the premises unless she would accept a rental of $35 per month. Upon her refusal to do this, he notified her of his intention to vacate, and advertised for sale the bank fixtures which had been installed in the building by the bank. The appellant thereupon brought this suit, denying the right of the Bank Commissioner to cancel the lease, and prayed for an order restraining the sale of the fixtures until the full rental for the ten-year period had been paid, and claimed a vault door as a fixture to the freehold.

A temporary restraining order was granted until the cause could be heard, and upon a hearing thereof the court found (1) that the appellant had no lien upon the fixtures; (2) that the appellee, if he found the lease burdensome to the bankrupt estate, had the right, within a reasonable time, to terminate the same; (3) that the appellant had not been damaged by appellee in vacating the premises; (4) that she was entitled to the rent at the contract price for the month of May, 1931; (5) that the appellant was entitled to a reasonable rent since June 1, 1931, upon which proof might be taken; and (6) that the vault door affixed by the appellee is personalty like other bank fixtures, and may be removed.

This appeal is from a decree setting aside and vacating the temporary restraining order and dismissing the petition.

The appellant states that "the only real question in the case is whether or not, under the allegation of the peti-

tion and under the proof, the petitioner has a lien for rent upon the property described. * * * It is our contention that Dr. Bennett, in his lifetime, had a lien upon these fixtures on the demised premises for the accruing rent on the premises, and that his executrix, the petitioner herein, has a lien upon the fixtures for the rent as it accrues, and that she is entitled to have these bank fixtures condemned and sold to pay the unpaid rent upon the premises, the rent that has accrued and the rent as it yet accrues, but certainly for the rent that has accrued." To sustain this contention, learned counsel calls attention to the provision in § 719 of Crawford & Moses' Digest, to the effect that the title of the State Bank Commissioner to, and his right of, possession of insolvent bank assets shall be subject to any and all equities in favor of third persons which have arisen or have been obtained as against said property or assets prior to the taking charge thereof by the said commissioner, and to the holding in the case of *Funk* v. *Young,* 138 Ark. 38, 210 S. W. 143, 5 A. L. R. 79, that the Bank Commissioner is not an innocent purchaser in taking possession of the assets of an insolvent bank, but takes them subject to the equities against the bank. He also relies on the landlord's prerogative of distraint by which at common law the landlord may seize all chattels found on the demised premises for rent in arrears. It is insisted that this common-law rule is in force in this State by reason of the provisions of § 1432 of Crawford & Moses' Digest, by which the common law, so far as the same is applicable and of a general nature, shall be the rule of decision in this State unless repealed by the General Assembly and not inconsistent with the Constitution of this State or of the United States.

Learned counsel for the appellant concede this rule has never been invoked or applied in this State, but that, not having been changed by statute, it still exists, for the reason that it is not at all incompatible with our institution. We cannot assent to this conclusion for the very

reason that, throughout nearly a hundred years of the history of this State, no court or Legislature has ever recognized the harsh and oppressive remedies of the landlord's common-law right of distraint, and, in the absence of a statutory direction, we are unwilling now to revive and apply that doctrine. It is a matter of common knowledge that the tenant class of this State are among the poorest and most helpless of our citizens, and, in the absence of a statute or contract authorizing it, we decline to say that a landlord may seize and dispose of the poor belongings of his tenant for rent in arrears, which, in many cases, are all they have. Indeed, we are of the opinion that the only common-law lien that has been recognized by the statutes or courts of this State is that which was recognized at common law as artisans' lien, by which a chattel which had been improved or repaired was impressed with a lien in favor of the workman so long as it remained in his possession. *Gardner* v. *First National Bank,* 122 Ark. 469, 184 S. W. 51.

In the early case of *Barnett* v. *Mason,* 7 Ark. 253, this court declared that even that lien would be lost where the chattel was once surrendered and could not be revived by any subsequently acquired possession. In the case of *Alexander* v. *Pardue,* 30 Ark. 359, where a landlord sought to have a lien declared on the corn and cotton raised by his tenant on the demised premises for food and other supplies advanced by the landlord to enable the tenant to make the crop, the court denied the landlord's right to the remedy invoked and defined a lien at common law to be "a right in one man to retain that which is in his possession belonging to another until certain demands of him (the person in possession) are satisfied." Continuing, the court said: "It does not appear that the plaintiff was in possession of the cotton and corn. No presumption of such possession can arise from the fact that the cotton and corn were raised on land belonging to him, for the defendant can be regarded in no other light than as a tenant, and his possession is exclusive of the plaintiff's."

To the same effect are the decisions of the court in *Hamlett* v. *Tallman,* 30 Ark. 509; *Roberts* v. *Jacks,* 31 Ark. 361; *Burrow* v. *Fowler,* 68 Ark. 178, 56 S. W. 1061.

Most of the cases in which the question of a landlord's lien has arisen are those dealing with the right of the landlord to a lien on the products of the soil. But we can see no difference in principle between such chattels and the cook-stove and sewing machine of the housewife or the furniture in a bank. The court, in a number of cases, has indicated that landlord's liens in this State arise only by operation of statute, and thus inferentially deny the common-law lien to be fixed by distraint.

In the case of *Smith* v. *Meyer,* 25 Ark. 609, it was held that the landlord's lien in this State is a statutory lien; and in *Rogers* v. *Cooper,* 33 Ark. 406, 409, and *Walters* v. *Meyer,* 39 Ark. 560-567, it was held that the landlord's lien is a creation of statute. Where a rent contract provides for a lien on certain chattels in default of the payment of the rent, it has been construed by this court in effect to be a chattel mortgage.

In the case of *Hill* v. *Morris,* 124 Ark. 132, 186 S. W. 609, the court, in denying the right of the landlord to a lien on the property of the tenant which he had put into the leased building, and which he held as assignee of the original lessee, held that, although the original contract of lease contained a stipulation which might be treated as an equitable mortgage binding the property of the lessees in the building for the payment of the rent, this could not bind the property of the assignee with the lien for the payment of the rent to the lessor as none was "allowed him by statute or under common law." (Referring to §§ 4 and 5, page 136.) See also *Grayson* v. *Mixon,* 176 Ark. 1123, 5 S. W. (2d) 312, where it was held that a landlord had no lien for rent due on the furniture of a tenant in a hotel.

The trend of all the cases above cited justifies the conclusion we have reached that the landlord has no lien either by statute or under the common law, as recognized

and applied in this State, on furniture or other property of the tenant in the demised premises for arrears of rent.

The vault door was installed by the bank, and was necessary for the conduct of its business, and could be removed without damage to the building. There is no showing made that it was the intention that the vault door should remain in the building and become the property of the landlord at the expiration of the lease, and the modern trend of decisions is in favor of the removal of articles affixed to the free-hold by the tenant unless, from their very nature, it appears that the fixtures were intended to be permanent, or that such was the intention of the parties. *Choate* v. *Kimball,* 56 Ark. 55, 19 S. W. 108; *Ark. Cold Storage Co.* v. *Fulbright,* 171 Ark. 552, 285 S. W. 12; *Barnes* v. *Jeffers,* 173 Ark. 100, 291 S. W. 990; *Rogers* v. *Vanderbilt,* 175 Ark. 977, 1 S. W. (2d) 71; *Bank of Mulberry* v. *Hawkins,* 178 Ark. 504, 10 S. W. (2d) 898; *Alwes* v. *Richheimer, ante* p. 535. These authorities sustain the chancellor in his finding that the vault door was a trade fixture and removable.

Since we have disposed of the question as to what, by her, is regarded as the only real issue in the case, and adverse to her contention, it will be unnecessary to discuss the other questions raised by counsel for the appellant.

Affirmed.

CARLE *v.* AVERY POWER MACHINERY COMPANY.

No. 4—2465.

Opinion delivered May 16, 1932.

[redacted]

Leach & Elms, for appellant.

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

HART, C. J., (after stating the facts). The warranty clause relied upon by the defendant is in writing and is set out in our statement of facts. It provides that, if within six days from the first starting of the machine, the purchaser is not satisfied that the machine can be made to operate and do work as well as any other machine of the same size, the purchaser shall notify the company by registered mail or telegram addressed to the Avery Power Manufacturing Company of Peoria, Illinois, clearly specifying his complaint, and the pur-

chaser shall forthwith discontinue the use thereof pending the remedying of such claimed defect.

Thus, it will be seen that the warranty was conditioned upon giving the notice of the defect within a specified length of time. The agreement of warranty, being in writing, is controlled by the language used. It has been held by this court that contracts of this sort are lawful and must be enforced as they have been made by the parties, and the test must be made within the time specified, and the notice given according to the terms of the agreement. The condition that notice of defects must be given within a specified time is imperative; and if the buyer does not show a compliance therewith, he cannot enforce it against the seller. Where a purchaser of machinery has agreed that, if it proves defective, he will give notice thereof to the seller within a specified time, he will not be entitled to resist payment of the purchase money on account of imperfections of it if he did not give notice. *Southern Engine & Boiler Works* v. *Globe Cooperage & Lumber Company,* 98 Ark. 482, 136 S. W. 928; *Heer Engine Company* v. *Papan,* 142 Ark. 171, 218 S. W. 202; and *Thomas* v. *Schaad,* 170 Ark. 797, 281 S. W. 10.

It is claimed by the defendant, however, that the agreement to give them notice was waived by the seller. Of course, it was within the power of the seller, under a contract containing warranties and conditions, to waive any or all the conditions, including a requirement that the purchaser give notice of defects within a stipulated time. We do not think, however, that this principle of law has any application under the facts of this case. The only thing to base it upon is the testimony of the defendant to the effect that Hunt, the salesman, came out to his place where the machinery was being operated day after day in an effort to adjust the machine and see that it would work properly. Hunt finally told him that he did not know what to do, and it then became the duty of the defendant to give the notice required by the con-

tract of warranty. He knew that Hunt was only endeavoring to see that the machine was installed properly, and there is nothing in the conduct of the parties to show that Hunt was endeavoring to remedy any defect in the machine or to do anything else but to properly install it. The defendant continued to use the machine during the remainder of the fall of 1929 and never even made any demand upon the dealer at Stuttgart through whom he purchased it to remedy the defect. He did not attempt to give notice at the factory as required by the contract of warranty. He continued to use the machine during the season of 1930. Under these circumstances, we do not think that there was any waiver of notice on the part of the seller, and the contract between the parties must be enforced according to its terms.

The parties were competent to contract and must be bound by the language used by them. There is nothing to show that the seller had any knowledge that Hunt was trying to remedy any defect in the machinery or that he was attempting to waive any of the conditions of the contract. It only appears that he was trying to properly install the machinery and get it ready to operate. It then became the duty of the defendant to give the notice as required by the contract, or he must be deemed to have accepted the machine.

Therefore we are of the opinion that the decree of the chancery court was correct, and it will be affirmed.

OGLETREE *v.* WELKER.

Opinion delivered May 23, 1932.

William Gibson, George M. Chapline and *Joseph Morrison,* for appellant.

George C. Lewis, for appellee.

KIRBY, J. (on rehearing). This suit was brought by appellant in the Arkansas Circuit Court for the possession of certain property. There was a judgment for the appellees, and an appeal was prosecuted to this court. This court, on April 18, 1932, reversed the cause and remanded with directions.

Our attention is now called to the fact that we overlooked the failure of the appellant to file a bill of exceptions within the time allowed. Judgment was rendered in the circuit court on August 4, 1931, and on the 5th day of August, 1931, motion for new trial was filed. The court on September 1, 1931, overruled the motion for a new trial, and granted an appeal to the Supreme Court, but did not give any time for filing bill of exceptions.

The clerk's certificate shows the bill of exceptions was filed in the clerk's office November 24, 1931. Since the record does not show that any time was given in which to file a bill of exceptions, and it was not filed until November 24, 1931, court having adjourned on November 16, 1931, the bill of exceptions was not filed during the term of court, and cannot be considered. *Petroleum Products Ass'n* v. *First Nat. Bank,* 165 Ark. 267, 263 S. W. 965; *Engles* v. *Oklahoma Gas & Oil Co.,* 163 Ark. 270, 259 S. W. 749.

Since the bill of exceptions cannot be considered and no error appears on the face of the record, it follows that the judgment of April 18, 1932 is erroneous. The petition for rehearing is granted, the judgment heretofore entered in the case is set aside, and the judgment of the Arkansas Circuit Court is affirmed.

STATE *v.* HURLOCK.

Opinion delivered May 9, 1932.

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

A. L. Smith, for appellee.

MEHAFFY, J. Jeff Duty, deputy prosecuting attorney for Benton County, Arkansas, on May 22, 1931, filed with the justice of the peace, F. P. Galbraith, the following information, charging Butler Hurlock, M. C. Morris and John Elrod with misdemeanor: "The said Butler Hurlock, M. C. Morris and John Elrod, in the said county of Benton, in the State of Arkansas, on or about the 26th day of April, 1931, did unlawfully and wilfully fail and refuse to secure a regular valid license issued by the Arkansas Real Estate Commission authorizing the above-named parties to act as a real estate broker or brokers or real estate salesman or salesmen in the State of Arkansas, and the above-named parties assumed, advertised and did act as such real estate brokers or salesmen without having secured such valid license from the Arkansas Real Estate Commission."

On July 10 the case against appellees was tried, and the justice of the peace held the law invalid and unconstitutional and discharged the defendants. The deputy prosecuting attorney prayed an appeal to the circuit court, and the appellee, Butler Hurlock, filed a motion in the circuit court to dismiss the action, on the ground that act 148 of the Acts of 1929, as amended by act 142 of the Acts of 1931, is unconstitutional and void for the following reasons:

"(1) Because the acts with which defendant is charged with committing do not constitute a public offense, and

"(2) Because said act is against public policy and void, and

"(3) Because by said act it is attempted to confer the power upon the State of Arkansas, or upon any member of the Real Estate Commission, its secretary, or any citizen of the county holding a license, as authorized by

said act, in the name of the State of Arkansas, to appeal from an adverse decision in a justice court."

The circuit court dismissed the cause on the ground that the act under which appellees were prosecuted was unconstitutional and void, because said act conferred the right of individuals to appeal in behalf of the State.

Appellee's motion was sustained, and the cause dismissed because the law is unconstitutional and void, and the State prayed an appeal, which was by the court granted.

Act 148 of the Acts of 1929 and act 142 of 1931 are found in Castle's Supplement, 1931, §§ 838a to 838l.

Appellee first contends that the acts with which defendant is charged with committing do not constitute a public offense. "A public offense is any act or omission for which the law has prescribed a punishment." Crawford & Moses' Digest, § 2294.

The act provides that a person violating it shall, upon conviction, be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than $25 and not more than $500, or by imprisonment for a term not to exceed six months, or by both such fine and imprisonment in the discretion of the court.

The statute, after defining felony, provides all other public offenses are misdemeanors. Crawford & Moses' Digest, § 2297.

It therefore clearly appears that the acts charged constitute a public offense, as defined by the statute.

The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision.

A statute will not be held to be invalid unless it is either expressly or impliedly forbidden by the Constitution. *Bush* v. *Martineau,* 174 Ark. 314, 295 S. W. 9; *Ark. Rd. Commission* v. *Casteter,* 180 Ark. 770, 22 S. W. (2d) 993; *Dabbs* v. *State,* 39 Ark. 353; *Moore* v. *Alexander,* 85 Ark. 171, 107 S. W. 395; *Webb* v. *State,* 176 Ark. 722, 3

S. W. (2d) 1000; *Hargraves* v. *Solomon,* 178 Ark. 11, 9 S. W. (2d) 797.

In discussing the police power of the State and the right of the Legislature to enact laws thereunder, this court said: "In the exercise of this power, the States have always regulated certain kinds of business, and absolutely prohibited others. The power to prohibit any business which is dangerous to public safety, health, or morals, has never been denied, and the power to regulate any business in which the public is interested is also sustained." *Williams* v. *State,* 85 Ark. 464, 108 S. W. 838, 26 L. R. A. (N. S.) 482, 122 Am. St. Rep. 47; *Little Rock* v. *Barton,* 33 Ark. 436.

It is true that the police power can only be exercised to suppress, restrain, or regulate the liberty of individual action, when such action is injurious to the public welfare.

If an act of the Legislature is neither expressly nor impliedly prohibited by some provision of the Constitution, a court cannot declare it invalid. An act cannot be held void because, in the opinion of the court, it might violate the best public policy. As to whether a law is good or bad law, wise or unwise, is a question for the Legislature, and not for the courts. Lewis' Sutherland Stat. Const., vol. 1, p. 136.

The act expressly provides for an appeal from an adverse decision from a justice of the peace. It is contended, however, that, under § 3381 of Crawford & Moses' Digest, the State cannot appeal from judgments of the justice court.

If this act did not provide for an appeal, and there was no other statute enacted subsequent to the enactment of § 3381, appellant's contention would be correct, but there is nothing in the Constitution prohibiting the Legislature from authorizing the State to appeal from a judgment of the justice court, and the statute under consideration expressly authorizes an appeal.

The Constitution provides that appeals may be taken from the final judgments of the justice of the peace

to the circuit court under such regulations as are now, or may be provided by law. Section 42, art. 7, Constitution of Arkansas. This section gives the Legislature the right to regulate the manner of taking appeals from the judgments of justices of the peace, and the Legislature can provide any manner of taking such appeals that to it may seem proper.

Section 12 of act 148 provides that, if any section, sentence, clause, phrase, or requirement of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions thereof.

This court has frequently held that, when a statute is unconstitutional in part, the valid portion of an act will be sustained if complete in itself, and capable of being executed in accordance with the apparent legislative intent. *Alexander* v. *Stuckey,* 159 Ark. 692, 253 S. W. 9; *Davies* v. *Hot Springs,* 141 Ark. 521, 217 S. W. 769.

There are many other cases that might be cited to the same effect. In the act here under consideration, the act is capable of being executed in accordance with the legislative intent without the section conferring upon individuals the right of appeal. Although the Constitution authorizes the Legislature to provide for appeals from the justice court, it is not necessary to decide whether they might give an individual the right to appeal in this case, because the appeal was actually taken by the prosecuting attorney.

Many authorities are cited by counsel, but most of these authorities have been referred to and reviewed in the cases above cited, and it would serve no useful purpose to review those cases again.

Our conclusion is that the act under which this prosecution was begun is a valid act, and the judgment of the circuit court is reversed, and the cause remanded for a new trial.

SHOPTAW *v.* SEWELL.

4-2539

Opinion delivered May 16, 1932.

C. C. Wait, for appellant.

Hays & Smallwood and *Robert Bailey,* for appellee.

HART, C. J., Appellant prosecutes this appeal to reverse a decree sustaining a demurrer to his complaint asking that the defendant Sewell be declared a trustee

for the lands described in the complaint and that the deeds from the defendant Sewell to the defendant Bailey be canceled as a cloud upon his title.

The material allegations of the complaint may be stated as follows: Sometime prior to 1918, a partnership composed of R. K. Sewell and three others was organized in the city of Russellville, Arkansas, to deal in general merchandise under the firm name of Sewell-Thompson & Company. In April, 1919, appellant, J. J. Shoptaw, became by purchase a one-fourth owner of said mercantile company. In March, 1920, the partnership purchased the interest of one of the partners, leaving the firm composed of R. K. Sewell, Fred Thompson and J. J. Shoptaw, who continued the business under the firm name of Sewell-Thompson & Company, each owning a one-third interest therein. In April, 1925, Thompson sold his interest to W. A. West, and the business was conducted under the name of Sewell-West & Company. In March, 1928, West sold his one-third interest to T. M. Overman, and the firm became Sewell-Overman Company. In February, 1931, this firm was dissolved by mutual consent, and Sewell and Overman withdrew from it and sold their interest to appellant, Shoptaw.

In April, 1923, Sewell-Thompson & Company recovered judgment in the circuit court against J. M. Hendrix in the sum of $755.57. In September, 1926, execution was issued on the judgment and levied upon certain lands of said Hendrix. In October, 1926, Sewell-West & Company became the purchasers at the execution sale for the amount of the judgment indebtedness. Prior to the date of the aforesaid judgment, Hendrix had mortgaged said lands to Ray Moses. On the 23rd day of October, 1928, Ray Moses, by his attorney, Robert Bailey, brought suit to foreclose said mortgage, and on November 7, 1928, a decree of foreclosure was granted. Before said decree was rendered, Moses transferred his mortgage to Sewell-Overman Company, and judgment was rendered in favor of that firm both for the indebtedness due Ray Moses and for the judgment held by Sewell-

Thompson Company. The lands embraced in the mortgage were sold to satisfy the judgment.

We copy from the complaint the following:

"That said lands were duly advertised for sale according to said decree and at the sale thereof, R. K. Sewell (presumed to be bidding for Sewell-Overman Company), bid and offered for said lands the sum of nine hundred seventy-five and no/100 ($975) dollars, and, he being the highest and best bidder, the lands were struck off and sold to him for that sum, and a commissioner's deed was made to the said R. K. Sewell, said report of sale and approval of deed appearing of record in chancery record "K" at page 296. Date Feb. 25, 1929.

"That the cost of said proceeding in chancery was paid out of funds belonging to Sewell-Overman Company, and the value of the property carried upon the books of the firm as part of the assets of the firm."

In March, 1923, Robert Thomas became indebted to the firm of Sewell-Thompson & Company and executed a mortgage on certain town lots in the city of Russellville to secure his indebtedness. In August, 1927, Sewell-West & Company, successors to Sewell-Thompson & Company, by their attorney, Robert Bailey, brought suit to foreclose said mortgage and obtained a decree of foreclosure on the 27th day of September, 1927. We copy from the record the following:

"That said lands were duly advertised for sale according to the decree in said cause and at the sale thereof, R. K. Sewell (supposed to be bidding for the firm of Sewell-West & Company) bid and offered for said lands the sum of eight hundred twenty three and 09/100 ($823.09) dollars, and he being the highest and best bidder, said lands were struck off and sold to him for that sum, and a commissioner's deed was issued to the said R. K. Sewell, said report of sale and approval of deed now appearing of record in Chancery Record "K" at page 112. Date of deed Dec. 5, 1927.

"That the cost of this proceeding in chancery was paid out of funds belonging to the firm of Sewell-West

& Company, and the value of the property carried on the books of the firm as assets of the firm."

In the spring of 1930, Sewell borrowed from the bank $600, giving his promissory note therefor with Robert Bailey and H. B. Sewell as security. Said note became due and unpaid, and, to secure said Bailey against loss, R. K. Sewell conveyed to him the two tracts of real estate described in the complaint, the title to which had been taken in his own name as above stated. The deed to the Thomas property was dated May 15, 1930, and recited a consideration of $500, but no consideration passed between the parties. The deed to the Hendrix land was dated December 3, 1930, and recited a consideration of $400, but no consideration passed between the parties. The taking of title to said property in the name of R. K. Sewell and his subsequent sale to Robert Bailey was entirely unknown to appellant until after said deeds from Sewell to Bailey were recorded in December, 1930. The taking of title to said property in the name of R. K. Sewell and his subsequent conveyance to Robert Bailey was a fraud upon the right of appellant as the last successor to the rights and assets of said firm. The prayer of the complaint is that R. K. Sewell be adjudged to have acquired title to said tracts of lands as trustee for said firm, and that his deed to Robert Bailey be declared void and canceled as a cloud upon the title of appellant.

Our Code drew a marked line of distinction between an entire failure to state any cause of action or defense on one side which is to be taken advantage of by demurrer and the statement of a cause of action or defense in an insufficient, uncertain or imperfect manner, which is to be corrected by a motion to render the pleading more definite and certain by amendment. The court has uniformly held that, if the substantial facts which constitute a cause of action are stated in the complaint, or can be inferred by reasonable intendment by the matters which are set forth, although the allegations of these facts are imperfect or indefinite, such insufficiency should be met by a motion to make the averments more certain

and can not be corrected by demurrer. In short, if the facts stated, together with every reasonable inference therefrom, constitute a cause of action, then the demurrer should be overruled. *Ball* v. *Fulton County,* 31 Ark. 379; *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. (2d) 826; *Kansas City Southern Railway Company* v. *Fort Smith Suburban Railway Company,* 180 Ark. 492, 22 S. W. (2d) 21; and *Holcomb* v. *American Surety Company,* 184 Ark. 449, 42 S. W. (2d) 765. This practice has been uniformly sustained by numerous other decisions of this court.

Applying the principle to the case at bar, we think the learned chancellor erred in sustaining a demurrer to the complaint. It is the duty of partners to observe the utmost good faith towards each other in the partnership business. They stand in a fiduciary relation to each other, and the same rules are to be applied to the conduct of partners towards each other as are ordinarily applicable to that of trustees and agents. All property bought by funds belonging to a firm is *prima facie* the property of the partnership, although the title to it is taken in the name of one of the partners. The reason is that partners are bound to conduct themselves with good faith towards each other, and the partnership property cannot be used for the private gain of one of the partners to the exclusion of the others. *Drummond* v. *Batson,* 162 Ark. 407, 258 S. W. 616; and *Cain* v. *Mitchell,* 179 Ark. 556, 17 S. W. (2d) 282.

While stated in a somewhat imperfect and indefinite manner, it is fairly inferable, when the complaint and the surrounding circumstances are considered together, that it was intended to allege that R. K. Sewell became the purchaser at the commissioner's sale for the benefit of the partnership. It would have been more in accord with good pleading to have alleged directly that he became the purchaser for the partnership. This is inferable, however, from the allegations that the cost of the proceeding in chancery in each case was paid out of the partnership funds, and the value of the property carried

on the books of the firm as a part of the assets. If the land had been purchased by Sewell for his own benefit, the cost of the proceeding should have been deducted from the proceeds of the sale, and the balance would have been carried on the books of the partnership as the money derived from the proceeds of the sale.

It is pointed out that the sale in each case was made prior to the dissolution of the firm, and that several years elapsed before the present suit was instituted. The complaint, however, contains a distinct allegation that these facts were entirely unknown to appellant, and that it did not become known to him until sometime in December, 1930, when the deeds from Sewell to Bailey were filed for record.

It is also insisted that the defendant, Bailey, is an innocent purchaser, and that the deed to him should not be set aside. Here again the cause of action must be tested by the allegations of the complaint and not by what might or might not be proved upon a trial of the case upon the merits. It is alleged that the defendant, Bailey, was the attorney for the partnership in the foreclosure proceedings, and as such must have known all the facts connected therewith. Our court has uniformly held that whatever puts a party on inquiry amounts to notice where the inquiry becomes a duty and would lead to knowledge of the requisite facts by the exercise of due diligence. *Waller* v. *Danby,* 145 Ark. 306, 224 S. W. 615; *Walker-Lucas-Hudson Oil Co.* v. *Hudson,* 168 Ark. 1098, 272 S. W. 836; *Jordan* v. *Bank of Morrilton,* 168 Ark. 117, 269 S. W. 53; and *Richards* v. *Billingslea,* 170 Ark. 1100, 282 S. W. 985.

Besides this, the plaintiff alleges that no money was paid by the defendant Bailey in consideration of the deeds that were executed to him. The complaint alleges that he became a surety for Sewell, and that the deeds were executed to him by Sewell to secure him from loss by reason thereof. Notice at any time before payment was sufficient to defeat the defense of innocent purchaser by Bailey. *Massie* v. *Enyart,* 32 Ark. 251.

The result of our views is that the court erred in sustaining a demurrer to the complaint, and for that error 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.

AYRES & GRAVES *v.* ELLIS.

Series 4, No. 2550.

Opinion delivered May 16, 1932.

Reed & Beard, for appellant.

Chas. A. Walls, for appellee.

SMITH, J. On the 30th day of April, 1930, Ross & Dalton entered into a contract with the State Highway Commission for the construction of thirteen and one-half miles of State highway, and they sublet to Ayres & Graves a portion of the work. Ayres & Graves, in turn,

sublet to A. O. Freeman the concrete structural work on a portion of the highway, and Freeman entered into a contract with W. C. Ellis doing business as the W. C. Ellis Lumber Company to furnish money and material to carry out the sub-contract. When the original contract was let to Ross & Dalton they executed a bond with the New Amsterdam Casualty Company as surety, conditioned as required by act 368 of the Acts of 1929, page 1487. This was an act entitled "An act to protect those who furnish labor, material, * * * and all other supplies or things entering into the construction of public buildings or works or necessary or incident to the construction of the same." Section 1 of this act reads as follows: "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."

Upon the completion of Freeman's sub-contract, a balance was due from him to Ellis, who brought this suit against Freeman and all other parties above named to recover the balance due him.

A general denial of all the allegations of the complaint filed by Ellis was contained in the answer filed

in the name of all the defendants, and liability to Ellis was denied upon the following grounds: (1) That the contract between Freeman and Ellis was usurious, and void for that reason; (2) That all demands have been paid for which any of the defendants are liable; and (3) That the bond sued on was not offered in evidence.

At the conclusion of the testimony the case was, by consent, withdrawn from the jury and submitted to the court, and from a judgment against all the defendants is this appeal.

The defense of usury was not pleaded in the answer but was raised in the court below upon the testimony developed in the case, and is based upon the charge that the contract between Freeman and Ellis involved and required the payment of interest on money advanced at the rate of 8 per cent. per month.

We think the court below was warranted by the testimony in finding that the contract between Freeman and Ellis was not void as usurious. It appears that Ellis undertook to finance Freeman's contract, and to order and deliver all material required, to keep a record of the pay rolls, and to render monthly statements, to which there should be added 8 per cent. These statements included, among other items, cash advanced, and upon these cash advances, as well as all other items, a charge of 8 per cent. was added. Usury can only attach to a loan of money or to the forbearance of a debt. *Cheairs* v. *McDermott Motor Co.,* 175 Ark. 1126, 2 S. W. (2d) 1111. This compensation, by way of an 8 per cent. addition to the monthly statements, appears to have been made, not merely for the money advanced, but for services rendered in connection with ordering and delivering the material and in keeping the payrolls. In other words, the 8 per cent. charge was not exclusively for the money advanced, and the contract was not, therefore, usurious. *Coleman* v. *Hawkins, ante* p. 283. There was no testimony that any kind of partnership arrangement existed between Freeman and Ellis, and the extent of Ellis' connection with Freeman's sub-contract appears to have

been to order and deliver material and to keep records of the pay rolls.

Ellis' right to recover for the materials furnished Freeman is not questioned, but it is insisted that payments made were sufficient to discharge that demand, and it is denied that Ellis has any right to sue upon the contractor's bond for the money paid Freeman's laborers. On the other hand, it is asserted that both the bond and the statute confer that right. The right of the laborers themselves to sue upon the bond is conceded, but the question is whether Ellis has the right to sue for the money paid by him to Freeman's laborers.

The argument is made that, upon advancing money to pay laborers, Ellis acquired the status of a subcontractor, to the extent of such payments, and is thereby entitled to sue upon the bond. The statute enumerates the claims which may be enforced against the bond, and provides that "All persons holding such claims shall have a right of action on said bond." Is Ellis the holder of such a claim by reason of having paid the laborers? It is not contended that Ellis is the assignee of any of the laborers or that any attempt was made to assign these claims to him, and we do not, therefore, have the question of the right of an assignee of a claim to enforce it as the holder thereof.

We think the case of *Norton* v. *Maryland Casualty Co.,* 182 Ark. 609, 32 S. W. (2d) 172, is decisive of the question above stated. It is true that that case arose prior to the passage of the act of 1929, *supra,* but it is true also that the bond there sued on contained the provision in regard to paying labor which the act of 1929 would have written into it had it been executed subsequent to the passage of that act. The statement of facts in that case recites that: "The contractor executed a bond with the Maryland Casualty Company as surety for the faithful performance of the contract and the payment of all bills for labor and material entering into the construction of said road or used in the course of the performance of the work."

In a suit upon that bond, which covered both labor and material, (as does the bond here sued on and the statute pursuant to which it was executed), it was contended in the Norton case, *supra,* that one who had advanced money to pay the contractor's laborers might recover the amount of such advances. The reasoning of that case applies here, and we quote from it as follows: "The main question to be determined is whether appellant, by advancing money to the contractor in the manner he did, thereby became entitled to a lien or claim against the surety company. Of course, no one would claim that the surety company became liable for all of the contractor's personal debts, but it is claimed that, because appellant advanced or loaned money to the contractor to meet the pay roll of laborers and the money was used to pay for labor and material, the appellant thereby became a subcontractor and is entitled to enforce his claim against the surety company. We do not agree with appellant in this contention. It makes no difference what the purpose was in lending the money, it was a loan from appellant to the contractor. The contractor used the money or most of it to pay for labor and material, but this did not make appellant a sub-contractor, and he did not furnish either labor or material. The surety company was compelled to pay materialmen and laborers, and, as shown by the evidence, lost a large sum of money. It was not a volunteer, but under its bond it became obligated to pay all bills for material and labor used in the work."

Notwithstanding the liability of the surety company to pay laborers, we there denied the right of one to recover who had advanced money to pay laborers upon the theory that he did not thereby acquire a contractual relation to the bond, but became only a creditor of the contractor. The fact that Ellis personally paid the laborers in the instant case does not alter the legal principles there announced. Such payment was nothing more than an advance to Freeman, and created only the relation of debtor and creditor between Ellis and Freeman,

and did not constitute Ellis a subcontractor, as appellee contends, nor did it make him a person holding such a claim as the statute requires the surety to pay. Ellis furnished material, and for the contract price thereof he has a right of action. He advanced money to Freeman to pay laborers, and for these advances he has no enforceable demand against any one except Freeman.

It appears that, as the work progressed, Freeman received checks covering the estimates given him on his contract, which were indorsed and delivered to Ellis. As Freeman owed Ellis for both the materials and money advanced to laborers, Ellis had the right to credit such payments to the debt due him, whether for material or for money paid laborers, but, as no application of the payment appears to have been made to any particular item, the items will be credited proportionately. If at the time any check was indorsed to Ellis it sufficed to pay the entire account then due, the whole thereof was paid, as Freeman had the right to use the money for that purpose.

The case was not tried upon this theory, and we do not, therefore, render judgment here, as we are unable to say with certainty what the statement of the account is since the last payment was made. The account will, upon the remand of the cause, be stated in accordance with the principles here announced.

As to the failure to introduce the bond sued on in evidence, but little need be said. A copy of the bond was made an exhibit to the complaint, but the original bond was not introduced until after the cause had been withdrawn from the jury by consent and submitted to the court. The attorney for Ellis then asked permission to offer the bond in evidence, which request the court refused upon the ground that he did not consider it necessary, to which action plaintiff's counsel excepted. Thereafter judgment was rendered for the plaintiff. Later, during the same term, the court reconsidered its ruling excluding the introduction of the bond and permitted it to be formally offered in evidence, granting

to the defendants the right to object and except to that ruling and to amend the motion for a new trial to include this exception.

It is not contended that the copy of the bond made an exhibit to the complaint differed in any respect from the bond later offered in evidence, and, as the case had been, by consent, submitted to the court, and as the reversal of the ruling as to the admission of the bond was made at the same term of court at which the original judgment was rendered, there was no prejudicial error in the action of the court in permitting the bond to become a part of the record in the case. *American Bldg. & Loan Ass'n* v. *Memphis Furniture Mfg. Co., ante* p. 762; *Democrat Ptg. & Litho. Co.* v. *Van Buren County,* 184 Ark. 974, 43 S. W. (2d) 1075.

The judgment of the court below will therefore be reversed, and the cause remanded with directions to disallow so much of the account of Ellis for labor as has not already been paid by Freeman.

St. Louis Southwestern Railway Company *v.* Missouri Pacific Railroad Company.

4-2547

Opinion delivered May 16, 1932.

Carter, Jones & Turney and *Lamb & Adams,* for appellant.

R. E. Wiley, for appellee.

HUMPHREYS, J. Appellee, a railroad company doing an interstate and intrastate business, and owning terminal facilities in North Little Rock, Arkansas, filed its application with the Arkansas Railroad Commission under § 1643 of Crawford & Moses' Digest, to fix the point and manner of crossing with a proposed spur, an industrial track of appellant, for the purpose of serving directly the cotton seed oil plant in North Little Rock, which proposed spur was to extend from its own track a distance of 5,460 feet in a south and southeasterly direction to the plant and property of said National Cotton Seed Products Company. Notice was given to appellant, and the application and appellant's objections thereto were heard upon testimony adduced by each with the result that appellee's application was denied, from which an appeal was prosecuted to the circuit court. The circuit court heard the cause, quashed the order of the Commission, and fixed the point of crossing at grade 265 feet east from its switch connection with the main lead switch or old main line of the St. Louis Southwestern Railway Company, and directed the Commission to proceed in conformity with its order, from which is this appeal.

Appellant contends the circuit court erred in directing the Commission to fix the point and manner of crossing, because, first, under the statute it has no authority to act until appellee acquires the right-of-way by condemnation proceedings, and, second, until it obtains a certificate of convenience and necessity for the crossing from the Interstate Commerce Commission as provided by paragraph 18 of § 1 of the Interstate Commerce Act.

The section of Crawford & Moses' Digest, referred to and made the basis of appellee's petition, in so far as applicable here, is as follows:

"*Crossings.* The commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable."

It will be observed that there is nothing in the statute relative to a condemnation of the right-of-way before the Commission can proceed to fix the place and manner of a proposed crossing of one railroad by another. The legal right of one railroad to cross another exists by virtue of § 1 of article 17 of our Constitution, which is as follows:

"Every railroad company shall have the right with its road to intersect, cross and connect with any other road." Therefore, it is unnecessary to acquire a legal right for railroads to cross or intersect each other by a proceeding in court. As stated above, that right exists under our Constitution. Of course, it would be necessary if railroads could not agree as to the compensation or damages to condemn the right-of-way in order to determine the amount of compensation or damage, but it seems to us that the orderly way would be to first fix the place and manner of crossing and then proceed in the proper tribunal to condemn the land needed to effect the crossing at the place fixed or designated. The case of *Missouri K. & T. R. Co.* v. *St. Louis S. W. Ry. Co.,* (Tex. Civ. App.) 239 S W. 337, cited by appellant in support of its contention that condemnation proceedings must be brought and determined before the Commission can fix the place and manner of crossing, has no application in the instant case because in Texas the right to cross must first be determined by the judgment of a court; whereas in this State the Constitution fixes the right to cross.

Paragraph 18, § 1, of the Interstate Commerce Act referred to by appellant in support of its second contention, in so far as applicable, is as follows:

"(18) *Extension or Abandonment of Lines, Certificates Required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there first shall have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation of such additional or extended line of railroad."

The above paragraph is limited by paragraph 22 of said section, and is as follows:

"(22) *Construction, etc., of Spurs, Switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21) both inclusive, shall not extend to the construction or abandonment of spurs, industrial, team, switching or sidetracks, located wholly within one State, or of street suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

After a careful reading and analysis of the evidence adduced in the instant case, the court has concluded that the proposed improvement is a spur within the meaning of paragraph 22, and not an extension of the line of appellee's railroad within the meaning of § 18. The proposed improvement being a spur only, it was unnecessary to obtain a certificate of convenience and necessity for a crossing from the Interstate Commerce Commission before appellee could file its application before the Railroad Commission of Arkansas to fix the place and manner of the crossing.

The judgment of the circuit court is therefore affirmed.

RICKS *v.* SANDERSON.

4-2561

Opinion delivered May 16, 1932.

Arnold & Arnold, for appellant.

Will Steel, for appellee.

McHANEY, J. Appellee sued appellant and K. E. Green to recover damages done to her automobile by reason of a collision between her car driven by her daughter and the car of appellant driven by said Green. The collision occurred on May 28, 1931, at 5th and Walnut streets in the city of Texarkana. A trial resulted in a verdict and judgment for appellee against appellant and Green in the sum of $125. Green has not appealed.

At the conclusion of the testimony appellant requested the court to direct a verdict in his favor on the ground that he had loaned his car to said Green, and that said Green was not in his employ, was attending no business for him, but was on a mission of his own, in which appellant was not interested in any way. The court refused such request, and this is assigned as error and urged for a reversal of the case. In view of the decision we make on this point, that is whether Green was the agent of appellant in the operation of his car, we do not discuss the negligence of Green in the operation of the car.

The facts necessary to a decision of this point are that one Webb was the owner of an airplane, which was located in a garage near the airport out of Texarkana, which was undergoing some repairs and that Green had been piloting the airplane and was the mechanic making the repairs. He desired to get some material, cork, from

the ice plant and take it out to the garage where the airplane was, to be used on the step or wane, to keep one's foot from slipping when getting in the airship. Green went to the place of business of Mr. Mimms to borrow his automobile for such purpose, Mimms having formerly been a partner with Webb in the ownership of the airplane, but at that time no longer interested, having sold out to Webb. Mimms was unable to lend him the car at the time and suggested that he borrow appellant's car which was standing in front of Mimms' place of business. Appellant agreed to lend him the car, but desired to be taken to a picture show first. Green took appellant to the picture show, went on to the ice plant, secured the cork and had started out to the garage in the borrowed car when the accident occurred with appellee's car. Mimms agreed to take Webb out to the garage later to get his car. The judgment is sought to be sustained by reason of the testimony of one Harris, a deputy sheriff, who served the summons on appellant when he was sued, and who claimed to have had some conversation with appellant at the time of service. Harris' recollection of the conversation between him and appellant regarding the loan of the car to Green was very indistinct and uncertain. According to his recollection of the conversation between him and appellant at the time of the service of the summons upon appellant, he said: "Well, Green drove the car, took him to the picture show, and drove it the whole route, as I understand it, in taking him to the picture show, and then was going back and coming back after him." The whole substance of the witness' testimony relating to the conversation with appellant is that Green borrowed appellant's car, took him to the picture show, and was then to take something out to the garage near the airport, and later was to come back for appellant. Nowhere does he testify that in going out to the airport or to the garage near the airport Green was on a mission for appellant. The undisputed testimony is that, after Green took appellant to the picture show, he used the car on a mission of

his own, or that of his employer, Webb, a matter in which appellant had not the slightest interest, and in performing this service he was not the agent of appellant, even though it be conceded that there is some testimony to the effect that, after delivering the cork to the garage for the repair of the airplane, he was to come back and get appellant at the picture show or deliver the car to him anywhere else. The fact remains that he was on no business of appellant, and the relation of master and servant or principal and agent did not exist. The undisputed testimony is that Green was not in the employ of appellant and had never been. The court should have directed a verdict in appellant's favor. *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, L. R. A. 1918D, 115; *Hunter* v. *First State Bank of Morrilton,* 181 Ark. 907, 28 S. W. (2d) 712.

The result of our views is that there is no substantial testimony to support the verdict and judgment, and that the court should have granted appellant's request for a peremptory instruction, and erred in refusing to do so. The judgment will therefore be reversed, and, as the case seems to be fully developed, it will be dismissed.

SOUTHWESTERN GAS & ELECTRIC COMPANY *v.* W. O. PERKINS & SON.

4-2562

Opinion delivered May 16, 1932.

Arnold & Arnold, for appellant.

John K. Butt, for appellee.

BUTLER, J. In 1925, W. O. Perkins & Son brought suit against Evelyn S. Wilson, who at that time was the owner of a parcel of land, alleging that the defendant was justly indebted to them in the sum of $56.86 for lumber and building material sold and delivered to the defendant and used in the repair and improvement of the parcel of land, and that within ninety days from the date of the last item purchased they had filed a lien on the property and prayed for judgment for the amount of the debt, and that the property be ordered sold in satisfaction of the judgment. Answer was filed by Evelyn S. Wilson, and at the trial of the case the court rendered a decree adjudging the defendant indebted to the plaintiff in the sum sued for, and further that the suit was not filed within the time prescribed by law for the enforcement of liens, and denied that part of the prayer of the complaint asking that the property be sold. The judgment remaining unsatisfied, a writ of garnishment was issued on September 14, 1931, and properly served on the Southwestern Gas & Electric Company, but no allegations or interrogatories were filed at that time or thereafter.

The garnishee answered stating that it did not have in its hand or possession on or after service of the writ any moneys, goods, chattels or any other property of any kind, nature or description belonging to the defendant, Evelyn Wilson, and, continuing, it answered that "said garnishee states, however, that the records of said company show that the said Evelyn S. Wilson owns nine shares of the par value of $100 each preferred stock of said company with no maturity date; that, so far as the records of said company show, said stock is still owned by the said defendant."

No denial to the answer was filed by the garnisher and on the 19th day of January, 1932, in the case of *W. O. Perkins & Son* v. *Evelyn S. Wilson, defendant,* and *Southwestern Gas & Electric Company, garnishee,* the court entered the following judgment:

"On this day this cause came on to be heard upon the interrogatories propounded to garnishee by plaintiff and upon the answer herein filed by garnishee showing that defendant held preferred stock in defendant garnishee company of the par value of $900 and that said stock was issued in her name. The court finds that a writ of garnishment was issued against defendant garnishee at the instance of plaintiff, and that defendant garnishee's answer is filed in response to said writ.

"Upon the proof adduced, and upon the answer of defendant garnishee herein filed, the court finds that defendant garnishee has in its hands personal property belonging to defendant in the sum of $900, and that by reason thereof plaintiff is entitled to judgment against defendant, and that, upon payment of said judgment to plaintiff by defendant garnishee, defendant garnishee shall be entitled to reimburse itself out of said personal property so held by it.

"Wherefore it is the judgment of this court that plaintiff have judgment against defendant garnishee in the sum of $99.47 with interest thereon at the rate of 6 per cent. from September 14, 1931, until paid; that defendant garnishee have judgment against defendant in the same amount; that, in order to collect its said judgment, defendant garnishee is hereby authorized to deduct the amount of same from the value of the personal property held in its hands belonging to defendant."

The record in that case has been certified to this court for review, it being insisted by the appellant that the judgment is void for three reasons which appear on the face of the record, as follows:

"1. That the original judgment upon which the judgment by garnishment against appellant was rendered is void for want of jurisdiction.

"2. That the judgment by garnishment against appellant is erroneous because it was rendered without allegations and interrogatories.

"3. That the judgment is void and reversible because on its face it appears that it was rendered solely on the garnishee's (appellant's) answer."

We are of the opinion that the first and second grounds urged for reversal are without merit, but, since we think that the third ground is well taken, it is unnecessary to state our reasons for our conclusion as to the first and second grounds.

It is insisted by the appellee that, because of the recitals in the judgment that the court based its finding "upon the proof adduced and upon the answer of the defendant garnishee filed herein," the case must be affirmed, as it is here without a bill of exceptions or a record of the evidence, and therefore the conclusive presumption is that there was evidence to support the finding and judgment of the court. Appellee argues that this court cannot know what the evidence was, but the judgment shows upon its face that there was some evidence, and that it must be presumed that this evidence showed that the garnishee (appellant) had in its hands and possession personal property belonging to the defendant of the value of at least $99.47, and that by reason thereof the plaintiff was entitled to a judgment against the garnishee, notwithstanding the garnishee answered that it had no such money or property in its possession belonging to the defendant.

Appellee overlooks the fact that they did not file any denial to the answer. If they had deemed the answer untrue or insufficient, they might have denied the same and caused such denial to be entered on the record, § 4912, Crawford & Moses' Digest, and, having failed to do this, the garnishee's answer is conclusive of the truth of its allegations. *Beasley* v. *Haney,* 96 Ark. 568, 132 S. W. 646. Hence no proof could have been adduced tending to controvert the answer or to show that appellant had in its hands any goods, chattels, moneys, credits and effects or other property belonging to the defendant. In fact, when the judgment is scrutinized considering all of its parts, the inference is inescapable that the court based

its judgment on the information contained in the answer that the records of appellant company showed that Evelyn S. Wilson owned nine shares of the preferred stock of the company of the par value of $100 each, and this must have been the property it found to be in the hands of the appellant belonging to the defendant, Evelyn S. Wilson.

The statute prescribes the manner in which shares of stock belonging to a judgment debtor may be reached by the creditors. This appears to us to be the exclusive remedy, and garnishment will not lie.

If the appellee is so advised, it may proceed against the shares of the stock in the method pointed out by the statute for the collection of its debt. The decree of the trial court is reversed, and the garnishment is dismissed.

BOWIE *v.* STATE.

(Criminal No. 3790)

Opinion delivered May 16, 1932.

Wills, Wills & McLees, for appellant.

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

BUTLER, J. The appellant, C. E. Bowie, was charged with the crime of murdering his wife by poison, and on a trial was found guilty of murder in the first degree, and his punishment fixed at life imprisonment in the State penitentiary. From that judgment he has prosecuted this appeal.

The excellent brief filed by counsel for appellant has been of material aid to the court, and from the authorities therein cited, with others discovered by our own research, and after a careful examination of the record, it is our conclusion that the judgment of the trial court must be set aside, and the cause remanded for a new trial.

For that reason it becomes necessary to notice each one of the errors assigned, which we will proceed to do in the order in which they are set out in the brief for the appellant.

■ It is first contended that the court erred in overruling the petition praying for a dismissal of the grand jury, and also the motion to quash the indictment afterward returned by it. The grand jury was selected prior to the date of the alleged crime, and convened for an investigation of such crime at a time when the defendant

was confined in the jail. The grounds of the objection to the panel were (a) that one of the jury commissioners was not qualified as such under the provisions of § 6344 of Crawford & Moses' Digest. That statute provides that the jury commissioners shall possess "the qualifications prescribed for petit jurymen," and it is insisted that the particular commissioner did not have these qualifications because of act 135 of the Acts of the General Assembly of 1931, he having served as a member of the regular panel of the petit jury at the March, 1930, term of the court and as a member of the regular grand jury at the March, 1931, term.

Act No. 135, *supra,* provides that "no citizen in this State shall be eligible to serve on either grand or petit jury oftener than one regular term of the circuit court every two years." It is not suggested that the commissioner was disqualified otherwise than by the provisions of the act above quoted. That act did not disqualify him from jury service, and he still had all of the qualifications of a petit jury within the meaning of § 6344, *supra,* but was rendered ineligible for service for a season. Therefore he was eligible to serve as jury commissioner, and the panel could not be challenged because he was one of the number who had selected it.

(b) Another reason assigned for the quashing of the panel was that, in selecting the jury, the commissioners disregarded § 6350 of Crawford & Moses' Digest, which provides that the jury commission shall select "grand and alternate grand jurors from all parts of the county," in that none of the grand jury selected were from the city of North Little Rock or other parts of the county except the city of Little Rock, from which city all the grand jurors came. We think this provision merely directory. The grand jury is an inquisitorial body for the county, and is charged with the duty of investigating all infractions of criminal laws occurring therein. Doubtless the provision above quoted was for the reason that a grand jury drawn from all parts of the county would have within itself a fair degree of information regarding

conditions existing, and, be in a better position to determine the character of the witnesses brought before it, and the reliability of the information which it might receive.

■ It is next insisted that the court erred in overruling the demurrer filed to the indictment. Without setting out the indictment in full, it is sufficient to say that we are of the opinion that it set out the offense charged with sufficient certainty and particularity. It charged that the murder was committed by poisoning the deceased. The indictment need not allege the nature of the poisoning, the way in which it affected the victim, or the character of poison used, and the demurrer was properly overruled.

■ Mrs. Bowie died suddenly on the night of October 23, 1931. Her body was embalmed by a local undertaker and buried in a cemetery without the city. After the burial the two daughters of the deceased went to the house of the deceased's sister and there remained. Their aunt questioned them about the circumstances of their mother's death and made such representations to the officers as to induce them to arrest the defendant, and to cause the body to be disinterred and an autopsy performed.

The testimony of the chemist who made an analysis of the contents of the viscera and that of physicians who attended the deceased at her death and who viewed the body thereafter tended to show that death was brought about by arsenical poisoning. The chemist testified that a slight trace of strychnine was also disclosed by his analysis. The testimony of the two daughters, the oldest of whom was about 17 years of age, and the other about 15, was to the effect that the defendant, their father, had frequently cursed and threatened their mother and at one time, when he was whipping the older of the two with a sash cord, he struck the deceased with it; that on several occasions he had been drunk and threatened to kill his wife "if she came to bed."

The defendant's sister-in-law testified as to the conduct of the defendant with a woman other than his wife, indicating an illicit relationship existing between the two and that she took the defendant to task about his conduct and told the wife about what she claimed to have discovered.

It was in testimony that a number of poisonous substances were in the house where the defendant and his wife resided, both at the time and before the wife died, and some paris green, nux vomica, strychnine and bichloride of mercury tablets were found on the premises. The paris green was kept in an outbuilding and the strychnine in a trunk.

The older of the two daughters, Veenie Bowie, related that her father came home on the evening of her mother's death between six and seven o'clock. He was mad and threatened to whip her (the witness) because supper had not been prepared; that, after they had partaken of the evening meal, and while her father and mother were in the act of retiring, her mother jumped and screamed and ran out into the yard choking and exclaiming she was dying. Witness was directed by her father to procure a doctor, and, with her sister, left for that purpose. When they returned she found her mother on the bed and her father fanning her. The other daughter stated that both her parents had gone to bed when her mother became sick and jumped up and ran out into the yard and her father choked her mother and bent her backward on the automobile. In this statement she was not corroborated by the older sister. That she and her sister left to get a doctor; that she had heard her father and mother discussing cattle stealing and arson, and had heard her mother object and ask her father not to do it. Neither of the daughters, nor any other member of the family saw the defendant give his wife anything to eat or drink. The younger daughter testified that when her father came home he threatened to kill her mother if she didn't have supper cooked the next time he came. The older daughter stated that, after the mother's death,

she prepared some chicken and dumplings for her father; that he was ordinarily very fond of this, but that he didn't take any at that time, and that when some of these were taken to the woods as a lunch, they were brought back uneaten, and the younger girl said they turned green.

Some remarks were said to have been made by the defendant in the presence of his daughters. One remark, made two or three days after the death of the mother, was: "She knows and God knows I didn't poison her." Another remark said to have been made by defendant was that he wished he could call back 30 minutes.

The other circumstances relied on were found in the testimony of the two daughters, the two sisters, and the brother-in-law of the deceased, and one or two other witnesses, to the effect that the defendant expressed a desire that his wife's body be not cut upon, and that he had her buried in a cemetery at Jacksonville where they had no relative interred, although the brother-in-law had offered the defendant a lot in another cemetery in which to bury the deceased. Also that, in the opinion of one of the deceased's sisters, the defendant did not appear to grieve much over the death of his wife, and this was one of the things which aroused her suspicion. According to the testimony of the older daughter, her father got up early one morning and built a fire and threw a snuff box in the stove; that he didn't ordinarily build a fire, and that she got the snuff box and took it to her aunt, who gave it, with other things, to the officers.

The above relates substantially all of the circumstances testified to on which the jury arrived at their verdict.

On the part of the defense, it was shown by near neighbors who had visited in the home of the defendant and his wife, and who lived very nearby, that they never heard or observed any threats or abusive conduct on the part of the husband to the wife other than the usual marital jars that would, as they said, naturally occur,

and that when Mrs. Bowie died the defendant seemed to be much affected and to sincerely mourn her death.

Two physicians testified (one who had had occasion to observe 25 or 30 cases of arsenical poisoning) to whom the symptoms of the deceased were described, stated that it was their opinion that the symptoms were not such as would be brought about by acute arsenical poisoning, and that about twelve hours was the shortest time in which one would ordinarily die from such poisoning. They also testified that arsenic was sometimes found in the human system, and that the amount of arsenic reported by the chemist to have been found would not necessarily indicate death due to arsenical poisoning, and that arsenic might get into the system without oral administration.

Other witnesses testified to circumstances tending to show malice and prejudice on the part of the two daughters and the sisters of the deceased, and there was other testimony which tended to impeach the credibility of these witnesses. All the testimony indicates the family were very poor and of a low order.

The defendant denied knowing that any poison was on the premises. He stated that he had bought some paris green about a year before to put on his potato plants and some nux vomica to feed his chickens, but when his wife died he did not know where it then was. It was shown by others that the bichloride of mercury tablets were given to Mrs. Bowie by her brother-in-law. The defendant testified that he did not administer any poison of any kind to his wife, and denied any desire to destroy her. The deceased and the defendant had married when they were quite young. At the time of her death she was about 36 years of age and the mother of seven children by the defendant, and was pregnant with the eighth child, and had had a miscarriage once about eighteen months previously. It was shown by a number of witnesses that, during the times she was pregnant, her body would become swollen, especially her face and extremities, and she complained a great deal on account of

her physical infirmities and her lot in life. She was subject to choking spells and would suffer much on these occasions.

■ The record, as we view it, presents a doubtful question as to the cause of the death of Mrs. Bowie. The circumstances which tend to establish, first, that her death was due to arsenical poisoning, and, second, that if so, the poison was administered by the defendant, are of uncertain value and wholly circumstantial in their character. It is a rule, however, of universal application, that circumstantial evidence is sufficient upon which to base a verdict of guilt, as experience and observed facts frequently establish a connection between proved facts and the fact sought to be proved that is as convincing in its nature as the most positive and direct testimony. Indeed, in many cases where the circumstances are testified to by several unprejudiced witnesses from different sources, the chain of circumstances is less likely to be the result of perjured testimony than even the direct testimony of witnesses, and often is more cogent. This character of evidence, however, has certain disadvantages. A jury has not only to weigh the evidence and the credibility of the witnesses, but to draw just conclusions from the circumstances in proof, and in doing so it may, by want of due deliberation, make hasty and false deductions and be swayed in its judgment by prejudice or partiality. This demands that in a case depending upon circumstantial evidence the circumstances relied upon must be so connected and cogent as to show guilt to a moral certainty, and must exclude every other reasonable hypothesis than that of the guilt of the accused. Circumstances, however strong they may be, ought never to coerce the mind of the jury to a conclusion of guilt if they can be reconciled with the theory that one other than the defendant has committed the crime, or that no crime has been committed at all. Therefore it becomes important that every fact which might reasonably shed light on the issues investigated should be received and given proper consideration.

It will be remembered that Mrs. Bowie died suddenly, and, while her extremities were swollen, and she suffered much discomfort, she had given no evidence of being seriously ill at any short time before her death. The defendant denied any voluntary act upon his part which was the occasion of his wife's demise, and offered to prove by a number of witnesses that at times she became despondent because of her frequent and manifold ills, and that she had, on numbers of occasions and to different persons, expressed a dissatisfaction with her life and an intention to end it; that she had often said, over a period of six months preceding her death, and to several persons, in effect, "that she had suffered about all a human could and that for very little she would end it all."

The trial court, on objections of the State, ruled this testimony incompetent, and refused to admit it, to which ruling timely exceptions were saved, which were preserved in the motion for a new trial and are now urged as error. The question presented has never been directly passed upon by this court.

In support of the ruling of the trial court, the appellee offers a declaration found in Michie on Homicide, at page 810, and, while admitting that the authorities differ, contends that the better view supports the text, which is that: "Declaration of the deceased made at different times before his death and prior to his last sickness that he intended to take his own life not accompanied by an act of the deceased which they might explain, being mere hearsay, are not admissible on the part of the defense. This is undoubtedly the correct rule * * *."

The precise question has not before been before us, but we do not agree with the contention of the appellee, nor do we subscribe to the doctrine of the text, which we think illogical and with but little support in the adjudicated cases. The author, in support of the declaration made, refers to but one case, *Nordgren* v. *People,* 211 Ill. 425, 71 N. E. 1042, and that case does not warrant the declaration of the text. There the defendant was charged

with having caused the death of his wife by giving her whiskey containing strychnine or some other kind of poison. She died suddenly and under circumstances from which it might have been deduced that she had been poisoned with strychnine. The record there, as here, was silent as to the manner in which the poison was given to, or taken by, the deceased. The defendant denied the charge and offered to prove by a number of witnesses, whose affidavits were taken and read on motion for a new trial, that for a long time before her death she had led a life of drunkenness, and while on sprees would announce that she was tired of life and that she had poison enough in her possession to kill a whole family. The court held that these affidavits did not set forth newly discovered evidence, nor were they cumulative or impeaching in character, but embodied the substance of what the defendant offered to prove but which he was not permitted to do by the trial court. It was held that the trial judge erred in refusing to allow the evidence to go to the jury, and the case was reversed and remanded.

In the case of *Seibert* v. *People,* 143 Ill. 591, 32 N. E. 431, the Supreme Court had decided that the declaration of the deceased threatening to commit suicide was incompetent as being mere hearsay, but it would seem that the case of *Nordgren* v. *People, supra,* which is a later case, while not mentioning the Seibert case, has in effect overruled it.

At one time the rule, as contended for by the appellee, and as announced in the Seibert case, seems to have been followed by the Supreme Court of Missouri in the case of *State* v. *Fitzgerald,* 130 Mo. 407, 32 S. W. 1113, but that case and other cases which seem to hold to the same doctrine were expressly overruled in the case of *State* v. *Ilgenfritz,* 263 Mo. 615, 173 S. W. 1041. Indeed, the only cases we have been able to find which seem to support the rule contended for are decisions of the Supreme Court of Colorado, *Ausmus & Moon* v. *People,* 47 Colo. 167, 107 Pac. 204, 19 Ann. Cas. 491, and *Moya* v. *People,* 79 Colo. 1004, 244 Pac. 69, but in a later case those cases are

questioned. In *Massie* v. *People,* 82 Colo. 205, 258 Pac. 226, the court, after calling attention to the textwriters and decisions holding contrary to the cases under review, said: "We are therefore asked to re-examine the question and reverse our former holding. We would not shirk the re-examination or hesitate to correct the error should such clearly appear, even though convinced of the guilt of the accused and the sufficiency of the evidence to support the verdict, were this defendant in position to make the demand, but we think he is not." It was shown that the reason that the defendant was not in a position to make the demand was because, when questions were propounded to the witnesses relative to the declarations of the deceased evidencing a suicidal intent, the expected answers were not given, and for that reason the court refused to review its prior decision.

The contrary, and we think the better view, is stated in the 2d ed. of Mr. Wigmore's treatise on the law of Evidence in vol. 1, §§ 143 and 144 of chap. 7, as follows: Section 143. "If the deceased, with whose death the defendant is charged, committed suicide, obviously the defendant could not have killed the deceased. There ought to be no doubt about the admissibility of plan or desires to commit suicide, even where no other evidence of its probability or feasibility is offered. Its improbability or nonfeasibility should be a matter for rebuttal, and should not exclude the evidence of its probability. That the evidence may be manufactured is no reason for its exclusion for it may also not be manufactured, and if not it is most cogent. The distance in time ought not to exclude the evidence of plans; for it does not exclude evidence of a defendant's threats. That the deceased's hearsay statements of plan are admissible, under an exception to the hearsay rule, is plain."

Section 144. "For the same reason, an emotion or feeling impelling to suicide is relevant; and facts tending to show the existence of such an emotion * * * should be received to show it. Contrary facts tending to show emotions adverse to suicide would be equally admissible."

The text is supported by decisions of many eminent courts. Leading these cases is that of *Commonwealth* v. *Trefethen,* 157 Mass. 180, 31 N. E. 960. The evidence of declarations of the deceased made prior to death which would indicate a suicidal trend of mind have been held to be admissible in the following cases: *Ottis* v. *State,* 160 Ala. 29, 49 So. 810; *Crow* v. *State,* 89 Tex. Cr. 149, 230 S. W. 148; *State* v. *Beeson,* 155 Ia. 355, 136 N. W. 317; *State* v. *Carter,* 100 Ia. 510, 69 N. W. 880; *Nordgren* v. *People,* 211 Ill. 425, 71 N. E. 1042; *Hull* v. *State,* 132 Ind. 317, 31 N. E. 536; *State* v. *Ilgenfritz,* 263 Mo. 615, 173 S. W. 1041; *People* v. *Gehmele,* (N. Y.) 1 Sheldon (N. Y.) 251; *Blackburn* v. *State,* 23 Ohio St. 146; *Epperson* v. *Commonwealth,* 227 Ky. 404, 13 S. W. (2d) 247; *Sharp* v. *State,* 115 Neb. 737, 214 N. W. 643; *State* v. *Prytle,* 191 N. C. 698, 132 S. E. 785; *State* v. *Keely,* 77 Conn. 266, 58 Atl. 705.

The case presented by the record here emphasizes the importance of the proper application of that rule of evidence, that all facts which may shed light on the issues investigated may be received and given proper consideration. *Arnold* v. *State,* 179 Ark. 1072, 20 S. W. (2d) 189.

The testimony raises a doubtful question as to whether the deceased in fact died from arsenical poisoning, and, if she did, whether the poison was administered by the appellant or by her own hand. Therefore any declarations she might have made reflecting her mental condition induced by her physical condition and sordid surroundings, or from any other cause, indicating the thought of self-destruction, were material to the defense offered, and their exclusion was prejudicial to the rights of the defendant, and the court erred in excluding them.

Veenie Bowie, the daughter of the deceased and one of the principal witnesses introduced by the State, was asked if her mother did not make inquiry of the witness on the day of her death as to the location of the paris green. The witness answered in the negative. She was further asked if she had not told a neighbor that her mother had made such inquiry on the day she died and

answered in the negative. This testimony was material as indicating a suicidal intention, and the court erred in refusing to permit the neighbor to testify that the girl had in fact made such declaration to her a short time after the death of the deceased. The daughter evidenced an unfriendly animus toward the defendant, and this testimony was competent as affecting her credibility.

It is lastly urged that the cross-examination of the defendant was improper in that the defendant, while on the stand in his own defense, was questioned and required to answer relative to the commission of other unconnected crimes and acts not connected with the offense for which he was being tried.

We pretermit any discussion of this alleged error for doubtless the court on the trial anew will see that the examination be kept within due bounds.

For the errors indicated, the judgment of the trial court is reversed, and the cause remanded for new trial.

McCutchen *v.* Siloam Springs.

4-2509

Opinion delivered May 23, 1932.

A. L. Smith, for appellants.

Tom Williams, Williams & Williams and *James B. McDonough, Jr.,* for appellees.

HUMPHREYS, J. Appellants, resident citizens and taxpayers of the city of Siloam Springs, Arkansas, instituted this suit on the 24th day of August, 1931, in the chancery court of Benton County to enjoin appellees from carrying out a contract entered into on the 6th day of August, 1931, between said city, with the approval of the board of improvement of Electric Light District No. 1, and the Trans-American Construction Company and Seymour Corporation as guarantor, to construct a powerhouse and install all necessary equipment therein, including Diesel engines to generate power to operate the light plant, water plant, and current for other purposes, upon the alleged ground that said contract is null and void because made by said city without statutory authority, and in contravention of amendments Nos. 10 and 13 to the Constitution of Arkansas, and because same is improvident.

The material allegations of the complaint were denied, and the cause was submitted upon the issues joined and evidence introduced, resulting in a finding and decree that the contract is valid and in a dismissal of appellants' complaint, from which is this appeal.

The record made in the case is voluminous, and to attempt a detailed statement of the facts would unduly extend this opinion. The substance of the facts necessary to a determination of the issues involved is as follows: Immediately after the electric light plant was constructed, in 1898, under a bond issue by Electric Light District No. 1, it was turned over to the city council for operation and maintenance, under § 5739 of Crawford & Moses' Digest, which is as follows: "In case of the construction of waterworks or gas or electric light works by an improvement district or districts, the city or town council, after such works are constructed, shall have full

power and authority to operate and maintain the same, instead of the improvement district commissioners, and said city or town council may supply water and light to private consumers and make and collect uniform charges for such service, and apply the income therefrom to the payment of operating expenses and maintenance of such works."

The bonds were all paid long before the execution of the contract sought to be enjoined. The electric light system consisted of machinery and equipment in the powerhouse, twenty-five miles of poles and wires, transformers, meters, and much other apparatus necessary to a going light and power system. During the operation of the system by the council, something like $30,000 was expended out of the earnings of the system for new machinery and equipment in the maintenance thereof. After being used for about thirty years, the machinery and equipment in the powerhouse, in the opinion of competent experts, had become inefficient, uneconomical, obsolete, and hazardous. After investigating many modern powerhouses and equipment, the council concluded to install Diesel engines and other modern equipment in a new powerhouse on a small tract of land purchased by the city. In keeping with this purpose, the council advertised for bids, and let a contract for the construction of the powerhouse and installation of Diesel engines and other equipment to the Trans-American Construction Company, the lowest bidder, for $80,425, in monthly payments of $1,218 each, covering a period of about five and one-half years with no interest on the evidences of indebtedness or pledge orders until the maturity of each. It was also provided that, upon default in the payment of any pledge order, the Trans-American Construction Company might repossess the particular property sold or might operate the plant as the agent of the city until the pledge orders were paid out of the net earnings of said system. It was also provided that the city was not obligated to pay for the machinery or equipment out of any fund except the net earnings from said light plant.

A reversal of the decree is urged upon the ground that "operation and maintenance" used in the section of the statute quoted did not confer authority on the city council, acting in its capacity as trustee for Electric Light District No. 1, to abandon the old powerhouse and the old machinery and equipment therein and construct a new powerhouse on another tract of land and install therein modern, efficient, and more economical machinery and equipment. Appellant interprets the word "maintenance," as used in the statute, as synonymous with the word "repair," and contends that "repair" does not mean to reconstruct the system. This court, in construing the statute in question in the case of *Arkansas Power & Light Company* v. *Paragould,* 146 Ark. 1, 225 S. W. 435, gave the word "maintenance" a much broader meaning than the word "repair" by saying that the purpose and meaning of the statute was to authorize the council to keep the system up to an established standard, and, in its sound discretion, to determine the way in which the standard of efficiency should be maintained. In the recent case of *Anderson* v. *American State Bank,* 178 Ark. 652, 11 S. W. (2d) 44, in construing the scope of the word "maintenance" in a similar statute, it was ruled that authority was conferred on the county court to purchase a tractor on the theory that it was impossible to maintain highways without machinery.

A reversal of the decree is also urged on the ground that the contract is an improvident one. The chancellor found that the improvement was necessary, and that the contract was awarded to the lowest bidder for a fair price upon reasonable terms, and that it was in no sense improvident. After a careful reading and analysis of the testimony, we think his finding is supported by the weight of the evidence.

A reversal of the decree is also urged upon the ground that the contract is prohibited by constitutional amendments Nos. 10 and 13.

Amendment No. 10 forbids cities from making contracts in excess of their revenue for the current year. The city incurred no liability payable out of its revenues on account of the instant contract. The contract specifically provides to the contrary. Under the act for operation of the system by the council, none of the proceeds therefrom became the city's funds until expenses of operation and maintenance had been fully paid. The consideration for this contract or the purchase price must and can only be paid under its terms as maintenance charges out of the gross receipts derived from the operation of the system after operating expenses have been paid, and not out of funds belonging to the city; hence the amendment referred to is not applicable to the instant contract, and not inhibited by it under the ruling announced in the case of *Anderson* v. *American State Bank,* 178 Ark. 652, 11 S. W. (2d) 444.

Amendment No. 13 provides the manner in which cities may purchase, extend, improve, enlarge, build or construct light plants and distributing systems. According to the amendment, it must do so by a bond issue and special assessment after a majority of the qualified electors shall vote in favor of the project. Appellants contend that, since the adoption of the amendment, this is the exclusive method by which a light system may be acquired for or by a city. This section can only apply where a city acquires or already owns a plant in its own name, and not to a system which it has taken over for the purposes of operation and maintenance only in trust for an improvement district.

No error appearing, the decree is affirmed.

TALLMAN *v.* BOARD COMMISSIONERS NORTHERN ROAD IMPROVEMENT DISTRICT OF ARKANSAS COUNTY.

4-2560

Opinion delivered May 23, 1932.

George C. Lewis, for appellant.

Ingram & Moher, for appellee.

MEHAFFY, J. On May 9, 1931, the commissioners of Northern Road Improvement District of Arkansas County filed suit to enforce the payment of delinquent taxes alleged to be due the said district. To the complaint was attached an exhibit which was said to be a record of delinquent lands in said district, returned delinquent on June 9, 1930, for the nonpayment of taxes due thereon for the year 1929.

This record was properly certified to by the sheriff and collector of Arkansas County. The clerk of the chan-

cery court certified that the list was filed in his office August 29, 1930.

Warning order was published, and a number of the landowners of the district intervened, and interposed the defense that the suit was not brought within three years after said taxes became delinquent. There was a number of interveners, but the defenses interposed were identical.

Answers were filed to all the interventions, alleging that the lands in controversy stood forfeited to the State, and the district's right to proceed to collect the taxes was suspended because the lands had been sold to the State, and therefore the three years' statute did not apply.

There is no controversy about the facts, but only questions of law are involved. There appears to be some confusion and uncertainty about the law with reference to collection of improvement district taxes, and for that reason the law should be stated clearly, so that any doubt or uncertainty may be removed.

The Northern Road Improvement District of Arkansas County was created by act 247 of the Acts of 1919. Section 6 of this act provides for the assessment of benefits, and § 7 provides that the assessment shall be filed with the county clerk, and the secretary of the board shall give notice by publication for two weeks in a newspaper, published and having a *bona fide* circulation in the city of Stuttgart.

Said notice must advise the landowners of the filing of the assessment, and that it is open for inspection, and fix the time when they may be heard by the commissioners. The act permits a reassessment not oftener than once a year.

Section 13 of the act fixes the time when the assessments are payable between the first Monday in January and the 10th of April in each year. The section also provides that the collector shall not embrace such taxes in the taxes for which he shall sell the lands, but he shall report such delinquencies to the board of commissioners of said district, which shall add to the amount of tax a

penalty of 25 per cent., and said board of commissioners shall enforce the collection by chancery proceedings in the manner provided in §§ 23 and 24 of act 279 of the Acts of 1909. The owner has five years in which to redeem from said sale.

Appellee concedes that, if the improvement district could proceed to enforce or foreclose its lien before the assessments are formally returned as delinquent, then the three years' statute of limitations has run, and this case should be reversed.

Section 6695 of Crawford & Moses' Digest provides that the words "forfeited" and "forfeiture" shall be construed to mean and apply to lands which were sold for nonpayment of taxes according to law, etc.

This court has said: "Of course, the forfeiture to the State of lands for general taxes necessarily suspends the enforcement of the special tax lien as long as the title remains in the State, but, as the lien, under the terms of the statute, is not extinguished, and continues until the special taxes are paid, the same can be enforced when the land goes back into private ownership. This construction of the statute gives full recognition to the State's paramount right of taxation, and in nowise detracts from the dignity and power of the State as against subordinate governmental agencies." *Turley* v. *St. Francis County Road Imp. Dist. No. 4,* 171 Ark. 939, 287 S. W. 196.

This court, in a later case, said: "Sale to the State of lands for nonpayment of general taxes suspends the enforcement of the special road tax lien so long as the title remains in the State; but such lien, under Crawford & Moses' Digest, § 5433, may be enforced when the land goes back to private ownership." *Wyatt* v. *Beard,* 179 Ark. 305, 15 S. W. (2d) 990.

In the case above cited the sales to the State were valid. These cases were referred to and the rule announced by them approved in *Hopper* v. *Chandler,* 183 Ark. 469, 36 S. W. (2d) 398.

The appellant suggests that the court, in its former decision, overlooked § 2 of act 261 of the Acts of 1925.

That act, however, applies only to road improvement districts which embrace lands in five or more counties, and therefore has no application here.

The lien for improvement district assessments shall be in the manner provided in §§ 23 and 24 of act 279 of the Acts of 1909. These sections provide that the assessments shall be payable between the first Monday in January and the 10th day of April in each year. The act then provides that the collector shall report delinquencies to the board of commissioners; that they shall add the penalty, and enforce the collection by a suit in the chancery court.

The question is, when did the lands become delinquent? There can be no doubt that the assessments are payable between the first Monday in January and the 10th day of April.

Section 4 of act 534 of the Acts of 1921 is as follows: "When the board of commissioners, or any one authorized by law to file suit for the collection of such delinquent taxes, desires to commence said suit, they shall obtain a certified copy of said list from said clerk, which shall be filed with the complaint and taken as a part thereof, and the clerk, for making said list, shall be entitled to ten cents per tract, which shall be taxed as costs in said suit. No suit for the collection of such delinquent taxes shall be brought after three years from date same became delinquent."

It appears from that act that, whether the taxes have been extended or whether the collector has made any report, the board of commissioners, if they desire to commence suit, shall obtain a certified copy of the list from said clerk, and file this list with the complaint, and it will be observed that under said section no suit shall be brought after three years from the date same became delinquent. When the law fixes a day for the payment of taxes, and the taxpayer fails to pay on or before that day, he is delinquent. These acts themselves indicate that, because they require the sheriff to report the delinquency. Unless they were delinquent, there would be no delin-

quency to report, and a delinquent tax means a tax overdue and unpaid.

"To constitute a legally delinquent tax on land, three things are necessary: First, that the land is subject to taxation; second, that a tax authorized by law has been levied on it in the manner provided by law; third, that the tax remains unpaid after the time appointed by law for its payment. To make out a tax delinquent, each of these things must be shown—each is as essential as either of the others." *Chauncy* v. *Wass,* 35 Minn. 1, 30 N. W. Rep. 826; 18 C. J. 475.

It seems clear that when the statute fixes the 10th of April as the last day for payment, and provides that the commissioners may secure the list from the clerk before bringing suit, the intention is to authorize suit to be brought at any time within three years after the failure to pay at the time the taxes are due.

We have heretofore held that when lands have been sold to the State, the lien for assessments was suspended, and could be enforced after the lands went back to private ownership. Of course, this meant valid sale. A void sale would not suspend the statute because if void, it is a nullity, binding on no one. But if the collection of improvement district assessments is suspended by a valid sale to the State and not by a void sale, the commissioners would be required to determine in each instance whether a tax sale was valid or void. This, in many instances, might require expensive lawsuits because, in many instances, no one could say whether the sale was void or not.

We therefore hold that, when taxes are not paid at the time fixed by law, they are delinquent, and the commissioners may secure the certified list from the clerk and proceed to enforce collection. If the lands have been sold to the State, the sale for improvement district taxes will be subject to the paramount right of the State. There can then be no confusion or doubt about the time and manner of inforcing liens for assessments in improvement districts.

When all the acts are considered together, it seems clear that this was the intention of the Legislature.

In this case, three years having elapsed after the taxes became delinquent before suit was brought, such suit was barred by the three years statute of limitations.

The decree of the chancery court is therefore reversed, and the cause remanded with directions to dismiss the complaint.

TAYLOR *v.* MOOSE.

4-2530

Opinion delivered May 23, 1932.

Edward Gordon, for appellant.

E. A. Williams, for appellee.

MCHANEY, J. The only question presented for our determination by this appeal is the validity of a contract between appellant Bank Commissioner and appellant Gordon by which the latter was employed as attorney to represent the former in the liquidation of the People's

Bank & Trust Company of Morrilton, insolvent, at a stipulated fee per month as follows: "$200 per month for the first six months following the closing of said bank; $225 per month for the next six months; $150 per month for the second year; and $100 per month for the third year. This contract was presented to the chancery court for its approval on the petition of appellants and the remonstrance of certain officers and depositors of said bank, and the court declined to approve same, and held that proper fees would be allowed said attorney from time to time when it was definitely determined what service had been rendered. It appeared in evidence that approximately 90 per cent. of the bank's bills receivable had been hypothecated with other banks to secure loans, and that the court had made a consent order that the expense of collecting such collateral held by other banks must be paid out of same, and should never be borne by the 10 per cent. of such bills receivable as remained in the bank unpledged which latter amounted to about $46,000. The court found that said contract was improvident and declined to approve it.

We think the court was correct in so holding. The Bank Commissioner is without power to fix attorney's fees by agreement with attorneys in the liquidation of insolvent banks, and his agreement in this regard is not binding on the court, but is suggestive merely. Section 723, Crawford & Moses' Digest, provides that "the compensation of the special deputy commissioner, counsel, employees and assistants, and all expenses of liquidation shall be fixed by the commissioner, subject to the approval of the chancery court on notice to the officers of such bank," etc. He is given the power to appoint (§ 5, act 627 of 1923), but may fix compensation subject to the approval of the court. The contract in question was, therefore, not valid and binding without the approval of the court, a matter resting in its sound discretion.

Furthermore we think the court did not abuse its discretion in refusing its approval. In the very nature of things, no one could tell in advance the amount of

work and skill that would be required of counsel in the liquidation of this bank. Practically all its notes receivable were held by other banks in which the insolvent bank had a possible equity, of doubtful value, as were also the unpledged notes. No doubt litigation would result in some matters, but the extent and nature of it was doubtful. The court would undoubtedly be in a better position to allow compensation as the work progressed. As we said in *Shackleford* v. *Arkansas Baptist College,* 181 Ark. 363, 26 S. W. (2d) 124: "Neither the trial court, nor this court on appeal, is bound by the testimony of appellant and his expert witnesses in determining the value of his services." We there further said: "In *Jacoway* v. *Hall,* 67 Ark. 345, 55 S. W. 12, it was held that the judge could act upon his own knowledge in fixing reasonable compensation, and that this court would not overturn his finding unless clearly erroneous." See also other cases cited in the Shackleford case.

The matter of fixing compensation for counsel finally rests in the sound discretion of the trial court, and we are of the opinion that the court did not abuse its discretion.

Affirmed.

COMMONWEALTH BUILDING AND LOAN ASSOCIATION *v.* MARTIN.

4-2449

Opinion delivered May 23, 1932.

Powell, Smead & Knox and *C. E. Wright*, for appellant.

Coulter & Coulter, for appellee.

BUTLER, J. This cause was submitted to the chancellor on the complaint of plaintiff, Dollie Mae Martin, the answers of L. A. Reed, the Progressive Building & Loan Association, and of the appellant, together with the exhibits thereto and the following stipulation:

"It is agreed by and between the parties hereto and their respective counsel of record that this cause may be submitted to the court on the following agreed statement of facts covering all the issues except as to the question of agency on the part of L. A. Reed for Progressive Building & Loan Association.

"On July 11, 1929, E. L. Kendrick, who is the common source of title to lot 6 of block 4 of Triangle Subdivision to the city of El Dorado, Union County, Arkansas, was the owner of said property. On said date he executed a mortgage to Progressive Building & Loan Association conveying to the said association said property to secure the payment of an indebtedness in the sum of $2,000, with interest at the rate of 9 per cent. per annum, to be repaid in monthly installments. Thereafter, on August 6, 1930, Commonwealth Building & Loan Association obtained a judgment against the said Kendrick in the Union Chancery Court in the sum of $2,480.17, which judgment constituted a mortgage lien against other property held in the name of Kendrick, but only a general judgment against the property in controversy. The property against which the judgment con-

stituted a mortgage lien was sold on September 9, 1930, for the sum of $1,250, which amount was credited on the judgment against Kendrick, the remaining portion thereof, together with accrued interest thereon, remaining unpaid. Thereafter, on October 22, 1930, Kendrick conveyed the property here in dispute to L. A. Reed for the sum of $10 and the assumption of the Progressive Building & Loan Association's mortgage indebtedness. Thereafter, on December 1, 1930, Reed conveyed the property in controversy to Dollie Mae Martin by deed of general warranty, in consideration of the sum of $400 and the assumption of the Progressive Building & Loan Association's mortgage indebtedness. Thereafter, on February 3, 1931, Mrs. Martin paid to the Progressive Building & Loan Association the amount due under its mortgage, and said association entered a full satisfaction of the mortgage from Kendrick to it. Mrs. Martin borrowed $1,000 of the money which she paid to the association, and executed her mortgage covering the property in controversy to secure said sum, and paid the balance from her own personal funds; but the mortgage from Mrs. Martin has never been filed for record.

"The instruments herein referred to may be read into the record in the trial of this cause before the court.

"The Commonwealth Building & Loan Association contends that its lien is now a first lien against the property in controversy, the mortgage indebtedness having been satisfied. Mrs. Martin concedes that the association can redeem the property by repaying her the amount expended in paying the mortgage of the Progressive Building & Loan Association, but denies its right to proceed against the property free and clear of the mortgage debt."

In addition to the facts set out in the foregoing stipulation, plaintiff alleged that at the date of the execution by Kendrick of his deed to Reed and on the date of the deed from Reed to her the judgment in favor of the appellant against Kendrick was outstanding and unsatisfied; that because of this the covenant of warranty in her

deed was breached. She further alleged that Reed, her grantor, was the agent of the Progressive Building & Loan Association, and that the deed taken by him from Kendrick was in satisfaction of the mortgage of his principal. The complaint concluded with the prayer that appellant be required to assert any interest it claimed in the property, that her grantors be required to defend against any claim of appellant, and with a prayer for judgment against the defendants, Kendrick and Reed, for any indebtedness which might be established "by said Commonwealth Building & Loan Association against the property herein described and for all further and proper relief."

The court found that the deed from Reed to the appellee contained a covenant of warranty against incumbrances, and that it did not mention the judgment lien of the Commonwealth Building & Loan Association, and therefore, "upon the execution and delivery of the deed, said covenant of warranty was broken, and that plaintiff is thereby entitled to recover of and from the said L. A. Reed and Lillian Reed, his wife, nominal damages in the sum of $1, together with all costs in this cause including a reasonable attorney's fee, which the court finds to be the sum of $100." The court further found that the appellee had paid the mortgage indebtedness due the Progressive Building & Loan Association which had entered a full satisfaction on the records, and thereby the appellee was subrogated to the rights of said association, but that it (appellant) might redeem said property by paying to appellee the amount of indebtedness due the Progressive Building & Loan Association which she had discharged. Judgment was rendered in accordance with these findings, and the complaint dismissed as to the defendant, Progressive Building & Loan Association.

L. A. Reed has not appealed from that decree, the appeal here being taken and prosecuted by the appellant, Commonwealth Building & Loan Association, which makes two contentions for reversal, as follows:

1. Appellee is bound by her allegation that Reed was agent of Progressive Building & Loan Association, and is therefore precluded from any relief as against appellant.

2. Appellee has neither pleaded nor proved that she lacked knowledge of appellant's lien at the time she bought the property in question, and is therefore precluded from any relief as against appellant.

The appellant argues that by appellee's own allegation there was no mortgage extant when she acquired the property from Reed, but that the mortgage was discharged and satisfied by the conveyance from Kendrick to Reed, who was acting as agent for the Progressive Building & Loan Association, and that the deed was taken in discharge of the mortgage debt. It contends that these allegations were admitted by it in its answer, and that appellee could not take a position contradictory to the allegations of her complaint, as such had not been denied.

We do not agree with the contention made for the reason that the allegations as to the agency of Reed, and that he took the conveyance from Kendrick to himself as agent of the Progressive Building & Loan Association in satisfaction of the debt from Kendrick to it were denied by both Reed and the loan association. No evidence was taken on this issue, and it was abandoned, and the court dismissed the complaint as to the Progressive Building & Loan Association.

The real question in this case is that contained in the second contention made by the appellant, and in this we are of the opinion that it is wrong. It was agreed that, after Reed conveyed the property to appellee, she paid the amount due under the mortgage, having borrowed $1,000 of the amount and paying the remainder from her own personal funds. It was clearly to the interest of the appellee to succeed to the rights of the mortgagee, and it must be presumed that this was her intention, in the absence of any affirmative showing of intention as to the outstanding judgment lien of the appellant, or that she had knowledge of its existence.

"And the rule supported by the weight of authority is that when a purchaser pays off a prior incumbrance as a part of the purchase price, without actual notice of a junior lien, it will be presumed that he paid the same for his own benefit, and the protection of his own interests, and equity will treat him as the assignee of the previous incumbrance, and will revive and enforce it for his benefit. Having caused the same to be satisfied under circumstances authorizing an inference of mistake of fact, equity will presume such mistake in order to give the party the benefit of the equitable right of subrogation; and, in so doing, prevent injuries and hardship, without interfering with intervening equities." 25 R. C. L. 1353.

"The general rule is that the lesser estate in land will merge in the greater whenever the two estates are owned by the same person. This rule, however, does not apply where such merger would be inimical to the interests of the owner; hence, unless the intention to merge with knowledge of a junior lien or liens clearly appears, no merger results from the acquirement by the holder of a senior mortgage of the interests of the mortgagor, and the senior mortgage retains its priority as against all junior or intervening liens upon the mortgaged property; and this rule is true whether the interest of the mortgagor is the legal title to the land, or the mere equity of redemption. 39 L. R. A. 384.

The doctrine above announced is supported by the weight of authority and numerous decisions announcing and applying it have been cited by counsel for appellee in his brief. Among these are the following cases: *Mallory* v. *Hitchcock,* 29 Conn. 127; *Smith* v. *Dinsmoor,* 119 Ill. 656, 4 N. E. 648; *Artz* v. *Yeager,* 30 Ind. 677, 66 N. E. 917; *Putnam* v. *Collamore,* 120 Mass. 454; *Tucker* v. *Crowley,* 127 Mass. 400; *Bell* v. *Tenny,* 29 Ohio St. 240; *Senter* v. *Senter,* 87 Ohio St. 377, 101 N. E. 272; *Dollar Sav. Bank* v. *Burns,* 87 Pa. 491; *Harris* v. *Masterson,* 91 Tex. 171, 41 S. W. 482.

The appellant has shown no equity in this case calling for the application of the doctrine of merger, and, on the other hand, its application would work a manifest injustice to the appellee which ought not to be done. *Simpson* v. *Robinson,* 37 Ark. 132. In many cases it has been our policy to apply the doctrine of subrogation, where by so doing the ends of justice will be met (*Chaffee* v. *Oliver,* 39 Ark. 531; *Cohn* v. *Hoffman,* 45 Ark. 376; *Neff* v. *Elder,* 84 Ark. 277, 105 S. W. 260, 120 Am. St. Rep. 67; *Beauchamp* v. *Bertig,* 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; *Southern Cotton Oil Co.* v. *Napoleon Hill Cotton Co.,* 108 Ark. 555, 158 S. W. 1082, 46 L. R. A. (N. S.) 1019; *Rowland* v. *Griffin,* 179 Ark. 421, 16 S. W. (2d) 457) and to deny mergers where an injustice would follow.

In the case of *Bemis* v. *First Nat. Bank,* 63 Ark. 625, 40 S. W. 127, it is said: "It is admitted in argument, and cannot be successfully controverted, that a merger will never be presumed against the interest of the party taking the deed; but it is claimed that 'this rule only applies in the absence of evidence tending to show a merger.' That is a mild way of stating it. Mergers are not favored either in courts of law or equity, and it requires evidence to show that the interests of him who holds both rights will not be prejudiced, before the rule allowing a merger will be applied; and it is hardly sufficient that the evidence tends to show a case for the application of the rule. We do not intend by this discussion to admit that the evidence shows this to be a case where a merger can be made, but, rather, how far the courts will lean towards the real interest of the holder of the two rights; and, in so doing, how strong the evidence must be to sustain the merger."

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

AMERICAN NATIONAL INSURANCE COMPANY *v.* CHAVEY.

4—2577

Opinion delivered May 30, 1932.

W. G. Dinning, for appellant.

Jo M. Walker, for appellee.

HART, C. J., (after stating the facts). The court instructed the jury as follows: "The policy having been introduced, and it being admitted that all the premiums were paid at the time of the death of the deceased, and due proof made, the burden then shifts to the defendant to show that the deceased, in her application, knew that she was in unsound health, or that she accepted the policy while in unsound health; and if you find that the application was made or that the policy was delivered while the deceased was in unsound health, she knowing the same to be true, and made application knowing she was in unsound health, or accepted the policy knowing she was in unsound health, that would constitute fraud on the insurance company, and the beneficiary would not be entitled to recover."

It is earnestly insisted by counsel for the defendant that the court should have instructed a verdict in its favor because, under the undisputed evidence, the insured was not in sound health when the policy was delivered to her, and this was a condition precedent to the policy becoming effective.

Counsel for the defendant claims that the case is governed by *American National Insurance Company of Galveston, Texas,* v. *Lacey,* 182 Ark. 1158, 34 S. W. (2d) 757. We do not think so. In that case, the beneficiary knew that the insured took sick on the 27th day of February, 1929, and the policy was delivered to her for her brother on the 4th day of March, 1929. Her brother was taken to the hospital on February 27, 1929, and was confined to his bed with pneumonia until his death from that

disease on March 14, 1929. Hence there was no liability under the policy.

Here the facts are essentially different. The policy was issued on the 10th day of March, 1930, and the insured did not die until the 7th day of January, 1931. At the time the agent of the insurance company took her application, she was working in a store, and he testified that she appeared to be in sound health. It is true that the physicians testified that they had been treating her from time to time for diabetes in a chronic form for several years; but the fact that she lived for several years after she was treated, and was able to pursue her daily vocation of working in a store tended to show that she regarded herself, as did the agent of the company, as apparently being in sound health. The court properly submitted this question to the jury because the policy, by its own terms, provided that the representations in her application should not be considered as warranties.

The case falls within the principles of law decided in *Modern Woodmen of America* v. *Whitaker,* 173 Ark. 921, 293 S. W. 1045. In that case it was held that, in an action by the beneficiary to recover on a life insurance policy, nonexpert witnesses may state their opinions as to the physical condition of deceased on the day when he took the fraternal insurance certificate and stated that his health was good.

It was further held that, in an action by the beneficiary to recover on a life insurance policy, the jury's finding that deceased was in good health when he received the policy and stated that his health was good, was conclusive in view of the evidence where the issue was submitted on instructions that plaintiff must prove that no misrepresentation was made and that defendant must prove that deceased was sick when he received the policy. See also *United States Annuity & Life Insurance Company* v. *Peak,* 122 Ark. 58, 182 S. W. 565; *Id.* 129 Ark. 43, 195 S. W. 392, 1 A. L. R. 1259.

This is an application of the well-settled rule that forfeitures are not favored and will not be enforced

unless the provisions of the policy are so plain and unequivocal as to admit of no other construction.

The court properly submitted to the jury whether the insured knew that she was in sound health when she applied for the policy or whether she accepted the policy while in unsound health, knowing that to be a fact. The jury was justified in finding, under the evidence introduced, that, although she may have suffered from diabetes, she believed that she was well at the time she applied for the policy. The fact that she was pursuing her daily vocation of working in a store, and that her outward appearance indicated that she was in sound health, justified the jury in finding in her favor.

No other assignment of error is urged for a reversal of the judgment, and the judgment will therefore be affirmed.

BOONE COUNTY BOARD OF EDUCATION *v.* TAYLOR.

4—2607

Opinion delivered May 30, 1932.

[redacted]

Shinn & Henley and *V. D. Willis,* for appellant.

M. A. Hathcoat, for appellee.

HART, C. J. Appellants prosecute this appeal to reverse a decree of the chancery court sustaining a demurrer to their complaint, and, upon their electing to stand upon their complaint, dismissing it for want of equity.

According to the allegations of the complaint, on the first day of September, 1931, the People's Savings Bank, of Boone County, Arkansas, became insolvent and was taken charge of by the State Banking Department for liquidation under the statute. At that time there was on deposit in said bank $42,697.53 belonging to the various school districts of Boone County. Prior to March, 1931, the People's Savings Bank had been designated by the Boone County court as a depository, and W. W. Wilson, treasurer of Boone County, Arkansas, and the Boone County Board of Education had been depositing the school funds in said bank. On the first day of August, 1931, W. W. Wilson, as said treasurer, and said board of education demanded said bank to conform to act 160, passed by the Legislature of 1931, with reference to securing said school money by the deposit of bonds as provided for in that act. Said bank was unable to comply with the act by the deposit of bonds, and orally agreed with appellants that the school funds at that time on deposit in said bank should remain as a preferred deposit, and that, in case of the insolvency of said bank, any and all school funds would be paid in full in preference to other claims.

The Legislature of 1927 passed an act amending the original act passed by the Legislature of 1913 for the liquidation and control of banks. Acts of 1927, p. 297. The purpose of the act of the Legislature of 1927, just referred to, was to define the relation between creditors of banks in charge of the State Bank Commissioner and to set out how they should be settled with if the banks

were liquidated as insolvent banks. *Taylor* v. *Dierks Lumber & Coal Company,* 183 Ark. 937, 39 S. W. (2d) 724.

The court has also held that the deposit of funds of an improvement district in a bank, although the funds are known to be a trust fund in the hands of the official depositing them, constitute a general deposit in the absence of a written agreement making them a special deposit, as required by said act of 1927. Hence the improvement district stood upon the same footing as other general creditors, and was entitled to no preference or priority of payment. *Taylor* v. *Street Improvement District No. 343,* 183 Ark. 524, 37 S. W. (2d) 84.

It is conceded that the principles of law there announced would control in the present case but for the passage of act 169 by the Legislature of 1931. Acts of 1931, p. 476. This was an act to provide for the organization and administration of the public common schools. It is very comprehensive in its nature and contains 198 sections. Section 74 reads as follows: "Deposit of school funds safeguarded. All general deposits of school funds in banks shall be secured by bonds of the United States, or bonds of the State of Arkansas, or by bonds of a political subdivision thereof, which has never defaulted on any of its obligations, in an amount at least equal to the amount of such deposit, or by a bond executed by a surety company authorized to do business in the State of Arkansas; such surety on such bond to be approved by the commissioner of education. Provided that, if the bank selected by the school board as a depository of its funds shall be unable to secure such school deposit as herein set out, it shall be authorized to accept said funds as a preferred deposit, and, in the event of insolvency, such preferred deposit shall be paid in full before other bank deposits are paid."

The particular part of the section which it is claimed governs the present case is the proviso. According to the allegations of the complaint, the first part of the section was not complied with, but it is claimed that the concluding part of the section contained in the proviso controls

in the instant case. Under the allegations of the complaint, which are accepted as true on demurrer, there was an oral agreement between the county board of education and the county treasurer, on the one hand, and the bank, on the other, that the school funds should be accepted as a preferred deposit and, in the event of insolvency, should be paid in full before other deposits are paid. It is contended that this repeals the act of 1927 above referred to, providing that special deposits, in order to obtain priority, should be created in writing.

We do not agree with counsel in this contention. The two acts of the Legislature are related to each other, and a statute is not to be construed as though it stood alone on any particular subject. It is well settled that repeals by implication are not favored; and, in construing any statute, the court should place it beside other statutes relevant to the subject and give it a meaning and effect derived from the combined whole. Where the harmony of the law requires, one statute may be construed as lengthening out another. So the act of 1931 was passed with reference to the general law upon the subject of winding up insolvent banks and fixing the liabilities and preferences of creditors to each other. Both acts, being related to each other, should be construed together as a part of an entire law of which both are a part. *State* v. *Sewell,* 45 Ark. 387; *Benton* v. *Willis,* 76 Ark. 443, 88 S. W. 1000; *McIntosh* v. *Little Rock,* 159 Ark. 607, 252 S. W. 605; and *Connelly* v. *Lawhon,* 180 Ark. 964, 23 S. W. (2d) 990.

Applying this principle of law to the case at bar, we think the Legislature of 1931, when it provided in the proviso of the section under consideration that a bank should be authorized to accept school funds as a preferred deposit under certain contingencies, meant to use the words in the sense defined by the Legislature of 1927, and meant that, in order for the bank to accept school money as a preferred deposit, the agreement must be in writing, in compliance with act 107, passed by the Legislature of 1927, as construed by this court in the cases above cited.

In this way the two statutes would be read and considered together, and construed as a harmonious whole.

Having reached this conclusion, it does not become necessary for us to consider the other question presented and argued by counsel.

The result of our views is that the decree of the chancery court was correct, and it will be affirmed.

STANFIELD *v.* FRIDDLE.

4—2569

Opinion delivered May 30, 1932.

Evans & Evans and *Cochran & Arnett,* for appellants.

W. L. Kincannon, Rhyne & Shaw and *Roy D. Campbell,* for appellees.

SMITH, J. Appellee filed in the Logan Circuit Court a petition for a writ of mandamus to compel the treasurer of that county to redeem certain county warrants held by him. Interventions were filed by a number of persons holding county warrants, and various questions as to the validity and priority of these warrants have been raised. It will be unnecessary to recite upon what demands those claims arose, as the court's declarations of law, hereinafter set out, are decisive of the questions involved on this appeal; indeed, as appellant states, the questions for decision are questions of law, and not of fact.

The declarations of law which the appeal challenges read as follows:

"1. That the revenue from all sources during the fiscal year must be allocated to the payment of the indebtedness for that year.

"2. That, if there is not enough revenue to pay all demands for said year, then what are termed statutory claims have preference to be paid first, because this character of expense is necessary to the proper operation of the county affairs.

"3. After paying all statutory claims, the contractual claims are to be paid in the order of their allowance by the county court, but in no case to exceed the appropriations for said year on each fund.

"4. I hold that, in so far as the statutory claims are concerned, they have preference right regardless of the amount appropriated for each fund by the levying court.

"5. All claims allowed in excess of the total revenue from all sources are absolutely illegal and void.

"6. All allowances not in excess of the revenue for any fiscal year are legal and valid, and may be paid out of the revenue of the next fiscal year, provided there is a surplus of revenue over the expenditures for such year."

It is at once apparent that a review of these declarations of law entails a further consideration of the effect of amendment No. 10, heretofore frequently referred to as amendment No. 11 (See 184 Ark. XXIX). We have had frequent occasion to interpret this amendment, and more than a score of these cases are cited in the opinion in the case of *Luter* v. *Pulaski County Hospital Association,* 182 Ark. 1099, 34 S. W. (2d) 770. Many, if not all, of these cases have quoted the provisions of the amendment which relate to the questions here under consideration, and they will not be again quoted; nor will we review those cases. It will suffice to summarize their holdings.

It was said in the case of *Luter* v. *Pulaski County Hospital Association, supra,* that amendment No. 10 must now, since the adoption of amendment No. 17, be construed as it reads literally, that is, that contracts and allowances in any year cannot exceed the revenues of that year, not even for a purpose so necessary as that of building courthouses and jails, nor, as was said in that case, for building a county hospital, and we there expressed our unwillingness to hold that there was any exception for which a county might make a contract in excess of its revenues.

The law may therefore be regarded as definitely settled that any contract entered into or allowance made in excess of the revenues of the year in which the contract was entered into, or the allowance made, is wholly void, and the issuance of county warrants based thereon adds nothing to their validity, as the warrants are also void.

Other constructions of the amendment which are apposite here may be briefly stated.

A county may not incur any obligation in any year which exceeds the revenues of that year, and, if this is done, such obligation is void and cannot be paid out of the revenues of the succeeding year. Those contracts entered into, or allowances made, or warrants issued, which did not exceed the revenues of the year in which they were entered into, made or issued, are valid; all others are void.

The holder of a valid warrant may, by an appropriate action, compel the redemption of his warrant, to the exclusion of an invalid warrant, and he may, if necessary, enjoin the redemption of an invalid warrant. The invalid warrants cannot be received by any collecting officer of the county, and the officer who does receive one does so at his peril, and is not entitled to take credit for it in any settlement of his account, because the warrant is void. It is issued without authority, and the action of a collecting officer in receiving it cannot give it validity. Counties (and cities and towns also) must pay as they go, and can go only so far as they can pay, and they are without power to make or authorize any contract or make any allowance or issue any warrant for any purpose whatsoever in excess of the revenues, from all sources, for the fiscal year in which said contract was entered into, or allowance made, or warrant issued.

None of these statements announce any new interpretation of the amendment, but all have been made one or more times in the numerous cases interpreting the amendment, in a more or less futile attempt to coerce the

fiscal officers of the counties, cities and towns of the State to obey the plain mandate of the Constitution.

It is said that certain fiscal officers of Logan County have interpreted the case of *Polk County* v. *Mena Star Co.,* 175 Ark. 76, 298 S. W. 1002, as authorizing an expenditure in excess of the revenue in certain cases. But we do not think the case is open to that construction. We must read that case in the light of the facts there stated. Polk County had not issued bonds as the amendment authorized. It had an outstanding indebtedness at the time of the adoption of the amendment which had not been paid. Its annual expenditures were less than its annual revenues. The redemption of these outstanding warrants exhausted the county's cash, so that money was not available to redeem warrants issued in the then current year, yet we said that this fact did not affect the validity of such warrants, for the reason that their issuance did not increase the county's debt beyond what it was at the beginning of the fiscal year. In other words, a county might operate, although it could not do so on a cash basis. The inhibition of the amendment was and is that a county should not increase its indebtedness, by appropriating and spending in any fiscal year any sum in excess of the revenues of that year.

It was there contemplated that counties might not have the revenues to pay for all the expenditures which are required or allowed by law to be made, and for the guidance of fiscal officers we declared the priority in which contracts should be entered into and allowances made.

We there quoted the sixth subdivision of § 1982, Crawford & Moses' Digest, which directs the order in which quorum courts shall make appropriations. These items, seven in number, were divided into two classes, of which, as we said in the case of *Worthen* v. *Roots,* 34 Ark. 356: "The first four are of an indispensable nature, essential to the support of the government. They are for services that must be performed, or the business of

the counties must stop. The last three are not supposed to be imposed by necessity, but are matters of contract."

Defining the duties of quorum courts under this statute, limited as it is, of course, by the constitutional amendment, it was there said: "They should first make ample provision for those necessary expenses imposed on the counties by law, including outstanding warrants payable in that year, as, for instance, an installment due for construction of a courthouse; and, after having done this, they are at liberty to make appropriations of part or the whole of the remainder of the revenue for the purposes provided by items 5, 6 and 7, but they cannot exceed the amount of the revenue for the fiscal year," not for items 5, 6 and 7 merely, but for these or any other purpose.

Now this case did decide that those items designated as indispensable must first be paid before other items merely permissible under the law were paid. In other words, counties could not make allowances to cover the permissible items until they had first made allowances for the indispensable items essential to the support of the government. Having made allowances for the indispensable items, allowances could thereafter be made for the permissible items, provided the combined allowances did not exceed the revenues. Those allowances not in excess of revenues were valid; all others were void.

We did not decide in that case, as is here argued, that warrants to be valid must be redeemable in the year of their issuance. The holding in that case, when applied to the facts there stated, is expressly to the contrary. The point decided was that warrants were valid, although they could not be redeemed in the year of their issuance because the redemption of valid warrants issued in the previous year had exhausted the county's cash. Such warrants were valid notwithstanding the fact that they could not be redeemed in the year of their issuance, because their issuance was not in excess of the revenues of the county in the year in which they were issued.

The point primarily involved in the Mena Star case, *supra,* was the right of a county to pay its current bills in the year in which they should be paid, and such bills were and are paid, within the meaning of the constitutional amendment, when a valid allowance thereof is made by the county court, pursuant to which order a valid county warrant is issued.

The case of *Miller* v. *State to use of Woodruff County,* 176 Ark. 889, 1 S. W. (2d) 998, is cited as holding that valid warrants coming over from a previous fiscal year cannot be redeemed until all warrants issued in a particular fiscal year have been first redeemed. But such is not the holding in that case. The trial judge so held, but we reversed that judgment. We there pointed out that in the Mena Star case, *supra,* allowances were made by the county court in the year 1925 which did not equal the revenues of that year, but the redemption of valid outstanding warrants out of the revenues of that year made it impossible to redeem all the claims contracted and allowed that year. This was true also in the year 1926, so that there remained outstanding warrants which could not be redeemed. It was held that these facts did not prevent the county from contracting obligations which could be paid only by the issuance of warrants which could not be redeemed out of the revenues of 1926, and that such obligations might later be paid. We there concluded the discussion of this question with the following statement: "But here, as in the case of *Polk County* v. *Mena Star Co., supra,* expenditures have not exceeded revenues. The receipt by the collector and the redemption by the treasurer of valid warrants, which those officers could not refuse when tendered in payment of any demand due the county, made it impossible to redeem all the warrants issued in the year 1927, but those unredeemed in the year of their issuance may be redeemed, as was said in that case, out of the revenues of a subsequent year, and this is true because, in so doing, the indebtedness of the county is not increased."

If it were held that warrants issued in a particular year must first be redeemed out of the revenues of the year of their issuance before valid warrants previously issued may be redeemed, it would follow, as a practical result, that many of such previous warrants would never be redeemed.

In the instant case, expenditures have exceeded revenues, and in most of the cases which have come before us for review there has been but little, if any, excess of revenues over expenditures, and if the redemption of these previous valid warrants must be postponed until all current warrants have been redeemed, the value of the previous warrants would be destroyed, as in many cases their redemption would be impossible, and in all cases uncertain.

The redemption of warrants is a different matter which we now proceed to discuss.

Now, while, as we have said, a county must first pay its indispensable obligations before paying those which are permissible merely, yet both are paid, within the meaning of the amendment, by the county when allowances therefor are made, pursuant to which allowance warrants are issued, and these warrants, when issued, are equally valid, regardless of the purposes for which they were issued, and their priority in the matter of redemption or payment by the county treasurer thereafter depends, not upon the purpose for which they were issued, but upon the date of their issuance. The warrants thus issued are equally valid, if they are not in excess of the revenues of the year in which they were issued, and their validity is unimpaired because they cannot be redeemed by the county treasurer when the redemption of prior valid warrants has exhausted the county's supply of cash. That is the essence of the decision in the Mena Star case, *supra*.

The case of *Stanfield* v. *Kincannon, ante* p. 120, considered the order of payment of valid county warrants. It is true the warrants there issued were drawn against a fund not derived from county revenues, but from a gra-

tuity provided by the State for the benefit of the counties of the State, which fund was not, for that reason, subject to amendment No. 10. But it is true also that the statutes there construed did relate to warrants drawn against county revenues.

Section 2007, Crawford & Moses' Digest, there quoted, was passed in 1846, which was, of course, long before there was any such fund as a county turnback fund, provided by the generosity of the State, and that statute, at the time of its enactment and at all times since, has applied to county scrip or warrants, which we there held to be identical terms covering vouchers drawn against county revenues. That case disposed of the question of priority here presented, and in the construction of the act of 1846 we said: "This section applies in this case, as the treasurer is not able to meet all demands against him drawn on the county highway fund. We think it applies in all such cases and not merely to warrants issued in cancellation of scrip or warrants previously issued. Otherwise injustice might, probably would, result on account of favoritism. This view is strengthened by a reading of § 3 of said act. It provides 'that all county scrip or warrants * * * shall be received, irrespective of their number and date in payment of all taxes, duties, fines, penalties and forfeitures, accruing to said county.' The necessary inference is that, except for the purposes named in § 3, all scrip or warrants shall be redeemed in the order of their number and date, if the treasurer is not able to meet all demands. No distinction is to be made between scrip and warrants, as the terms are used interchangeably in the act. This meaning of the act was recognized by this court in *Crudup* v. *Ramsey,* 54 Ark. 168, 15 S. W. 458, in an opinion by Judge HEMINGWAY, where he said, in reference to the act of 1846, now under consideration: 'This is a part of an act which provided that warrants should be paid in the order of their number, and that no warrants should be paid until all of a prior date had been paid or provided for. * * * Its manifest purpose was to provide that warrants should be received in payment of

taxes and dues to the county, even though there were prior warrants not paid or provided for.' And the same meaning of the act was recognized in *Graham* v. *Parham,* 32 Ark. 677, 694, where Mr. Chief Justice ENGLISH used this language: 'County warrants shall be redeemed and paid by the county treasurer in the order of their number and date, and no warrant shall be thus paid until all of a prior date are paid, provided the county treasurer upon whom the warrants are drawn shall not be able to meet all demands upon the treasury. Acts December 17, 1846, § 2; Gantt's Dig., § 1042.' This cannot be avoided by making warrants payable in the future."

Valid warrants must therefore be redeemed by the county treasurer in the order of their issuance when cash is available for that purpose, but, as was said by Judge HEMINGWAY in the case of *Crudup* v. *Ramsey, supra,* warrants may be received in payment of taxes and dues to the county, even though there were prior warrants not paid or provided for. The sentence following the language quoted from Judge HEMINGWAY's opinion in the Stanfield case, *supra,* reads as follows: "It" (the statute above referred to) "was designed to make the date of a warrant, in so far as it was later than others, immaterial when it was offered in payment of taxes and dues—nothing more."

The quotation from the case of *Miller* v. *State, to use of Woodruff County, supra,* herein appearing, is to the same effect. While, therefore, warrants may be used in payment of taxes or dues to the county regardless of their priority as to date, the warrants must, so far as their redemption by the county treasurer by payment in cash is concerned, be in the order of their priority as to number and date.

The judgment of the court below will be reversed, and all the declarations of law made at the trial from which this appeal comes, set out above, will be modified to conform to the views here expressed, and upon the remand of the cause the court will adjudge the rights of

the various parties in accordance with the principles here declared.

HART, C. J., and MEHAFFY, J., dissent in part.

GATES *v.* REESE.

4—2572

Opinion delivered May 30, 1932.

David A. Gates, Earl R. Wiseman and *Jay M. Rowland,* for appellant.

A. T. Davies, for appellee.

HUMPHREYS, J. Appellant proceeded under § 69 of act 65 of the Acts of 1929 to collect from appellee the privilege tax provided for in acts Nos. 62 and 65 of the Acts of 1929 for operating a motor vehicle for compensation for the transportation of persons, property, or freight.

Appellee brought this suit in the chancery court to enjoin appellant from proceeding further in the collection of said privilege tax upon the alleged grounds: first, that said tax is confiscatory in that it is greater than the earnings of the business; and, second, because their particular business did not constitute an operation of motor

vehicles for compensation for the transportation of persons, property, or freight.

A demurrer was filed to the complaint, which was overruled, and the case was tried upon the following agreed statement of facts:

"The parties to the above entitled and numbered cause agree that the following is a statement of facts upon which judgment shall be rendered therein, in so far as the said judgment of the court applies to the liability or nonliability of the defendants for the payment of the 4 per cent. vehicle tax, the controversy therein being submitted to the court upon the same as such agreed statement of facts.

"That in this case, David A. Gates, Commissioner of Revenues of the State of Arkansas, has filed with the circuit clerk a certified judgment as to the amount of motor vehicle tax due the State of Arkansas from the petitioners herein, and upon said judgment an execution has been delivered to the sheriff as provided by law, and the said sheriff has endeavored to make a levy upon said execution, and the petitioners herein have applied for an injunction to prevent the sheriff from levying upon their property, claiming that they do not owe the State anything, and that the particular part of their business in question is not subject to the 4 per cent. motor vehicle tax.

"That the petitioners operate what is known as a wrecker, and use it for the purpose of going out on the highways and streets to tow disabled automobiles into their garage for repair, and, while so doing, they carried automobile parts, oil, gasoline, tires, etc., and they hold themselves out to the public as ready to undertake this service in the city of Hot Springs and along public highways in the country and, by advertising they solicit patronage of the public and do a general business with the public, and solicit business from the public.

"That the period for which the Commissioner of Revenues estimated the tax due begins August 1, 1929, and ends December 31, 1930.

"That there has been no audit made by the revenue department as to the amount of gross income received by the petitioners herein from this source, and it is agreed that, in the event they are held liable to pay a tax, then the department shall have a right to check their books, as provided by the law, to arrive at the actual amount taxable during the period that the motor vehicle tax has been in force."

Upon a hearing of the cause, the trial court permanently enjoined the collection of the tax in question.

Under the ruling in *Fitzgerald* v. *Gates,* 182 Ark. 655, 32 S. W. (2d) 634, the court should have sustained the demurrer to paragraph No. 1 of the complaint, which merely alleged that the law as applied to appellees' business would confiscate his property without due process of law.

Under the ruling in the case of *Merchants' Transfer & Warehouse Co.* v. *Gates,* 180 Ark. 96, 21 S. W. (2d) 406, the business conducted by appellee comes clearly within the statute under the agreed statement of facts, and is subject to the 4 per cent. privilege tax provided for in § 67 of act 65 of the Acts of 1929. This class of motor vehicles was not exempted by act No. 239 of the Acts of 1931 from the collection of the 4 per cent. privilege tax as contended by appellee.

On account of the error indicated, the decree is reversed, and the cause is remanded with directions to dissolve the injunction, and to dismiss appellee's complaint.

HALBROOK *v.* WILLIAMS.

4—2576

Opinion delivered May 30, 1932.

E. W. Moorhead, for appellant.

Frauenthal, Sherrill & Johnson, for appellee.

McHaney, J. On July 1, 1931, appellee's intestate, B. M. Morgan, was driving his Ford coupe south on Palm Street in North Little Rock and was crossing Second Street when his car was struck near the rear end by the Chevrolet car of appellant going east on Second Street with such force and violence as to tear off the right rear wheel of the Ford, causing it to reverse its direction, and throwing Mr. Morgan and his wife, who was riding with him, to the pavement, killing both of them. Mr. Morgan was killed instantly. Mrs. Morgan died some hours later without regaining consciousness. Separate suits were brought by appellee as administratrix of both estates for the benefit of their four minor children, the oldest being a boy 17 years of age, and the youngest a girl of 7. A recovery was also sought for pain and suffering, but, as the proof failed to develop any consciousness of either after the accident, the court properly

declined to submit that element of damages to the jury. The cases were consolidated for trial which resulted in a verdict and judgment in each case of $15,000 against appellant.

Five grounds are urged for a reversal of these judgments as follows:

1. When the jury was being impaneled, counsel for appellant asked all the members of the panel if they had "any connection or relationship with the Standard Casualty & Surety Company of New York." And further if they "had such relationship with any such company or any surety company that insures persons against liability." At the first intimation of such questions being propounded to the jury, counsel for appellant stated to the court in the absence of the jury that he offered to prove in the absence of the jury by its general agent for Arkansas that "none of this jury is connected with the general agency or any local agency," and by its general counsel that none of the jury had any interest in the company as stockholders. The court then inquired of counsel for appellee if he had any reason to believe appellant had liability insurance, and he answered that he knew such to be the fact. The two questions as above stated were then permitted to be asked the jury over appellant's objections and exceptions. Even though appellant had made the proof offered, which he did not, and even though it be accepted as true, it would not preclude the questions, as it did not go as far as they did. The jurors or some of them might have had some relationship or connection with the particular company mentioned or some other surety company so as to make them undesirable jurors, and still not have been connected with any agency or held any stock in the particular company. We have many times held that similar questions may properly be asked the veniremen for the purpose of intelligently exercising the right of challenge. *Smith-Arkansas Traveler Co.* v. *Simmons,* 181 Ark. 1024, 28 S. W. (2d) 1052; *Ellis & Lewis* v. *Warner,* 182 Ark. 613, 32 S. W. (2d) 167; *Bourland* v. *Caraway,* 183 Ark. 848, 39 S. W. (2d) 316; *Sutton*

v. *Webb,* 183 Ark. 865, 39 S. W. (2d) 865. No error was committed, therefore, in this regard.

2. It is insisted that appellee is barred from recovery because of the contributory negligence of Mr. and Mrs. Morgan. We do not review the evidence, as we think no useful purpose could be served in doing so. We have carefully read the testimony of the witnesses for both sides, and have reached the conclusion that there was very substantial evidence that appellant was negligent, and that the deceased persons were not. At least, we cannot say, as a matter of law, that the latter were guilty of contributory negligence preventing a recovery. The court properly submitted this question to the jury, and, there being substantial evidence to support the verdict, it is binding here.

3. It is suggested that the court erred in permitting a police officer to testify over appellant's objection that another officer arrested appellant shortly after the accident. There was no error in this regard, but, even so, it could not be prejudicial as the other officer so testified without objection, and appellant himself testified that he was arrested by such other officer.

4. Complaint is also made of the giving of certain instructions and the refusal to give certain others at appellant's request. For instance instruction No. 2, given at appellee's request, told the jury that if they believed from the evidence that Mr. and Mrs. Morgan were proceeding south on Palm at its intersection with Second in the exercise of ordinary care, and, while in said intersection, appellant negligently drove into same and struck the Morgan car and negligently caused their deaths without fault on their part, a recovery should be had in each case. This instruction is criticised on the grounds that it disregarded the duty imposed on them to look to the right and yield the right-of-way to cars approaching from the right. A city ordinance so provides, but we held in *Murray* v. *Jackson,* 180 Ark. 1144, 24 S. W. (2d) 960, that a vehicle having first entered an intersection had the right-of-way over a vehicle which had not, under a

like municipal ordinance. In this case the evidence was sufficient to establish the fact that the Morgan car entered the intersection first and was crossing the south rail of the street car track before appellant's car struck it. The instruction under discussion was in line with the holding in *Murray* v. *Jackson* by saying: "And that while in said intersection the defendant * * * drove into said intersection and ran his car against the car of B. M. Morgan and in doing so he was negligent and his negligence caused the collision," etc. In *Jacks* v. *Culpepper,* 183 Ark. 505, 37 S. W. (2d) 94, we held that a similar ordinance does not require one who has actually entered the intersection to yield the right-of-way to one whose car is approaching but has not entered the intersection. We cannot discuss in detail all the errors argued relative to instructions, as to do so would extend this opinion beyond due bounds without accomplishing any practical result. We have examined the argument made on the several assignments and find it without substantial merit.

5. It is finally suggested that the verdicts are excessive. We do not think so. Four children were deprived of both mother and father in the same tragedy. The oldest, a boy, was 17 years of age. There were three little girls, age 14, 11 and 7. The father was earning $100 per month and was supporting and educating them with the help of his wife who looked after them and operated a grocery store in connection with the residence. They were shown to be a happy and contented family with ambition to educate and properly rear their children. The value of the counsel, advice, guidance, loving care and solicitude of both mother and father would be difficult of ascertainment in money and must be left to the sound judgment of the jury where it is not shown that such judgment has been swayed beyond reason and common sense by passion or prejudice. In addition the father was earning $1,200 per year, which was devoted to family purposes. Under these circumstances, we cannot say the judgments are excessive.

We find no error, and the judgments are accordingly affirmed.

COLUM *v.* IMBODEN.

4—2571

Opinion delivered May 30, 1932.

[redacted]

Edward Gordon, for appellant.

J. W. Johnston and *Carroll W. Johnston,* for appellee.

BUTLER, J. This is a suit to recover the purchase price of a bill of material amounting to $118.51, alleged to have been sold by appellee to appellant, who defended upon the ground that the material had not been sold to him, and that he had not agreed to pay for it. Appellee testified, and he was corroborated in this testimony by other witnesses, that he sold the building material to appellant, but had delivered it, at appellant's direction, to W. S. Birt, who testified that the lumber had been sold to him and upon his credit, and that Colum did not buy it or agree to pay for it.

This issue of fact was submitted to the jury, and is concluded by the verdict of the jury in appellee's favor.

The defendant asked an instruction, which the court refused to give, reading as follows: "No. 1. The jury are instructed that no contract for the sale of goods, wares and merchandise for the price of $30 or upward shall be binding upon the parties unless first, there be

some note or memorandum signed by the party to be charged; or second, the purchaser shall accept a part of the goods so sold and actually receive the same; or third, shall give something in earnest to bind the bargain or in part payment thereof."

This instruction is, of course, a correct declaration of the law; indeed, it is a copy of § 4864, Crawford & Moses' Digest, but no error was committed in refusing to give it, for the reason that the instruction is not applicable to the controlling issue of fact. According to the undisputed evidence, there was a sale, pursuant to which there was an actual delivery of the goods sold, and the material was used for the purpose for which it was bought. *Chalfant* v. *Haralson,* 176 Ark. 375, 3 S. W. (2d) 38.

The controlling question in the case is the one of fact: To whom was the sale made? The plaintiff did not contend that he sold the material to Birt upon Colum's promise to see the debt paid. A contract of sale of that character could not be enforced against Colum unless the agreement to pay Birt's debt had been evidenced by a writing signed by Colum. Section 4862, Crawford & Moses' Digest. It is unnecessary to review any of the numerous cases which have construed this statute and defined the difference between original and collateral promises. The plaintiff's testimony was to the effect that Colum and Birt came together to his place of business; that he did not know Birt, and that no credit was extended to him; that he did know Colum and knew him to be responsible, and made the sale directly to Colum, and charged the material, at the time of the sale, to Colum, and made no charge against Birt. It is true the material was delivered to Birt, but plaintiff testified that this was done pursuant to the contract of sale and under Colum's direction. If this was true, the sale was to Colum, and the statute of frauds does not apply. As we have said, this issue of fact was submitted to the jury, and is controlled by the verdict returned in the case in appellee's favor.

The judgment must be affirmed, and it is so ordered.

MEYERS *v.* STATE.

Criminal No. 3788

Opinion delivered May 16, 1932.

[redacted]

E. L. Holloway and *C. O. Raley,* for appellant.

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

McHANEY, J. Appellant was convicted of the crime of seduction and sentenced to three years in the peniten-

tiary. A number of errors are assigned and urged for a reversal of the cause.

It is first argued that the court erred in overruling his motion for continuance on account of the absence of certain witnesses, but his motion in this regard failed to allege one of the necessary statutory grounds for a continuance,—that he believed the testimony of the absent witness to be true. Section 1270, Crawford & Moses' Digest; *Estes* v. *State,* 180 Ark. 656, 22 S. W. (2d) 172; *Weaver* v. *State, ante* p. 147. It is not error for the trial court to deny motion for continuance where the motion fails to allege the grounds specified in the statute.

It is next argued that the evidence given by the prosecuting witness fails to establish an express promise of marriage, but that such promise was only conditional, that is, that he promised to marry her only in the event of pregnancy. An examination of the evidence of the prosecuting witness, however, especially upon the examination by the court, tends to establish the fact that there was an express promise of marriage, and that she would not have yielded to his embraces upon a mere promise to marry in the event of pregnancy. In this respect this case is similar to that of *Woodard* v. *State,* 140 Ark. 258, 215 S. W. 708. Moreover, the court submitted that question to the jury by telling them that if the promise of marriage was conditional only, such a promise would not be an express promise, and that their verdict should be not guilty. See also *Bethel* v. *State,* 180 Ark. 290, 21 S. W. (2d) 176. The jury under a proper instruction has decided this point adversely to appellant.

Complaint is next made of the admission of the testimony of the witness Lela McDonald for the State. She was permitted to testify, over appellant's objection, that the prosecutrix showed her a letter signed with appellant's name and written to the prosecutrix in which he said: "We will marry soon and be happy." This testimony was permitted after the prosecutrix had testified that she had received several letters from appellant, but

that when he came to see her in September following a visit in May, at her request, so that she might inform him of her condition, he procured the letters and burned them. The purpose of this evidence was to corroborate the prosecutrix concerning the promise of marriage, and we are of the opinion that, since the letters received by her from appellant were shown to be destroyed, it was competent to prove the contents of the letters or one of them by secondary evidence, even though the witness could not testify that the letter she read was actually written by appellant. She did not know his handwriting. *Patrick* v. *State,* 135 Ark. 173, 204 S. W. 852. Moreover, even though it should be held that the testimony was incompetent, it would not be prejudicial as there was other substantial evidence to corroborate the prosecutrix as to the promise of marriage.

It is next urged that the evidence is insufficient to support the verdict and judgment against him. Under our statute the prosecuting witness must be corroborated to sustain a conviction of the crime of seduction both as to the promise of marriage and the act of intercourse. The corroboration need not be direct evidence but may be and most frequently is circumstantial in character, as from the nature of the offense would necessarily be true. Convictions have been many times sustained by this court where the corroborative evidence was merely circumstantial and slight in character, the final determination of the question being for the jury where there is some evidence of corroboration. *Brooks* v. *State,* 126 Ark. 98, 189 S. W. 669; *Jackson* v. *State,* 154 Ark. 119, 241 S. W. 862; *McMaster* v. *State,* 163 Ark. 194, 260 S. W. 45. The father of the prosecutrix testified as follows: "No, sir. Nothing more than his sister hatched out his chickens, and he brought them over there and asked us if we could raise them, and so him and Francis (the prosecutrix) could have something to start on this fall; him and Francis could have chickens to start keeping house this fall, so they could have chickens." It was

also shown that appellant "kept company" with the prosecutrix for about three years, and it was shown that she was pregnant at the time of trial and had been for a period of time back to about the time he quit going with her. There are many cases decided by this court holding such evidence sufficient to corroborate the prosecutrix as to both the promise of marriage and the illicit relation, some of the later cases being *Sloan* v. *State,* 172 Ark. 44, 287 S. W. 598; *Taylor* v. *State,* 174 Ark. 800, 297 S. W. 854; *Phillips* v. *State,* 182 Ark. 70, 30 S. W. (2d) 817.

It is next insisted that the court erred in permitting Dr. F. H. Jones to testify, after the State had rested its case, that he had made an examination of the prosecutrix, found her to be pregnant and from his examination he judged that she conceived about the middle of May preceding. There was no error in this regard. *Hannah* v. *State,* 183 Ark. 810, 38 S. W. (2d) 1090; *Simmons* v. *State,* 184 Ark. 376, 42 S. W. (2d) 549.

It is finally insisted that the court erred in giving instruction No. 4 over his objection. This instruction told the jury that lack of chastity by the prosecutrix was a defense, but that the burden of proving same by a preponderance of the evidence was upon appellant. This instruction was not erroneous on this ground. There is a presumption of chastity, and the burden is upon him who alleges the contrary to establish the fact by a preponderance of the evidence. *Taylor* v. *State, supra.* The court correctly told the jury in instruction 7 that if on the whole case the jury had a reasonable doubt of appellant's guilt it would be their duty to acquit him.

We find no error, and the judgment is affirmed

RICE GROWERS' CREDIT CORPORATION *v.* WALKER.

Opinion delivered May 2, 1932.

M. F. Elms and *W. A. Leach,* for appellant.

Ingram & Moher, for appellee.

HART, C. J., (after stating the facts). The chancery court erred in its finding and decree. The law is well settled that, where a creditor receives from his debtor the note or bill of a third person, the presumption is that he takes it by way of security. *Bank of Hatfield* v. *Bruce,* 164 Ark. 576, 262 S. W. 665; *Hume* v. *Indiana Nat. Life Ins. Co.,* 155 Ark. 466, 245 S. W. 19.

The record shows that appellant had made advances to appellee with which to make a rice crop and took a mortgage on the crop to secure the payment of the indebtedness. Appellee sold the crop and delivered to appellant an instrument called a trade acceptance on McGill Brothers for $4,920.89. The acceptance appears on the face of the instrument, but the amount was not paid because, before it became due, McGill Brothers, on whom it was drawn, became insolvent. According to the evidence of appellant, the draft or trade acceptance upon

McGill Brothers was not received by it as an absolute payment. The source of payment provided having proved unproductive, appellant had the same recourse upon appellee as it had in the beginning. There is no evidence that appellant intended to release appellee. The draft or trade acceptance upon McGill Brothers and their acceptance were equivalent in legal effect to the receipt by appellant of a bill or note of McGill Brothers drawn to the order of appellant.

In *Akin & Company* v. *Peters,* 45 Ark. 313, it was held that the acceptance by a creditor of the note or bill of a third party for his debtor's debt does not discharge the debtor, unless so specially agreed by the party. In discussing the question the court said "*Prima facie* such an instrument is conditional, not absolute payment. It operates only as a collateral security. It does not take the place of the debt, but is placed in the hands of the creditor to make him safe. And, in the event of the nonpayment of the security, the debtor remains liable for his own debt. If the transaction has any greater efficacy—as of course it may have by special agreement of the parties—it is for the debtor to show it. Extinguishment of his own debt does not follow as a consequence, unless that was a part of the contract."

It is also insisted that the draft was not presented when due and notice given of the nonpayment within the time prescribed by our Negotiable Instruments Act. The draft was accepted for payment by McGill Brothers on May 11, 1931. The manager of the Rice Growers' Credit Corporation took the draft to St. Louis with him and offered to deposit it with its bank, the Intermediate Credit Bank of St. Louis, with which it did business. The bank refused to accept the draft as a deposit, but stated that they had better leave the draft with the bank for collection. This was done.

On the back of the draft we find the following indorsements—C. A. Walker, R. B. Westbrook, Rice Growers' Credit Corporation, by R. B. Westbrook, Sec'y; Pay to the order of People's Nat. Bank of Stuttgart, Ark-

ansas; for collection and remittance Federal Intermediate Credit Bank of St. Louis, Mo., by Wood Netherland.

The draft was protested for nonpayment on May 13, 1931. The protest notice was mailed to C. A. Walker at Stuttgart, Arkansas, which was his postoffice address. The postmark shows May 14, 1931.

A check must be presented for payment within a reasonable time, the question of what is a reasonable time depending upon the circumstances of the particular case. *Federal Land Bank of St. Louis* v. *Goodman,* 173 Ark. 489, 292 S. W. 659; *George H. McFadden Brothers' Agency* v. *Keesee,* 179 Ark. 510, 16 S. W. (2d) 994; and *Board of Directors of St. Francis Levee District* v. *Hagan,* 180 Ark. 33, 20 S. W. (2d) 314.

The draft was presented within a reasonable time under the circumstances of this case by the bank at St. Louis with which it was left for collection. The draft was duly protested on the 13th day of May, 1931, and the postmark of the protest notice was May 14, 1931. The postoffice address of C. A. Walker was Stuttgart, Arkansas, where the draft was protested and where the protest notice was mailed. This was sufficient notice of dishonor under our statute. Crawford & Moses' Digest, § 7869.

In the application of these well-settled principles of law, it follows that the court erred in dismissing the appellant's complaint. Therefore the decree will be reversed, and the cause remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion. It is so ordered.

UNIVERSAL AUTOMOBILE INSURANCE COMPANY *v.* DENTON.

4—2532

Opinion delivered May 16, 1932.

Buzbee, Pugh & Harrison and *Roberts & Stubblefield,* for appellants.

McMillan & McMillan, for appellee.

SMITH, J. This suit was brought by appellee against the following defendants: Mrs. L. E. Davis, as administratrix of the estate of Louis Davis, her deceased husband; Universal Automobile Insurance Company, hereinafter referred to as the insurance company; the Standard Oil Company of Louisiana, hereinafter referred to as the oil company, Horace Thornton, and W. H. Greene.

The suit arose out of the following facts. The plaintiff was driving in a northerly direction in a truck loaded with lumber. An oil truck belonging to the oil company was being driven along the same road in a southerly direction. Horace Thornton was driving this oil truck. Following this oil truck, and traveling the same direction, was an automobile owned by W. H. Greene, and driven by Louis Davis. The insurance company had issued to Greene a policy of insurance, which will hereinafter be discussed. Denton, the plaintiff, testified that he first saw the oil truck as it came over the top of a hill which the road traversed, and that this truck bore to the right

of the road as it approached him, but that it would not have struck his car, even though Thornton had not pulled over to the right. That just before the oil truck passed him he saw the car driven by Davis come from behind the oil truck, and that he turned his car to the right as far as he could—so far, in fact, that he ran the wheels on the right side of his truck off the road. It was getting dark, and the oil truck had its light on, and was traveling at a moderate rate of speed. Just as plaintiff turned his car to the right as far as safety permitted, Davis drove his car between the trucks, and, as space was not afforded for its passage, a collision occurred between Davis' car and plaintiff's truck. The oil truck passed on in safety without being involved in the collision. Davis was killed as a result of the collision, and plaintiff was seriously injured. He recovered judgment against all the defendants for $2,000, and all have appealed except Greene. No contention is made that the judgment is excessive.

Liability against Davis is asserted upon the ground that he negligently and recklessly drove his car between the passing trucks, and the testimony fully sustains that contention. Two witnesses who were riding in the car with Davis testified that they first saw the oil truck when it was a hundred or two hundred yards ahead of them, and that the oil truck was on the right-hand or west side of the center of the road, and continued on that side all the time. Davis overtook the oil truck just before it passed the plaintiff's truck, and as he turned to the east or left side of the road the collision occurred. Davis at the time was driving about 35 or 40 miles per hour.

Thornton testified that he was going down grade on the west or right-hand side of the hill, and met Denton coming up the grade on the east side, and that he had gone 30 or 40 feet beyond appellee's car when the collision occurred, and that he did not know the Davis car was attempting to pass him.

Liability against the oil company is asserted upon the theory that Thornton, the driver of its truck, was negligent in not anticipating that Davis was trying to

pass him just after the cars reached the top of the hill, and in not affording Davis space so to do by turning farther to the right. At the place of the collision the road was slightly less than 26 feet wide, with low embankments and sloping ditches about 8 or 10 inches deep. The road was straight. Thornton first saw in his mirror the light of the Davis car when it was about 200 yards away, and knew that it was overtaking him. Appellee says the oil company truck was traveling about 40 feet per second, which is about 27 miles per hour, and that the Davis car was traveling about 60 feet per second, which was nearly 41 miles per hour. The testimony is conflicting as to whether Davis blew his horn. Thornton testified that he did not hear it. It is appellee's theory that when the Davis car reached the crest of the hill Thornton knew it was following him, and knew, or should have known, that Davis was about to pass him, and should have driven his car to the extreme right-hand side of the road to give sufficient space for passing.

Under these facts the jury was warranted in finding that the collision was the result of Davis' negligence, and that appellee was not guilty of any negligence contributing to his injury, and the judgment against the Davis estate must therefore be affirmed.

We are also of the opinion that, under the facts stated, the oil company is not liable, and that the sole cause of the collision was the negligence of Davis.

At § 121, vol. 3-4, page 194, Huddy's Cyclopedia of Automobile Law, it is said: "The driver of a motor vehicle overtaking another vehicle is in duty bound to look out for the car ahead, and, if such vehicle is motor driven, he must realize that the driver is engaged in handling a high-power, dangerous machine, requiring constant attention and quick action, and that his lookout is ahead and not behind. An automobilist has no right to assume that the forward conveyance will turn out to permit him to pass. He cannot drive his car ahead and take the chance that the forward vehicle will move to one side in time to permit him to make a safe passage. It is

the duty of the rear driver to keep a safe distance between the vehicles, and to keep his machine well in hand, so as to avoid doing injury to the machine ahead, so long as the driver is proceeding in accordance with his rights. Before attempting to pass the vehicle ahead, the rear driver must see that the road is clear, and, if there is not sufficient room for a safe passage, or the driver ahead does not turn out so as to afford opportunity to pass, or if, after attempting to pass, the driver of the overtaking vehicle finds that he cannot make the passage in safety, the latter must slacken his speed so as to avoid the danger of a collision, even bringing his car to a stop if necessary. In passing, the overtaking car should leave reasonable space between it and the overtaken vehicle, so as to avoid any danger of striking it."

The numerous cases cited in the note to the text quoted sustain the text.

A similar statement of the law appears in § 8, of chap. 21, entitled, "Following, Overtaking, and Passing Other Vehicles," in vol. 1 of Blashfield's Cyclopedia of Automobile Law, page 433.

The relative rights and duties of drivers of cars passing each other on the highways of the State have been declared in this State by a statute on the subject.

At the 1927 session of the General Assembly of the State of Arkansas a comprehensive act was passed, entitled, "A Uniform Act Regulating the Operation of Vehicles on Highways." Act 223, Acts 1927, page 721. Section 13 of this act reads as follows:

"13. Limitations on Privileges of Overtaking and Passing.

"(a) The driver of a vehicle shall not drive to the left side of the center line of a highway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.

"(b) The driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction

upon the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed within a distance of 500 feet.

"(c) The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing nor at any intersection of highways unless permitted to do so by a traffic or police officer."

In the case of *Madison-Smith Cadillac Co.* v. *Lloyd,* 184 Ark. 542, 43 S. W. (2d) 729, it was said that the law of the road is that the automobile in front has the superior right to the use of the highway, even 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. See also *Kittrell* v. *Wilkerson,* 177 Ark. 1174, 9 S. W. (2d) 788; *Bourland* v. *Caraway,* 183 Ark. 848, 39 S. W. (2d) 316.

Under the law of this State, as declared in the statute quoted above, Davis should not have attempted to pass the oil company truck until he had seen that he could do so safely, and his action to the contrary, under the undisputed evidence in the record before us, must be held to be the sole proximate cause of the collision. It follows therefore that it was error not to have directed a verdict in favor of the oil company and of Thornton, the driver of its truck.

As has been said, judgment was rendered against the insurance company, which issued the policy which Greene carried, and the insurance company has appealed.

Two of the relevant paragraphs of the policy mentioned read as follows:

First: "The company does hereby agree to insure the assured named and described in the 'Schedule of Statements' herein, for the term therein specified, against direct loss by reason of liability imposed by law upon the assured for damages by reason of the ownership or maintenance of the automobile described in statement 6 of the 'Schedule of Statements,' and the use thereof for

the purposes described in statement 7 of the 'Schedule of Statements' (including loading and unloading thereof), to an amount not exceeding the limits hereinafter stated, if such loss be sustained on account of bodily injuries or death, etc."

Second: "It is understood and agreed that the insolvency or bankruptcy of the assured or other persons entitled to benefit hereunder shall not release the company from the payment of damages for injuries or loss occasioned during the life of the policy. In case execution against the assured or such other defendants is returned unsatisfied in an action brought by the injured (or if death results from the accident by such other parties in whom the right of action vests) an action may be maintained by the injured person (or such other parties in whom the right of action vests) against the company for the amount of the judgment of said action not exceeding the amount of the policy."

At the 1927 session of the General Assembly an act was passed to regulate accident and liability insurance companies doing business in this State. Act 196, Acts 1927, page 667. This act reads as follows:

"Section 1. On and after the passage of this act no policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or against loss or damage to property caused by horses or by any vehicles drawn, propelled or operated by any motive power, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this State by any corporation authorized to do business in this State, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case

death results from the accident, because of such insolvency or bankruptcy, that then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy.

"Section 2. Whenever any policy of insurance shall be issued in this State indemnifying any person, firm or corporation against any actual money loss sustained by such person, firm or corporation for damages inflicted upon the property or person of another, such policy shall contain a provision that such injured person, or his or her personal representative, shall be subrogated to the right of the assured named in such policy, and such injured person, or his or her personal representative, whether such provision be inserted in such policy or not, may maintain a direct cause of action against the insurance company issuing such policy for the amount of the judgment rendered against such assured, not exceeding the amount of the policy."

It thus appears that § 2 of this act writes into the policies named in § 1 the provisions of § 1, whether they are recited in the policies or not.

Section 1 of this act is copied almost literally from an act passed in New York in 1918. (Laws of 1918, chap. 182), and the constitutionality of the act was upheld by the Supreme Court of the United States in the case of *Merchants' Mutual Automobile Liability Insurance Co.* v. *Smart,* 267 U. S. 126, 45 S. Ct. 320, 69 L. ed. 538. The New York statute has no section corresponding to § 2 of our act, set out above.

The policy issued to Greene was evidently prepared to conform to the New York statute, as well as our own, and it contains the paragraph concerning the insolvency of the assured, set out above.

It was insisted—and the court below held—that the provisions of this policy, read in conjunction with our statute, entitled plaintiff to bring an original or primary

suit against both Greene and the insurance company, and, as has been said, there was a judgment against both.

The case of *New York Indemnity Co.* v. *Ewen*, 221 Ky. 114, 298 S. W. 182, was one in which an original suit was brought against both the insured, whose negligence was alleged to have occasioned the plaintiff's injury, and an insurance company which had written a policy of insurance very similar to the one here sued on. It was alleged and proved in that case, as it was also in the instant case, that the insured defendant was insolvent, and it was insisted there, as it is here, that the provision in regard to insolvency, that fact being alleged, authorized the joinder of the insurance company in the suit brought to determine the liability of the insured and the extent thereof.

After a review of the authorities, it was said by the Supreme Court of Kentucky that the policy provided indemnity only against loss, and not against liability for loss, and did not authorize the joinder of the insurance company in a direct suit and, in that connection, said: "Paragraph G" (the one relating to the insolvency of the assured) "goes on to provide that the claimant, in the event of insolvency or bankruptcy of the assured, shall have the right to maintain an action against the company for the recovery of *such indemnity*. Such indemnity, as we have seen, is the indemnity *against loss from liability*. This being true, we think these observations of the Supreme Court of Arizona, in the case of *Smith Stage Co.* v. *Eckert*, 21 Ariz. 28, 184 Pac. 1001, 7 A. L. R. 995, are quite apposite: 'It also appears from what we have said that the words 'loss and damage' mean a real loss—one, at least so far as the indemnity company is concerned, that has been put into judgment against the assured.' Paragraph G, in our judgment, was not intended to change the effect of the policy in any respect except to provide that, if after a judgment has been obtained against the assured and the injured party was then unable to collect that judgment by reason of the insolvency or bankruptcy of the assured, then and only

in that event the insurance company would be responsible to the injured party in a direct action."

We concur in this view, and the following cases construing similar policies are to the same effect: *Smith Stage Co.* v. *Eckert,* 21 Ariz. 48, 184 Pac. 1001; *Hanson* v. *Haymann,* (Tex. Civ. App.), 280 S. W. 869; *Bowers* v. *Gates,* 201 Mich. 146, 166 N. W. 880; *Aplin* v. *Smith,* 197 Iowa 388, 197 N. W. 316; *Van Derhoof* v. *Chambon and State Farm Mut. Auto. Ins. Co.,* 8 Pac. (2d) 925; *American Auto. Ins. Co.* v. *Struve,* (Tex. Civ. App.) 218 S. W. 534.

We do not think the provisions of the policy sued on, or those of our statute, above quoted, in regard to the insolvency of an insured, whose wrongful act caused loss or damage, were intended to confer an original cause of action against the insurer to recover the loss or damage, nor does the fact that it was alleged and proved that the tortfeasor—the insured—was insolvent affect either the recitals of the statute or the obligations of the contract of insurance, although it is known in advance, and alleged, that a *nulla bona* return will be made upon an execution which may be issued upon any judgment recovered against the insured. The statute does not appear to contemplate that the insurer shall be made a party to an original suit to determine the question of liability and the extent thereof, but does provide that, after an execution is returned unsatisfied (which execution could not be issued until after there had been a judgment upon which to base the execution), "that *then* an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in said action not exceeding the amount of the policy," and this right of action is not defeated by the insolvency or bankruptcy of the person insured, notwithstanding the fact that the policy would otherwise be one of indemnity merely.

In other words, the effect of the provisions of the policy and of the statute regarding insolvency is that,

notwithstanding that the policy is one of indemnity to the insured, the fact that he was insolvent or bankrupt, and thereby unable to respond in damages for his wrongful act, shall not operate to relieve the insurer. If, by an execution issued upon a judgment for the loss or damage, the injured plaintiff could collect, and did collect, his damages, he would not be concerned about the policy of insurance. But, if he is unable to collect his judgment, "then an action may be maintained" against the insurer. Until the injured party has recovered a judgment to compensate his "loss or damage," he can have no cause of action against the defendant indemnitor, which is neither a necessary nor a proper party to a direct suit for the damages.

We have here a policy conforming to the statute which created a cause of action which would not otherwise exist, and the cause of action thus created can only be maintained under conditions specified, which are that, upon an execution being returned unsatisfied, the plaintiff in the judgment may maintain an action against the insurer for the amount of the damage not exceeding the amount of the policy.

We are cited to certain cases which it is asserted have held to the contrary, but there are points of difference in the policies construed or in the applicable statutes of the States where the cases arose. At any rate, we have given our statute what we regard as a fair and proper construction, and that is, that the insurer may be sued only upon a judgment previously recovered against the insured, in which suit the insurer was neither a necessary nor a proper party.

The provision of the policy that "* * * an action may be maintained by the injured person (or such other parties in whom the right of action vests) against the company for the amount of the judgment of said action not exceeding the amount of the policy" does not contravene our statute, but conformed to it, and, as no original or direct cause of action is conferred against the indemnitor, the judgment against it must be reversed, and that cause

of action will be dismissed as having been prematurely brought. This order does not, of course, affect the right of appellee to sue the insurance company, if unable to collect his judgment against the Davis estate.

STANDARD OIL COMPANY OF LOUISIANA *v.* DAVIS.

4—2533

Opinion delivered May 16, 1932.

Robinson, House & Moses and *Roberts & Stubblefield,* for appellants.

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

HUMPHREYS, J. This suit was brought by appellee as administratrix of the estate of Louis Davis, deceased, and for the next of kin in the circuit court of Clark County against appellants to recover damages for the death of the intestate occasioned through their alleged negligence.

Appellants filed an answer denying the material allegations of the complaint, and, in addition, pleaded contributory negligence on the part of the intestate as the cause of his death.

The case was tried upon the pleadings, evidence introduced by the parties, and instructions of the court, resulting in a judgment against appellant in the sum of $25,000, from which is this appeal.

The intestate was killed in a collision between an automobile he was driving and a lumber truck driven by Larkin Denton on Highway 53 about half way down

Barringer's Hill, between Gurdon and Camden. L. A. Cox and Ernest Schee were riding in the Chevrolet coupe which the intestate was driving. They were traveling south and descending the hill behind appellant's truck and when about half way down attempted to pass appellant's truck and ran head on into the lumber truck, which was traveling north, about the time the two trucks were passing each other. Soon after starting down the hill, Thornton, who was driving appellant's truck, observed the lumber truck starting up the hill. The collision occurred about seven-thirty P. M., on the 17th day of September, 1930, just about dusk. The lights in all the cars were on. The road, at the point of collision, was about 25½ feet wide. All were driving at a reasonable rate of speed. Denton was on the extreme east side of the road as he ascended the hill. The evidence is conflicting as to whether Thornton was in the middle or on the west side of the road, and also as to whether he knew the intestate was attempting to pass his truck as they were descending the hill and as to whether he turned to the right to allow him to pass and before the intestate had done so, turned to the left and forced him to run into the lumber truck. In view of the dispute in the evidence touching appellant's negligence, the court might well have submitted that issue to the jury, had there been any conflict in the evidence on the issue of contributory negligence on the part of the intestate. The undisputed testimony reflects that the intestate was guilty of contributory negligence resulting in his own death; so, instead of submitting the issue of negligence on appellant's part, the court should have instructed a verdict for appellant on account of the contributory negligence of the intestate. According to the undisputed testimony, the intestate turned to the left in an effort to pass appellant's truck when about half way down the hill without first ascertaining whether the way was clear and could have accomplished his purpose had the lumber truck coming up the hill with which he collided not been so near. It was almost dark, and before at-

tempting to pass appellant's truck, the intestate should have seen to it, in the exercise of ordinary care for himself and his companions, that the way was clear of nearby approaching cars from the south, and this, too, even though appellant had been or was negligent in failing to turn to the right sooner than he did or after starting to turn to the right, he turned to the left. The negligence on the part of the intestate consisted in attempting to pass appellant's truck at the particular time he did so without ascertaining to a certainty that the way was clear of nearby approaching cars from the south. Had the truck driven by Denton not been in the way, the intestate could have passed appellant's truck, notwithstanding appellant's negligence just as Denton's truck, coming north, passed it in the clear. It was not intended, according to the law of the road, on a highway only 25½ feet wide, for three rapidly driven cars to pass each other at the same point. Denton had the right-of-way on his side of the highway, and the intestate should not have attempted to occupy that space in order to pass a truck in front of him.

On account of the error indicated, the judgment is reversed, and, as the case seems to have been fully developed, the cause is dismissed.

CENTRAL STATES LIFE INSURANCE COMPANY *v.* HOLCOMBE.

4—2565

Opinion delivered May 23, 1932.

Burk Mann and *T. D. Wynne,* for appellant.

J. B. Milham, for appellee.

HART, C. J., (after stating the facts). It is first sought to uphold the judgment on the theory that the insurance company had funds in its hands belonging to the insured which would have paid the next quarterly premium, and, that being true, it was its duty to apply the amount thereto. *Inter-Ocean Casualty Company* v. *Copeland,* 184 Ark. 648, 43 S. W. (2d) 65. The amount referred to was a canceled check for the sum of $23.68, sent by the insured to the company. According to the testimony of Mrs. Holcombe, this represented payment of interest in advance in the sum of $14.88, due on the loan note of $248 remaining unpaid on March 7, 1930; and a balance of $8.80, representing cash payment on the annual premium of $58.80, due on March 7, 1930. The check was applied to these purposes. Hence there were no funds on hand belonging to the insured with which to pay the next premium, due March 7, 1931.

The next contention of the plaintiff is that the company waived the forfeiture under the principles of law decided in *Home Life & Accident Company* v. *Scheuer,* 162 Ark. 600, 258 S. W. 648. On this branch of the case, Mrs. Holcombe testified that they saw in a newspaper a notice that a receiver would be applied for, and that in December, 1930, they wrote to the company with respect to its financial condition. They received a reply that the company would notify them as soon as it was reorganized, and the company did not notify them. She admitted that the letter had been lost and, further on in her testimony, stated that she thought, when they got the company re-

organized, they would let them know to whom to pay the premium. She admitted that she knew that the premiums were due annually on the 7th day of March, and that they had a grace period of thirty days. She also admitted that she knew that, under the terms of the policy, it would be forfeited if they did not pay the annual premium when due, and that the forfeiture would take place under the terms of the policy without any notice thereof. It will be noted that the insured wrote to the company to know about its financial condition, and there was no definite promise made by the company to waive the forfeiture under the terms of the policy, and the insured had no right to rely upon the general statement which plaintiff says was in the letter to the effect that the company would notify the insured when they got reorganized. Plaintiff admits that they were moving around the country at that time and did not stay in one place long.

It is next insisted that there was a waiver of the forfeiture by the letter dated April 7, 1931, which was not received until the 17th day of April, the date on which the insured was fatally burned, and died therefrom sometime that night. This letter appears to have been a form letter, signed "Conservation Department." It was written about the premium loan of $300, which had been placed against the policy, covering the note due March 5, 1931. The letter also notified the insured that the arrangement was to help continue the policy in force, and that the loan might be paid in part or in full at any time during the continuance of the policy. In conclusion, the insured was reminded in the letter that premium notices would be sent, and that all future premiums should be paid promptly in order to maintain the valuable protection that the policy offered. She admitted that she knew the date the premiums were due, and that the policy would be forfeited under its own terms if the annual premium was not paid within the thirty days' grace extension after it became due. This court has held that, under a policy of life insurance providing that it should become void on failure to pay premiums when due, the nonpay-

ment of a premium when due *ipso facto* caused a forfeiture of the insured's rights under the policy. *Home Life & Accident Company* v. *Haskins,* 156 Ark. 77, 245 S. W. 181; and *Home Life & Accident Company* v. *Scheuer,* 162 Ark. 600, 258 S. W. 648.

The result of our views is that, under the undisputed evidence, the court should have directed a verdict for the defendant. For the error in refusing to do so, the judgment must be reversed; and, inasmuch as the cause of action has been fully developed, it will be dismissed here. It is so ordered.

DOWELL *v.* SLAUGHTER.

4—2566

Opinion delivered May 23, 1932.

J. V. Walker, Cravens & Cravens and *Dwight L. Savage,* for appellant.

John R. Duty, John Mayes and *C. D. Atkinson,* for appellee.

SMITH, J. Appellants, who are citizens and taxpayers of Washington County, filed a complaint on October 7, 1931, in which they alleged that on July 6, 1931, a day of the July, 1931, term of the county court, there was entered upon the records of that court the following order:

"NOTICE

"The Washington County Court, July term, 1931, first day, July 6, 1931, in the matter of the debt of Washington County, Arkansas, due December 7, 1924.

"Declaration of indebtedness and order.

"This, the Washington County Court, having made a thorough examination and investigation of the indebtedness of Washington County, Arkansas, existing on the 7th day of December, 1924, being the day when amendment No. 11 to the Constitution of the State of Arkansas was adopted and became effective, finds and declares that the indebtedness of Washington County existing on the 7th day of December, 1924, amounted to the sum of $65,000, still exists, is still outstanding, and on this date remains unpaid.

"The clerk of this court is directed to publish for one insertion, in some newspaper having a *bona fide* circulation in the county, a copy of this order, to the end that any person who desires to question the correctness of the finding here made may bring suit for that purpose within thirty days after such publication.

"Done and ordered in open court, this the 6th day of July, 1931.

"J. Lona Slaughter, Judge."

A copy of this order, duly certified by the clerk of the county court, was published in a weekly newspaper published in that county on July 6, 1931, and on August 10, 1931, bonds were issued in the name of Washington County in the sum of $65,000, and sold for that amount.

On the date of the issuance and sale and delivery of these bonds, the following order was made and entered of record in the county court:

"Washington County Court, July term, 1931, August 10, 1931. In the matter of the transfer of surplus funds in the bond account to the county general account.

"Now on this, the 10th day of August, 1931, comes on to be heard the matter of transferring funds from the bond account to the county general account, and the county treasurer, Chas. S. Stearns, being present in person, and, upon the evidence adduced at the hearing, the court finds:

"That on August 10, 1931, a bond issue was made for Washington County, Arkansas, in the sum of $65,000, and that on the 10th of August, 1931, the treasurer of said county received the proceeds of said bond issue in the sum of $65,000; and the court further finds that the purpose of said bond issue was to pay off the indebtedness of said county as of date December 7, 1924, and that warrants issued and then existing for said indebtedness have heretofore been paid by the treasurer of said county out of the general funds belonging to said county, and that there is now a surplus in the bond account in the sum of $65,000, and that there is now no outstanding warrants against said account, and that by virtue of the authority of act No. 30, of the Acts of the General Assembly for the State of Arkansas, in the year 1927, and under the law, said bond account should be transferred to the county general account and the county reimbursed.

"That the warrants drawn on the following funds are payable out of the county general account, county general, pauper, jail and inquisition, justice of the peace and circuit court funds.

"Therefore it is considered, ordered and adjudged by the court that the sum of $65,000, together with the interest on daily balances on said amount since the 10th day of August, 1931, be and the same is hereby transferred, and the county treasurer is hereby ordered to transfer on his books said amount from the bond account to the county general account and pay warrants drawn on the above named funds out of the county general account.

"J. Lona Slaughter, Judge."

It was alleged by the citizens and taxpayers in their complaint that this order of July 6, 1931, was false and fraudulent, in that there was no indebtedness then outstanding of the county which had been incurred prior to December 7, 1924. It was prayed that the court appoint a master to inquire into and report upon the state of the county's finances, and that the order of the county court be held to be illegal, fraudulent and void, and that the county treasurer be enjoined from paying any of said bonds.

A demurrer was filed alleging five grounds therefor, and the court sustained the 3d, 4th and 5th grounds. The demurrer reads as follows:

"Come now the defendants in the above entitled action and demur to the complaint as amended of the plaintiffs in said action upon the following grounds:

"1st. That the court has no jurisdiction of the persons of the defendants or of the subject-matter of the action.

"2d. That there is a defect of parties defendant.

"3d. That the complaint does not state facts sufficient to constitute a cause of action.

"4th. That the complaint shows upon its face that the cause of action attempted to be stated by the complaint as amended is barred by the statute of limitations.

"5th. That the complaint shows upon its face that the alleged cause of action attempted to be stated therein has been adjudicated by the county court of Washington County, Arkansas."

From the decree of the court sustaining the demurrer to the complaint upon the grounds above stated is this appeal.

This appeal challenges the validity of the bonds issued and sold on August 10, 1931, pursuant to the order of the court made and entered on July 6, 1931.

In making the order of July 6, 1931, the court acted under the authority of the amendment to the Constitution adopted at the general election held in 1924, and which has frequently been referred to as amendment No. 11. Owing to the confusion arising from the fact that certain amendments to the Constitution had been numbered in the order of their submission, rather than in the order of their adoption, the Secretary of State has compiled a list of the amendments now in force, and this list, as thus compiled, has been published in vol. 184 of the reports of this court, pages XIX, *et seq.*, and the amendment heretofore frequently referred to as No. 11 has been given No. X, and we employ that number in referring to it.

It was held in the case of *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22, that amendment No. X (there referred to as amendment No. XI) became effective December 7, 1924, and that it was self-executing, even without an enabling act.

By this amendment to the Constitution, the counties of the State (as well as cities and incorporated towns) were given authority * * * "to secure funds to pay indebtedness outstanding at the time of the adoption of this amendment, * * *" by issuing interest-bearing certificates of indebtedness or bonds, for the payment of which authority was conferred to levy a tax, in addition to the taxes theretofore authorized, not exceeding three mills, and to levy and collect such tax until such indebtedness was paid.

At the ensuing session of the General Assembly an enabling act was passed, entitled, "An Act to Facilitate the Funding of the Debts of Counties, Cities and Incor-

porated Towns." Act 210, Acts of 1925, page 608. Section 1 of this act provides as follows:

"Before the issue of any county or city bonds under this act, the county court shall, by order entered upon its records, declare the total amount of such indebtedness or the city or town council shall by ordinance declare the total amount of such indebtedness. Such order of the county court shall be published immediately for one insertion in some newspaper published in the county, and such ordinances of the city or town council shall be immediately published in some newspaper issued in such city or town, if there be one, and, if not, in some newspaper published in the county; and any property owner who is dissatisfied may, by suit in the chancery court of the county, brought within thirty days after the publication of such order or ordinance, have a review of the correctness of the finding made in such order or ordinance; but if no such suit is brought within thirty days, such finding shall be conclusive of the total amount of such indebtedness, and not open to further attack, and if said suit is brought the adjudication shall settle the question, and appeal therefrom must be taken and perfected within thirty days. If any officer of such county, city or town shall wilfully make any false statement as to the amount of its indebtedness, he shall forfeit his office and be ineligible to hold any other office of profit or trust in this State."

Other sections of the statute provide that the bonds thus authorized to be issued shall be negotiable coupon bonds, payable serially, through a period not exceeding forty years, and shall bear interest at a rate not exceeding six per cent.; that the bonds shall not be sold at less than par, but with the privilege of converting into bonds bearing a lower rate of interest, and for the levy of a tax to pay the bonds.

A penalty is prescribed against any officer who shall include in the debt to be funded any debts which were not due in good faith at the time of the adoption of the

amendment, and the fiscal year is made coincident with the calendar year.

These provisions are not here involved and need not be enlarged upon.

It will be observed that, under § 1 of the act of 1925, copied above, the county court (in case of counties) is required, before issuing bonds, to ascertain the outstanding indebtedness of the county on the date upon which the amendment became effective, which, as has been said, was December 7, 1924, and, after ascertaining that fact and entering an order of court evidencing that finding, notice thereof shall be given in the manner there provided.

The making of this finding and the publication thereof is made a condition precedent to the exercise of the power to issue bonds, and, while the amendment does not require that the notice shall announce this purpose, the publication of the notice is made tantamount to a declaration of that intention.

The act provides that "any property owner who is dissatisfied may, by suit in the chancery court of the county, brought within thirty days after the publication of such order or ordinance, have a review of the correctness of the finding made in such order or ordinance; but if no such suit is brought within thirty days, such finding shall be conclusive of the total amount of such indebtedness, and not open to further attack, and if said suit is brought, the adjudication shall settle the question, and appeal therefrom must be taken and perfected within thirty days."

The property owners in the instant case seek to excuse their delay of over thirty days after the publication of the court order before bringing suit by alleging that they were unaware of its publication until after the thirty days had expired. But the act does not authorize suit within thirty days after knowledge had; on the contrary, the act requires that the suit be "brought within thirty days after the publication of such order."

Inasmuch as the complaint concedes that the suit was not brought within the time limited by the act, the validity of the bond sale depends upon the validity of the act, for, if this suit must be brought within thirty days after the publication of the court order, and not thereafter, the instant suit was not brought within that time, and the demurrer was properly sustained for that reason, if the act itself is valid.

For the reversal of the decree of the court sustaining the demurrer, it is insisted that, under the allegations of the complaint, the county court was without jurisdiction to make the order, that there was no authority to issue bonds unless there was an outstanding indebtedness on December 7, 1924, and, as the complaint alleged there was no indebtedness as of that date, the truth of which allegation the demurrer confessed, there was no authority to issue bonds, and the action of the county court was therefore *coram non judice,* and is open to the attack here made upon it.

We do not concur in this view. The county court had the jurisdiction conferred by the amendment and the enabling act passed pursuant thereto to issue bonds to discharge the indebtedness named, and the court was required to find, before exercising this jurisdiction, that there was such debt, and the amount thereof, and, having made that finding, to publish notice thereof, to the end that property owners who were dissatisfied with such finding might have a review of the correctness of it made in the chancery court. In order to make the bonds salable, by having this question put at rest, the right of the property owner to raise the question was limited to thirty days, this being regarded by the General Assembly in the passage of the enabling act as a reasonable time within which to raise that question. The notice was given, and more than the time limited was allowed to expire before this right was exercised, and in the meantime the bonds were sold and paid for, and the rights of the bondholders have intervened. These bonds were sold and paid for under an order apparently valid upon its face,

and the rights of the holders of these bonds must be protected unless the proceeding leading to their sale is void.

It is no new doctrine to hold that, when the right of a court of superior jurisdiction to exercise a jurisdiction conferred is dependent upon the existence of a given state of facts, the court has the right and is under the duty to ascertain whether those facts exist, and its finding upon that question is not subject to a collateral attack.

For instance, the case of *Whitford* v. *Whitford,* 100 Ark. 63, 139 S. W. 653, was one in which there was a contest between the mother and the alleged wife of a decedent to recover compensation for his wrongful death. The decision of this question turned upon the validity of a decree for divorce, it being contended by the mother that the alleged widow was not the lawful wife of her son, for the reason that she had obtained a divorce from a former husband, before marrying her son, without having first resided in this State for one year before instituting the suit for divorce, as required by the laws of this State.

The statute then in force provided that "The plaintiff, to obtain a divorce, must allege and prove, in addition to a legal cause for divorce: First. A residence in the State for one year next before the commencement of the action." As a condition upon which the jurisdiction of the chancery court might be invoked to grant a divorce, the plaintiff was required to allege and prove a residence in this State for a year next before the commencement of the action, and the mother insisted that as such proof could not have been truthfully made, the decree of the chancery court granting a divorce was void.

The reasoning of the court in overruling that contention is apposite here, and we quote from it as follows:

"In determining the sufficiency of a judgment against collateral attack, a distinction must be observed 'between those facts which invoke the jurisdiction of the court over the parties and subject-matter and those *quasi* jurisdictional facts, without allegation of which the court cannot properly proceed and without proof of which

decree should not be made; absence of the former renders the judgment void and assailable collaterally, but not so as to the latter.' (23 Cyc., 1074.) 'Where the court judicially considers and adjudicates the question of jurisdiction, and decides that the facts exist which are necessary to give jurisdiction of the case, the finding is conclusive, and cannot be controverted in a collateral proceeding.' (*Id.* 1088.) 'A judgment cannot be impeached collaterally on account of any defects in the pleadings. Its validity cannot be impugned, for instance, by showing that a wrong form of action was chosen, or that the complaint does not state facts sufficient to constitute a cause of action.' *Id.,* 1094; *Warner* v. *Hess,* 66 Ark. 113, 49 S. W. 489.

"It seems to be well settled that a judgment rendered by a court having power to deal with the general subject of the action, although against the facts or without facts to sustain it, is not void as rendered without jurisdiction and cannot be questioned collaterally. 14 Cyc. 723.

" 'The fact of required residence of plaintiff in a divorce suit cannot be collaterally questioned if it was a jurisdictional question necessarily passed on by the court in its finding and decree.' *Hilbish* v. *Hattle,* 33 L. R. A. 783."

Counsel for the mother in that case conceded the principle that courts of general jurisdiction, having decided in favor of their jurisdiction, are presumed to have acted upon evidence justifying such decision, but it was contended that "such presumption is indulged only where the record is silent; where the evidence appears in the record with respect to the jurisdiction on which the decree is based, no presumptions are indulged in." In answer to this argument, the court said: "But this, we think, must necessarily be confined to questions of jurisdiction which arise in regard to the *person* or *subject-matter* of the action. Otherwise, every judgment rendered by a court where its jurisdiction rested upon its having determined the existence of a certain fact upon

the existence of which its jurisdiction to proceed to judgment must depend rests forever upon the dubious proposition as to whether every other court whose proceedings encounter it will take the same view of what was established by the evidence before the court that rendered it."

It is true the instant case is not one in which there are adversary parties, and is one in which the public generally has an interest. Upon this question the court, in the Whitford case, *supra,* said: "We do not overlook the fact that a divorce proceeding is one in which the public is interested. The parties can waive nothing essential to the validity of the proceeding, and all statutory requirements must be observed; but, in determining upon collateral attack, whether such has or has not been the case, we know of no reason why the same verity should not be imported to a decree for divorce which guards the sanctity of a decree rendered by a superior court having jurisdiction of the parties and the subject-matter."

The instant proceeding was commenced as an *ex parte* case, but it was one in which any property owner had the right to intervene, provided he did so within the time limited for that purpose. We have before us a record containing a recital of the jurisdictional fact which the court was required to find, to-wit, that there was an indebtedness, before exercising its jurisdiction, and, as no one has questioned that finding within the time and manner allowed by law, it has become final.

In the case of *Blanton* v. *Forrest City Mfg. Co.,* 138 Ark. 515, 212 S. W. 330, it was said: "In determining the validity of a judgment upon a collateral attack, a distinction must be observed between those facts which involve the jurisdiction of the court over the parties and subject-matter, and those *quasi* jurisdictional facts, without allegation of which the court cannot properly proceed and without proof of which a decree should not be made. The absence of the former renders the judgment void upon collateral attack." See also *Merchants' & Planters' Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. (2d) 421.

Here there were no parties unless property owners made themselves such, and the jurisdiction of the court over the subject-matter is not denied.

This is not a case where an order was entered which the court was without power to make. It had that power, and the only question presented is that of the existence of the *quasi* jurisdictional fact which the court was required to find, and did find, before exercising its power to sell bonds, to-wit, the existence of the indebtedness.

It was said in the case of *Stumpff* v. *Louann Provision Co.,* 173 Ark. 196, 292 S. W. 196, that "The county court is a court of superior jurisdiction, and its judgment, rendered in pursuance of jurisdiction rightfully acquired, cannot be attacked collaterally. *Sharum* v. *Meriwether,* 156 Ark. 331, 246 S. W. 501."

We do not pursue the discussion of this subject further, as a concrete application of the principles involved have been made in identical proceedings.

In the case of *Stahl* v. *Sibeck,* 183 Ark. 1146, 40 S. W. (2d) 442, it was said: "The order of the county court in 1925 found that the county was indebted in the sum of $350,000. No person brought any suit to review the finding within the time limited, and it thereupon became 'conclusive of the total amount of such indebtedness, and not open to further attack,' and is *res judicata.*" See also *Stranahan, etc., Inc.,* v. *Van Buren County,* 175 Ark. 678, 300 S. W. 382.

It is finally insisted that, if the statute be construed as we have here construed it, it is unconstitutional as being arbitrary and unreasonable and inadequate to afford the property owners an opportunity to resist the proceeding. This contention may be disposed of by saying that statutes have been frequently upheld by this court, some of which provide even less than thirty days' notice of proceedings whereby taxes were imposed which became liens upon the lands of the territory affected. Among these are: *Luck* v. *Magnolia-McNeil Road Imp. Dist. No. 1,* 141 Ark. 603, 217 S. W. 781; *House* v. *Road*

Imp. Dist. No. 2, 158 Ark. 330, 251 S. W. 12; *Howell* v. *White River Levee Dist.,* 174 Ark. 381, 295 S. W. 381.

As it appears from the allegations of the complaint that this proceeding to question the order of the county court was not begun within the time limited by law for that purpose, and no ground of avoidance was shown, the right to proceed was properly raised by demurrer. *Smith* v. *Missouri Pacific R. R. Co.,* 175 Ark. 626, 1 S. W. (2d) 48.

It follows, from what we have said, that the demurrer was properly sustained, and the decree is therefore affirmed.

STARLING *v.* HAMNER.

4—2557

Opinion delivered May 23, 1932.

Marsh, McKay & Marlin, for appellant.

Henry Moore, Jr., for appellee.

SMITH, J. Without reciting or reviewing the conflicting testimony appearing in the record in this case, we announce our conclusion to be that the preponderance of this testimony establishes the following facts:

J. W. Starling was engaged in farming a tract of land which he had contracted to buy, and the title to which was involved in a suit argued and submitted on the same date on which the instant case was submitted in this court.

The Hamner-Edwards Company, hereinafter referred to as the company, made advances to Starling to enable Starling to cultivate the land, and these advances were secured by a chattel mortgage on Starling's mules and a horse, upon his farming tools and implements, and upon all the crops grown on the farm.

On March 7, 1930, a settlement was had of the farming accounts, and it was agreed that the balance then due was $2,189.06. To secure this balance, a note was executed to cover, not only the balance, but the anticipated advances for the year 1931. The note thus executed was for the sum of $4,500, and bore interest at the rate of ten per cent. per annum from date until paid. It appears, however, that the true intention of the parties was that the mortgage should cover the amount which might be due upon foreclosure of the mortgage, and that the note was executed in order that the company might use it as collateral in securing advances made to it, and not to otherwise evidence the debt. This was in accordance with the custom under which they had previously operated.

The company was engaged in the general furnishing business, and it was contemplated that the advances should consist principally of supplies sold Starling at the company's store, although advances in money were made during the year 1931 slightly in excess of $700. Monthly statements were furnished to Starling of all advances. Goods were sold and charged at cash prices, and, on August 1st, a full and final settlement of the account was rendered, to which there was added 10 per cent. of the total "for time," as that item appeared on the account. This 10 per cent. charge was made only at that time. This addition was made to the cash advanced as well as to the price of the goods sold, and was the method employed to increase the credit prices 10 per cent. above the cash prices. The correctness of this account does not appear to have been questioned by Starling.

On January 2, 1931, Starling died. He was survived by his widow and certain children begotten by her. He was also survived by certain children by a former marriage. Starling's affairs were badly involved, and litigation was threatened between the widow and her children and Starling's children by his former marriage.

An appeal was made by Mrs. Starling to M. M. Hamner for advice and assistance. M. M. Hamner was not connected with the company, although the senior member of that firm was his relative, and M. M. Hamner had sold the farm to Starling, which the latter operated.

M. M. Hamner interceded for Mrs. Starling and made an agreement with the company by which its debt secured by the chattel mortgage was to be reduced to $2,500, which was to be paid in the following manner: Starling had left certain life insurance payable to his widow. M. M. Hamner agreed to pay the company $1,000, and pursuant to that agreement paid the company $1,000 in cash, and as security therefor took an assignment of the chattel mortgage and the debt which it secured to himself. The balance of $1,500 was to be paid by Mrs. Starling when she collected her insurance, and the insurance was collected, but Mrs. Starling declined to per-

form her agreement, which had been evidenced by a written memorandum thereof. She refused to comply with this agreement by paying the $1,500 which she had promised to pay, and, upon her cross-examination as a witness, declined to state why she did not do so. We think it fairly inferable from the testimony to say that two reasons induced this decision: The first was that she had adjusted her differences with her stepchildren, but the principal reason was that the mortgaged property was not worth the money which she had obligated herself to pay.

Although the company's mortgage and the debt which it secured were assigned to M. M. Hamner, we think there was no intention on his part to foreclose it until after Mrs. Starling refused to perform her contract. The mules were in thin order, and Mrs. Starling had no feed for them, and they were collected and turned over to M. M. Hamner with Mrs. Starling's consent. There was nothing to do with these mules but to feed them until farming operations began.

Upon the advice of M. M. Hamner, Mrs. Starling qualified on March 3, 1931, as administratrix of her husband's estate, and she approved the claim of Hamner against her husband's estate, and it was allowed and classed by the probate court. However, an appeal was later prosecuted from this probate order, which appears to be pending and undisposed of in the circuit court.

On March 24, 1931, (at which time Mrs. Starling had definitely declined to perform her contract by paying the $1,500 out of the insurance money which she had then collected) this suit was filed by M. M. Hamner to foreclose the mortgage which had been assigned to him. The company, as assignor of the debt and the mortgage securing it, was made a co-plaintiff.

The chancellor found that the debt secured by the mortgage at the time of the rendition of the decree from which this appeal comes was only $3,700. Just how this amount was arrived at is not clear, unless the court struck out of the account the charge for cash money ad-

vanced. Upon this finding it was decreed that "M. M. Hamner do have and recover of, from and against the property above mentioned (in the mortgage) the sum of $3,700 * * *," and that the lien of M. M. Hamner against said property "was superior and paramount to any rights of any of the other parties hereto." No personal judgment was rendered against any one, and the sale of this mortgaged property was ordered. Pursuant to this order of sale, the mortgaged property was later sold by the commissioner appointed to make the sale for $700.

Various defenses were interposed to this foreclosure suit, which we now proceed to discuss.

It is insisted that the mortgage, if otherwise valid, could not be held as security for any amount in excess of $2,500, the consideration for its assignment which M. M. Hamner assumed and agreed to pay. This would be true if Mrs. Starling had performed her agreement in regard to its transfer. But she did not do so.

If Mrs. Starling's written agreement in regard to the assignment of the mortgage be treated as an obligation on her part to pay $2,500, she did not pay it. On the contrary, she repudiated that obligation and refused to perform it. Treating this obligation as a promise to pay, or even as a promissory note, did not enlarge her rights. It is settled law that giving a promissory note for a debt is not a payment of the debt unless, by agreement of the parties, the note is taken in payment of the debt. This is true even of a note executed by a third party. *Bank of Hatfield* v. *Bruce,* 164 Ark. 576, 262 S. W. 665; *Hume* v. *Indiana Life Ins. Co.*, 155 Ark. 466, 245 S. W. 19, and cases there cited. The contract between Mrs. Starling and M. M. Hamner for the ultimate assignment of this mortgage to her for a consideration of $2,500 was, in effect, annulled by her refusal to perform the contract entitling her to the benefit of the reduction in the debt, and M. M. Hamner was, and is, as the court below decreed, the legal holder of the mortgage and the debt which it secures.

It is unimportant whether M. M. Hamner has paid to the company all of the $2,500 or not. He is obligated to do so, and his assignor, the company, was a party to the foreclosure proceeding and made no question as to M. M. Hamner's ownership of the mortgage, and the company is bound by the finding of the court that M. M. Hamner is in fact the owner of the mortgage.

It is insisted that M. M. Hamner converted the mortgaged property to his own use without foreclosing the mortgage, and thereby became liable for its actual market value at the time of the conversion, and should be charged with this value. It may be said that the testimony is in irreconcilable conflict as to the value of the mortgaged property, but the fact remains that when sold by the commissioner under the foreclosure decree the mortgaged property brought only $700.

We do not, however, pass upon the question of the actual market value of the mortgaged property, for the reason that we do not find, nor did the court below find, that there had been any conversion of it. The testimony established the fact that, after making his agreement with Mrs. Starling, Hamner took possession of the mortgaged property, but, as default had been made in the payment of the debt secured by the mortgage, he had the right to do so. *Thornton* v. *Findley,* 97 Ark. 434, 134 S. W. 627; 33 L. R. A. (N. S.) 491; *Lee Wilson & Co.* v. *Crittenden County Bank,* 98 Ark. 384, 135 S. W. 885; *Barron-Fisher-Caudill Co.* v. *Rhoda,* 126 Ark. 556, 191 S. W. 229.

We do not find that Hamner took possession of the mortgaged property as the owner thereof. There is but little question that Hamner would have turned the mortgaged property over to Mrs. Starling had she complied with her contract.

One of the items of the mortgaged property to which testimony was especially directed was that of the cottonseed which Starling had on hand at the time of his death, and this testimony confirms our view that there was no conversion. After the date of the alleged conversion, an

agreement was reached between Hamner and Mrs. Starling's representative that Hamner should use the seed and pay fifty cents per bushel for them, which appears to have been a most reasonable allowance on that account. It is true that Hamner took possession of the mortgaged property on February 10, 1931, but, as we have said, this was for the purpose of taking care of it, and not for converting it to his own use. Indeed, at that time Hamner was expecting Mrs. Starling to comply with her original contract and would, no doubt, have delivered the property to her, had she performed this contract by paying the $1,500 as agreed.

It is also insisted that the debt was usurious and void for that reason, and that the usury consisted in taking the note above mentioned. But we do not agree with this contention. The monthly statements furnished Starling in his lifetime, and the testimony in the case, show conclusively that the note was only an estimate of what the account would finally be, and was in the nature of an accommodation note which the company might use as collateral, and that it was at all times the intention of all the parties that the final indebtedness would be determined from statements of the account.

The 10 per cent. addition to the account was dated on August 1st, at which time the crops had been "laid by," and the advances ceased and the credit items would thereafter be in excess of the debit items. There could be, and was, no usury in adding 10 per cent. to the cash price of goods which were not sold for cash, but on credit. *Brakefield* v. *Halpern,* 55 Ark. 266, 15 S. W. 190; *Blake Bros.* v. *Askew & Brummett,* 112 Ark. 514, 166 S. W. 965; *Standard Motors Finance Corporation* v. *Mitchell Auto Co.,* 173 Ark. 879, 293 S. W. 1026, 57 A. L. R. 877.

The foreclosure suit was based upon the account, and not upon the note, but, if the note were held to be usurious, this would not affect that portion of the account incurred for goods purchased, and would invalidate only such portions of the account as were based upon the loan of money. Usury cannot be predicated upon the charge

of a profit of more than 10 per cent. for goods sold on credit. *Atkinson* v. *Burt,* 65 Ark. 316, 53 S. W. 404; *Tillman* v. *Thatcher*, 56 Ark. 315, 19 S. W. 968; *Briggs* v. *Steel,* 91 Ark. 458, 121 S. W. 754.

The account, on August 1, 1931, amounted to $4,687.73, and the decree, rendered December 29, 1931, found the indebtedness secured by the mortgage to be $3,700. The difference between these items is $987.73, which is greater than the money advanced and the price of the cottonseed combined, so that, if the note were usurious, the judgment is for a sum no greater than the balance due, exclusive of the money advanced (the only items against which the plea of usury could be asserted), and that of the seed also. To constitute usury, there must be an agreement requiring the borrower to pay, and entitling the lender to receive, a higher rate of interest than that allowed by statute for the loan or forbearance of money, and the plea of usury cannot therefore be sustained. *Cheairs* v. *McDermott Motor Co.,* 175 Ark. 1126, 2 S. W. (2d) 1111.

The decree appears to accord with the preponderance of the testimony, and it must therefore be affirmed, and it is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY *v.* MILLER.

4—2568

Opinion delivered May 23, 1932.

Thos. B. Pryor and *H. L. Ponder,* for appellant.
Coleman & Reeder, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for damages to a mule that became entangled in a cattle guard which had been voluntarily constructed by appellant on a roadside to prevent stock running at large from coming upon its right-of-way. It was alleged in appellee's complaint that appellant company negligently and carelessly permitted said cattle guard to become partly filled with weeds, trash, dirt and other obstructions so as not to be discernable and so as to resemble the road leading to and across same, and that a certain mule belonging to appellee and being of the value of $125 or more, in walking down said road, walked upon said stock guard and his feet were caught in same, and the said mule fell through said cattle guard, and, in attempting to get out or by reason of his fall, was seriously and permanently injured. The suit was brought and judgment obtained in a magistrate's court, from which an appeal was prosecuted to the circuit court of Independence County, where, upon trial *de novo,* the judgment was obtained from which is this appeal.

Appellant's contention for a reversal of the judgment is that the suit was brought under §§ 8478 and 8479 of Crawford & Moses' Digest, which afforded appellee no protection against damages to his property because he was not a landowner and because he failed to give the notice required by said statute as a prerequisite to the maintenance of a suit. The sections referred to penalize a railway company for failure to construct, keep and maintain in good repair cattle guards, after ten days' written notice, on each side of the inclosures through which its lines run, by requiring it to pay the owners of the inclosures, in addition to actual damages sustained a penalty of not less than $25 nor more than $100. The undisputed evidence reflects appellee was not an owner of an inclosure, and that he had not given appellant ten days' written notice to construct the cattle guard, or to keep and maintain same in good repair. Based upon this evidence, appellant requested an instructed verdict in its favor, which was refused. The trial court correctly re-

fused to so instruct the jury. This suit was not brought under these statutes. The gist of the complaint was for negligently maintaining the cattle guard voluntarily constructed in such manner as to injure stock lawfully running at large. *Jones & Norris* v. *Nichols,* 46 Ark. 207, 55 Am. Rep. 575. The remedy under the statute referred to is exclusive to the owners of inclosures, but has no application to damages sustained by others on account of the negligent and careless maintainance of a cattle guard. The statutes referred to did not in any manner curtail or abrogate the common-law remedy for damages for maintaining dangerous nuisances.

No error appearing, the judgment is affirmed.

AXLEY *v.* HAMMOCK.

4—2618

Opinion delivered May 23, 1932.

D. L. Purkins, Clary & Ball and *J. R. Wilson,* for appellant.

Williamson & Williamson and *Aubert Martin,* for appellee.

MEHAFFY, J. The petitioner filed suit in the Bradley Circuit Court against the respondent, Southern Lumber Company, for damages for slander, alleging that Fred Wyman, president of respondent company, and acting within the scope of his authority, falsely and maliciously spoke and published, of and concerning plaintiff, certain false, malicious and defamatory words, setting out the words spoken, and asked for damages.

The respondent, defendant in the slander suit, filed a demurrer, a motion to make the complaint more specific, and complaint was amended to comply with the motion to make more specific.

After the demurrer filed by defendant was overruled, the defendant filed answer in which it alleged, among other things, that Wyman had no authority to act for it in the utterance of any slander. It denied that Wyman spoke and published the slanderous words alleged in complaint, and denied any malicious intent, and in fact denied all the material allegations with reference to the charge of slander. It alleged in addition that the slander was unauthorized, that it was a privileged communication, and defendant also pleaded the truth of the statements alleged to have been made, and a settlement of the entire matter, and that the plaintiff was estopped; that the slander was the result of plaintiff's own repetition and publication of an alleged slander of plaintiff's own making; that a suit had been filed for the same slander against Wyman, and was still pending.

In addition to the answer the defendant filed a counterclaim and cross-complaint in which it alleged misconduct on the part of the plaintiff in numerous ways and numerous acts of improper conduct with reference to defendant's property, alleging that defendant had wrongfully appropriated to his own use much of the

money and property and many facilities of defendant without knowlege of said company; that an accounting which would involve many thousands of items to be found hidden in vast volumes of records and files covering a period of many years, complicated because of the wrongful action of plaintiff, was necessary; that it was necessary to appoint a master.

The defendant attached to his counterclaim and cross-complaint a motion to transfer to equity, setting up all the defenses mentioned in its counterclaim, and many others which it alleged entitled it to have the cause transferred to equity; asked for judgment against the plaintiff in damages, and the cause was, over the objection of plaintiff, transferred to the chancery court.

The plaintiff then in chancery court filed a motion to remand to the circuit court, which was overruled, and plaintiff required to go to trial.

The defendant's pleadings in the circuit court, including the answer, counterclaim and cross-complaint, together with the motion to transfer to equity, consist of more than forty pages, and it would be useless to set out the pleadings in full.

The chancellor made lengthy findings. Among other things the court said in its findings that it was impossible to reconcile the testimony upon any point materially affecting the issues.

The court also said in its findings: "This court is not impressed with much of the allegations contained in the cross-complaint. Some of these allegations are frivolous and merely challenge conditions long acquiesced in by defendant corporation. Some are referable to faulty judgment rather than intentional wrongdoing on the part of the cross-defendant."

The court then entered a decree that the court had full and complete jurisdiction of both the parties and the subject-matter and the issue, as made by the pleadings, and that the pleadings set forth matters cognizable exclusively in equity; that the appointment of a master was proper, and that the plaintiff's request for a jury, and

motion to remand to the circuit court were denied and overruled, to which plaintiff excepted.

There are many other specific statements in the decree which it is unnecessary to set out in this opinion. The court dismissed the complaint of plaintiff and dismissed the cross-complaint of defendant.

The court in its decree, names more than 150 witnesses who gave testimony.

The petitioner filed in this court, April 15, 1932, an application for writ of certiorari, and prays that the decree and judgment of the chancery court be quashed, and that an order be issued by this court directing that said cause of action be remanded to the circuit court for trial, and for other relief.

A response was filed by the chancellor and Southern Lumber Company in which they first demurred, stating that it is an effort to use certiorari as a substitute for appeal. They also contend that, unless all the pleadings filed in the lower court are printed in full, this court cannot exercise an informed and intelligent discretion; that the writ of certiorari does not properly lie to courts of chancery; that the petitioner is estopped. It is also stated in the response that the entire record is necessary to the exercise of an intelligent discretion, and that the petition was not filed in time, and the response then denies the allegations contained in the petition.

It is first contended by the respondents that the writ should be denied because it is obviously an effort to use certiorari as a substitute for an appeal, and they call attention to *Adams* v. *Sub-Drainage District No. 3*, 171 Ark. 802, 286 S. W. 962.

It is true that there is a statement in the opinion in that case that certiorari cannot be used as a substitute for appeal, and the orders are not brought up on appeal for correction of error.

It is the general rule, in this State, that the writ of certiorari cannot be used as a substitute for appeal.

As contended by the respondent, the writ of certiorari is not a writ of right, but is one of discretion. Many

cases are cited by respondent to support this rule, but it may be said that the rule is well established in this State that the writ of certiorari is not a writ of right, but is a writ of discretion.

The petitioner cannot demand as a matter of right that the writ issue. On the other hand, the respondent cannot claim as a matter of right that the writ shall not issue. It is a matter, not of right, but of discretion, and that means of discretion to grant or refuse the writ.

Discretion of a judge or court, when called upon to grant or refuse a petition for a writ of certiorari, requires the judge or court to act according to the dictates of their own judgment and conscience, and it involves a fair consideration of all the peculiar features of the particular question involved.

"In a broad sense, the option which a judge may exercise, either to do or not to do that which is proposed to him that he shall do; choosing between the doing and not doing of a thing, the doing of which cannot be demanded as an absolute right of party asking it to be done; the exercise of the right legally to determine between two or more causes of action." 18 C. J. 1135.

The respondent can no more demand that the court refuse to grant the writ than the petitioner can demand that it grant it, but the granting or refusing to grant the writ is within the sound discretion of the court.

In determining whether the writ should be granted or not, the court will look only to the face of the record, and will not consider questions of fact.

It is wholly unnecessary to call attention to or review authorities cited to support this proposition.

It is next contended by the respondent that the application for the writ should be dismissed unless all of the pleadings in the lower court, resulting in the transfer of the case to the chancery court are printed in full.

The complaint filed in the Bradley Chancery Court was a suit for damages for slander, and the only court having jurisdiction to try an action for slander is the circuit court, and no pleadings filed by the defendant in

such suit could authorize the transfer of the case to the chancery court, and thereby deprive the plaintiff of the right to trial by jury.

The statutes as to counterclaim and set-off referred to and relied on by respondent do not authorize a transfer of a lawsuit to the chancery court.

Section 1195 of Crawford & Moses' Digest provides: "The counterclaim mentioned in this chapter may be any cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them."

Prior to the enactment of this statute, the cause of action that could be pleaded in a counterclaim was some matter arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

Under the law as amended, it is not necessary that the cause of action mentioned in the counterclaim arises out of the contract or transactions, or that it is connected with the subject of the action. In other words, it may be any cause of action in favor of the defendants against the plaintiffs, whether growing out of the contract or transactions or connected with the subject of the action or not.

This is the only change made in the law as to counterclaim, and the same change was made as to set-off, but, both before the amendment and since, the cause of action mentioned in the counterclaim must be within the jurisdiction of the court. It was not the intention of the Legislature in enacting these statutes to violate the Constitution. The presumption is that the Legislature did not intend to violate the Constitution, but, if these statutes are construed as contended for by respondent, they would violate the Constitution.

Section 7 of art. 2 of the Constitution of Arkansas, provides: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."

The right to trial by jury would not remain inviolate if, in an action only cognizable in a court of law, the defendant could interpose defenses and cause a transfer to a court of chancery, and thereby deprive the plaintiff of the right to trial by jury, and the defendant cannot secure a transfer to chancery of a case of which the court of chancery has no jurisdiction.

Even if the transfer to the chancery court did not deprive the plaintiff of a trial by jury, still the judgment of the chancery court in the slander suit would be void, because such court has no jurisdiction in a slander suit, and it is the general rule that the judgment of a court having no jurisdiction over the subject-matter is void.

In speaking of the jurisdiction in Freeman on Judgments, it is said: "A lack of it, on the other hand, will lay the judgment open to successful impeachment if such fact is made to appear from the face of the record or by matters dehors where extraneous evidence is receivable for the purpose."

"It is this jurisdictional element that differentiates a void from a voidable judgment, the distinction between them being that when a court attempts to render the former a jurisdictional fact is absent without the existence of which the court is without authority to act at all. A judgment, in fact, rendered by a court whose want of jurisdiction is made to appear is no judgment at all and binds no one." 1 Freeman on Judgments 668.

Consent cannot give jurisdiction of the subject-matter, although it may of the person, and where the court has no jurisdiction of the subject-matter, the judgment is void, and a void judgment is a nullity. *Grimmett* v. *Askew,* 48 Ark. 151, 2 S. W. 707; *Blanton* v. *Forrest City Mfg. Co.,* 138 Ark. 508, 212 S. W. 330; *Oliver* v. *Routh,* 123 Ark. 189, 184 S. W. 843; *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39.

It is next contended by respondent that writs of certiorari do not properly lie to courts of chancery. This court has settled the question against the remonstrant in the case of *Martin* v. *Hargrove,* 149 Ark. 383, 232 S. W.

596. It not only settled the question that certiorari will lie to courts of chancery, but the opinion in that case stated: "Inasmuch as the orders of the court exceed its jurisdiction, certiorari is an appropriate way to bring before this court for review."

This court is therefore committed to the doctrine, not only that the writ will lie to a chancery court, but that it is the appropriate method to bring void judgments before this court for review.

Where the chancery court has no jurisdiction to try the case before it, that is, no jurisdiction over the subject-matter, its judgment is void, and since the original suit, brought in the circuit court was for damages for slander, the chancery court had no jurisdiction, and no pleadings that could have been filed by the defendant in that suit would give the chancery court jurisdiction.

It is wholly unnecessary, and would be improper, to consider the evidence, because the circuit court alone had jurisdiction to try the slander suit.

As contended by respondent, it was evidently the intention of the Legislature, in adopting the provisions with reference to counterclaim and set-off, to permit persons to settle in a single suit all matters in dispute between them, but it was manifestly not the intention of the Legislature to violate the Constitution and deprive one of the right to trial by jury, nor to give the chancery court jurisdiction to try cases that were only cognizable in a court of law.

It is contended that the pleadings on the part of the defendant in the slander suit gave the chancery court jurisdiction. Section 1194, Crawford & Moses' Digest, which provides that a defendant may set forth in his answer as many grounds of defense, counterclaim and set-off, whether legal or equitable, as he shall have, does not authorize equitable defenses in a suit for slander. All the defenses proper in a slander suit are legal defenses. Defendant in a slander suit may introduce evidence tending to show justification or partial justification.

Section 1229 Crawford & Moses' Digest provides: "In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances legally admissible in evidence to reduce the amount of damages, whether he proves the justification or not, he may give in evidence the mitigating circumstances." These defenses are legal defenses in a suit for slander.

Lengthy briefs have been filed by both parties, and many authorities cited. We do not deem it necessary to discuss or review all the authorities cited. We have reached the conclusion that the chancery court was without jurisdiction, and that its judgment is void.

The certiorari is sustained, and the judgment of the chancery court in the slander suit is set aside, and the chancellor directed to remand the slander suit brought by petitioner to the Bradley Circuit Court.

SMITH and MCHANEY, JJ., dissent.

HAMNER *v.* STARLING.

4—2564

Opinion delivered May 23, 1932.

Henry Moore, Jr., for appellant.

Marsh, McKay & Marlin, for appellee.

McHaney, J. This is a suit for specific performance brought by appellees against appellant to compel him to convey to them as the widow and heirs at law of J. W. Starling, deceased, 360 acres of land contracted to be conveyed by appellant to said Starling on or about December 15, 1924, by oral agreement. The complaint alleged the sale and purchase of the land for a consideration of $12,800, of which $800 was paid in cash, and that the remainder was to be paid from the proceeds of one-fourth of all the cotton grown on the lands until the purchase price with interest should be paid. It was alleged that they were able, ready, and willing to pay the balance due. Appellant answered admitting the sale for the consideration alleged and the cash payment, but that said Starling agreed to pay in addition $300 incurred by appellant as attorney's fee for examining the abstract of title and certain incidental expenses, making the total purchase price $13,100; that Starling agreed to pay interest thereon at the rate of 10 per cent. per annum and from 1925 to 1931, inclusive, for taxes, lumber, goods, wares and merchandise, and after charging him with such amounts and interest at 10 per cent. and after giving credits for all payments made, there was still a balance due as of February 3, 1931, of $10,808.44. He offered to convey on payment of said sum. If not paid, he prayed a foreclosure of his lien for same. The items in dispute will be hereinafter discussed in detail. The court decreed specific performance, but found the bal-

ance due on the purchase price to be $5,161.28 with interest at 6 per cent. to date of payment. But if payment was not made in 45 days the land was ordered sold to pay the balance of the purchase money for which a lien was declared against the land. There was no personal judgment against appellees. From this decree both sides have appealed.

Mrs. Starling, as administratrix of her deceased husband's estate (he having died intestate in January, 1931) was made a party plaintiff. On demurrer of appellant, the court held that she was not a proper or necessary party plaintiff to the action in her representative capacity and struck her name from the complaint. This action of the court is attacked by the appellees and sought to be upheld by appellant because of the effect it might have on the admissibility of the testimony of appellant as to transactions with or statements of the intestate. Section 4144, Crawford & Moses' Digest, and § 2, Schedule to Constitution 1874. We do not decide this interesting question as to whether or not the executrix was a proper or necessary party, for, as we view the matter, it becomes immaterial. For the purposes of this opinion therefore we treat appellant as a competent witness.

■ The first point of difference between the parties relates to the alleged payment of taxes by appellant for the years 1924, 1925 and 1926. The trial court gave judgment to appellant for the taxes paid for the year 1924, but refused him credit for taxes for 1925 and 1926. We think the court erred as to the 1924 taxes, but did not err as to those for the other years. The facts are that appellant purchased this land from one Kresky for $3,200 less than he sold it to Starling for. We do not mean any reflection on appellant, as he was buying for cash and selling on credit, and no doubt Starling knew this fact. The land was bought for Starling at his suggestion. At that time, about December 15, 1924, he put up with appellant $800 which in turn appellant put up as earnest or good faith money. Title was not finally acquired by appellant until January 30, 1925, when deed

was taken in his own name. Nothing was said about the taxes at that time, and it was not known whether the land could be bought or whether the title was good. Appellant was to get a good title, and the title would not be good with the lien for taxes unpaid. There was no valid and binding sale, no grantor and grantee, until appellant got his deed from Kresky on January 30, 1925. As between appellant and Kresky, the latter was due to pay the taxes for the year 1924, unless appellant agreed to pay same. Section 10,023, Crawford & Moses' Digest. Starling was never the record owner, and the proof shows conclusively that he did not go into possession until sometime in January or February, 1925. The purchase price was $12,800, and not that amount plus the 1924 taxes. Appellant should not have credit for the amount thereof. The receipt was taken in his own name, and correctly so as he was due to pay same.

As to the taxes for 1925 and 1926, the receipts therefor were held by appellant, but they were receipts to Starling, and not to appellant. This was very cogent evidence that Starling did pay the taxes for these years. The record title was in appellant, and there was nothing of record or even in writing to show Starling's ownership. Appellant testified that he paid all taxes at Starling's request, and the amounts paid were charged to Starling's account on his ledger, but we cannot say this testimony was sufficient to overcome the written tax receipts showing payment by Starling. The evidence to accomplish this must be clear and convincing.

■ It is next insisted by appellant that the court erred in allowing him only 6 per cent. interest instead of 10 per cent., as he testified the oral agreement was. We do not think so. We have many times held that an agreement to pay interest at a rate greater than 6 per cent. will not be enforced as to the excess unless the agreement is in writing. *Matlock* v. *Purifoy,* 18 Ark. 492; *Wallis & Bro.* v. *Lehman,* 36 Ark. 571; *Johnson* v. *Hull,* 57 Ark. 550, 22 S. W. 176; *Temple* v. *Hamilton,* 178 Ark. 355, 11 S. W. (2d) 465. We decline to reconsider these

cases and overrule them. Appellant invokes the maxim that he who seeks relief in equity must do equity, and that therefore, to get a performance of the contract appellees ought to be required to perform the contract as made and pay interest at 10 per cent. But the same rule applies to him, as he seeks to foreclose his purchase money lien for the balance due at 10 per cent. on an oral contract to pay. As said in *Temple* v. *Hamilton, supra,* to quote a syllabus: "An agreement to pay interest on an account at a rate exceeding 6 per cent. will not be enforced as to such excess, unless the agreement be in writing." And that was an equity case.

■ On the cross-appeal, in addition to the 1924 taxes, which we have already discussed and disallowed, it is urged that the court erred in allowing appellant his charge of $300 for attorney's fees and expenses, and we agree with appellees in this regard. Appellant was undertaking to acquire the land and a good title at a handsome profit to himself. If he had sold the land to Starling without profit, it would be equitable for his estate to pay this amount, but, since he was making an investment for his own benefit, with both his investment and profit at stake, we think it would be inequitable to charge the estate with it.

■ As to the amounts advanced for building material and supplies totaling $1,377.05, we think these amounts were properly allowed and should bear interest at 6 per cent. from the date of advancements.

■ Interest should be charged on the balance of purchase price of the land from January 30, 1925, at 6 per cent. instead of December 15, 1924. Appellant had no money invested therein until he got his deed with good title, and the agreement was to return to Starling his $800 cash payment, if, for any reason, the deal fell through.

■ We also think the court erred in arriving at the rental value of the land for the year 1931 by allowing appellees credit for a portion of the value of an estimated amount of crops grown on the land for that year. We do not mean to say that the market value of the customary

portion of crops grown and harvested would not be the rental value. It would. So also what its rental value was in money. In *Missouri Pac. Rd. Co.* v. *Frost,* 146 Ark. 472, 225 S. W. 645, we held that a mortgagee in possession is liable, not merely for the rent he received, but for the rental value of the land, and *Greer* v. *Turner,* 36 Ark. 17, is cited to support that statement. So here appellant is in the position of a mortgagee in possession and is liable to appellees for the rental value of the land.

The testimony as to the rental value is so indefinite and uncertain as to make it difficult of ascertainment, and we therefore refer this matter to the trial court, with the right of either party to submit further proof in this regard.

The decree will therefore be reversed, and the cause remanded with directions to restate the account in accordance with this opinion, except as to rental value for 1931 and 1932, if appellant is still in possession, and as to rental value to permit the parties to offer further testimony and for further proceedings according to law and the principles of equity.

AMERICAN SURETY COMPANY *v.* KINNEAR MANUFACTURING COMPANY.

Opinion delivered July 7, 1930.

W. G. Dinning, for appellant.

Moore & Moore, for appellee.

SMITH, J. This is the third appeal involving suits by contractors who furnished labor or material, or both, used in the construction of the River Terminal by Wharf Improvement District No. 1 of the City of Helena. A controlling question in each of these cases was whether the suits had been commenced within six months of the date of the completion of the improvement.

The two former appeals were from decrees in which the chancellor held that the improvement had been completed more than six months prior to the time of the institution of those suits. *Wharf Imp. Dist. No. 1 of Helena* v. *U. S. Gypsum Co.,* 181 Ark. 288, 25 S. W. (2d) 425; *Perry Hanson Gin Co.* v. *American Surety Co.,* 181 Ark. 1150, 26 S. W. (2d) 1113. In the instant case there was a verdict by a jury and judgment thereon in favor of the plaintiff subcontractor against the principal contractors and the surety on their construction bond, and this appeal is from that judgment.

The opinions in the former cases recognized that there was a conflict in the testimony on the question of the date of the completion of the work, and in the last-mentioned of these two cases it was said: "In addition to this, it may be said that the chancellor found from the evidence that the improvement was completed more than six months before the beginning of this suit. The chancellor's finding is conclusive unless it is against the preponderance of the evidence. We have reached the conclusion that the finding in this case is supported by a

preponderance of the evidence, and the decree is affirmed."

It appears, however, that, while the testimony in the instant case is sufficiently similar to that on the former appeals to render a restatement of the facts unnecessary, the testimony is not identical. There were some depositions which were used in all three cases, but there was some oral testimony offered at the trial from which this appeal comes.

The two former cases were tried before the chancellor, while the instant case was heard by a jury, and the instructions given by the court at this trial show that the liability of the surety on the bond of the principal contractors was made to depend upon the question of the date of the completion of the improvement. The jury was told that the plaintiff subcontractor had the right to recover against the surety of the principal contractors if the suit was brought within six months of the date of the completion of the work, and the verdict in favor of the plaintiff necessarily implies the finding by the jury that the suit was brought within that time.

Although the finding of fact in the instant case is contrary to the finding of fact made by the chancellor in the former cases, the judgment here appealed from must be affirmed if there is any substantial testimony to support the verdict upon which the judgment was rendered, unless it must be reversed for some other reason. The plaintiff here was not a party to either of the former cases, and it is not concluded by the finding of the chancellor in those cases.

We would, therefore, affirm the judgment in the instant case, so far as the sufficiency of the testimony is concerned, notwithstanding the finding of fact by the chancellor in the former appeals, if the testimony heard at the trial from which this appeal comes is legally sufficient for that purpose; and we think it is. It must be remembered that we do not reverse the decrees of chancery courts on the facts unless the findings based on those

facts appear to us to be contrary to the preponderance of the evidence; whereas in appeals from judgments rendered upon verdicts of juries we are required to affirm, so far as the sufficiency of the testimony is concerned, if the testimony tending to support the verdicts is sufficient for that purpose, when given its highest probative value. This results from the fact that in chancery appeals we try the cases *de novo,* whereas in law cases we do not.

These questions were considered in the case of *Simpson* v. *Martin,* 174 Ark. 956, 298 S. W. 861, which cited the case of *Bush* v. *Alexander,* 134 Ark. 307, 203 S. W. 1098. Those cases involved the title to adjoining tracts of land owned by different parties, but the controlling question in each case was whether the land in litigation formed as an accretion to other lands the title to which was not in dispute. In the *Bush* v. *Alexander* case the judgment of the court, based upon the verdict of the jury finding that the land in litigation was an accretion, was not reversed, because that verdict was supported by testimony legally sufficient to support that finding; whereas the decree in the case of *Simpson* v. *Martin,* based upon the finding that there was no accretion, but an avulsion, was affirmed, because that finding did not appear to be contrary to the preponderance of the evidence. The Simpson case was a chancery case and was tried *de novo;* the Bush case was a law case and was, therefore, not tried *de novo* on the appeal.

As the testimony here is in conflict as to the date of the completion of the work, and is legally sufficient to support the finding that the work had not been completed more than six months prior to commencement of the instant case, we would be required to affirm the judgment from which this appeal comes, notwithstanding the decrees on the former appeals and our affirmance of them, if no other question was presented for our decision. But there is another question. Appellant asked an instruction numbered 6, reading as follows: "If you find from the testimony in this case that W. F. Schulz was

the architect and had the supervision of the construction of the improvement, and that as such on the 31st day of March, 1927, executed and delivered to the Commissioners of Wharf Improvement District No. 1 of Helena, Arkansas, his ninth and final estimate of the work performed under such contract showing a completion thereof, then you will find that such final estimate constituted an acceptance of the improvement, unless you find that the commissioners of said district expressly repudiated the act of the architect, and gave notice of such repudiation, both to the contractor and to the architect, or took any other course that may have been provided for by the terms of the contract."

The court refused to give this instruction as requested, and gave it as amended, and as amended and given it reads as follows: "If you find from the testimony in this case that W. F. Schulz was the architect and had the supervision of the construction of the improvement, and that as such on the 31st day of March, 1927, executed and delivered to the Commissioners of Wharf Improvement District No. 1 of Helena, Arkansas, his ninth and final estimate of the work performed under such contract showing a completion thereof, then you will take that into consideration as to whether or not that said building was accepted as being completed."

It is apparent that the effect of the amended instruction is to make the final estimate of the supervising architect evidentiary merely of the fact that the work had been completed when the estimate was given; whereas it is insisted, for the reversal of the judgment, that the principal contractors were not entitled to the estimate until the work had been completed, and that, in the absence of actual fraud or such inattention and indifference to the interests of the improvement district as to imply bad faith, the estimate is conclusive of the fact, unless questioned in the manner provided by the building contract. It was not insisted at the trial below that

the architect was guilty of actual fraud or that inattention and indifference which implied bad faith.

The building contract was offered in evidence, and § 39 thereof reads as follows: "Architect's Decision—The architect shall, within a reasonable time, make decisions on all claims of the owner or contractor and on all other matters relating to the execution and progress of the work or the interpretation of the contract documents. The architect's decisions, in matters relating to artistic effect, shall be final, if within the terms of the contract documents. Except as above or as otherwise expressly provided in the contract documents, all the architect's decisions are subject to arbitration."

This provision, or a similar one, appears in most contracts of this character, and has uniformly been construed as meaning that the architect is constituted an arbiter between the owner and the contractor. *Illinois Surety Co.* v. *U. S.,* 240 U. S. 214; *U. S. Fidelity Co.* v. *Board of Com'rs.,* 137 Ark. 375, 209 S. W. 88; *Boston Store* v. *Schleuter,* 88 Ark. 213, 114 S. W. 242; *Hill* v. *Cone,* 176 Ark. 704, 2 S. W. (2d) 700, and cases there cited.

The last paragraph of this section recites that the architect's decisions in matters relating to artistic effect shall be final if that question arises under the building contract. This means, of course, in the absence of fraud or such inattention and indifference as implies bad faith. The paragraph concludes with the proviso that "Except as above or as otherwise expressly provided in the contract documents, all the architect's decisions are subject to arbitration."

The question here involved is not one of artistic effect; therefore the decision of the architect is not final; but we think the effect of the proviso last quoted is to make it final unless one party or the other questions the decision and requests an arbitration. The language is meaningless if it does not mean this. We, therefore, conclude that instruction numbered 6 should have been given in the form requested, and that it was error to modify

it over appellant's objection, and for this error the judgment must be reversed, and it is so ordered.

AMERICAN SURETY COMPANY *v.* KINNEAR MANUFACTURING COMPANY.

4—2579

Opinion delivered May 30, 1932.

W. G. Dinning, for appellant.

Moore, Daggett & Burke, for appellee.

SMITH, J. This is the second appeal of this case. See page 953 *ante.* Two other appeals had been previously decided which arose out of the bond here sued on. *Wharf Imp. Dist. No. 1* v. *United States Gypsum Co.,* 181 Ark. 288, 25 S. W. (2d) 425; *Perry Hanson Gin & Machine Co.* v. *American Surety Co.,* 181 Ark. 1146, 26 S. W. (2d) 1113. The first two appeals were from decisions of the chancery court, in which it was decided that the suits brought upon the bond executed by the surety

company had not been brought within six months after the completion of the work covered by the bond given by the principal contractor as required by law.

We said, in the opinion on the former appeal in this case, *ante* p. 953, that the decision of the chancery court upon very similar facts was not conclusive of those facts upon the jury trying this case, for the reason that the plaintiff here was not a party to the chancery cases, and we there stated the reasons why this was true, which need not be restated here.

We reversed the judgment on the former appeal of the instant case, for the reason that the court had refused to give an instruction numbered 6, there set out, as requested, and for this reason only. We there said that the judgment would have been affirmed had this instruction been given, as no other error appeared. The instruction was modified and given as modified, and we held that it was error to modify the instruction, and we reversed the judgment for that reason. The effect of the instruction there set out, as asked, was to make the final estimate of the architect conclusive of the performance of the contract covered by the bond unless the district had expressly repudiated the action of the architect and had given notice of such repudiation both to the architect and to the contractor, or had taken some other course provided for by the terms of the contract. The effect of the modification of the instruction was to make the architect's final certificate evidentiary only, and not conclusive, of the fact that the contract had been fully performed.

The mandate which went down to the lower court upon the reversal of this judgment contained the following recitals: "The court erred in refusing to give instruction numbered six in the form requested by the appellant and in modifying it. It is therefore considered by the court that the judgment of said circuit court in this cause rendered be, and the same is hereby, for the error aforesaid reversed, annulled and set aside with costs; and that this cause be remanded to said circuit

court for a new trial and for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered."

This mandate conformed to the opinion of the court.

It was said, in the opinion holding that instruction numbered 6 should have been given as requested, that "it was not insisted at the trial below that the architect was guilty of actual fraud or that inattention and indifference which implied bad faith."

Upon the remand of the cause, and before its retrial, the complaint was amended to specifically allege that the architect was guilty of that inattention and indifference which implied bad faith, and this issue was submitted to the jury under instructions correctly declaring the law of that subject.

It is very earnestly insisted that this action of the court was erroneous, and, in support of that contention, we are cited to several of the numerous cases in which this court has held that, where a judgment has been reversed in this court and remanded for a new trial, the law as announced on the former appeal is the law of the case, and that a proposition of law decided on the former appeal is not open to reconsideration upon a subsequent appeal. This contention, as applied to the facts of the instant case, is so completely answered in the opinion in *Morgan Engineering Co.* v. *Cache River Drainage District,* 122 Ark. 491, 184 S. W. 57, that we quote from it as follows:

"But this doctrine can have no application here for the reason that on the former appeal the judgment was reversed because the court erred in its instructions to the jury, and the case was remanded with directions not 'to render judgment in accordance with the opinion,' but for 'further proceedings in accordance with the opinion.' There is a marked distinction between the two. 'Further proceedings' contemplated that there was to be a new trial on the issues that might be presented, and that proof might be introduced on these issues. The order was in effect a remand for a new trial in general. Of course, all

further proceedings that were to be had were to be in accord with the opinion, and, if the issues on the second trial and the testimony remained substantially the same, then the appellant would have been entitled to a judgment for the value of its services under the terms of the alleged contract under which it claimed, computed in the manner directed by this court in its opinion on the former appeal. But, as was said in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *York, supra:* 'The finding of the facts upon the former appeal cannot be binding as the finding of facts in this second trial, because the testimony on the second trial might be different from or additional to that given on the first trial. But the principles of law determined and announced upon the former appeal are binding, and must stand as the law of this case; and if the testimony upon this second trial is substantially the same as on the first trial, then the former decision of this court upon all questions of law involved in this case must be followed on this appeal'."

The opinion in that case further amplified the doctrine stated by a review of other cases by this court there cited.

We stated, in the former opinion in the instant case, that the testimony sufficiently supported the jury's finding that the suit was brought within the time limited by the bond and by the statute pursuant to which it was executed (§ 6913, Crawford & Moses' Digest), and the similar testimony offered at the trial from which this appeal comes is also sufficient to support that finding.

At the trial from which this appeal comes, instruction numbered 6 was given without modification, but there was testimony to support the allegation, not made at the former trial, that the architect's final certificate was void, for the reason that it was given without authority and resulted from an inattention and indifference which implied bad faith, and the testimony in the record before us is legally sufficient to support that finding.

The contract between the improvement district and the principal contractor, to secure the performance of

which the bond was executed, not only required the architect, before issuing his final certificate, to ascertain that the work had been completed in accordance with the plans and specifications, but contained also the following provision: "Before issuance of final certificate, the contractor shall submit evidence satisfactory to the architect that all payrolls, material bills and other indebtedness connected with the work have been paid."

Certain correspondence appears in the record between the architect and the surety company, in which the architect referred to certain work which he regarded as immaterial, but not completed, and it was referred to as "one or two minor details," but which the jury has found, under instructions submitting that question, were substantial. One of these letters, written by the architect to the surety company subsequent to the issuance of the final certificate by the architect, contained this statement: "The Kaucher-Hodges Company, however, have a great many accounts outstanding, which have not been paid to this writing, and I do not see how the bond can be released until everything is finally adjusted satisfactory to the terms of the contract."

One of the outstanding accounts there referred to is the account here sued on, and, while the architect no doubt assumed that this account would be paid along with others, the undisputed testimony shows that the account here sued on has not been paid. In fairness to the architect, it may be said that he probably regarded his final estimate and certificate as being qualified by the letters written subsequent to the issuance of this certificate, in which he stated to the surety company that the bond could not be treated as discharged until certain unpaid bills due by the contractor to materialmen had been paid.

It is finally insisted that there can be no recovery in this case because there was no arbitration or demand therefor. The building contract contains provisions for supervision of work and for replacement and correction of defective work, and also that the architect's decision in matters relating to artistic effect shall be final, and

that, "Except as above, or as otherwise expressly provided, in the contract documents, all the architect's decisions are subject to arbitration." If this provision relates to any questions except those arising between the owner, the improvement district, and the contractor (which we are not required here to decide), it may be first said that no dispute had ever arisen relating to appellee's account, and there was nothing to arbitrate concerning it. Indeed, its original validity is not even now questioned.

But, as has already been said, the binding character of the architect's decision is destroyed if that decision was fraudulent or was induced by such inattention or indifferences as implied bad faith.

It was said in the case of *Boston Store* v. *Schleuter,* 88 Ark. 213, 114 S. W. 242, that, "Notwithstanding the contract makes the certificate, report, opinion, decision of the architect conclusive on the parties, the law writes into this provision that the conduct of the architect must be free from fraud. Fraud on his part destroys the effect of the provision. Therefore, if the architect fails to exercise his honest judgment, or makes such gross mistakes as necessarily imply bad faith, his decision, report, certificate and opinion are not binding on the parties to the contract. (Citing authorities.)" See also the later cases of *United States Fidelity & Guaranty Co.* v. *Board of Commissioners,* 137 Ark. 375, 209 S. W. 88, and *Hill* v. *Cone,* 176 Ark. 697, 3 S. W. (2d) 985.

The questions of fact which arose upon the issues herein stated were submitted to the jury under correct declarations of law, and the jury's verdict is conclusive of them. The judgment must therefore be affirmed, and it is so ordered.

CITRUS PRODUCTS COMPANY, INC., *v.* TANKERSLEY.

4—2575

Opinion delivered May 30, 1932.

I. J. Friedman and *U. L. Meade,* for appellant.

Hardin & Barton, for appellee.

MEHAFFY, J. On February 10, 1931, the appellants filed suits against the appellees in the municipal court in the city of Fort Smith, Arkansas, for $321.82. They filed statements of account and no other pleadings.

The statement filed for the Citrus Products Company, Inc., was for $279.58, and the statement for Menasha Products Company was for $66.65. The defendants did not appear in the municipal court, and default judgment was rendered against them, whereupon they filed affidavit for appeal and bond.

In the circuit court the defendants filed answer, denying that they, or either or any of them, were indebted to plaintiff on accounts sued on; denied that they were partners at the time the account was alleged to have been contracted; denied that either of them was responsible for the account; denied that there was any indebtedness due; and denied that the checks sued upon were authorized by them or either of them; denied that R. L. Pitts had any authority to write checks, and particularly the checks sued on, on the account of the defendants or either of

them, or on account of the White Dairy Products Company; and they especially denied that Kate Tankersley, administratrix of the estate of R. H. Tankersley, deceased, was liable, and alleged that no claim had been exhibited against the estate of her intestate; that she was appointed administratrix, and more than twelve months had transpired, and no claim had been exhibited.

The case was tried in the circuit court, where there was a verdict and a judgment for defendants, and the case is here on appeal.

The depositions of E. J. Hockstead and E. H. Lewandoski were offered in evidence.

One of the attorneys for the plaintiffs offered in evidence a signed order attached to copies of invoices. The statement was introduced over the objection of defendants, although the attorney who introduced it did not testify, and there was no evidence by any one identifying the papers or signature of any person signing the order or the invoices.

Hockstead, in his deposition, testified that he was treasurer and agent of the Citrus Products Company and that the account annexed in favor of Citrus Products Company against the White Dairy Products Company, a partnership composed of Ross Tankersley, Walter Tankersley, and Mrs. Tankersley; that the balance shown on the account was correct, and that no part of it had been paid. The witness did not show that he had charge of the books, or knew anything about them.

Plaintiff was then permitted to read interrogatory No. 4 and the answer thereto, which was based on the report of the R. G. Dunn agency. It was shown that the report of R. G. Dunn Company indicated that Ross Tankersley and R. L. Pitts were partners. All these things transpired before the witness had any connection with the Citrus Products Company.

A check signed "White Dairy Products Company, by R. L. Pitts," for $124.83 was introduced, and witness testified that these checks were returned from the bank unpaid, and that they received a telegram from White

Dairy Products Company on December 31, 1928, advising that they would mail check on January 15, and Pitts' signature canceled, and that they had never received the check.

He testified, in answer to interrogatory No. 7, that the mercantile report indicates that the present partnership is composed of Ross H. Tankersley and Mrs. Kate Tankersley, and the report indicated that the above persons secured control of the interest of Ross Tankersley and R. L. Pitts, on February 14, 1930, and have since continued to be the owners.

In answer to another interrogatory, witness said that they had received a telegram canceling Pitts' signature, but had never received any letters denying liability. Numerous letters and statements were introduced, but it is unnecessary to set them out here.

Lewandoski testified, by deposition, for the Menasha Products Company in substantially the same way that Hockstead did for the Citrus Products Company, and introduced statements of the accounts. Neither of the witnesses testifying knew, or pretended to know, who the partners were or who owned the business. They did not offer any evidence tending to show that the merchandise for which they were asking payment had ever been delivered to the defendants or any of them.

The defendants introduced Mrs. Lena Curtis, the daughter of Mrs. R. H. Tankersley, who testified that R. L. Pitts was not a member of the partnership now or at any time. He was the ice-cream maker. Witness was at work for the White Dairy Products Company as general office manager, and knows there was no partner in there. She was there in 1928 and 1929.

Witness testified that Borengasser was bookkeeper, but never had any authority to bind the company. He had no authority to write the letters. On cross-examination, this witness testified that Pitts did not put any money into the concern, and, when asked how she knew, she said she heard her father say so many times. This answer was objected to by plaintiff.

Mrs. Elaine Robertson testified in rebuttal for plaintiffs, and, among other things, she said that she received a check for $15 from the White Dairy Products Company, and she also testified that Mrs. Curtis promised to make payments. This witness was secretary and stenographer in the office of Mr. Friedman, attorney for plaintiffs.

At the close of the testimony the court, of its own motion, instructed the jury, and refused to give instructions requested by plaintiffs.

After appellants had filed their motions for a new trial, they filed an amendment to the motion asking for a new trial on the grounds of newly discovered evidence.

It is appellants' first contention that the court erred in not excluding the testimony of Mrs. Lena Curtis to the effect that she had heard her father say that Pitts did not put any money in the business. This was an answer brought out on cross-examination, and it could not have been prejudicial. The appellants did not show by any competent evidence that Pitts either put any money in the business, was a partner, or had any authority to bind the company. There is no evidence that there was any partnership.

It is next contended that the court erred in overruling appellants' amendment to its motion for a new trial, wherein it was alleged that Miss Minnie Burke, who lived in Fort Smith, would testify that she was an employee of defendant during the year 1929 in the month of January, during the life of R. H. Tankersley, and was employed by Ross Tankersley, Jr., and R. L. Pitts, and Pitts was recognized by Mr. Tankersley as owning an interest in the business, and, to her knowledge, issued most of the checks for bills contracted by defendant, and also ratified and approved her employment, and would issue checks and sign the firm's name, by him, for her salary; that this witness was unknown to plaintiff prior to said trial, and that she would testify further that the defendants bought the articles mentioned in the account, and that she saw them in the possession of defendants.

It was alleged that plaintiffs are nonresidents of the State, and that their attorney did not know of this witness until after the trial.

The record shows that on March 20, 1931, this case was postponed until April 8; that on April 8 the defendants filed a verified answer denying each and all the allegations of the complaint. The appellants knew on March 20 that defendants claimed that Pitts had no authority to make any contract.

On April 8, when defendants filed their answer, appellants knew that defendants denied any partnership, and denied any authority of Pitts to make contracts or sign checks.

On the same day, April 8, the cause went to trial in the circuit court. After starting the trial on the 8th, the court continued the case on motion of the plaintiffs for the term, which meant a continuance for six months. The plaintiffs had all this time after they knew what the issues were. They knew that defendants denied Pitts had any authority; they denied receiving the goods, and knew all of the defenses set up in appellee's answer, and no reason is shown why the plaintiffs did not introduce proof showing that the merchandise was delivered to defendants. This might have been done by the carrier who delivered it, and the record does not show why Pitts and Borengasser, and others who knew all the facts, were not produced as witnesses. There was nothing to prevent plaintiffs from subpoenaing the defendants or any other witnesses who might have known about the facts.

This court has repeatedly held that a motion for a new trial on the ground of newly discovered evidence should not only be supported by affidavits, but that a new trial would not be granted on the grounds of newly discovered evidence unless the party applying for the new trial had used proper diligence.

Here, after approximately six months' time, plaintiffs went to trial without introducing any competent evidence, either to show that a partnership existed, and, if so, who the members were, or whether Pitts or Boren-

gasser had any authority to order merchandise, make contracts, or sign checks.

The burden, of course, was on the plaintiffs to make out their case, and as to whether they did or not was a question of fact decided by the jury against the appellant.

Appellants do not ask a reversal because of any error of the court in giving or refusing to give instructions. It is therefore unnecessary to discuss the instructions.

We find no error, and the judgment is affirmed.

COCA-COLA BOTTLING COMPANY *v.* MCANULTY.

4—2580

Opinion delivered May 30, 1932.

Bullock & Priddy and *Buzbee, Pugh & Harrison,* for appellant.

Robert A. Ragsdale, Reuben Chenowith and *Hays & Smallwood,* for appellee.

MEHAFFY, J. This action was begun by appellee in the Pope Circuit Court against appellant and Henry Carter to recover for personal injuries received when he was struck by an automobile driven by said Henry Carter.

It was alleged that the appellant had parked its truck on the left side of the highway, so that the wheels and body of the truck extended over the hard surface of the road four or five feet. The hard surface or pavement was 14 feet wide, and the entire roadbed was 22 feet wide.

Appellee, who was riding in a buggy with his nephew, got out of the buggy after the team had been driven off the highway, and about 30 or 40 yards from the truck. The truck was in front of a filling station. Appellee walked from where the buggy was stopped on the shoulder of the highway, until he got opposite the filling station, and then started across the highway to the filling station. He had gone two or three steps when he was struck by a car driven by Henry Carter. The car driven by Carter was going at a very rapid rate of speed.

The appellee was knocked down, his leg broken, and he was otherwise injured. He alleged, and the proof tended to show, that Carter was driving very rapidly, and that there was not room on the highway for the passage of the car between the truck and appellee; that, before reaching the truck, Carter swerved his car to the left and struck appellee.

It was alleged that his injuries were caused by the concurrent negligence of the appellant and Henry Carter. There was a verdict and judgment against Henry Carter and appellant for $3,000.

Henry Carter did not appeal. The appellant filed motion for a new trial, which was overruled, and appeal prosecuted to this court.

Appellant's first contention is that there was no evidence to justify the submission of the question of negligence on its part to the jury.

The Legislature of 1927 passed act 223, which was an act regulating the operation of vehicles on highways. Section 9 of said act reads as follows:

"Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway and shall drive a slow-moving vehicle as closely as possible on the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway, and except when overtaking and passing another vehicle subject to the limitations applicable in overtaking and passing set forth in §§ 12 and 13 of this act."

The first paragraph of § 24 of said act is as follows: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of 200 feet in each direction upon such highway."

The undisputed evidence in this case shows that appellant had driven its truck on the left side of the highway, parked it there, so that the body and wheels of the truck extended four or five feet over on the hard surface of the highway, and the hard surface was only 14 feet wide.

The evidence tends to show that the truck of appellant was so parked on the highway that it did not leave a clear and unobstructed width of 15 feet of the main traveled highway opposite said truck.

The undisputed evidence shows that the main traveled portion of the highway was only 14 feet wide, and, if the truck was on the hard surface at all, it necessarily left less than 15 feet for the passage of other vehicles.

It is true that Henry Carter, the driver of the car which struck appellee, saw the truck and its position, but, if appellant was guilty of negligence, this negligence of Henry Carter did not relieve it from the consequences of its negligence.

It is also true that, if there was any negligence on the part of the driver of appellant's truck, it was in obstructing the highway. That it did obstruct the highway is not disputed, and that it was parked on the wrong side of the road is not disputed.

Of course, the remaining space of the highway would be the same whether the truck was parked on the right or wrong side. But in any event, if the wheels and body of the truck were over the pavement four or five feet, it did not leave 15 feet for the passage of other vehicles as provided by law.

Appellant calls attention to, and relies on, *Powers* v. *Standard Oil Co.*, 98 N. J. Law 730, 119 Atl. 273. In that case the truck of the Standard Oil Company was parked on the wrong side of the street in violation of the traffic law, and a little girl nine years old ran out from behind the truck and was struck by a passing automobile. Suit was brought against the driver of the car and the Standard Oil Company and another. There was a verdict in favor of the driver of the automobile, and against the other defendants. It was not alleged in that case that there was any violation of the traffic laws by the Standard Oil Company, except the mere parking on the wrong side of the street. There was ample space for other vehicles, and the court held that the parking of the truck did not *per se* constitute negligence upon the owner of the truck so as to subject him to liability as an efficient proximate cause.

Appellant says that the truck did not extend more than four or five feet on the hard surface of the roadbed, and that this left at least 17 feet of roadway remaining. If the roadway is to be considered 22 feet wide, and the truck was five feet on the hard surface, then it was at least nine feet in the road, and that would only leave 13 feet if the entire roadbed was included, rather than the hard surface. In any event 15 feet required by law was not left. In the above case relied on by appellants, there was no question of an obstruction of the highway, but the only allegation was that the truck was parked on the wrong side of the street. It was not claimed in that case that the highway was so obstructed that there was not ample room to pass. Moreover, it was held that the injured party there was guilty of contributory negligence.

In the instant case, whether the appellee was guilty of contributory negligence was a question of fact to be determined by the jury, and its verdict is not without evidence to support it.

It is next contended that whatever negligence there may have been on the part of appellant, that negligence was not the proximate cause of the injury. Where concurrent negligence is alleged, the general rule is stated as follows: "As a general rule, it may be said that negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient that his negligence concurring with one or more efficient causes, other than plaintiff's fault, is the proximate cause of the injury. So that where several causes combine to produce injuries, a person is not relieved from liability because he is responsible for only one of them, it being sufficient that his negligence is an efficient cause without which the injury would not have resulted to as great an extent, and that such other cause is not attributable to the person injured. But it must appear that the person sought to be charged was responsible for one of the causes which resulted in the injury. The concurring negligence of another cannot transform the remote into the proximate

cause of an injury, or create or increase liabilities therefor." 45 C. J. 920.

There was ample evidence to support the finding of the jury that the injury to appellee would not have occurred if the truck had not been so parked as to obstruct the highway. If it did obstruct the highway when parked there, and this obstruction was negligence, it was a continuing act of negligence up to the time of the injury, and whether it was negligence, and whether the injury would not have occurred but for this negligence, were questions for the jury. *Helena Gas Co.* v. *Rogers,* 104 Ark. 59, 147 S. W. 473.

"The law is practical, and courts do not indulge refinements and subtleties as to causation, if they tend to defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause in producing a given effect or result, though subordinate and dependent causes may have operated, must be looked to in determining the rights and liabilities of the parties." *Cook* v. *Ormsby,* 45 Ind. App. 352, 89 N. E. 525.

The undisputed proof shows that Henry Carter was guilty of negligence, and the undisputed proof shows that appellant's truck was obstructing the highway in violation of law, and whether this violation of law was negligence was a question of fact for the jury.

Appellant calls attention to the case of *Hartnett* v. *Boston Store,* 265 N. E. 331, 106 N. E. 837, L. R. A. 1915C, 460. There was in that case, however, no question of concurrent negligence, but the Boston Store, the defendant, undertook to escape liability by showing that the condition existing at the time and place was the proximate cause of the injury. The court in that case however said: "There are three essential elements in actionable negligence: First, a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed; second, the failure to perform that duty; and third, a consequence so connected with the failure to

perform the duty that the failure is the proximate cause of the injury."

In the instant case there can be no question about the duty being imposed by law, nor can there be any dispute about the fact that it was for the benefit of persons using the highway. The undisputed proof shows that there was a failure to perform that duty, and there was substantial evidence to show that the injury would not have happened but for the failure to perform its duty by appellant.

Appellant also calls attention to *Anderson* v. *Baltimore & O. R. Co.*, 74 W. Va. 17, 81 S. E. 579, 51 L. R. A. (N. S.) 888. The court however said in that case: "The causal connection between the first act of negligence and the injury is broken by the intervention of an act of a responsible party, which act is in law regarded as the sole cause of the injury." In the instant case the causal connection was not broken. The negligence of the appellant continued and existed as long as its truck remained on the highway in violation of law, and it was its negligence together with the negligence of the driver of the automobile, that caused the injury.

It is next contended that appellee was guilty of contributory negligence as a matter of law. The undisputed proof shows that he started across the highway, and before he started he looked to see if a car was coming, and, as he proceeded to cross the highway, the car driven by Carter struck the truck and then struck appellee, causing the injury. Contributory negligence, under the circumstances, was a question of fact for the jury, and this question was submitted to the jury by the court, and the finding of the jury on this question is conclusive here.

We have not discussed or reviewed the authorities cited by appellee, with reference to the violation of the traffic law, because there is no contention that the instructions given in this case were erroneous.

We find no error, and the judgment is affirmed.

HOWELL *v.* HARVILL.

4—2581

Opinion delivered May 30, 1932.

Buzbee, Pugh & Harrison, for appellant.

Charles D. Frierson, Jr., and *Chas. D. Frierson,* for appellee.

MCHANEY, J. Appellant prosecutes this appeal from a judgment for $8,642.50 against him for personal injuries sustained by appellee by reason of a cave-in or slide of gravel in the gravel pit of appellant some distance out of Jonesboro. Appellee was employed by appellant as fireman on a steam shovel used by appellant in digging gravel from a gravel pit known and operated as Cotton Belt Gravel Company, and his right leg was crushed when a large slide of gravel caught him on the running board of the steam shovel on which he was standing at the time, having gone out on the running board to advise the operator of the shovel that the water was low and that it would be necessary to cease operations to get a sufficient head of water in the boiler. Appellee and the shovel operator, Whittington, were engaged in dig-

ging gravel from a large pit by scooping it up as it caved in from the bank or by scooping into the bank with the steam shovel and undermining it so it would cave in, and loading it on cars by an operation of the steam shovel. It was all done mechanically. Neither the operator, Whittington, nor appellee were in any danger caused by slides of gravel from the bank when in the cab of the machinery. The bank of gravel was estimated by the witnesses to be from 25 to 50 feet high, but by actual measurement was shown to be 30 feet high. On August 19, 1929, the accident occurred, causing serious and permanent injuries to appellee. He was immediately taken to a hospital, treated for his injuries, and on January 10, 1930, appellant settled the claim for $1,000 plus hospital and doctor's bills of $357.50, on the representation of the physician that he had recovered, with a good union of the broken bones, and would be well again.

Appellant requested a directed verdict in his favor, which was refused. We think this request should have been given, and that appellee was not entitled to recover in this action for two reasons: 1st. that appellant was not guilty of any actionable negligence; and, 2nd, that if there were any negligence shown, it was the negligence of a fellow-servant, Whittington, for which no recovery can be had. This view makes it unnecessary to discuss other questions argued by the parties.

■ The undisputed evidence shows that appellant was mining gravel by use of a steam shovel; that it is the universal custom or proper method to operate the shovel by scooping into the bank of the gravel bed, filling the scoop or shovel, and, by an operation of the machinery, the shovel or scoop is then turned to a car and dumped into it. The same process is then repeated, and the gravel loaded into cars. The scoop or shovel operates from the bottom of the bank upwards, and in this way the bank is undermined, and the gravel bank caves in, causing slides. It frequently happens that the gravel slides in around the machine which is only the length of the boom or arm away from the bank, and often covers

it up. The machine then backs out, scoops up the loose gravel, and digs into the bank again for another slide. It is not customary or good practice to dynamite a bank no higher than this was, but the universal practice is to undermine it with the shovel and let it cave in. Appellant was proceeding in the usual, customary and proper way to remove the gravel when the injury complained of occurred. The machinery was being frequently changed to bring it closer to the bank as gravel was removed or to back up, if necessary, to get out of a slide and pick up the cave-in, and working conditions were changing as the necessity arose.

Where the conditions under which a servant works are constantly changing, so as to increase or diminish his safety, it is his duty to make his place of work safe, and no duty in that regard rests upon the master, the servant assuming the risk arising from the use of the working place and appliances. *Moline Timber Co.* v. *McClure,* 166 Ark. 364, 266 S. W. 301.

Appellee had been working in the capacity of fireman for two or three months, and during all that time they had been doing the work in exactly the same way. No dynamite had been used. Under these circumstances, we think there was no negligence shown on the part of the master.

■ But, conceding negligence, it was the negligence of Whittington, a fellow-servant. Both appellee and Whittington were engaged in a common purpose under a common foreman, Thorpe. Neither had any control or direction over the other, and neither could hire or discharge the other. So, if there be any negligence shown, such as failing to warn, or turning the machinery to the right instead of the left, or in failing to notice the trickling or spitting of the gravel and failing to move the machinery to a place of safety, it was the negligence of Whittington, a fellow-servant. Appellant, although present on the job, was not exercising immediate supervision over appellee or Whittington, nor directing personally how the work should be done.

We are therefore of the opinion that there was no substantial evidence to take the case to the jury, and that appellant's request for a directed verdict should have been granted. The case will be reversed, and, as same seems to be fully developed, the cause will be dismissed. It is so ordered.

WALKER *v.* TAYLOR.

4—2567

Opinion delivered June 6, 1932.

[redacted]

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Coleman & Reeder, for appellant.

J. Paul Ward, for appellee.

HART, C. J., (after stating the facts). It is first earnestly insisted by counsel for appellant that the decree should be reversed because the failure of the plaintiff to secure leave to sue the receiver of the insurance company was a bar to the jurisdiction of the court. We do not agree to this contention. The decree recites that the plaintiff and defendant were both present and represented by their attorneys and agreed that the case should be presented for final determination in the Independence Chancery Court. The requirement that leave of court must be had before a receiver can be sued is for the receiver's protection; and, if waived by him, no advantage can be taken of the omission by any one else. This is certainly true in all cases like this where there is no attempt to interfere with the actual possession of the property placed in the hands of the receiver.

In a case note to 29 A. L. R. at page 1460, it is said that, although leave to sue a receiver is generally required, the great weight of authority is to the effect that failure to secure permission to sue a receiver appointed

by a State court does not affect the jurisdiction of the court in which the suit is brought. It is generally held that the defect is merely technical and may be remedied by order or may be waived.

Reliance, however, is placed by counsel for appellant on the case of *Ratcliff* v. *Adler*, 71 Ark. 269, 72 S. W. 896. It is true that the case note just referred to cites that case as following the minority rule that the failure to secure leave to sue a receiver is a bar to the jurisdiction of the action, but we do not think that such is the effect of the decision. The court expressly stated that it was unnecessary for it to determine whether failure to obtain permission to sue is a matter affecting the jurisdiction of the court in which the suit is brought, for, if it be conceded that the general rule is that the court will not entertain jurisdiction of a suit brought against a receiver appointed by another court until the appointing court has given its consent that he be sued, still there are exceptions to the rule. The case under consideration was held to fall within the exceptions because the same judge presided over the court that appointed the receiver who presided over the court in which the suit was brought. Hence it was said that there was an implied consent to the action on the part of the court which appointed the receiver. This case seems to recognize that the omission to obtain leave to sue the receiver is a matter which does not affect the jurisdiction of the court in which the suit is brought and may be waived by the receiver.

In the present case, the receiver expressly consented to the jurisdiction of the court which tried the case; and, as an arm of the court which appointed him receiver, in the absence of evidence to the contrary, it will be presumed that he obtained leave of the court to do so.

The court properly held with the plaintiff on the merits of the case. This is not a suit to recover the sum of $3,000, as argued by counsel for the defendant. The whole matter is one of bookkeeping. On the 15th day of November, 1930, before the Little Rock bank closed its

doors for insolvency on the 17th day of November, the insurance company made a deposit of drafts in said bank in the sum of $15,500. One of them was a draft on an insurance company in the State of California. The bank at once placed $3,000 of this amount to the credit of the Batesville bank. This bank became insolvent and was placed in the hands of the State Bank Commissioner for liquidation. No return was had on the draft of the insurance company which was sent to California for payment until more than a week after both banks had been taken charge of by the State Bank Commissioner as insolvent banks. The draft given by the defendant on the California insurance company was returned not paid and has never been paid. Therefore the chancery court, properly directed that the $3,000 which had been credited to the insurance company on the books of the Batesville bank was without consideration, and that the State Bank Commissioner, who was in charge of the Little Rock bank and the Batesville bank as insolvent banks, should be directed to charge the entry of $3,000 on the books of the Batesville bank, whereby it would show a credit to the Little Rock bank for $3,000, instead of to the defendant insurance company.

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

NEW YORK LIFE INSURANCE COMPANY *v.* CHERRY.

4—2598

Opinion delivered June 6, 1932.

James B. McDonough, for appellant.

Hardin & Barton, for appellee.

HART, C. J. This appeal is prosecuted from a judgment of the circuit court of the Fort Smith District of Sebastian County, rendered on the 10th day of February, 1932, refusing to set aside a judgment rendered against appellant in favor of appellee in a garnishment proceeding.

The material facts disclosed by the record may be briefly stated as follows: On February 28, 1931, M. A. Cherry sued Etta L. Stokes in the Sebastian Circuit Court for the Fort Smith District to recover $2,000 alleged to be due on a promissory note executed by Etta L. Stokes and Walter R. Stokes, her husband, on January 1, 1925, and due one year after date. The complaint alleges that, since the execution of said note, Walter R. Stokes had died, and that there was no administration on his estate. A writ of garnishment was sued out

against the New York Life Insurance Company, which was alleged to be indebted to Etta L. Stokes upon a life insurance policy. Summons was issued on the complaint, directed to the sheriff of Sebastian County. The return of the sheriff was dated March 25, 1931, and shows that he returned the summons because he was not able to find the defendant in Sebastian County. The return was filed with the clerk on March 26, 1931. The writ of garnishment was dated February 28, 1931, and showed that it was served on the second day of March, 1931.

On September 15, 1931, the plaintiff filed what she called an amendment to her complaint in which she alleged that Walter R. Stokes died on or about the 19th day of February, 1931, and that he was a resident of the Fort Smith District of Sebastian County, Arkansas, at the time of his death. It was also alleged that Eugene K. Torbett was duly appointed administrator of his estate by the probate court of Sebastian County. The prayer of the complaint is that Eugene Torbett, as administrator of the estate of Walter R. Stokes, deceased, be made a defendant, and summons issue for him as well as for the defendant Etta L. Stokes. Summons was duly served upon the defendant administrator in Sebastian County. On the 15th day of September, 1931, a summons was issued on Etta L. Stokes, directed to the sheriff of Johnson County. The return of the sheriff of Johnson County shows that summons was duly served by delivering a copy to Mrs. E. L. Stokes in Johnson County as commanded in the summons. On the 9th day of October, 1931, judgment was rendered in favor of M. A. Cherry against E. K. Torbett, administrator of the estate of Walter R. Stokes, deceased, and Etta L. Stokes, in the sum of $1,385, and the accrued interest. Judgment was also rendered in favor of the plaintiff against the New York Life Insurance Company as garnishee.

At the same term of the court at which the judgment was rendered, said New York Life Insurance Company filed a motion to set aside the judgment against it as

garnishee on the ground that it was void. The facts above recited were set forth in the motion. It was stipulated that on September 15, 1931, the probate court of Sebastian County appointed E. K. Torbett as administrator of the estate of Walter R. Stokes, deceased. It was further agreed that Walter R. Stokes carried a policy in the New York Life Insurance Company in which Etta L. Stokes, the defendant, was a beneficiary, and that the amount of money due her on said policy was $1,977.18. It was further agreed that the New York Life Insurance Company had paid the amount of said policy to Etta L. Stokes on the 21st day of May, 1931, and that it did not owe her any other sum.

Under our statute a writ of garnishment may not issue until after an action has been commenced by filing complaint and procuring summons to be issued. *First National Bank of Huttig* v. *Rhode Island Insurance Company,* 184 Ark. 812, 43 S. W. (2d) 535; and *Missouri Pacific Railroad Company* v. *McLendon, ante* p. 204.

The original suit in this case was brought by M. A. Cherry against Etta L. Stokes on the 28th day of February, 1931. The summons was directed to the sheriff of Sebastian County; and on the 25th day of March, 1931, the sheriff returned the summons unserved because he was unable to find the defendant within Sebastian County. The writ of garnishment was issued on the day the suit was commenced and was duly served upon the New York Life Insurance Company on the second day of March, 1931, as evidenced by the return of the sheriff filed March 25, 1931. There was no judgment rendered in favor of the plaintiff against Etta L. Stokes in the original action, presumably because no service of summons had been had upon her as required by § 1144 of Crawford & Moses' Digest.

It is well settled in this State that a valid judgment can not be rendered against the garnishee where no judgment has been rendered against the defendant in favor of the plaintiff. The reason is that garnishment

proceedings are auxiliary to the main suit. The object of a garnishment is to get money or property in the possession of the garnishee and subject it to the payment of the judgment which the plaintiff may recover against the defendant. It necessarily follows that there can be no lawful judgment against the garnishee until after judgment has been recovered against the defendant. *Norman* v. *Poole,* 70 Ark. 127, 66 S. W. 433; *St. Louis, Iron Mountain & Southern Railway Company* v. *McDermitt,* 91 Ark. 112, 120 S. W. 831; *Smith* v. *Spinnenweber,* 114 Ark. 384, 170 S. W. 84; *Smith* v. *Bank of Higden,* 115 Ark. 216, 170 S. W. 1008; *Bank of Eudora* v. *Ross,* 168 Ark. 754, 271 S. W. 703; and *Austin Bridge Company* v. *Vaughan,* 178 Ark. 995, 13 S. W. (2d) 13.

This brings us to a consideration whether the pleading, termed by the plaintiff an amendment to her complaint, which was filed on September 15, 1931, was what it purported to be, or whether it was the commencement of a new action against the defendant. The suit was based upon a promissory note executed in favor of the plaintiff by Walter R. Stokes and Etta L. Stokes, his wife. The original complaint states that Walter R. Stokes was dead, that there was no administration on his estate, and that the suit was brought against Etta L. Stokes.

Under § 1176 of Crawford & Moses' Digest, the action might be brought in any county in which the defendant, or one of several defendants, resides, or is summoned.

As we have already seen, no service was had upon the defendant, Etta L. Stokes, in the original action, and the plaintiff elected to sue her alone. When the plaintiff failed to get service on Etta L. Stokes in the manner provided by the statute, in September, 1931, she filed what she called an amendment to her complaint and asked that the administrator of the estate of Walter R. Stokes be made a defendant. It will be remembered that the original complaint alleged that no administration had

been had upon his estate. The summons issued upon Etta L. Stokes under the amended complaint was directed to the sheriff of Johnson County, and recites that she was in that county. Thus, the record affirmatively shows that she was not a resident of Sebastian County at the time the amendment to the complaint was filed, although she may have been a resident of Sebastian County when the original suit was brought. This indicates that the amendment to the complaint was filed for the purpose of giving the Sebastian Circuit Court jurisdiction of the person of the defendant Etta L. Stokes. She had not been served in the original action; and, as long as she stayed in Johnson County, she could only be legally served by making some one a party defendant who was jointly liable and over whom the circuit court of Sebastian County for the Fort Smith District had jurisdiction.

This is not a case where new parties might be brought in without affecting the rights of the parties to the original action. The return of the sheriff in the original suit expressly shows that the defendant could not be found in Sebastian County, and inferentially shows that service could not be had by leaving a copy at the usual place of abode of the defendant with some member of the defendant's family over the age of 15 years. The bringing of a suit against the administrator of the estate of Walter R. Stokes, deceased, and the issuance of a summons against Etta Stokes directed to the sheriff of Johnson County was equivalent to an admission that service could not be had upon Etta L. Stokes in Sebastian County. In the meantime the garnishee had paid the amount of the policy to Etta L. Stokes as it had the legal right to do.

Under these circumstances, the appointment of an administrator over the estate of Walter R. Stokes, deceased, and making him a party defendant to the action constituted a new cause of action and was not an amendment to the original cause of action by the substitution of parties defendant or by bringing in new parties over whom the circuit court of Sebastian County for the

Fort Smith District already had jurisdiction in the original suit. Unless and until Etta L. Stokes was legally served in Sebastian County or entered her appearance to the action, the circuit court of Sebastian County had no jurisdiction over her person and could acquire none. The commencement of a new action was an abandonment of the old one. Therefore the judgment rendered against her was not under the original action brought against her, but was under what constituted a new cause of action against the administrator of her husband's estate in which she was also made a party defendant. This would require the issuance of a new writ of garnishment, and none was ever issued. The money had already been paid out by the New York Life Insurance Company to Etta L. Stokes, the beneficiary named in the policy which had been issued to her husband. *Smith* v. *Spinnenweber*, 114 Ark. 384, 170 S. W. 84.

It follows that the judgment must be reversed; and, inasmuch as the cause of action against the garnishee appears to have been fully developed, it will be dismissed here. It is so ordered.

SAENGER *v.* STANDARD LUMBER COMPANY.

4—2584

Opinion delivered June 6, 1932.

Ras Priest, for appellant.

James H. Johnston, Hendrix Rowell, A. H. Rowell and *W. B. Alexander,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment sustaining an intervention of appellee in an attachment proceeding brought by appellant against V. O. Jones Hardwood Company, Inc., in the circuit court of Jackson County.

The cause was tried by the court sitting as a jury upon the pleadings and testimony, from which the court found that all the lumber on the yard of V. O. Jones Hardwood Company, Inc., at Newport was covered by three absolute bills of sale executed by V. O. Jones Hardwood Company, Inc., to appellee except certain lumber that had been sold to A. L. Ulen and others and that the lumber covered by said bills of sale belonged to appellee and was not subject to the attachment which appellant levied upon said lumber.

The trial court gave appellant a personal judgment for the amount of his account against the V. O. Jones Hardwood Company, Inc., but refused to sustain the attachment on the lumber covered by the bills of sale, which were executed prior to the issuance of the writ of attachment. The V. O. Jones Hardwood Company, Inc., made default and did not controvert the alleged grounds of appellant's attachment, and on this account appellant takes the position that he was entitled to have his attachment sustained on all the lumber on the yard. His contention is that appellee had no right to defend against

the attachment proceeding. This contention does not take into account the issue of the ownership of the lumber tendered by the intervention of appellee Ulen, and others. According to the allegations of their interventions, they became the owners of the lumber in question by purchase before the issuance and levy of appellant's attachment. An intervener in an attachment proceeding claiming title to the property attached becomes the plaintiff in the action, and the *onus* is upon him to prove his title thereto. *State* v. *Spikes,* 33 Ark. 801; *Stevens* v. *Oppenheimer,* 45 Ark. 492; *Excelsior Mfg. Co.* v. *Owens,* 58 Ark. 556, 25 S. W. 868. And he must recover, if at all, upon the strength of his own title to the property. *Cate-LaNieve Co.* v. *Plant,* 172 Ark. 82, 287 S. W. 750. The title to the property involved is the paramount issue between an intervener and the attaching creditor, irrespective of whether the alleged grounds of attachment have been controverted by the debtor, and, of course, it would be error for a court to sustain an attachment because the alleged grounds of the attachment were not controverted if the intervener met the burden and proved title to the property attached.

Appellant also contends that the bills of sale were intended as chattel mortgages to secure advances as the lumber was sawed and stacked on the yard, but the testimony of Miller and Carnahan tended to show that the intention on the part of V. O. Jones Hardwood Company, Inc., was to sell and on the part of appellee to buy the lumber, and that there was a constructive delivery of same. The bills of sale are absolute, and purport upon their face to convey the title to the lumber from V. O. Jones Hardwood Company, Inc., to appellee. The court made this finding sitting as a jury, and appellant is bound thereby on appeal in this court, as there is substantial evidence to support it. A sale of chattels is absolute, and title to the property passes from the vendor to the vendee, even though only a part of the purchase money is advanced or paid, if a sale was intended by the

parties and if supported by actual or constructive delivery. *Cate-LaNieve Co.* v. *Plant, supra.* The testimony of Carnahan was to the effect that, after the lumber was sawed and stacked on the yard, an inventory was made of same, and that a mark was placed thereon.

Appellant also contends that appellee was unable to identify the lumber supposed to be covered by the bills of sale as its lumber. There is substantial testimony in the record tending to show that it could and did identify the lumber on the yard as that covered by the bills of sale. Carnahan was asked the question if the lumber on the yard was the lumber actually purchased by appellee, and he answered that it was, explaining that it checked exactly with his inventory except a small portion thereof that had been stolen. He also testified that he had seen the lumber frequently, and that he had examined it the day before the trial of the cause and identified same as the lumber that he had invoiced and marked. This evidence is of a substantial nature and sufficient to support the finding and judgment of the trial court.

No error appearing, the judgment is affirmed.

FRANKLIN *v.* MANN.

4—2666

Opinion delivered June 6, 1932.

John Baxter, for appellant.

Hal L. Norwood, Attorney General, *J. W. House* and *M. J. Harrison,* for appellee.

MEHAFFY, J. The Inter-Southern Life Insurance Company is a foreign corporation organized under the laws of the State of Kentucky and was authorized to do business in the State of Arkansas, and did business in this State prior to the receivership. It operated in the State of Arkansas under the laws and supervision of the Insurance Commissioner.

A receiver was appointed by the court of Kentucky. On April 18, 1932, the deputy and acting Insurance Commissioner of the State of Kentucky telephoned A. D. DuLaney, Insurance Commissioner of Arkansas, requesting that an ancillary receiver be appointed in Arkansas. On the same day, April 18, the Insurance Commissioner of this State certified the Inter-Southern Life Insurance Company to the Attorney General as an insolvent company operating in Arkansas.

Thereafter, on April 19, 1932, the Attorney General of this State presented a petition on behalf of the Insurance Commissioner to Judge Richard M. Mann, circuit judge of the Pulaski Circuit Court, asking for the appointment of an ancillary receiver. M. J. Harrison was

appointed ancillary receiver, and filed his bond, which was approved.

On April 20, 1932, the acting Insurance Commissioner of the State of Kentucky wrote to A. D. DuLaney a letter confirming the telephone conversation, and stating that the reason for asking that an ancillary receiver be appointed in Arkansas was for the sole purpose of having the co-operation and assistance of the Commissioner in Arkansas in working out the conditions of the Inter-Southern Life Insurance Company to the best advantage of the policyholders.

Thereafter, on April 22, 1932, P. O. Bynum filed a petition in the Chicot County Chancery Court asking for the appointment of a receiver by that court. He alleged that he was a creditor of the insurance company. The Chicot County Chancery Court granted the petition and appointed Mr. G. A. Franklin receiver. G. A. Franklin then came to Little Rock and filed a motion in the Pulaski Circuit Court to quash the order of the Pulaski Circuit Court appointing Harrison receiver. This motion was denied. No appeal was taken from the order denying the motion.

The petitioner here, G. A. Franklin, asks for a writ of prohibition directing and commanding the said R. M. Mann, as judge of the circuit court of Pulaski County, to make no further orders in this matter, and that, upon a final hearing, an order be made by this court quashing the receivership proceedings and the order of the Pulaski Circuit Court appointing a receiver.

The petitioner, in his brief, states: "The only question to be determined is one of jurisdiction. The petitioner readily admits that, if the Pulaski Circuit Court had jurisdiction to appoint a receiver, then this writ of prohibition should be denied."

The only question therefore for our consideration is whether the Pulaski Circuit Court has jurisdiction.

As early as 1873 the Legislature of this State recognized the importance and necessity of a general law regulating and supervising insurance companies doing busi-

ness in this State, and it passed an act in 1873 to establish an insurance bureau. This act was amended from time to time, and in 1917 there was an act passed creating the office of Insurance Commissioner and State Fire Marshal. These acts prescribed the duties of the insurance Commissioner, and, among other duties imposed on the Commissioner by law was that of enforcing all laws of this State in relation to insurance companies, and to see that all laws of this State respecting insurance companies are faithfully executed.

The eighth paragraph of § 5951 of Crawford & Moses' Digest, is as follows: "Whenever the Insurance Commissioner shall have reason to believe that any insurance company of this State is insolvent or fraudulently conducted, or that its assets are not sufficient for carrying on the business of the same, or during any noncompliance with the provisions of this chapter, he shall communicate the fact to the Attorney General, whose duty it shall then become to apply to the Supreme Court or the circuit court, or, in vacation, to any of the judges thereof, for an order requiring said company to show cause why their business should not be closed; and the court or judge, as the case may be, shall thereupon hear the allegations and proofs of the respective parties, or appoint some suitable person as examiner to perform such duty and report upon the facts to said court or judge. If it appear to the satisfaction of said court or judge that such company is insolvent, or that the interests of the company so require, the said court or judge shall decree a dissolution of such corporation, and a distribution of its effects; but, in case it shall appear to said court or judge that said corporation is able to comply with the provisions of this act, and that it is not insolvent, a decree shall be entered annulling the act of the Insurance Commissioner in the premises and authorizing such company to resume business."

It is contended by the petitioner, however, that this paragraph refers to insurance companies of this State only, and does not apply to foreign corporations. How-

ever, § 11 of art. 12 of the Constitution of this State provides, among other things, in speaking of foreign corporations: "And, as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State." This provision of the Constitution was also enacted by the Legislature as a statute, and is § 1825 of Crawford & Moses' Digest.

It was manifestly the intention of the Legislature, in creating the office of Commissioner of Insurance and prescribing his duties, to protect all the policyholders and persons interested in an insurance company, and for this reason provided a State officer whose duty it is to supervise all insurance companies in this State, and to see that all laws are faithfully executed, to the end that every one interested in an insurance company may have protection.

It was evidently thought that this would be a greater protection to the policyholders and interested persons than to permit any creditor or policyholder to bring suit anywhere in the State for the purpose of taking charge and management of an insolvent insurance company.

The application for a receiver in the Pulaski Circuit Court on behalf of the Commissioner was made at the instance and request of the Insurance Commissioner of the State of Kentucky.

In the case of *Grand Lodge, A. O. U. W.*, v. *Adair*, 182 Ark. 684, 32 S. W. (2d) 430, all the questions involved in this case are settled. The authorities are reviewed, and it would serve no useful purpose to review or discuss them again. In the case referred to it is said: "A special department and a State official are clothed with special duties and powers to invoke the aid of courts of general jurisdiction in the discharge of these duties." It is also said in the same case: "It is a well-established rule that has been often adhered to by this court that, where a court exercising general jurisdiction under the Constitution has been given special statutory jurisdiction in cer-

tain matters, and the manner in which jurisdiction is to be exercised is pointed out by the statute, the record of such court must show the jurisdictional facts."

This is a special proceeding provided for by statute, for the purpose, among other things, as we have said, of protecting the interests of policyholders and the property of the company.

The petitioner contends that the case of *Grand Lodge, A. O. U. W.*, v. *Adair, supra,* has no application, his contention being that the statute applies to fraternal benefit societies. We think the statute is broad enough to cover all insurance companies, and that it was the intention of the Legislature, in forming this general plan to protect policyholders in all insurance companies, and there is nothing in the Constitution prohibiting the Legislature from authorizing the circuit court to act on the petition of the Insurance Commissioner.

The writ of prohibition is denied.

LEONARD *v.* STATE EX REL. ATTORNEY GENERAL.

4—2668

Opinion delivered June 6, 1932.

Arthur G. Frankel, for appellant.

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

Rose, Hemingway, Cantrell & Loughborough, Charles B. Thweatt and *Robinson, House & Moses, amici curiae.*

McHaney, J. The State of Arkansas, on the relation of her Attorney General, Hal L. Norwood, brought this action against appellants, Roy Leonard, State Treasurer, and Oscar Humphrey, State Auditor, to enjoin the Auditor from issuing State warrants on certain vouchers of the State Highway Commission, and the Treasurer from paying such warrants, on a complaint as follows: "That during the years 1930, 1931 and 1932 the Arkansas State Highway Commission entered into purported agreements with certain contractors to build and repair certain State highways in the State of Arkansas; that said purported agreements consisted of propositions made by contractors to the chief engineer, or the chairman of the Arkansas State Highway Commission, in which the contractor proposed to do certain work and furnish certain material at unit prices set up and described in said propositions. That said propositions were accepted by a notation at the foot thereof in these words, 'Accepted, Arkansas State Highway Commission, by Dwight H. Blackwood', the said Dwight H. Blackwood being the chairman of the Arkansas State Highway Commission. Said propositions were duly filed in the office of the State Highway Commission and are now on file in the office of said Commission. A copy of said purported agreement is filed herewith, marked Exhibit A and made a part of this complaint.

"Plaintiff further states that during said years of 1930, 1931 and 1932, the said Arkansas State Highway

Commission entered into other purported agreements whereby certain contractors were engaged to build and repair certain State highways in the State of Arkansas, and in which propositions said contractors agreed to furnish on a rental basis certain equipment for unloading and storing materials, manufacturing and transporting, laying and rolling paving mixture together with the required materials, labor, fuel, lubricants, repairs, hand tools, barricades, and lights and other necessary materials and equipment, and in which propositions said contractors offered said equipment to the Arkansas State Highway Commission upon a rental basis of a certain amount per calendar day. In such propositions said contractors also agreed to furnish necessary labor and materials at actual cost to the contractor plus fifteen per cent. Said purported agreements, or contracts, provided further that the cost of paving mixture laid on the road would not exceed a certain amount per ton. Such propositions were accepted by the following notation at the foot thereof, 'Accepted, Arkansas State Highway Commission, by D. H. Blackwood, Chairman.' Said propositions were duly filed in the office of the State Highway Commission and are now on file in said Commission, a copy of this proposition is filed herewith and marked Exhibit B and made a part of this complaint.

"Plaintiff states that the defendants, Roy Leonard, as State Treasurer, and Oscar Humphrey, as State Auditor, are charged with notice that the said purported contracts have been entered into by the Arkansas State Highway Commission and all of the contractors who have been working under such agreements.

"Plaintiff further states that neither of said propositions was advertised as required by law, or at all, and neither of said purported contracts was let on competitive bidding, and each proposition called for payment by the State of more than one thousand dollars.

"That each of said purported contracts requires the payment by the Arkansas State Highway Commission out of funds belonging to the State of Arkansas of labor

and material and rental that are in excess of the actual cost and value thereof.

"Plaintiff further states that the Arkansas State Highway Commission has issued vouchers to said contractors for payment of amounts alleged to be due upon the basis of unit prices, rental prices and cost plus prices mentioned in said propositions; that said vouchers, issued in payment of amounts for alleged unit prices as set out in said contracts, of which Exhibit A is an example, are in excess of the actual cost and value of labor, equipment and materials used, and that said vouchers, issued in payment of amounts for rental of equipment though issued for the designated rental in said contracts, are in excess of the actual rental value of such equipment, and that said vouchers issued in payment of amounts claimed to be due the contractors under the form of contract represented by Exhibit B, are fifteen per cent. in excess of the cost of labor and materials, and, although said vouchers do not exceed in amount the maximum guarantee mentioned in said proportions, they do exceed the actual cost of material, rental, labor, repairs, fuel and freights and superintendence of work.

"Plaintiff states that said purported agreements entered into between said contractors and said State Highway Commission are null and void, and that the vouchers issued to said contractors are null and void.

"That said vouchers will be presented to the Auditor of State and demands made upon him for the issuance of warrants upon the State Treasury, and that, unless restrained, the State Auditor will issue warrants upon the State Treasury for the amounts mentioned, and, unless restrained, the State Treasurer will pay the money of the State of Arkansas to the holders of said warrants, and the State of Arkansas will have to suffer great and irreparable damages.

"Wherefore plaintiff prays that the defendants be restrained from issuing and paying warrants that have been, or may be in the future, issued by the State Highway Commission upon the kind of contracts herein set

out, and that plaintiff have any and all other proper and equitable relief."

Exhibit A mentioned in the complaint consists of a form of proposal made by contractors to the State Highway Commission, hereinafter referred to as the Commission, and, omitting formalities, is as follows: "We will remove dust and dirt from existing road surface, true up old base with additional gravel where needed (State Highway Commission to furnish said gravel on the road); then furnish and apply a prime coat of cut-back asphalt at the rate of one-half gallon per square yard, then blade, shape and roll the surface. When the surface is bonded and set, we will furnish and apply an application of hot asphalt averaging one-half gallon per square yard, furnish and apply and roll a covering of pea gravel. The gravel to be furnished and applied by us at the rate of thirty-five pounds per square yard.

"For the above work and materials furnished, we shall be paid the sum of twenty-seven cents per square yard.

"When additional gravel is added to bring up this base, the one-half gallon application of cut-back prime coat will not be sufficient to bond and incorporate the loose gravel with the old base, and where the additional amount of cut-back asphalt is needed and required, we will furnish and apply same as directed by your representatives.

"For all cut-back asphalt furnished and applied in excess of one-half gallon per square yard, we shall receive nine cents per gallon." Such proposals were accepted as follows: "Accepted; Arkansas Highway Commission, by Dwight H. Blackwood." Such contracts were those referred to as having been made on a unit basis.

Exhibit B, mentioned in the complaint, being the form of proposal made by contractors on the rental and the cost plus basis, follows: "We beg to submit, for your consideration, the following proposition for furnishing on a rental basis the necessary equipment, completely installed at our expense, for unloading and storing ma-

terials, manufacturing and transporting, laying and rolling the paving mixture, together with the required materials, labor, fuel, lubricants, repairs, hand tools, barricades and lights.

"We will furnish the following equipment completely installed on the job in first class working condition:

"One asphalt mixing plant, complete with power, having a capacity of not less than 150 tons paving mixture per ten-hour day.

"One 10-ton 3-wheeled roller, steam powered;

"One 8- or 10-ton tandem roller, steam powered;

"One 2-car capacity asphalt storage tank, equipped with steam coils for heating;

"One 1-car capacity fuel oil storage tank;

"One asphalt pump with all necessary connections;

"One fuel oil pump, with all necessary connections;

"One clam shell outfit for unloading and handling materials.

"All necessary hand tools for operating asphalt plant and laying asphalt surface on the road.

"All necessary forms and steel pins for laying asphalt surface on road.

"All necessary trucks, equipped with steel bodies and hydraulic hoists for transporting paving mixture from the asphalt plant to the line of work.

"All necessary trucks for moving forms, transporting labor, fuel, water, etc., to all points along line of work.

"All necessary automobiles to transport superintendent and foreman over the line of work.

"All necessary barricades, light and danger signs, necessary to protect the public and employees while the work is in progress.

"We will also furnish all necessary fuel, lubricants, oils, gasoline and tires, necessary for the satisfactory operation of all equipment and trucks.

"We will also make promptly and pay for all necessary repairs on all equipment and tools furnished.

"For the above the Arkansas Highway Commission shall pay us as a rental the sum of $500 per calendar day, rental to start when above equipment arrives on the job.

"The Commission may reserve and have the right at its option to take over said equipment, or any other equipment furnished for the work, at a price represented by the difference in its agreed value, plus six per cent. interest for the period used, less the amount of rental paid to the date of exercising said option.

"In case the Commission desires us to furnish additional equipment on the work, we will do so at an agreed rental, or the commission may furnish such additional equipment as it may desire.

"We agree to furnish the Commission a list of all equipment furnished with the type, capacity and condition set out with an agreed appraisal of value set out for each unit furnished.

"We further agree to furnish all necessary labor and materials to manufacture, transport and lay the asphalt paving mixture at actual cost to us, plus fifteen per cent.

"Original invoices, freight bills and payroll sheets shall determine the labor and material costs.

"Figuring on the above basis, we guarantee the cost of Amiesite paving mixture per ton laid on the road will not exceed $11.94.

"Should the work be delayed by bad weather, or other conditions, and if, in the opinion of the Commission or its chief engineer, the rental set out, together with the cost of materials and labor, will exceed our estimate of $11.94 per ton for paving mixture in place, they can pay said rental, including labor, materials, repairs, fuel and freights, in an amount equal to $11.94 per ton for the asphalt paving mixture actually laid as full compensation to us.

"For any labor, or materials, or work that the Commission may desire or require in addition to the unloading of materials, manufacture, transport and laying the asphalt paving mixture, we will furnish same for actual cost, plus fifteen per cent.

"Payment for equipment rental, labor and materials furnished shall be due and payable on or about March 1, 1931, and monthly or semi-monthly thereafter."

A like acceptance was made to this form of contract.

To this complaint appellants interposed a general demurrer, which was overruled by the court. They declined to plead further, and a decree was entered enjoining them from issuing and paying warrants on vouchers issued by the commission pursuant to such contracts which were not advertised as required by law and which involved the payment by the State of more than $1,000, and which were not let on competitive bidding, or were based on a unit price or on a cost plus basis. This appeal followed.

The complaint alleges, and the demurrer admits, that during the years 1930, 1931 and 1932 the Commission entered into purported contracts with various persons not named to build and repair certain State highways on a basis of cost to the State at unit prices, and also entered into purported contracts with various persons not named for the same purpose on a rental and a cost plus basis, in which the cost of laying the paving mixture should not exceed a certain amount per ton; that said purported contracts were not signed or executed by the Commission as required by law, but in its name by its chairman only; that neither of said proposals or purported contracts was advertised as required by law, or at all, and that neither was let on competitive bidding, and that each called for payment by the State of more than $1,000. It was further alleged that vouchers had been issued by the Commission to such contractors in payment of amounts alleged to be due thereunder which are in excess of the cost of the material, labor and rental value of equipment.

Appellants seek to reverse the judgment on the ground that the Commission has and had the power and authority to enter into the contracts referred to in the complaint, such power and authority being expressly conferred or necessarily implied. On the other hand, the State, by her Attorney General, contends that such

contracts are null and void, not merely voidable, for these reasons: 1st, that they were not advertised as required by law; 2d, that they were not let on competitive bids to the lowest responsible bidder; 3d, that they were not signed and executed as required by law by three members of the Commission and attested by the secretary; and, 4th, that the vouchers issued on such contracts are in excess of cost of labor and material and of rental value of equipment. Three excellent and persuasive briefs have been filed by counsel, *amici curiae,* who seek a reversal and dismissal of the judgment principally on the ground that there is a defect of necessary parties defendant—the holders of vouchers issued by the Commission, of more than 3,000 in number of vouchers, it is stated—and on the further ground that the Commission had the power it assumed to exercise and properly exercised it, and that, even though the contracts mentioned be held void, the contractors should not be precluded from setting up whatever rights they may have based on *quantum meruit.*

The only question presented by this appeal, the only one urged by appellants, and the only one we do decide, is the validity of the contracts mentioned in the bill of complaint. We now proceed to a determination of that question.

The latest act of the Legislature prescribing the general duties and limiting the powers of the Commission is act 65, Acts 1929, p. 264, entitled "An Act to Amend and Codify the Laws Relating to State Highways." Section 18 thereof makes it the duty of the Commission to begin as soon as practicable and continue the maintenance of State highways, and so far as practicable do so according to what is known as the "Patrol System," and to employ such laborers and use such equipment and materials as may be necessary. "The Commission may make all necessary contracts, purchase all necessary equipments, supplies and materials and employ all necessary labor, and is hereby given all other necessary powers to provide for maintenance, and shall pay for

same out of the State Highway Fund. Provided, however, that all contracts so let in excess of $1,000, so made by said Commission, shall be let on a competitive basis, and to the lowest responsible bidder; provided, the Commission may reject all bids, and provided further that all bids shall be sealed bids and shall be filed with the Commission in open session and opened and tabulated during the said session of the Commission. No such contract shall be valid unless signed by at least three members of the Commission and attested by the secretary." This section refers to maintenance of State Highways.

Section 21 of said act relates to new construction and is as follows: "All new construction work shall be done by contract, and all contracts for such work shall be let to the lowest responsible bidder. The Commission shall have the right to reject any or all bids. No contract in excess of $1,000 shall be let without advertising for bids. Successful bidders shall be required to furnish a surety bond by a surety company to be approved by the Commission, in a penal sum of at least one-fourth of the amount of the contract price, conditioned as the Commission may require. The Commission may, however, accept personal bonds, but in every case in which a personal bond is accepted the contractor shall be required to deposit United States Government bonds or notes or valid bonds of any road improvement district referred to in § 19 of this act, in an amount equal to twenty-five per cent. of the amount of the contract, to be held in escrow as collateral security for the performance of the contract.

"The Commission may let contracts for the construction of necessary bridges on the State highways, to be paid for out of the State Highway Fund. It may make contributions to other bridges which it deems necessary on the State highway that may be constructed by bridge districts.

"Provided that where the Commission is of the unanimous opinion that any particular piece of work

may be done more economically with State forces, the Commission may proceed to do said particular construction work with State forces."

Other sections, notably 53, of said act confer broad powers on the Commission, but none of them change, limit, modify or alter the provisions of §§ 18 and 21 relative to the limitations on the powers of the Commission to contract in the matter of construction, reconstruction and maintenance of State roads. Analyzing these sections, 18 and 21, we find the following limitations on the powers of the Commission: § 18, relating to contracts for maintenance of State roads, plainly provides first, that any contract made for maintenance in excess of $1,000 "shall be let on a competitive basis, and to the lowest responsible bidder," in the manner therein provided; and, second, that "no such contract shall be valid unless signed by at least three members of the Commission and attested by the secretary." Section 21, relating to new construction, plainly provides, first, that: "All new construction work shall be done by contract," and, second, that: "all contracts for such work shall be let to the lowest responsible bidder," and, third, that "no contract in excess of $1,000 shall be let without advertising for bids." At the end of that section it is provided "that where the Commission is of the unanimous opinion that any particular piece of work may be done more economically with State forces, the Commission may proceed to do that particular piece of work with State forces." Whether this proviso relates to the paragraph of said section immediately preceding it authorizing the Commission to let contracts for the construction of necessary bridges on State highways, or whether it relates to all new construction work mentioned in the first line of said section, we think it unnecessary to decide, as we are of the opinion that the contracts mentioned in the complaint cannot, with any reasonable stretch of the imagination, be said to have been performed with "State forces." We think doing the work by "State forces" means the use of labor in the employ

of the State, under supervisors and engineers of the State, with State equipment and materials. It cannot reasonably be said that when a contractor is doing the work with his own men, equipment and materials, whether in maintenance or new construction, and either upon a unit price basis, a cost plus basis, or a rental basis with a maximum unit cost, the work is being done with "State forces."

The limitations on the power of the Commission to contract above set out in §§ 18 and 21 are too plain to admit of construction. The same power that created the Commission and gave it such broad and comprehensive powers, including the power to spend millions of dollars, thought it wise to provide these safeguards. They are plain, unambiguous and mandatory, not directory merely, and were not complied with. 44 C. J. 324, 25 R. C. L. 394. As said by this court in *Woodruff* v. *Berry*, 40 Ark. 251: "The entire authority of the board to let such contract is conferred by statute, and the statute prescribes how only they can contract. Any other contract is unauthorized, in excess of the powers vested in the board and voidable at the election of the State."

The Constitution provides that "any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the inforcement of any illegal exactions whatever." Article 16, § 13, Constitution 1874. We perceive no valid reason why the Attorney General may not maintain this action against the Auditor and Treasurer to prevent them from issuing and paying warrants on illegal exactions made against the State without the necessity of joining the beneficiaries of such exactions. As suggested by counsel as *amici curiae,* the holders of such vouchers are numerous. It would be difficult if not impossible to locate them all in this State, and many suits of a similar nature have been sustained by this court without joining the beneficiaries of the illegal exaction. *Belote* v. *Coffman*, 117 Ark. 352, 175 S. W. 37, is a fair sample of such cases. There a taxpayer brought suit

to enjoin the issuance of warrants upon an appropriation made by the General Assembly to pay the expense incurred by numerous persons in exhibiting resources of the State at the Panama Pacific Exposition in San Francisco in 1915. The injunction was denied by the chancery court which was reversed by this court and remanded with directions to grant the writ. Another case in point is *Farrell* v. *Oliver*, 146 Ark. 599, 226 S. W. 529. This was another taxpayer's suit to enjoin the Auditor from issuing warrants to pay for the maintenance of the Boys' and Girls' Industrial School. The injunction was denied by the chancery court, but was reversed by this court and remanded with directions to grant the writ. Many other cases might be cited to the same effect that neither the holders of the vouchers, the contractors, nor the Commission were necessary parties in determining whether appellants should be enjoined from the payment of illegal exactions.

It is argued that there may be contractors who, by reason of having furnished labor and materials to the Commission in the construction and repair of roads under these contracts, who have certain special defenses or rights to recover, even though the contracts may be void. We are not undertaking to adjudicate any such rights in this opinion. We have, however, reached the conclusion that the contracts set out in the complaint are void, and that the vouchers issued by the Commission pursuant thereto constitute illegal exactions, for the reason that such contracts were not made in compliance with the statutes heretofore mentioned.

The judgment of the chancery court in so holding is correct, and must be affirmed. It is so ordered.

STATE NATIONAL BANK *v.* TEMPLE COTTON OIL COMPANY.

4—2601

Opinion delivered June 13, 1932.

James D. Head, for appellant.

Jones & Jones, for appellee.

SMITH, J. This suit was begun in June, 1931, by the Temple Cotton Oil Company, hereinafter referred to as the oil company, to foreclose a deed of trust executed to it by Sanderson & Orton on January 22, 1923. The State National Bank, hereinafter referred to as the bank, held

a deed of trust on the property described in the oil company's deed of trust, and for that reason was made a party defendant. It was alleged that the oil company's deed of trust secured four notes as follows: One dated January 22, 1923, for $4,903.96, due December 1, 1925; one dated June 1, 1926, for $1,844.35, due November 1, 1926; one dated July 31, 1927, for $1,568.44, due ninety days after date; and one dated April 1, 1930, for $1,178.82 due November 1, 1930. The court decreed that the note first described was barred both as to Sanderson & Orton, and as to the bank also, but that the other three notes were secured by the deed of trust to the oil company, and that this deed of trust was prior to that of the bank, and decreed its foreclosure as a prior lien. From that portion of the decree holding that said three notes were secured by the oil company's deed of trust and constituted a lien superior to that of the bank, the bank has appealed. Sanderson & Orton have not appealed. The oil company has cross-appealed from that part of the decree holding that the note for $4,903.96 was barred.

Sanderson & Orton were large cotton planters, and operated two gins, ginning for themselves and for the public, and, in connection with their ginning business, they bought cotton seed, which they sold to the oil company. They entered into a written contract with the oil company on October 10, 1922, whereby they agreed to sell the oil company all cotton seed owned or controlled by them up to the close of the season of 1923-1924, at a price $5 per ton in excess of the prevailing street prices. The contract provided that the oil company might apply this $5 bonus to any indebtedness then owing to the oil company or which might thereafter be incurred, and that the contract might be extended by mutual agreement in writing to cover subsequent ginning seasons. The parties extended this agreement orally, but not in writing, from season to season thereafter, and continued to operate under the oral extension until the close of the ginning season of 1930-1931.

Prior to the execution of this seed purchase contract, Orton owed the predecessor of the oil company $5,500, and he and Sanderson were indebted to the Gullett Gin Company in the sum of about $9,000. To refinance these debts, Sanderson & Orton, on January 22, 1923, executed two notes for $5,000 each and a third for $4,903.96, due, respectively, December 1, 1923, 1924 and 1925, and, as security therefor, executed the deed of trust here sought to be foreclosed. The note for $4,903.96 matured on the date last named.

Beginning in 1925, Sanderson & Orton borrowed money from the bank for use in their farming operations, and executed deeds of trust each year to secure these advances. These deeds of trust included the gin properties described in the oil company's deed of trust and other property, both real and personal, in addition, and each of these deeds of trust executed previously to 1931 to the bank by Sanderson & Orton recited the priority of the oil company's deed of trust as to the gin properties therein described.

In February, 1931, representation was made to the bank by Sanderson & Orton that the gin properties were no longer subject to the oil company's deed of trust, and a new deed of trust was then taken by the bank from Sanderson & Orton which contained no reference to the oil company's deed of trust. This deed of trust was given to secure a large balance then due the bank, and an additional advance of $2,000, which the bank agreed to make and which was later made; in fact, the subsequent advances by the bank to Sanderson & Orton largely exceeded that amount. This deed of trust, executed in February, 1931, embraced not only the gin properties but a large amount of other property, both real and personal, owned by Sanderson & Orton.

In the meantime, Sanderson & Orton were buying and selling seed to the oil company under their seed contract. Pursuant to this contract the oil company made large advances of money, which were not fully repaid by seed delivered under that contract, and the notes above

referred to, dated June 1, 1926, due November 1, 1926; July 31, 1927, due ninety days after date; and April 1, 1930, due November 1, 1930, were executed to cover deficiencies arising out of the purchase of seed. The two notes for $5,000 each, specifically described in the deed of trust to the oil company, due, respectively, December 1, 1923 and 1924, were paid, but the note due December 1, 1925, for $4,903.96, was not paid. However, on November 18, 1930, the oil company indorsed on that note a credit of $89.62 which it contends it was authorized to do, as having on that date that balance on hand to the credit of Sanderson & Orton. The oil company also contends that the $4,903.96 note had been kept alive by the repeated acknowledgments of its validity by Sanderson & Orton and by their repeated promises to pay it, in consideration for which promises the date of payment had been extended.

We have therefore for decision the following questions: Was the $4,903.96 note barred? Were the advances made subsequent to the execution of the seed contract secured by that contract alone, or were they secured also by the deed of trust from Sanderson & Orton to the oil company? Did the oil company's deed of trust secure advances made after December 1, 1925? Conceding that the oil company's deed of trust was intended to secure, and did secure, the three notes of Sanderson & Orton executed in 1926, 1927 and 1930, was the right of foreclosure not barred as to the bank?

Other facts will be stated in the discussion of these questions. Separate answers were filed by both the bank and Sanderson & Orton, but they present a common defense.

The agreement referred to as the seed contract contemplated the advancement of large sums of money by the oil company to Sanderson & Orton, which were made during each of the years it continued in effect, and all parties agree that it was extended orally and was in effect until the termination of the relations out of which this litigation arose. The said contract was dated Oc-

tober 10, 1922. The deed of trust was dated January 22, 1923. The deed of trust specifically described the two $5,000 notes above referred to and the note for $4,903.96, due December 1, 1925.

The deed of trust further recited that "This deed of trust shall also be a security for any other indebtedness that the first parties may now or may hereafter owe to the third party; and shall also be security for any notes, drafts, accounts or debts of whatsoever kind that the said third party may hold against the first parties herein, by purchase as an assignee thereof, or otherwise, and for all future advances during the life of this trust."

The deed of trust further provided that: "If the said parties of the first part * * * shall pay all sums of money due thereon, as aforesaid, when the same shall become due and payable, together with all other indebtedness as aforesaid that may be due by the parties of the first part to the party of the third part, * * *, then this deed of trust shall be null and void, and shall be released at the expense of the parties of the first part; but if default be made in the payment of said note or notes, or either of them, or the interest thereon, * * * when the same shall become due and payable, or in the payment of any other indebtedness that the parties of the first part may be due the party of the third part, when the same shall become due and payable, as aforesaid, then all of the said indebtedness shall become due and payable at once." The deed of trust contained the usual provisions in regard to sale in the event of default.

The two notes for $5,000 each described in the deed of trust were paid, but the note for $4,903.96 was not paid. Sanderson & Orton did not repay all the advances made in their operations for the 1925 season, and that balance was covered by the note dated June 1, 1926, for $1,844.35, due November 1, 1926. The advances for the 1926 season were not all paid, and the balance due on the operations for that season were covered by the note dated July 31, 1927, for $1,568.44, due ninety days after date. The advances for the 1929 season were not all paid, and

that balance was covered by the note dated April 1, 1930, for $1,178.82, due November 1, 1930. It is alleged that the deed of trust secured these three notes, as well as the note for $4,903.96, and the foreclosure of the deed of trust was prayed to enforce their payment.

As we have said, the court found that the note for $4,903.96 was barred, and the cross-appeal questions the correctness of this finding.

Unless the payment of $89.62 indorsed upon the note was authorized and was made, that note was barred when the suit was brought. It was contended by the oil company that this note had been kept alive by the promises of Sanderson & Orton made from time to time to pay it, in consideration of which promises the time for its payment had been extended. It is also contended that the credit was authorized, and was made by applying the balance then in the hands of the oil company as a credit on the note. Sanderson & Orton denied there was such a credit, and denied also that they had made promises to pay the note, in consideration of which promises the note had been extended. The chancellor found, upon conflicting evidence, which we do not recite, that the note had not been extended, and, as this finding does not appear to be contrary to the preponderance of the evidence, that finding must be affirmed, and it is so ordered.

The principal and controlling question in the case is whether the deed of trust secured the three notes above described, executed since the date of the deed of trust.

In the excellent briefs of opposing counsel, there have been collected and cited most, if not all, of our recent cases dealing with the question of future advances under mortgages and deeds of trust. These cases have clearly defined the law of that subject, and we shall not review them. In some of those cases such advances were held to be secured; in others, not; the distinction depending upon the provisions of the various instruments under review. One of the latest of these cases is that of *American Bank & Trust Company* v. *First National Bank of Paris,* 184 Ark. 689, 43 S. W. (2d) 248, where a number

of the earlier cases are reviewed, and their holdings are summarized in that opinion by the following statements of the law:

One may execute a valid mortgage to secure a debt to be contracted in the future, 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.

That a mortgage or deed of trust given 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.

And further, that the circumstances attendant upon the execution of the instrument and the nature of the transaction subsequent thereto are to be taken into account in determining the effect of the instrument, and each case therefore calls for a construction of the language employed in the instrument to determine whether it secures future advances or not.

We there also said that, for future advances to be secured by an instrument, that purpose must be unequivocally stated, and, unless the nature of such advances 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.

Under these tests we have concluded that the notes in question (except the one for $4,903.96) are secured by the deed of trust here sought to be foreclosed.

The seed contract was the one under which the parties began to operate. At the time of the execution of the deed of trust, it was contemplated that these operations would be enlarged, and that large future advances would be made, and the purpose of the deed of trust was to secure them. We think the language of that in-

strument, quoted above, manifests that purpose. The purpose of both the seed contract and the deed of trust was to secure the payment of the large advances contemplated by the parties, and which were later made. There was no inconsistency in taking the additional security which the deed of trust afforded. Under the seed contract only seed delivered could be applied to the advances. Under the deed of trust the gin properties were offered as additional security. All these transactions bore the most intimate relation to each other; indeed, it is very difficult to separate them. The oil company not only advanced money to buy seed, but also advanced money to buy large quantities of bagging and ties, and no separate accounts were kept distinguishing these advances. They were all a part of the contemplated operations of the parties under both the seed contract and the deed of trust. The bank was advised of the fact that the oil company was relying upon the security of its deed of trust for the payment of all these advances, and in all of the deeds of trust which the bank took to secure its own advances to Sanderson & Orton except the last, that dated February 11, 1931, it was expressly recited that those instruments were subject to the deed of trust to the oil company. The bank's last deed of trust did not contain this recital.

The notes to the oil company covering advances, as herein stated, were all taken before the $4,903.96 note, specifically described in the deed of trust, was barred. The trust created by that instrument had not therefore been discharged when the notes here involved were taken, and they were therefore advances made within the life of the trust.

The views here expressed render it unnecessary to consider other interesting questions discussed in the briefs except the effect of the accelerating clause set out above. It is argued that the effect of this clause reading that "when the same shall become due and payable, as aforesaid, then all of the said indebtedness shall become due and payable at once," was to limit the security of the

deed of trust to such advances as had been made on or before the date of the maturity of the $4,903.96 note. We do not agree, however, that this was the purpose or effect of the clause quoted. The three notes here involved were all executed subsequent to the maturity of the note for $4,903.96, but before that note was barred and within the lifetime of the trust.

The case is distinguishable from the case of *Patterson* v. *Ogles,* 152 Ark. 395, 238 S. W. 598. In that case it was held (to quote a headnote) that: "Under a mortgage to secure a certain note and 'any and all other and further indebtedness which the grantors or either of them may contract to pay to the grantee for future loans, advances or acceptances, made during the existence of this mortgage, and any renewal or renewals of note or notes for said present or future indebtedness; this mortgage to mature and be enforceable at the maturity of said note or subsequent notes, or renewal note or notes'; *held* that the mortgage limits the secured debt to advances made up to the maturity of the note or any renewal thereof."

In the instant case the language quoted (which appears in the defeasance clause) does not provide that the deed of trust shall mature and be enforceable at the maturity of the notes. On the contrary, we construe the deed of trust to mean, when all of its provisions are read together, that it shall be security for the payment of any other liability or indebtedness of the grantor already or thereafter contracted until the right to foreclose the deed of trust was barred. *Price* v. *Williams,* 179 Ark. 13, 13 S. W. (2d) 822. It may be conceded that the deed of trust was barred when the debt was barred, but the note for $4,903.96 was not barred until five years after the date of the maturity, which date was December 1, 1925. But before that note was barred, and while the lien of the deed of trust was in effect, the notes here involved were executed, and they, too, were secured by the deed of trust, because that instrument so expressly provides.

Learned counsel for appellant quotes from § 139 of the chapter on Limitation of Actions, 17 R. C. L., page 771, as follows: "If a contract provides that on default in the payment of one of several notes the remaining unpaid notes shall become due, according to the weight of authority, the stipulation has the effect of fixing a contingency upon the happening of which the debt is to mature at a time earlier than the dates given in the notes for their maturity, and the statute of limitations begins to run against the entire debt upon such default. And the creditor cannot by his act alone change that effect, but the parties may by mutual agreement change the effect of the default and treat the contract as if no default had been made."

Here the evidence shows that the parties, by mutual agreement, changed the effect of the default and treated the contract as if no default had been made by executing other notes within the life of the trust. We think this conclusion is fairly inferable from the conduct of the parties to this instrument. There was no attempt or threat of foreclosure, which would, no doubt, have been had if either party had taken the position that the trust had been closed by the maturity and nonpayment of the $4,903.96 note. If only this note was secured, there has been such delay as would have barred the foreclosure of the deed of trust. On the contrary, the parties continued to operate under the faith of the security afforded by the deed of trust, and advances were made and received pursuant thereto, the balances due thereon being evidenced by the notes here sued on.

The bank took six mortgages from Sanderson & Orton securing its advances, and the latest of these, dated February 11, 1931, was the only mortgage which did not recite the priority of the oil company's deed of trust. The last mortgage previously executed, and which, like those antedating it, recognized the priority of the oil company's deed of trust, was dated February 10, 1930, and only one of the three notes here involved was executed on a later date. But all three of the notes here involved were exe-

cuted prior to the date of the bank's last mortgage, the one which did not expressly recognize the priority of the oil company's deed of trust. As all three of the notes were executed during the life of the trust created by the oil company's deed of trust, we hold that this lien securing their payment is prior to the lien of the bank.

In the case of *Hollan* v. *American Bank of Commerce & Trust Company*, 168 Ark. 939, 272 S. W. 654, a mortgage had been given to secure two notes, there specifically described, and upon the foreclosure of that instrument it was sought to include other indebtedness, but it was insisted that the language of the mortgage should be interpreted to refer only to indebtedness incurred up to the date of the maturity of the two notes described in the mortgage. It was there said: "Placing that interpretation on the language of the mortgage does not help appellant's cause, for, according to the undisputed evidence, there was an agreement extending the date of the maturity of the notes to a date beyond the time that the additional indebtedness was incurred. But we are of the opinion that the construction contended for by counsel for appellants is not the correct one. In the case of *Fort* v. *Black*, 50 Ark. 256, 7 S. W. 131, there was involved the interpretation of a mortgage to secure a promissory note and to secure 'supplies furnished and to be furnished,' and this court held that the mortgage covered only advances made up to the date of the maturity of the note. In later cases involving mortgages, using broader language, we have held that the mortgage covered any indebtedness up to the time of the foreclosure. Each instrument, of course, must be interpreted according to its particular language, and, in order to interpret the present mortgage in accordance with the contention of counsel for appellants, it would be necessary to wholly reject the language in the mortgage which has an unmistakable meaning. *Howell* v. *Walker*, 111 Ark. 362, 164 S. W. 746; *Word* v. *Cole*, 122 Ark. 457, 183 S. W. 757. We must interpret the language of this mortgage to mean just what it says—that it secures any indebtedness incurred up to

the time of the foreclosure. It is a matter of contract between the parties, as there is no limitation upon the right to contract with reference to the extent of the debt secured by a mortgage, and the province of the court is merely to interpret the language and declare the rights of the parties in accordance with their intention as expressed in the language used.''

Here we have an instrument which secures ''all future advances during the life of this trust,'' and, as the advances were made during the life of the trust, they were secured by it.

The decision of the court below conformed to this view, and, as we think this is the correct construction of the deed of trust, that decree must be affirmed, and it is so ordered.

McHaney *v.* Lafayette South Side Bank & Trust Co.

4—2596

Opinion delivered June 13, 1932.

Partlow & Rhine and *W. W. Bandy,* for appellant.

Cecil Shane, for appellee.

HUMPHREYS, J. Appellee, successor to the Lafayette South Side Bank of St. Louis, both foreign corporations, brought this suit in the circuit court of Greene County to recover from appellants, on a guaranty contract executed November 1, 1927, to the Lafayette South Side Bank of St. Louis, a balance of $9,219.76 due upon two renewal notes dated, respectively, on August 16th and 20, 1930, from the Paragould Wholesale Grocer Company.

Appellants filed an answer, admitting the execution of the notes and guaranty contract, but denying liability on the guaranty contract because neither appellee nor its predecessor, foreign corporations, had complied with §§ 1826-32 of Crawford & Moses' Digest in order to do an intrastate business in Arkansas, which failure rendered the contract invalid and nonenforceable in the courts of this State, according to said statutes.

The cause was submitted to the court sitting as a jury upon the pleadings and testimony, which resulted in a judgment against appellants in the amount sued for, from which is this appeal.

The record reflects the following facts: Appellee and its predecessor were Missouri corporations organized to extend credit and lend money to other corporations in or out of the State of Missouri upon notes to be executed by them, and to be guaranteed by their officials or directors under written guaranty contracts. The guaranty contracts undertook to pay any indebtedness incurred by the corporation obtaining the line of credit absolutely in the event said corporation should fail to pay same. The Paragould Wholesale Grocer Company solicited and obtained in the office of appellee's predecessor, in St. Louis, Missouri, a continuing line of credit from it of $100,000, in the year 1925, under agreement that it would execute notes for the amounts borrowed from time to time, to be dated as of St. Louis, and to be delivered there and pay-

able there, and guaranteed by its officers or directors in the form of a written guaranty contract. Pursuant to the agreement, two written guaranty contracts, identical in form, were signed by the officers of the Paragould Wholesale Grocer Company, and delivered to appellee's predecessor in St. Louis, each being signed by different officials. It does not appear why the contracts were executed in two identical parts. Pursuant also to the agreement, large amounts were borrowed from time to time, and notes were executed to cover same. Some of the notes were paid by the Paragould Wholesale Grocer Company, and others were renewed. On November 1, 1927, at the request of appellee's predecessor, a renewal guaranty contract, in identical form of the first two, was signed by all the officers except two, who signed the original guaranty contracts. It was the custom of appellee to have all guaranty contracts taken by it to guarantee the payment of running loans within the line of credit extended so as to avoid such possibilities as the statute of limitations getting in the way, and, in accordance with that custom, the renewal guaranty contract was requested and obtained. The renewal guaranty contract closed with this language: "Executed at Paragould, Arkansas, this 1st day of November, 1927." The representative of appellee, who was in the employ of appellee's predecessor, a Mr. Jones, testified, in response to a question by the court, that he was certain the renewal guaranty contract was executed at Paragould. No money was advanced after the execution of the renewal guaranty contract, but the old notes were renewed from time to time and interest and a part of the principal were paid, until the indebtedness was reduced to the amount sued for. The original guaranty contracts, as well as the renewal guaranty contract, provided for the renewal of notes evidencing the line of credit granted in 1925, and also for the assignment of the guaranty contracts, as well as notes executed in the line of credit. The Paragould Wholesale Grocer Company went into bankruptcy the latter part of 1930. After its failure, several of the appellants

wrote letters requesting time for the payment of the notes, and subsequently made payments thereon. Neither appellee nor its predecessor complied with the law of Arkansas in order to do intrastate business here.

Over the objection of appellants, the court admitted in evidence the two original guaranty contracts, which had never been surrendered, and the letters written by appellants requesting time in which to pay the notes.

The main contention for a reversal of the judgment is that the execution of the last guaranty contract, made the basis of the action, constituted a doing of business within the State by foreign corporations, in violation of §§ 1826-32 of Crawford & Moses' Digest, and is a void obligation and nonenforceable in the courts of this State.

Appellants' interpretation of the evidence is that, because the last guaranty contract was executed and delivered to appellee or its predecessor in Paragould, it amounted to doing business in this State within the meaning of, and contrary to, said statutes. It does not follow that, because the renewal guaranty contract was signed and delivered in Arkansas, it was an independent, original undertaking or obligation. According to the testimony, its sole purpose was to continue in full force and effect the original contract for a line of credit with guaranty of payment by the officers of the Paragould Wholesale Grocer Company. The execution thereof in this State was a mere incident to the original contract for the extension of a line of credit made and to be performed in Missouri. It was clearly collateral to and not independent of the indebtedness incurred in the line of credit. Transactions merely incidental or collateral to contracts made and to be performed outside the State do not constitute a doing of business within the meaning of statutes imposing conditions, restrictions, or regulations of the right of foreign corporations to do business. 14A C. J., § 3982. This general declaration of law was approved by this court in the case of *Equitable Credit Company* v. *Rogers,* 175 Ark. 205, 299 S. W. 747. The failure of two of the original guarantors to sign the renewal

guaranty contract in no way affects the incidental character of the latter obligation, since the purpose of the execution of the last agreement was to continue in full force and effect the original agreement, which was clearly a Missouri contract.

Appellants also contend for a reversal of the judgment because the court admitted the original guaranty contracts and letters written by the guarantors requesting extensions because they were not made the basis of the suit. It is true the suit was not founded upon them, but they were admissible to show whether the contract sued upon was incidental to the main contract executed and to be performed in Missouri; in other words, to show whether the notes and guaranty were Missouri or Arkansas contracts. That was the issue involved, and all facts are admissible in evidence which afford reasonable inference or throw any light upon the issues joined. *Coca-Cola Bottling Company* v. *Shipp,* 174 Ark. 130, 297 S. W. 856; *Heard* v. *Farmers' Bank of Hardy,* 174 Ark. 194, 295 S. W. 38.

No error appearing, the judgment is affirmed.

Mr. Justice McHaney disqualified and not participating.

Home Ice Company *v.* Union Trust Company.

4—2582

Opinion delivered June 13, 1932.

G. E. Garner, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

McHaney, J. In May, 1931, the Arkansas Cold Storage Company, being largely indebted to the Union Trust Company, executed and delivered to it an instrument in writing called an "assignment" of "all of its book accounts and bills receivable due it from customers, and also all such accounts and bills receivable that may accrue or become due hereafter, until said indebtedness hereby secured is paid in full, the said book accounts and bills receivable being set out in a certain list hereto attached, made a part of this agreement and marked Exhibit No. 1."

Included in said book accounts so assigned was an account against appellant in the sum of $785.33. This account remaining unpaid, and the Arkansas Cold Storage Company having been found to be insolvent, the Union Trust Company, as assignee, brought this suit against appellant, to recover the amount due on said account. The case was tried before the court sitting as a jury, and resulted in a finding and judgment against appellant in the sum sued for.

For a reversal of the judgment, it is first argued that the appellee had no right to maintain this action for the reason that an open account is not assignable, so as to authorize the assignee to maintain an action in his own name. In other words, it is contended that the Arkansas Cold Storage Company should have been a party plaintiff in order to maintain the suit. This was a defect, if a defect at all, that should have been raised by demurrer or answer: Crawford & Moses' Digest, § 1189, and § 1192. So it was decided in *Jordan* v. *Muse,* 88 Ark. 587, 115 S. W. 162, that: "A defect of parties defendant in a complaint was waived by defendant failing to plead it specifically in the trial court, either by demurrer or answer." This case and a number of others were cited in *Tomlin-*

son Chair Mfg. Co. v. *Joppa Mattress Co.*, 122 Ark. 569, 184 S. W. 32, where the court held that the appellant waived the provision of the statutes above mentioned by failing to raise the objection of the defect of parties. So in this case appellant failed to raise the question, either by demurrer or answer, and must be held to have waived same.

It is next argued that there was no contractual relation or agreement of purchase and sale between Arkansas Cold Storage Company and appellant. The facts are these: Mr. Rose, acting for the Arkansas Cold Storage Company, in which S. R. Morgan was also interested, sold to the Home Ice Company, through S. R. Morgan, a large quantity of ice at $1.50 per ton. The Home Ice Company was a distributing company, handling the product of three companies in North Little Rock, one of which was Morgan's. Morgan represented to Rose that he was the owner of a two-thirds interest in the Home Ice Company. At any rate, he bought the ice from Rose, caused the Home Ice Company trucks to call at the plant of the Arkansas Cold Storage Company for the ice, and its employees received and receipted for the ice in the name of the Home Ice Company. Tickets were made out to the Home Ice Company and bills rendered to it for same without any objection from the officers of the Home Ice Company. Finally, the Morgan Utilities Company went into bankruptcy, and, at the suggestion of Morgan, Rose filed a claim for his company with the trustee in bankruptcy of the Morgan Utilities Company. Rose did not know the Morgan Utilities Company in the sale, but was willing to receive payment from any source. Of course, there could be only one satisfaction, and the claim was filed for the protection of the appellant, as it had paid Morgan Utilities Company for the ice at a price of $3 per ton. By filing the claim in bankruptcy, neither the cold storage company nor its assignee was precluded from pursuing the party primarily liable. We think the facts already related constitute substantial evidence sufficient to support the findings of the court sitting as a

jury, that the Home Ice Company was the purchaser of the ice, and that it was sold to it by the cold storage company.

Affirmed.

HILL *v.* BRITTIAN.

4—2585

Opinion delivered June 13, 1932.

Dean, Moore & Brazil and *J. W. Johnston,* for appellant.

John George and *R. W. Robins,* for appellee.

BUTLER, J. F. O. Stobaugh, in his lifetime, became indebted to Dr. A. J. Brittian, the appellee, and executed certain notes to evidence the indebtedness. It is not disputed that Stobaugh owed the appellee, and that the amount represented by the notes was the true sum of the debt due. Stobaugh died intestate and R. E. Hill was appointed administrator of his estate. The appellee's claim was duly probated and became a lien on all the lands belonging to the estate and on the proceeds arising therefrom. Other debts had been probated prior to the probate of the claim of the appellee, and at the instance of the administrator a sale was ordered by the

probate court of the lands of the intestate, which sale was duly had, the purchaser executing a bond for the payment of the purchase price. Payment falling due and not having been made, the administrator brought suit in the chancery court asking judgment against the purchaser, and that a lien be fixed on the lands sold to satisfy the judgment. A decree was entered ordering the land sold as prayed by the administrator, and at the sale said administrator became the purchaser bidding the amount of the judgment. The land was struck off to him by the commissioner, and the sale was duly reported to the court with the deed which was approved by the court.

The administrator caused to be inserted in the granting clause of the deed a clause conveying the lands to "R. E. Hill, Administrator, for the use and benefit of the heirs of F. O. Stobaugh, deceased." All of the heirs of F. O. Stobaugh were adults, and, shortly after the aforesaid deed to Hill, he conveyed parts of these lands to some of the heirs.

This case was instituted by the appellee against the administrator and the heirs-at-law of F. O. Stobaugh, charging that the administrator fraudulently procured the deed from the commissioner of the court to himself as "administrator for the use and benefit of the heirs of F. O. Stobaugh, deceased"; that he had conveyed these lands, or a part of them, to certain of the heirs, and that his procurement of the deed and his conveyance to the heirs was with the fraudulent purpose of attempting to defeat the creditors of F. O. Stobaugh and especially the appellee. It was further alleged that these deeds constituted a cloud upon the title to the lands to the injury of the appellee and other creditors having judgment liens thereon. The prayer of the complaint was that the above-mentioned deed executed by the commissioner to R. E. Hill, administrator, and the order of the court approving and confirming the same, be corrected so as to omit the words "for the use and benefit of the heirs of F. O. Stobaugh, deceased," and that the

deeds made by Hill to the heirs be canceled, and the lands subjected to the payment of all probated claims. To this complaint an answer was filed and evidence was heard on the issues joined. The court, on the 10th day of September, 1931, rendered a decree finding the facts to be as alleged in the complaint and granting the prayer thereof.

Proceedings in the instant case are the sequel to protracted litigation between the parties, branches of which have been before this court on two previous occasions. The facts disclosed in these lawsuits make interesting reading, but they are unimportant, and a statement of them is unnecessary.

The order of the court approving the sale and deed to the appellant as administrator, etc., was made in 1928, and the decree to correct it was made in 1931 in a suit filed in that year. On appeal counsel for the appellant contends that the court was without jurisdiction to render the decree in the instant case because the order sought to be reformed was made at a term of court which had lapsed, and the court was therefore without power to correct the order made at a subsequent term.

It is next contended that the court, on November 2, 1931, without any proof made an order appointing a receiver to take charge of the assets of the estate and directing the administrator to deliver the same to the receiver.

On the first contention, it is sufficient to say that it is apparent that the decree in the instant case was in its nature a proceeding for an order *nunc pro tunc* to make the record of the order entered at the previous term of the court correctly reflect what was actually done, the court finding that the sale was in reality made to Hill as the administrator of the estate of F. O. Stobaugh and for the benefit of said estate. The court further found that neither Hill not the heirs paid anything to the commissioner, but that the said administrator fraudulently caused to be inserted into the deed the clause "for the use and benefit of the heirs of F. O. Stobaugh, deceased,"

and that this was for the purpose of attempting to defeat the creditors of the estate in the collection of their claims against it.

The decree recites that evidence was introduced at the hearing, and the parties stipulate that the case was heard on the exhibits and depositions of S. E. McReynolds. This deposition is not abstracted, and a search we have made of the transcript fails to disclose it therein. We must therefore assume that the finding of the chancellor was in accord with the evidence introduced and supported by it.

The appellant invoked the aid of the chancery court for a judgment against the purchaser at the sale made under the order of the probate court and to affix a lien on the lands sold for the payment of the purchase price bid by him. The chancery court therefore had jurisdiction to correct this record in a subsequent proceeding and to proceed to administer complete relief. *DuVall* v. *Marshall,* 30 Ark. 230; *Rhinehart* v. *Gartrell,* 33 Ark. 727; *Sorrels* v. *Trantham,* 48 Ark. 386, 3 S. W. 198, 4 S. W. 281.

Counsel for appellant allege error of the court in the appointment of a receiver to take charge of the assets of the estate. We are unable to understand this assignment of error, as we cannot find where any receivership was prayed for or ordered in the instant case. But, if any such order had been made, we think the record before us and the history of the other proceedings of which we have knowledge and with which the chancellor was familiar justified the proceeding. *DuVall* v. *Marshall, supra.*

It is stated by counsel for the appellees that Glenna Cain intervened in the court below, and that she acquired an interest in the lands of decedent by a deed, regular on its face, purporting that the conveyance to her was for a valuable consideration. The decree recites that Glenna Cain appeared by her solicitor, and proceeds to quiet title in the estate of Stobaugh, declares the probated claims a lien, orders a sale to satisfy the same, and retains jurisdiction for further orders. We are un-

able to find where Glenna Cain has appealed from the order and decree of the chancery court, although counsel insist that she has done so.

The record before us presents no reversible error. The judgment of the trial court therefore is correct, and it is affirmed.

DUNKIN *v.* TAYLOR.

4—2651

Opinion delivered June 13, 1932.

Jack Holt, for appellant.

M. A. Hathcoat, for appellee.

BUTLER, J. The Citizens' Bank & Trust Company of Harrison, Arkansas, was taken over as an insolvent bank for purposes of liquidation by the Bank Commissioner on December 17, 1930. The officers and depositors, being anxious to reopen the bank, agreed that it might be opened by issuing to each depositor, in lieu of the payment of cash deposits, three certificates representing in the aggregate the amount of each deposit, payable in three installments, one on December 24, 1931, and the other two on the same date in the years 1932 and 1933. The certificates were to draw interest at the rate of three per cent. per annum. This agreement was rati-

fied by the Bank Commissioner, who applied to the Boone Chancery Court for an order authorizing the bank to reopen for business on that basis. The order was made, and the bank reopened for business on February 16, 1931, issuing to each of its depositors the three certificates as aforesaid. The bank continued to do business until September 1, 1931, when it again closed its doors, and was taken over by the Bank Commissioner and is now in process of liquidation.

Owing to the great financial depression prevalent and to the deflation of all values, the liquidating agent has experienced much difficulty in making collections, and many of the securities and other assets of the bank have shrunk in value. Consequently the appellees, the Bank Commissioner and the special deputy in charge of the liquidation of the bank, applied for, and obtained, an order in the Boone Chancery Court by which they were empowered to sell the assets of the bank, real, personal and mixed, piecemeal at private sale, and to compound such of the debts due said bank as might be found bad or doubtful.

This suit was instituted by a number of the depositors of the insolvent bank for themselves and the other depositors seeking to restrain the Commissioner from proceeding under the order of the Boone Chancery Court last mentioned above. The complaint, after reciting the history of the first closing of the bank and its reopening and final closing on September 1, 1931, and the order of the chancery court aforesaid, alleged that many of the notes held by the liquidating agent of the insolvent bank are fully secured by real estate mortgages, that others have good personal security, while many, though unsecured, are made by those who are willing and able to pay in full as soon as they can convert some of their property into cash. It was further alleged that the appellees were offering to accept deposits in payment of these notes and attempting to trade said notes and other assets for property instead of money; that this action on the part of the appellees was

arbitrary and in violation of the rights of the creditors and depositors of said bank and would amount to a dissipation of the assets by the appellees if they should accept for the notes less than the full face value in cash and would operate as a preference to creditors whose deposits in said bank were accepted in payment of these notes. They prayed for an order enjoining the appellees from proceeding further in their attempt to settle and compound the notes, etc., in their possession.

Answer was made admitting the allegations of the complaint except in denying that the action was arbitrary, contrary to law or in violation of the rights of the creditors and depositors of the bank, and alleging that the proposed action would expedite the liquidation of the bank and very greatly reduce the expenses thereof, and was and is for the best interests of the creditors and depositors of said bank and in conformity with the provisions of the law and the orders of the chancery court.

The case was submitted to the court on stipulation of attorneys which recited the facts as above set out, and also that there were outstanding certificates of deposit issued under the reorganization plan in the sum of $69,625.57 in the hands of various depositors to whom they were issued and purchasers of said certificates, some of which sales were made prior, and some subsequent, to the final closing of the bank. It was further stipulated that appellee Watkins, Special Deputy Bank Commissioner, had given notice of his intention to accept said certificates of deposit and other deposits in the bank "on such basis and such conditions as he deems right, fair and equitable, and as in his judgment will conserve the best interest of all concerned in the assets of said bank in payment and satisfaction of any notes held by said bank, both secured or unsecured, which he considers slow, bad or doubtful, whether said certificates are set-offs which he would be required to accept, or not; that he is offering to trade other assets of said bank, such as real estate, furniture and fixtures, for deposits in said bank, and other property besides cash, when in

his judgment it is to the best interest of all those interested in the assets of said bank."

It was further agreed that many of the notes are secured by mortgages on real estate, which real estate is of equal value to the amount of the notes, but that no loans could be procured on these from any source with which to discharge the indebtedness, and that, if the mortgages are foreclosed, it is doubtful whether any cash could be realized from said sales, and "highly probable that it would be necessary for the Bank Commissioner to buy said lands in," with the result that no cash could be realized and no progress made toward the final liquidation of the bank; that, since the bank had been taken over for liquidation, only $20,696.09 had been collected in cash on the notes held and only $30,730.70 on stock assessments and realized from other assets; that the average monthly expense of liquidation approximated the sum of $920.95. It was also agreed that the course proposed by the Special Deputy Bank Commissioner would greatly expedite the liquidation and materially reduce the necessary expenses thereof; that there were, and are, approximately $11,663.07 in prior claims filed, and that these, with other prior claims, may not be paid in full; that general claims had been filed and allowed in the sum of $390,270.08, and that there are claims due for deposits not yet filed in the sum of $62,881.36, and claims due to banks which have not been filed in the amount of $168,507.44, and that the total assets of the bank as shown by inventory at the close of business just prior to closing the doors of the bank in September, 1931, was $1,282,335.57. Other facts were agreed upon which were not material to the decision of the case.

The case was submitted on the pleadings, the exhibits and the agreed statement of facts. The court entered a decree dismissing the complaint, from which is this appeal.

It is the contention of the appellants that the appellees have no authority under the law or the orders of the chancery court to accept notes held as assets of

said bank for certificates of deposit therein, and that the contemplated action of the appellees exceeds the authorization made by the order of the court and is in violation of the provisions of the statute. The statute upon which the petition of the appellees and the order of the court granting the prayer for authority to dispose of the assets and the compound debts due the bank is act No. 113 of the Acts of 1913, as amended by § 6 of Act 131 of 1917, and § 4 of Act 496 of 1921, and is as follows:

"Upon taking possession of the property and business of any bank, the Commissioner is authorized to collect money due, and do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Commissioner shall collect all debts due and claims belonging to it, and for such purposes is authorized to institute, maintain and defend suits and other proceedings in this State and elsewhere, and, upon the order of the chancery court of the county in which it is doing business, may sell or compound all bad or doubtful debts and on like order may sell all its real estate and personal property on such terms and at public or private sale, as the court shall direct."

The order of the court under which the appellees were proceeding to act is as follows: "It is by the court considered, ordered and adjudged and decreed that the said Bank Commissioner in charge of the said bank be, and he is hereby authorized, impowered and directed from time to time to sell the assets of said bank, real, personal or mixed, piecemeal and at private sale, and also from time to time to compound such of the debts due said bank as the said Bank Commissioner may find to be bad or doubtful, all such sales and compositions to be upon such terms and considerations as in each instance the said Bank Commissioner may consider to the best interest of the estate herein, all sales so made by the said Bank Commissioner of any of the assets of the said bank consisting of its real estate to be reported by the Bank Commissioner to the court for confirmation."

The appellants call attention to the cases of *Sloss* v. *Taylor,* 182 Ark. 1031, 34 S. W. (2d) 231; *Krumpen* v. *Taylor,* 183 Ark. 1046, 40 S. W. (2d) 775, and *Tyler* v. *Citizens' Bank,* 184 Ark. 332, 42 S. W. (2d) 385, as authority for the position taken that the contemplated action of the appellees is in excess of their power. We do not think the cases are in point. In the Sloss case a debtor of an insolvent bank, after it had closed its doors, purchased certificates of deposit to the amount of his debt and attempted to set off his debt with these certificates. There was an attempt to pay the debt with a certificate of deposit at its face value regardless of what, in fact, such certificate might be worth, and we held that this would tend to secure a preference in favor of the debtor and would be in violation of the policy of our statute.

In *Krumpen* v. *Taylor,* stockholders in the bank organized to take over an insolvent bank attempted to pay for their certificates of stock by checks on their deposits in the insolvent bank. The payment of the certificates of deposit was not as contemplated by § 8, article 12, of the Constitution, in that it was not made in money or property actually received and was held to be invalid.

In *Tyler* v. *Citizens' Bank,* the question decided was similar to that in the Krumpen case. The insolvent bank could not pay its depositors dollar for dollar, and the Bank Commissioner, with full knowledge of this, permitted certain subscribers to stock in the new bank to pay for the same by checks accepted at their face value drawn on deposits in the insolvent bank.

In addition to deciding that that case came within the principles of law announced in the Krumpen case, it was held that the action of the Bank Commissioner was tantamount to allowing a preference. However, none of the principles announced in the cases cited apply to the instant case. The statute, the order of the chancery court, and the contemplated action of the appellees go no further than to accept the certificates of deposit on such terms and consideration as shall be fair and equitable and to the interest of all parties concerned, the

appellees being authorized to exercise their judgment as to what would be the best interest of all parties. It is our opinion that the order of the chancery court does not go further than the statute, and nothing appears to indicate that the appellees are not endeavoring to carry out the letter and spirit of the order. To be sure, the appellees must act in good faith, and any act upon their part creating a preference in favor of a debtor or a creditor would be in fraud of the rights of the other parties interested and would be an invalid act, but no such state of facts is presented by the record before us.

The decree of the trial court dismissing the appellants' complaint is correct, and it is therefore affirmed.

ROATH *v.* STATE.

Crim. 3791

Opinion delivered June 13, 1932.

Floyd Terral, for appellant.

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

BUTLER, J. Luther Lindsey was killed about three miles out of the city of North Little Rock between eight and nine o'clock on the evening of August 8, 1931. Clyde S. Roath, the appellant, and Mrs. Mary A. Griffin were jointly charged with his murder. A severance was granted, and the appellant placed on trial, which resulted in the conviction of the appellant and sentence to imprisonment in the State penitentiary for life.

The testimony introduced on the part of the State, independent of that of Mrs. Griffin, tended to establish the following facts: Mrs. Griffin was in the employ of Dr. Roath as an assistant in his office, and had been so employed for several years. She was a married woman, but was separated from her husband.

Mrs. Griffin had an appointment with Luther Lindsey to meet him near a school house in North Little Rock, the time for the meeting being eight o'clock, P. M. About eight thirty P. M., Mrs. Griffin was discovered a distance from North Little Rock walking on the highway in the direction of the city. Four young men who were driving an automobile, seeing her, stopped their car, and Mrs. Griffin asked to be carried back to town, explaining that she had been out driving with two men; that they had tried to "get funny," and she had gotten out of the car and started back to the city. One of the young men in the automobile noticed a purse Mrs. Griffin was carrying and testified that it appeared to be "bulging." At her request she was driven to a drug store at 5th and Main streets, about six blocks from Dr. Roath's office. She got out of the car there and left, walking in the direction of Dr. Roath's office.

A short time after Mrs. Griffin reached Dr. Roath's office and went in, Dr. Roath was seen to enter his office with his medicine case in his hand. About nine or nine-thirty P. M., Mrs. Griffin called her home, and told some one there to come to Dr. Roath's office for her. After this, Dr. Roath called Mrs. Griffin's home and said that they need not come for her—that he would bring her out himself. Dr. Roath received an emergency call

and went to attend a child who was choking. He went to the home of the child's parents in response to this call, reaching there about 9:40, and remained there some ten or fifteen minutes and, having given the child relief, left and entered his car. The child's father followed him to the porch and saw a woman sitting in the doctor's car whom he did not recognize.

Mr. Moore, the chief of police of North Little Rock, was away from his home after dinner until about eleven o'clock P. M., at which time he returned. He then learned that several telephone calls had been received at his house from some one who wanted to speak to him, but no name was given. Soon after his return and after he had received the above information, the telephone rang again, and a man's voice asked for permission to come out there. The name of the caller was not given, but just then another person spoke over the 'phone who said that she was Mrs. Griffin, and that her business with the chief was imperative. She was then given permission to come. Soon after that she arrived and entered Chief Moore's house alone, and told the chief, among other things, that Dr. Roath had brought her out there, and that he was then outside waiting in the car. She told the chief about the killing of Luther Lindsey, and, at the chief's suggestion, she was driven by Dr. Roath, first to police headquarters, and then led the way out to a highway beyond the city limits, and from thence to a point a few yards beyond what is commonly called "The Gravel Pit." There Lindsey's car was found on the side of the highway, and his dead body in the car lying forward on the driver's seat face downward. An examination of the body made soon thereafter disclosed that Lindsey had been killed by a thirty-eight calibre pistol bullet which entered the car from the rear breaking the back window and entering Lindsey's back and penetrating his heart.

A considerable number of persons, members of the police force of North Little Rock, and some officers from Little Rock had accompanied Dr. Roath and Mrs. Griffin

to the scene of the homicide. All of these were present when the dead body of Lindsey was found, and some of them began to question Mrs. Griffin in the presence of Dr. Roath. Dr. Roath appeared excited and nervous, and advised Mrs. Griffin in the presence of the officers not to tell the newspapers or the officers anything—that she could only be held for a time as a suspect, and that he would be down to see about it. This statement appears to have been made at a time when the officer had indicated that he was going to take Mrs. Griffin in charge and take her down to his office. As the officer and Mrs. Griffin were preparing to go, she extended her purse to Dr. Roath who reached for it—"snatched it," the officer said. This officer, instead of letting Dr. Roath take the purse, took it himself, but it was not shown that the purse contained anything out of the ordinary.

In addition to the above facts, about which there is little, if any, dispute, two women employed at the Mayflower Dairy which was located in the same block as Dr. Roath's office about two hundred feet away, testified that at about eight o'clock on the evening of the homicide they saw Dr. Roath and Mrs. Griffin in Dr. Roath's car passing in front of the Mayflower Dairy. A man, the superintendent of the Mayflower Dairy, was said by the two women to have been with them standing or sitting in front of the dairy when Dr. Roath and Mrs. Griffin were seen together on that evening. This man testified as to having seen Dr. Roath in his car at about the time stated by the two women, which, he said, was about ten minutes before eight o'clock. This witness, however, was not positive that Mrs. Griffin was in the car with Dr. Roath.

Mrs. Griffin was an employee of Dr. Roath, and had been working in his office for two years or longer. She acted as his office girl, bookkeeper and as nurse for such of his patients as needed her services and would accompany the doctor and assist him in all obstetrical cases. She remained on duty in his office and in the discharge of her other duties every day and frequently in the even-

ing. It was in evidence that Dr. Roath would be seen often with Mrs. Griffin in his car and would also be seen on a number of occasions going to or returning from Mrs. Griffin's home; that at least on one occasion while at her home he appeared to become impatient or angry. One witness, Ralph Mara, when asked, in connection with his testimony about Dr. Roath coming to Mrs. Griffin's while witness was there, if he had ever heard the doctor and Mrs. Griffin fussing, stated, "No, sir—the only thing I ever heard him say—he came there one night as we were getting ready to leave, he cursed and said, 'God damn, ain't you ready?' " Witness did not say what was the occasion for the doctor's impatience or to whom he was addressing his remark.

A witness Mrs. F. A. Matthews, in addition to having testified that, on a few occasions when Mrs. Griffin was visiting at her house in the evening, Dr. Roath would come there for her and take her away. She also stated that one night when Mrs. Griffin visited her she had her neck bandaged up and there was a blue place on her arm.

Another woman, Mrs. Ruby Counts, stated that she had seen blue marks on Mrs. Griffin's arm.

The above, in substance, is the evidence introduced on the part of the State, except it may be said that Lindsey's pistol was found on the car seat under his body with three chambers carrying empty shells and that there was sand on the pistol which had been seen the afternoon of the day of the homicide in Lindsey's possession, bright and clean, and with all chambers carrying loaded shells. There was further testimony on behalf of the State given by Mrs. Griffin's daughter, to the effect that her mother dined at home on the evening of the killing, and after dinner, and a short time before eight o'clock, the witness, at her mother's request, drove Mrs. Griffin to a point right near the Clendenning schoolhouse, where she got out of the car and walked to the schoolhouse.

There was additional testimony to the effect that it required ten minutes to drive a car from the gravel pit

to Mrs. Robinson's home, where Mrs. Robinson testified that Dr. Roath was, at eight-thirty, visiting her sick child.

Mrs. Griffin testified at the trial of Dr. Roath in substance to the following facts: that she had had intimate relations with Dr. Roath and with Lindsey, and that the doctor was jealous of Lindsey, and had on more than one occasion reproached her for her relations with Lindsey and did her physical violence because of Lindsey's attentions to her. She stated that she told the doctor that she was going to a picture show that night, and he told her then that if she had a date with Lindsey it would just be too damn bad, and that if she didn't stop going with him some one would be killed; that when she and Lindsey arrived at the gravel pit they saw a car standing there which resembled a Buick sedan owned and driven by Dr. Roath, and that either in the act of getting in or out of the car was a man who had on a light colored hat, shirt and trousers; that the Doctor on that day wore a panama hat and was dressed in light colored garments; that as they approached and Lindsey saw the car, he said, "Somebody has beat us here, and we will go further," so he turned his car and parked at another place. Just a few minutes after they stopped, and before they had gotten out, there was a little sound, and she looked back and saw a man standing back of the car. She screamed, "There is a man," and Lindsey reached for his pistol and the man said "Stick 'em up," and again said, "Stick 'em up, G..... d..... you," and the firing began. Lindsey "grabbed himself and says, 'They have got me' and drew several breaths and leaned over on the steering wheel and fell right over against me and I eased out from under him and stood by the car." Mrs. Griffin was badly frightened. She stood there a few minutes, and then left in the direction of the highway, and, as she passed the gravel pit, the car she had seen standing there was gone. She was unable to recognize the person who she saw at the car or the one who appeared at the back of Lindsey's car or to recognize his voice.

The defendant was not called to testify in his own behalf, but several witnesses were called for him, and testified that they were his patients and called at his office at about eight o'clock on the evening of the homicide; that the doctor was in his office examining, and administering to his patients from eight to eight thirty P. M. on that night. A Mr. and Mrs. Robinson testified that they called Dr. Roath to visit their child, and that he came at about eight-thirty o'clock; that he stayed about a half hour at their house and left just a few minutes before nine o'clock.

The case was submitted to the jury on a number of instructions to which only general objections were made, but the court failed to give, or the counsel for defendant to request, an instruction submitting to the jury the law by which they might weigh the testimony of an accomplice and telling them that a conviction could not be had on the uncorroborated testimony of an accomplice. The trial resulted in a verdict of guilty of murder in the first degree, and punishment was fixed at imprisonment in the State penitentiary for life.

Subsequent to this trial and within the time given by the court for presenting defendant's motion for a new trial, Mrs. Griffin was placed on trial for the same crime. She testified and repudiated the testimony given in the trial of Dr. Roath to the effect that he had maintained illicit relations with her, and that he was jealous of Lindsey, that he had threatened Lindsey and had struck or bruised the witness because of her associations with Lindsey. In a word, she recanted all that part of her testimony which tended to show motive on the part of Roath for the commission of the crime, explaining how her statements were induced by the officers while she was held in jail and stating that none of these statements made on the trial of Roath were true; that the only times Roath ever spoke to her about her relations with Lindsey was when he objected to her receiving Lindsey's attentions while she was in the doctor's office.

In the motion for a new trial filed by the defendant a number of alleged errors were assigned, among which (1) that there was no testimony independent of that given by Mrs. Griffin tending to connect the defendant with the commission of the crime, and (2) the recantation made by Mrs. Griffin presented such a state of case as would entitle him to have the verdict of the jury set aside and that he be granted a new trial.

After a painstaking consideration of the briefs filed by counsel and a careful reading of the entire testimony contained in the transcript, we have reached the conclusion that there was no substantial evidence independent of the testimony of Mrs. Griffin to connect the defendant with the commission of the crime. Mrs. Griffin, according to the State's theory, admittedly was an accomplice indicted jointly with Dr. Roath, and, after his trial and conviction, was herself placed on trial for the murder. Therefore § 3181, Crawford & Moses' Digest, applies, which is as follows: "A conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the crime was committed, and the circumstances thereof. Provided that in misdemeanor cases a conviction may be had upon the testimony of an accomplice."

Counsel for the appellee have argued with great force and earnestness that all the circumstances "not only tend to connect the doctor with the commission of the crime, but without question show his guilt, and that is true without consideration being given to the testimony of Mrs. Griffin." As stated, we have not only read the abstract of the evidence in the briefs, but have examined the testimony of the witnesses in the transcript with anxious care, and we are unable to view the circumstances as does the prosecution.

What are the circumstances which counsel think so clearly indicative of guilt? Briefly re-stated, they are these: On a number of occasions Dr. Roath went to the

home of Mrs. Griffin and on others to a neighbor's house for her, and would leave with her in his car. Two of Mrs. Griffin's neighbors saw bruises on her arm. Dr. Roath was seen with Mrs. Griffin a few minutes before 8 o'clock on the night of the homicide, in his car, passing in front of the Mayflower Dairy. A few minutes after nine o'clock on this same night, Mrs. Griffin went into the office of Dr. Roath, and he followed her in a few minutes. The murder was not reported until eleven o'clock. Between the time Mrs. Griffin left the car in which the four young men brought her to the city she walked to and entered the doctor's office, and was with the doctor until the crime was reported to Chief Moore. Dr. Roath made an emergency call after 9 o'clock and before the crime was reported, and a woman was seen seated in his car in front of the house where this patient lived. At about eleven o'clock Chief Moore was called over the telephone by a man who did not give his name, seeking an interview, and, while he was talking, the telephone was taken by one who informed the chief of her identity and obtained permission from him to come to his house. Dr. Roath drove her to the home of Chief Moore and remained in the car while she went in. From there he drove her to police headquarters and from thence to the scene of the crime. While there he was nervous and, in the presence of the officers, advised Mrs. Griffin not to talk, stating that she could only be held for a time as a suspect, and that he would see about it. He attempted to take Mrs. Griffin's purse which she held out toward him, but was prevented by an officer, who took it himself. This purse was seen by the boys who picked Mrs. Griffin up, and it seemed to them to be filled or full of something.

It seems to us that these circumstances, when viewed impartially, create a mere suspicion at most as to Dr. Roath's complicity in, or perpetration of, the murder. When examined in the light of the other facts surrounding these circumstances, they appear to be consistent with his innocence. It must be remembered that Mrs.

Griffin was, and had been, in the employ of Dr. Roath for a number of years occupying a more or less confidential relationship, and her presence in the discharge of her duties was required often and frequently at night. Hence it was not out of the ordinary that he should call frequently at her house or be seen often with her in his car. There was no independent testimony as to how the bruises which were seen on Mrs. Griffin's arm were occasioned. Whether the doctor was actually seen with Mrs. Griffin in his car in front of the Mayflower Dairy at about eight o'clock on the night of the murder is extremely doubtful. The testimony of the two women by which this fact was sought to be established is in direct conflict and irreconcilable with the testimony of other witnesses who testified in behalf of the State, and the companion of the two women, the superintendent of the Mayflower Dairy, was not positive that Mrs. Griffin was in the car with Dr. Roath. However, if the fact be true, it has no significance because the Mayflower Dairy was in the same block as Dr. Roath's office, not more than two hundred feet away and several miles from the scene of the crime, which must have been perpetrated around fifteen to thirty minutes after eight o'clock. Shortly after nine o'clock, a witness, whose place of business was near the office of Dr. Roath, saw the doctor park his car about a fourth of a block from his office and get out of it with his satchel in his hand. Just a moment or two before this the witness had passed Mrs. Griffin, spoke to her and saw her go into Dr. Roath's office, and in a moment Dr. Roath came by, and he too entered the office. Within a few minutes after Mrs. Griffin and Dr. Roath met in his office at the time last mentioned, Mrs. Griffin told him of the assassination of Lindsey, at which time he showed great concern, and when asked by her what she should do he said that he must have time to think before advising. She had called her home and Roath then called it and said he would bring Mrs. Griffin home, and, after a discussion, it was decided that it would be better to give the information to the chief of police,

rather than to some one else, as he would know better what action to take than an ordinary officer. Dr. Roath attempted to get in communication with the chief at the latter's residence by telephone, but the report was that the chief was out. About that time Dr. Roath was called to attend a child who was very ill, and Mrs. Griffin, not wanting to remain alone, went with the doctor in his car and remained in the car while the doctor went in to administer to the child. They returned to the office and again attempted to communicate with Chief Moore and again were unable to find him at home. Just how many times they called the chief is uncertain, but he testified that he was informed that he had been called several times before his return home at eleven o'clock.

It is argued that because Dr. Roath permitted Mrs. Griffin to remain in his office for the time she did, go with him to visit his patient, call Chief Moore's residence without giving his name, carrying Mrs. Griffin to Chief Moore's home and remaining outside in his car, then taking her in his car to the scene of the crime together with his nervous conduct while at the scene of the crime and his frequent warnings to her not to talk, and his attempt to take her purse are all highly indicative of guilt. It seems to us however that this would be the natural conduct of a physician where a woman who had been in his employ for two or three years had suddenly appeared in his office and informed him of the tragic event of that night. It was bound to have moved him profoundly and excited his apprehension for the woman, and it was but natural for him to endeavor to advise her, and a reasonable thing that he should prefer to communicate first with Chief Moore and to wait before disclosing the crime till this could be done. He took her to the scene of the crime on the indication of the chief, and it is not remarkable that he was nervous, and that, seeing the woman alone and without friends, he should advise her not to talk. The fact that he gave her this advice in the presence of the officers to our minds indicates an honest endeavor to give her proper advice, and was not

at all an indication that he had guilty knowledge of the crime. The purse snatching is a trifling incident because the purse was taken by the officer, and, if it had contained anything unusual or which might tend to incriminate either Dr. Roath of Mrs. Griffin, certainly the officer would have given information as to its contents.

This court has recognized the rule that the corroboration of an accomplice may be sustained by circumstantial evidence, and it need not be of that degree which, of itself, would be sufficient to justify a verdict of guilty, but this evidence is not sufficient corroboration where it is equivocal or uncertain in its character. It must be such that legitimately tends to connect the defendant with the crime and of a material nature. *Hudspeth* v. *State,* 50 Ark. 534, 9 S. W. 1; *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885; *Scott* v. *State,* 63 Ark. 310; *Cook* v. *State,* 75 Ark. 540, 87 S. W. 1176; *Celender* v. *State,* 86 Ark. 23, 109 S. W. 1024; *Earnest* v. *State,* 120 Ark. 148, 179 S. W. 174; *Strum* v. *State,* 168 Ark. 1012, 272 S. W. 359.

It will be remembered that the question of an accomplice was not presented to the jury, but it is proper for us to consider this question and the nature of the evidence sought for its corroboration, for it goes to the sufficiency of the testimony. *Redd* v. *State,* 63 Ark. 457, 40 S. W. 457.

In considering the recantation made by Mrs. Griffin of her testimony in the case at bar, it may be said that it is the better rule that the recantation of testimony of a material witness made after the trial and verdict is not sufficient to authorize the setting aside of the verdict and granting of a new trial where the verdict is justified on other testimony than that of the recanting witness, and in such cases we have consistently refused to reverse for a new trial. *Osborne* v. *State,* 96 Ark. 400, 132 S. W. 210; *Brown* v. *State,* 143 Ark. 523, 222 S. W. 377; *Little* v. *State,* 161 Ark. 245, 255 S. W. 892. However it is equally well settled in cases where the material evidence upon which a verdict is grounded,

and without which it would not have been justified, is given by a witness who subsequently repudiates this testimony, a new trial ought to be granted. *Bussey* v. *State,* 69 Ark. 545, 64 S. W. 268; *Shropshire* v. *State,* 86 Ark. 481, 111 S. W. 470; *Meyers* v. *State,* 111 Ark. 399, 163 S. W. 1177.

In this case, as stated, we have not found any substantial evidence other than that contained in the testimony of Mrs. Griffin which tends to establish the guilt of the accused, and because of this, even though she were not an accomplice, her recantation presents such a state of case that makes us believe that a grave injustice might be wrought by suffering the judgment based on her evidence to be sustained, and that the ends of justice would best be served by a new trial. Reversed and remanded.

MORRILTON *v.* MOOSE.

4—2563

Opinion delivered May 23, 1932.

E. A. Williams, for appellant.

W. P. Strait, for appellee.

BUTLER, J. On December 20, 1926, the city of Morrilton by proper resolution designated the People's Bank

& Trust Company as the depository for the funds of the city, and on the 23d of December, following, a depository bond in the sum of $10,000 was executed by the bank and signed by the appellees as sureties by which they obligated themselves that the principal, People's Bank & Trust Company, should promptly pay upon presentation all checks lawfully drawn upon such depository by the city treasurer or other proper officials of the city of Morrilton, so long as any funds of the said city should remain in said depository.

Without having passed any additional resolution or having executed any other bond, the city of Morrilton continued to deposit money in the bank until November, 1930, when the bank became insolvent and closed its doors. At the time the bank was taken over for liquidation, the city had on deposit the sum of $8,293.82. A short time thereafter the officials of the bank and other parties interested took up the matter of re-opening the bank, and it was agreed between them and the State Bank Commissioner that, if 65 per cent. of the depositors would agree to accept certificates of deposit payable in one, two and three years, bearing three per cent. interest, the bank might be reopened. The city council, by proper resolution, accepted this proposition and certificates were issued to the city covering the funds it had on deposit at the time the bank closed. More than 65 per cent. of the depositors accepted the agreement, and had issued to them certificates payable in one, two and three years, and the bank reopened. The city of Morrilton, however, did not then or thereafter make any further deposits with that bank. The bank, as reorganized, began to do an active business accepting deposits and paying checks until May 28, 1931, when it finally closed its doors and surrendered its assets to the State Bank Commissioner for liquidation.

An action was instituted by the city of Morrilton to recover on the depository bond and the sureties answered denying liability, on the ground that they were released by reason of the agreement for reopening the

bank and the acceptance of time deposit certificates by the city. Other defenses were also pleaded.

An agreed statement of facts was entered into by which the facts above stated were admitted, and further that "the sureties upon the bond in question were not consulted by the city of Morrilton as to whether or not it should enter into any such agreement, accepting time deposit certificates, and the matter of accepting said time deposit certificates was purely an act of the city of Morrilton, acting through its city council and mayor," and that, "excluding the signing of the agreement and accepting time deposit certificates by the city of Morrilton for its deposits, more than 65 per cent. of other depositors signed the agreement and accepted time deposit certificates." It was stipulated also that additional proof might be taken upon any issue not covered by, or included in, the agreed statement of facts.

The appellee, Mrs. J. J. Scroggin, in addition to the defenses of the other sureties, defended also upon the ground that she did not in fact sign the bond or authorize any one to sign it for her. Testimony was taken on this question and also to the effect that the interest received by the city of Morrilton on the daily balance of its deposits from the time that it first began to do business with the bank until the bank first closed its doors was from two to two and a quarter per cent.

The case was submitted to the court on the stipulation of facts, the testimony adduced and the pleadings. The court found in favor of the defendants, the sureties on the bond, and entered a decree dismissing the complaint as to them, from which the appellant prosecutes this appeal.

A number of questions are presented and argued by counsel in their respective briefs which we find it unnecessary to determine, as we think the decree must be sustained on the defense interposed that the sureties were released by the action of the city in entering into the reorganization agreement and accepting certificates of deposit due in one, two and three years, bearing interest

at the rate of 3 per cent., in lieu of its deposit in the bank at the time it first closed its doors.

The form of the certificate issued by the bank to the city of Morrilton pursuant to the agreement for the reopening of the bank is as follows:

"This is to certify that city of Morrilton, Bond Retirement Fund, has deposited in the People's Bank & Trust Company, of Morrilton, Arkansas, as a time deposit, one thousand, two hundred seventy-four & 65/100 dollars, due and payable by said bank to said depositor, or his order, on or before December 15, 1931, together with interest thereon at the rate of 3 per cent. per annum from the date of this certificate until paid, which said amount, with interest will be paid to the legal holder by the People's Bank & Trust Company at the maturity thereof, and upon surrender of this certificate, said deposit not being subject to check."

The other certificates are like the one copied except in amount and maturity dates. It will be observed that these certificates are negotiable, and are in effect interest-bearing promissory notes. It will also be remembered that the interest received on the deposits before the bank closed its doors did not exceed 2¼ per cent., while the certificates bore interest at the rate of 3 per cent. This, together with the agreed statement that the agreement for the reopening of the bank and the acceptance of the certificates in lieu of the deposits, was made without the sureties having been consulted, and in our opinion discharged them from further liability.

"An extension of time of payment to the principal, without the consent of the sureties, operates as a discharge of the latter from further liability, but such extension must have been for a definite time, and upon valid consideration." *Colvin* v. *Glover,* 143 Ark. 498, 220 S. W. 832.

In the instant case there was an extension of the time for payment of the deposits without the consent of the sureties and a higher rate of interest was agreed upon than that received on the original deposits for

which the sureties were liable. This was a sufficient consideration for the agreement and created a different obligation from that for which appellees were bound without their consent and for the convenience of the city of Morrilton. *Union Indemnity Co.* v. *Benton County Lumber Co.,* 179 Ark. 761, 18 S. W. (2d) 327; *Colvin* v. *Glover, supra.* See also *Hill* v. *Trezevant,* 123 Ark. 244, 185 S. W. 280; *Berman* v. *Shelby,* 93 Ark. 472, 125 S. W. 124.

The conclusion we have reached is not against the doctrine announced in *Waterworks Imp. Dist., etc.,* v. *Rainwater,* 173 Ark. 523, 292 S. W. 989, relied on by the appellant. In that case there was no execution of a new contract as in the case at bar, but a mere extension of the time of the old, and that fact alone could not work to the disadvantage of the sureties and did not effect their release. In the instant case negotiable instruments which might have been sold or transferred to a third party were taken in the stead of a checking account and created a new contract, not only in form, but in substance, which precluded the city of Morrilton from withdrawing its money from the bank either in whole or in part and placed the sureties in a position where they could not protect themselves.

The decree is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HEARD.

4—2559

Opinion delivered June 6, 1932.

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

John L. McClellan, for appellee.

BUTLER, J. Mrs. Allie Heard, the appellee, who lives on a farm in the vicinity of Malvern, was visiting relatives in California in the month of December, 1930. When she desired to make the return trip home, she was informed by a railroad agent at Redlands, California, that, by purchasing a through ticket to Little Rock instead of to Malvern, she could get excursion rates and her fare would be cheaper, and that she would be put

off at Malvern when she indicated that she wanted to do so. At the same time she was told what train to take and at what point it would be necessary for her to change trains. Appellee purchased a ticket as suggested by the agent and began her journey. She was not put off at Malvern or carried to Little Rock, but was put off at Arkadelphia.

Appellee brought suit against the appellant alleging a wrongful ejectment from the train at Arkadelphia, and that in ejecting her the conductor of the train was guilty of rude and insulting conduct; that he jerked her from the train to the sidewalk where she would have fallen had she not been supported by the negro porter who was standing there; that she was injured to such degree that a malady from which she had at one time suffered and of which she had been cured, recurred, and that she had never been well since that time. She further alleged that as a result of the insulting conduct of the conductor and the manner in which she was ejected from the train she was humiliated. She prayed punitive damages in addition to compensatory damages.

An answer was filed denying all the material allegations of the complaint, and alleging, as an affirmative defense, the negligence and carelessness of the appellee in getting on the wrong train when, by the exercise of ordinary care she would have known that the train upon which she elected to ride did not stop at Malvern.

The material evidence in the case in behalf of the appellee was contained in her testimony and that for the appellant in the testimony of the conductor who operated the train from Texarkana to Little Rock and his negro porter. The testimony was in direct and sharp conflict, but as the jury accepted the testimony of the appellee as true and rejected that of the conductor and porter where it was in conflict with that of the appellee, under the settled rule we must accept the judgment of the jury if there is any substantial evidence in support of the conclusion reached.

The material testimony of the appellee, briefly stated, is as follows: She lives on a farm near Malvern, and visited relatives in California in the year 1930. About the 20th of December of that year, she went to the railroad office at Redlands, California, and told the station agent that she wanted to purchase a ticket from there to Malvern. She was informed by the agent that by purchasing a ticket through to Little Rock she could have the benefit of a special rate which would be considerably less than if she bought a ticket to Malvern. She was also informed at that time that she could get off at Malvern, notwithstanding the fact that her ticket read to Little Rock, and she was given instructions as to what train to take and where to transfer on her journey. It was necessary for her to change trains at El Paso, and there she informed the railroad officials of her intention of proceeding to Malvern, Arkansas, and was directed as to what train to take and again told that she would be put off at Malvern on indicating a desire to that effect. She made no further change after leaving Fort Worth, but the train crew was changed at Texarkana, and from there on through Malvern and Little Rock the train was controlled by the conductor, Charles A. Guidici. When he made his first round after leaving Texarkana, the appellee presented her ticket and told him that she wanted to get off at Malvern. He left, and a little later came back and informed her that the train did not stop at Malvern, but that he would put her off at Prescott. Some argument ensued and the appellee refused to get off at Prescott. Later on the conductor told her that he was going to stop the train at Arkadelphia and put her off there. She told him of the instructions she had received in California and throughout her journey, explaining that her husband would be waiting for her at Malvern and insisting that she be put off there. The conductor, however, continued to refuse to do so, insisting that she would have to get off at Arkadelphia. The appellee then said that if she was not allowed to get off at Malvern as she wanted to do, she would prefer to be taken on to

Little Rock. The conductor became obstinate and insisted that he would put appellee off at Arkadelphia, and that he would neither let her get off at Malvern nor take her on to Little Rock.

Witness was traveling alone, and became perturbed by the domineering conduct of the conductor, and when Arkadelphia was reached, over her protestations, the conductor took her grips and bundles, took her by the arm and led her down the aisle displaying great ill humor and speaking roughly and insultingly to her in the presence of a number of passengers in the coach who heard her begging him to either let her off at Malvern or take her on to Little Rock. The conductor, however, continued to lead her down the aisle and through the door of the car on to the platform, and there seized her by the arm and violently jerked her downward as she was stepping off the train, causing her to fall and to suffer injury to her side. She would have fallen to the ground had she not been caught and upheld by the negro porter, who expressed concern for her situation and offered assistance, but the conductor reprimanded the porter and ordered him to board the train which continued on its way leaving appellee alone on the platform at Arkadelphia.

The agent at Arkadelphia offered her some assistance and advised her to go to a hotel and not to spend the night in the station. She explained to him why she was at Arkadelphia and told him that she had been compelled to get off there against her will. The agent called Little Rock to ascertain why this was so, and, after talking a while, told the appellee "that things were all balled up that night, and he would have to find out about it later." Appellee testified that the conduct of the conductor, while she was on the train and while she was being ejected from it, and his language frightened and greatly embarrassed her, and that, when she found herself in a strange town alone at night, her humiliation and fear increased; that she finally secured the services of a cab driver who first took her to a private dwelling where she hoped to

spend the night; that she was denied admission there, and then was taken to a hotel where she spent a wakeful night in pain and much discomfort. After having paid for her lodging at the hotel and the price of a ticket back to Malvern, the appellee did not have sufficient money to buy her breakfast and left without eating. Her side gave her pain, and she continues to suffer. Prior to this occasion she had suffered from a disorder peculiar to her sex, but she had been cured and had had no symptoms of the disorder for more than a year. Immediately after her experience the malady recurred. Appellee and her husband are people of moderate financial circumstances. She therefore administered her own remedies in her own way, depending on the experience she had gained when she was ill before. Not obtaining relief, she consulted with physicians, who prescribed for her, but she had not been relieved. Appellee is a housewife and accustomed to do all the work, but since the recurrence of her illness she has been able to do only a part of it. These facts show that the appellee suffered an actionable wrong by being put off the train at Arkadelphia over her protest and against her will.

The appellant has assigned as error the introduction of that part of the appellee's testimony in which she told of the information she had received in California and along the way by which she directed her conduct. It is insisted that this testimony was incompetent because the appellant company was not bound by any declaration of agents of other railroads in California, New Mexico and Texas. The court so told the jury. But it must be remembered that, in addition to the denial of the allegations of the wrongful conduct of appellant's conductor, an affirmative defense was interposed—*i. e.*, that appellee was herself negligent in purchasing a ticket to Little Rock, when her destination was Malvern, and in taking a train which did not stop at the latter point. The evidence, therefore, was competent for the purpose of showing exercise of ordinary care by appellee in purchasing her ticket and in the

conduct of her journey. She remained on the same train she took at Fort Worth, at which place she had received instructions to the effect that traveling on that train she might get off at Malvern. The court limited the jury's consideration of this testimony to the question of the exercise of ordinary care on the part of the appellee, and we are of the opinion that it was properly admitted for that purpose.

Objections were made and exceptions saved to that part of the testimony of appellee relative to the alleged wrongful conduct of the conductor in the presence of other passengers and the fact that she could hear their comments. This, of course, rendered the humiliation of appellee greater and was competent testimony on the question of punitive damages.

Objection was also made to questions being propounded the conductor and requiring him to return answers relative to any efforts he made to get in touch with his train dispatcher at Little Rock for permission to stop his train at Malvern after he learned that appellee was on the train through mistake and under the impression that she would be put off at Malvern. Some of the questions were not answered and others only in an indirect manner, but from the answers given the inference arose that no such effort was made, the witness explaining that he was under no duty to make any such effort, and that it was inconvenient for him to do so. The conductor testified regarding his customary effort to accommodate passengers and as to his politeness to them and to appellee. These questions were permissible on cross-examination as tending to negative the claim he made as to his conduct toward passengers generally and to appellee in particular.

Objections were saved to the giving of instructions requested by the appellee, the modification of certain instructions requested by the appellant, and to the giving of them as modified, and to the refusal to grant other instructions requested by the appellant. These objections are preserved and argued in appellant's brief. It

would serve no useful purpose, however, to discuss in detail the arguments advanced by the appellant to sustain its contention in these particulars. Suffice it to say that we have examined the instructions with care, and find no prejudicial error in any of them, as they fully and fairly presented the law governing the issues in the case.

The principal contention made by the appellant and the one we deem worthy of most serious consideration is that the compensatory damages awarded were excessive, and that the evidence did not justify the award of exemplary damages. It is argued with much earnestness that the appellee was not injured but was just angry because she had to get off the train and spend the night at Arkadelphia. Doubtless the appellee was angry, but, if her testimony is true, and it has been accepted as true by the jury, it is not unreasonable that she was in this frame of mind. Her testimony as to her alleged injuries and their resultant effect, however, was not disputed by any evidence (except that she made no complaint of physical suffering to the cab driver or the hotel keeper that night), and goes much further than the suggestion of appellant indicates. This testimony has already been set out, and it is unnecessary to restate it. In our opinion it is sufficient to justify the damages awarded by the jury.

Where the element of wilfulness or conscious indifference to the feelings of others is manifest, damages in addition to compensatory damages are justified by way of punishment for the willful misconduct, although the personal injury inflicted be but slight. *Barlow* v. *Lowder,* 35 Ark. 492. Where there are no circumstances which tend to mitigate or excuse insulting and profane language to another, malice will be implied, and where a personal injury is inflicted, although it be but slight, punitive damages are justified when the conduct attendant upon it shows a willful disregard of the rights and sensibilities of the person injured.

Here the evidence tends to show that the party injured was a woman traveling alone with no one to pro-

tect her, and that without any justification or excuse, but as a result of an ill-governed temper, the conductor in the presence of other passengers used language to, and about, the appellee calculated to embarrass and humiliate her, if not to put her in actual fear. This, coupled with the violence with which the conductor ejected her from the train, warranted the jury in concluding that the conduct of the conductor was willful and malicious and a wanton disregard of the safety of the appellee. *Railway* v. *Davis,* 56 Ark. 51, 19 S. W. 107. There is no fixed rule, nor indeed can there be, for measuring the amount of exemplary damages a jury may award. It must be left largely to their own judgment according to the circumstances of the case. In the instant case the trial court heard the evidence and observed the manner and demeanor of the witnesses upon the stand and refused to interfere with the verdict of the jury. We are therefore unable to say that such verdict was excessive or that the trial court erred in holding that it was not. There is substantial evidence to support the verdict, and, no error appearing, the judgment is affirmed

WARREN & SALINE RIVER RAILROAD COMPANY *v.* WILSON.

4—2594

Opinion delivered June 13, 1932.

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Coleman & Riddick, D. A. Bradham and *Clary & Ball,* for appellant.

D. L. Purkins, for appellee.

HART, C. J., (after stating the facts). The record shows that the consideration recited in the release agreement between Smith and the defendant was the sum of $4,000, which was paid to and received by Smith in full discharge and final settlement of his claim against said defendant in a damage suit brought by him against it for personal injuries in the circuit court.

It is earnestly insisted by counsel for appellant that to allow the attorneys to prove that there was an additional consideration that their fee should be paid would be in violation of the well-known rule that parol evidence is not allowed, in so far as the terms of the consideration are contractual, and the writing must control. They rely upon the case of *Williams* v. *Chicago, Rock Island & Pacific Railroad Company,* 109 Ark. 82, 158 S. W. 967,

and on other cases decided by this court deciding a similar principle.

We do not think the cases cited are applicable under the facts of this case. In the case just cited, Williams settled a claim for damages with the railroad company for a stipulated amount of money and testified at the trial that the release merely recited a part of the consideration for the settlement, and that it was agreed that he was to have a lifetime job with the railroad company. The court held that this could not be done because the part of the consideration proved by parol was contractual in its nature and tended to contradict the very terms of the settlement by the railroad with the plaintiff. The court recognized, however, the well-known rule that parol proof is admissible to establish the fact that other considerations not recited in the instrument of writing were agreed to be had where such proof does not contradict the terms of the writing. It was distinctly held that an additional consideration, based upon the same subject-matter, might be proved without varying the terms of the writing.

The admission of the parol proof of Smith did not tend in any way to contradict or vary the terms of the written release and settlement by himself with the defendant. It only recited an additional consideration that the defendant was to pay his attorneys whatever he had agreed to pay them.

Another reason why the testimony was admissible is that, under our statute, the attorney has a lien on his client's cause of action, of which all the world must take notice, and any one settling with the plaintiff without the knowledge of his attorney does so at his own risk. It is true that the existence of the lien under the statute does not permit the plaintiff's attorney to stand in the way of a settlement; but the lien operates as security, and, if a settlement is made in disregard of it, the court will interfere and give the attorney a lien for that percentage of the proceeds which his contract with his client entitled him to receive. *St. Louis, Iron Mountain &*

Southern Railway Company v. *Hays & Ward,* 128 Ark. 471, 195 S. W. 128.

This view was again adopted in the case of *Arkansas Foundry Company* v. *Poe,* 181 Ark. 497, 26 S. W. (2d) 584. In the latter case, it was held that all of the cases recognize the rule that the amount for which the parties have in good faith agreed to settle is binding on the attorneys, but they disagree as to what this amount is. Some of the cases hold to the view that the amount paid the client is the amount on which the attorney's percentage is to be computed where there is a contingent fee. Other cases hold that the amount paid the client is not the whole of the settlement, but only the client's part thereof, and that the whole amount of the settlement on which the attorney's percentage is to be computed is an amount bearing such a proportion to the amount paid to the client as the whole bears to the fraction represented in the client's share. In other words, under our statute, if the defendants are required to pay the attorney's fees as a part of the settlement, they will be deemed to have agreed to pay the plaintiff's attorney the amount the latter was entitled to receive under the contract of employment. This was the view of the law adopted in the Poe case; and it was expressly held that, where a client agreed to pay attorney a fee of fifty per cent., the defendant, settling with the client for a stipulated sum and agreeing to pay the attorney, must pay the attorney a like sum.

The undisputed facts in this case are that the defendant knew at the time it made the settlement that the plaintiff had agreed to pay his attorneys a contingent fee on a percentage basis, and knew the terms thereof. Smith, the plaintiff in the damage case, testified that they agreed to pay his attorneys on the basis on which he was paid. Now the release and settlement show that he was paid the sum of $4,000, and the court found that the attorneys were entitled to recover a like amount. The finding and judgment of the court shows that it did not take into consideration the fact that other sums in addi-

tion to the $4,000 were to be received by the plaintiff from the defendant in the settlement of the case. The court was at liberty to accept that part of the plaintiff's testimony which it believed to be true, and to reject that part that it believed to be untrue.

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

OWEN *v.* OWEN.

4—2555

Opinion delivered June 13, 1932.

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Wade Kitchens and *W. H. Kitchens, Jr.,* for appellant.

Henry Stevens, for appellee.

HART, C. J., (after stating the facts). This court is committed to the doctrine that, where a deed is executed in consideration of the agreement by the grantee to support the grantor, and this agreement is made by the grantee for the fraudulent purpose of securing the deed, and without intending to carry it out, and it has this effect, it constitutes a fraud vitiating the conveyance, and equity will set it aside. *Salyers* v. *Smith,* 67 Ark. 526, 55 S. W. 936; *Boyd* v. *Lloyd,* 86 Ark. 169, 110 S. W. 596; *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286; *Jeffery* v. *Patton,* 182 Ark. 449, 31 S. W. (2d) 738; and *Federal Land Bank of St. Louis* v. *Miller,* 184 Ark. 415, 42 S. W. (2d) 564.

We are of the opinion that, when all the attendant circumstances are considered, the chancellor should have found that the substantial consideration which was the inducement for the execution of the deeds was that the sons should take care of and support their father during his natural life. It is true that they deny that this was the consideration, but their testimony is contradicted by the attendant circumstances. They admit that their father resided on the land at the time he executed the deeds to them, and that he has continued to reside there ever since, a period of something over ten years. During all of this time he has had exclusive management of the land, and has collected the rents and otherwise used the land as still belonging to him. The sons testified that the rents and profits derived from the land were sufficient to support their father, and this was equivalent to them supporting him. It is not a case where

the grantees have neglected or refused to carry out their part of the agreement by refusing or neglecting to support their father.

In a transaction of this kind there is always an element of love and confidence reposed by the parents in their children, and they part with their property with the expectation and belief that they will be supported and cared for by the children. If the children refuse to carry out their part of the agreement, equity will grant relief to the parent by canceling the deed. In the present case, the evidence does not justify cancellation of the deeds on account of the sons' failure to support. In this connection it may be stated that if at any time in the future the sons should fail to carry out their part of the agreement and fail to support their father, equity will afford him relief by canceling the deeds.

We cannot agree with the contention of the sons that the consideration of the deeds was that the father conveyed the land to them in an effort to defraud his creditors. It is true that he stated that this had something to do with it, but it is evident that the substantial agreement was that his sons should support him. The deeds themselves recite that they are made subject to an indebtedness owed by the father to the Federal Land Bank. The deed to the home place also contains a covenant that the father is to remain in possession of that during his life, and that the deed should not become operative until his death. This was a valid covenant. *Reynolds* v. *Balding,* 183 Ark. 397, 36 S. W. (2d) 402.

The lands were of the value of $8,000, and the debt owed by the father was only $1,000. The debt was afterwards paid by the father. These circumstances strongly tend to show that the lands were not conveyed to the sons by the father in an effort to defeat his creditor in the collection of its debt, but that the consideration of support by the sons was the substantial inducement which caused him to execute the deeds.

The result of our view is that, as the case now stands, the chancellor erred in canceling the deeds. As above

stated, the duty of support is a continuing one; and, if at any time in the future the sons neglect or refuse to support their father, he will have the right to bring another suit to cancel the deeds on that account. Therefore the decree will be reversed, and the cause will be remanded with directions to dismiss the complaint for want of equity.

JOHNSON *v.* SIMPSON.

4—2595

Opinion delivered June 13, 1932.

F. C. Nolen and *Lee & Moore,* for appellant.

Jno. W. Moncrief and *A. G. Meehan,* for appellee.

MEHAFFY, J. The appellee, Jess Simpson, brought suit in replevin for the possession of certain stock belonging to him and running at large in Monroe County, Arkansas.

The stock were impounded by the appellant, Claudius Johnson, because it was claimed that the stock were running at large in violation of law.

On appeal to the circuit court, the case was tried on an agreed statement of facts, and the court held that act 205 of the Acts of 1927 and act 99 of the Acts of 1929

were invalid for the reason that they were amendatory of local legislation, and in violation of amendment No. 14 to the Constitution of the State of Arkansas, and that the orders of the county court authorizing the holding of an election, and all orders of said court made in consequence of said illegal election are invalid and of no force and effect.

The Legislature of 1915 passed a local act restraining the running at large of stock, but exempted from the provisions of the act twenty-three counties. We all agree that the exemption of the twenty-three counties made the act a local one.

In 1915 the Legislature had authority to pass a local act, but in 1926 the people adopted the following amendment to the Constitution: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of special or local acts."

After the adoption of this amendment, the Legislature could not pass a valid local act. They could not amend a local act, but they were given authority in the amendment to repeal local acts.

Act 205 of the Acts of 1927 amended § 321 of Crawford & Moses' Digest. This section of the Digest is § 1 of the local act of 1915, above mentioned. It provides for the per cent. of qualified electors necessary for the county court to order an election and a vote by the people.

This was purely an amendment to the local act. It did not undertake to repeal any part of it, but amended it as to the manner of calling an election.

Act 99 of the Acts of the General Assembly of 1929 undertook to repeal act 5 of 1923 in so far only as it applies to Monroe County.

Act No. 5 undertook to amend § 332 of Crawford & Moses' Digest. This was a section of the original local act of 1915 and simply applied to counties exempted from that act, and exempted twenty-one counties only. That left fifty-four counties under the provisions of the local act passed in 1915.

Act 205 of 1927 and act 99 of 1929 do not repeal any part of a local act, but act 99 of 1929 undertakes to repeal so far as it applies to Monroe County. Monroe County was one of the counties exempted from the provisions of the local act. The effect of repealing the law as to Monroe County, if it had any effect, was to take Monroe County out of the exemptions, and leave it under the provisions of the local act, which would then apply to fifty-four counties, if this were a valid act.

In other words, they undertook to amend the act of 1915 so as to take Monroe County out of the exemptions, and this necessarily added it to the counties under the provisions of the local act.

The election was called, held, and the stock impounded under the provisions of the local law. Of course, the local law would have no effect unless the act in controversy, which repealed the law so far as Monroe County was concerned, had the authority to put Monroe County under the provisions of the local law. If it did not do this, it did not accomplish anything, because there is no general law governing.

In other words, either the law repealing the local law as to Monroe County put Monroe County back under the provisions of the local law, or it was wholly ineffective. If it did not have the effect of putting Monroe County under the provisions of the local law, the election was void because it was held under the provisions of the local law; and if the election was void, the impounding of appellee's stock was unlawful.

Appellant calls attention to the case of *Smith* v. *Plant,* 179 Ark. 1024, 19 S. W. (2d) 1022, and *Wright* v. *Badders,* 181 Ark. 1124, 29 S. W. (2d) 671, and argues that these cases hold that the acts now involved are valid. The question of whether the sections of the Digest mentioned in these cases was a local or general law was never raised. The sections were in the Digest and were therefore assumed to be general laws, and the attention of the court was not called to the fact that these sections were parts of the local law enacted in 1915.

We all agree that the act of 1915 is a local law, and all amendments thereto were local laws.

If the court's attention had been called to the fact that these sections of the Digest were parts of a local law, we would have held then that the law was local, but it was not called to our attention, and, finding the sections in the Digest which is supposed to contain general laws only, and the fact that the attorneys did not call our attention to it, we assumed that the sections involved were parts of a general law.

Appellant calls attention to the case of *Ewing* v. *McGehee,* 169 Ark. 449, 275 S. W. 766, in which it was held that it was within the legislative power to amend a general statute by local and special acts. This case, however, was decided before the adoption of amendment No. 14, and, since the adoption of this amendment, the Legislature has no authority to pass any special or local act, although the Constitution gives the Legislature power to repeal local laws.

As it was held in *Gregory* v. *Cockrell,* 179 Ark. 719, 18 S. W. (2d) 362, the authority to repeal a local law includes the authority to repeal it in part. But the facts in the case of *Gregory* v. *Cockrell, supra,* are wholly different from the facts here, and the situation as to the instant case is exactly the reverse of the situation in that case. The Legislature of 1921 passed an act for a stock law embracing all of Chicot County, and all that part of Ashley County lying east of Bayou Bartholomew. The Legislature thereafter repealed that part of this local law that applied to Ashley County, and the local law no longer applied to the territory in Ashley County, but such territory was thereafter under the operation of the general law. No one would contend that the Legislature could have added other territory to this local act after the adoption of amendment No. 14. No matter whether they called it repeal or amendment, it would have been the enactment of a special law.

Act 99 of the Acts of 1929 repeals act 5 of the Acts of 1923, in so far only as it applies to Monroe County.

In the first place, the act did not apply to Monroe County. Monroe County was expressly exempted from the provisions of the act. Just how it could be said that this act applied to Monroe County, when Monroe County was exempted from its provisions, is difficult to see. The act meant that Monroe County was to be put under the provisions of the act, or it is meaningless.

The circuit court was correct in holding the acts mentioned invalid, and the judgment is affirmed.

SMITH, J., (dissenting). I think the majority opinion has impaired the authority of the cases which it cites and has left the Stock Law in unnecessary confusion. I therefore dissent.

Who can say, in view of the majority opinion, what the present status is of the stock districts organized under the amendments of the act of 1915 (§ 321-332, Crawford & Moses' Digest)? These are: Acts 1927, page 686; Acts 1929, pages 507 and 991; Acts 1931, pages 130 and 272.

What is the present status of districts organized under act 205 of the Acts of 1927, page 686? This act amends § 321, Crawford & Moses' Digest, to read that "When ten per cent. of the qualified electors of *any* county in the State of Arkansas * * * shall petition the county court for the privilege to vote on the question of restraining horses, etc., * * * from running at large within any county, the county court in which such petition is duly filed shall make an order for such election to be held at any general or special election of the county or State officers." The statute which this act amended required the petition of 25 per cent. of the electors.

The majority say the case of *Gregory* v. *Cockrell,* 179 Ark. 719, 18 S. W. (2d) 362, has no application, because the effect of that case was to place Ashley County under the general Stock Law. What general law if not the act of 1915?

Two statutes appear in the Digest where general laws are found upon the subject of the organization of

stock districts. The first is the act of 1883, which appears as §§ 305-320, Crawford & Moses' Digest. Under this act districts are created by petition. The second act is that of 1915 (§§ 321-332, Crawford & Moses' Digest), under which such districts are created by election.

The act of 1883 is more local in its nature than the act of 1915. By its express terms it applies only to "* * * any county bordering upon a navigable stream and having territory in cultivation subject to overflow, or subdivision of a county consisting of not less than thirty-six square miles where said subdivision borders upon a navigable stream and contains territory in cultivation subject to overflow * * *."

In the case of *Gregory* v. *Cockrell, supra,* that portion of a local act (special act 42, Acts 1929, page 80) was held repealed which applied to Ashley County. Prior to the repeal of this act that portion of Ashley County affected by it was not governed by either the act of 1883 or the act of 1915. It was governed by the local act of which it was a part.

The act of 1915 was introduced in the General Assembly as a general law, but before its final passage it was amended so that its provisions did not apply to twenty-two counties, which were exempted from its operation. But for this exemption of certain counties, it would have been a general law. If the section exempting those counties were repealed, it would be a general law. Had this law, when it was passed, exempted only Monroe County, can it be doubted that the law could be made general by striking out that exempted county? It would thereafter apply to the whole State? And if it could be repealed as to one county, why not as to more than one?

Under the Constitutional Amendment of 1926, local laws cannot be passed, but they may be repealed, and, if they may be repealed altogether, why not in part? Uniformity is promoted, and this is one of the prime purposes of the amendment. If all the exempted counties were taken from the exemption clause, which makes the

act local, we would then have a general law uniform throughout the State, and it appears to me that there is no question about the power of the Legislature to accomplish this result, under the Cockrell case, *supra.* The practical and correct construction of this amendment, as applied to the act of 1915, is just this: The Legislature is without power to add the name of any county to this exemption clause which makes the act local. It has the power to repeal or strike out the name of any county appearing in the exemption clause, because that action tends to make the act general, and if all counties were stricken from the exemption clause it would then be a general law applying to the entire State.

In the case of *Gregory* v. *Cockrell, supra,* an act was construed which originally applied to all of Chicot County and a portion of Ashley County. That act was, of course, local. It was amended by act 42, Acts 1929, by striking out the portion of Ashley County included in the original act. Special Act 42, which accomplished this purpose, was held valid as a repeal in part of a local law. It was held that the power to repeal wholly conferred the power to repeal in part, and I think that principle is applicable here.

It may be asked, what law now applies to that portion of Ashley County taken out of the operation of the special act 42, there repealed in part? It occurs to me that the answer to this question is that the act of 1915 applies, and that the act of 1883 would also apply to such of its territory as bordered a navigable stream and was subject to overflow, if there is such territory. If neither of those acts is applicable, I know of no legislation that does apply to the portion of Ashley County formerly included within the special act which the majority held in the Cockrell case had been repealed by a valid local act.

Ashley County was not included in the exemption section of the act of 1915, but that act did not apply to the whole of that county, because a portion of the county was included in the special act. Now, when this special

act, applying only to a portion of Ashley County, was repealed, why does not the act of 1915 then apply to the whole of that county? In a sense this would be an amendment of that act, but it is an amendment which results from the repeal of the special act 42 in part, a thing which the Cockrell case held the General Assembly had the power to do.

The obvious and the expressed purpose of act 99 of the Acts of 1929 was to repeal that portion of the exemption section which made the act local in so far as it applied to Monroe County, thereby placing that county with the majority of the other counties under the provisions of that portion of the act of 1915 which would be a general law if there were no exemptions.

I think the General Assembly has the express power to repeal this exemption clause in whole or in part. Counties in the exemption clause may be taken out, but others cannot be added, and this is true because repeal to any extent is authorized by the amendment. Taking counties out of the exemption clause would be a partial repeal, and they may therefore be taken out. Adding counties would not be a repeal, and they may not therefore be added.

It is, therefore, my opinion, in which Mr. Justice HUMPHREYS concurs, that Monroe County has been placed under the operation of the act of 1915, this result being accomplished by the repeal of that portion of the exemption clause which excluded that county from its operation. The judgment of the court below should therefore, in our opinion, be reversed, and we therefore dissent.

HARPER *v.* BANKERS' RESERVE LIFE COMPANY.

4—2626

Opinion delivered June 13, 1932.

[redacted]

Oliver & Oliver, for appellant.

Dudley & Barrett, for appellee.

McHANEY, J. November 16, 1926, Samuel Harper, deceased husband of appellant, made application to appellee for a policy of life insurance in the sum of $1,000, paying the premium therefor. The policy was issued bearing date January 8, 1927, in which appellant was named beneficiary. Twenty days later the insured died, and thereafter proper and timely proofs of death were furnished and demand made for payment, but appellee did nothing until June 29, 1927, when it sent its agent to appellee to effect a settlement. On that date, accompanied by a notary public of Corning, Arkansas, said agent called upon appellant, told her the policy was void because her husband had misrepresented his physical condition in the application, that his statements in this regard were warranties, were false, and that, because of such false warranties, the policy was void. He offered to return the premium paid, about $29, which she refused, and he finally offered her $100, stating that if she refused that she would get nothing. She finally made the settlement, signed a release, and the agent departed. Thereafter, within the period of limitations, she brought this action to recover the balance due on the policy, charging fraud in the procurement of the settlement. A second count of the complaint sought to recover special damages

for breach of the contract. In this count she alleged that her husband's farm was mortgaged, and that he was induced to apply for this on the representation of the agent that in the event of his death the amount of the policy would take care of the mortgage, and thereby preserve the homestead for the widow and minor children; and that appellee had breached the contract of insurance by refusing to pay, and that she had lost the farm homestead through or on account of such breach. Appellee demurred to the complaint. The court overruled the demurrer to the first count, but sustained it as to the second count. Appellant refused to plead further on the second count, and the court dismissed same. An answer was filed to the first count, denying the material allegations thereof. An affirmative defense was pleaded that insured had made certain statements in his application relative to his insurability which were false, known by him to be false, and made for the purpose of defrauding it.

The case proceeded to trial, and at the conclusion of the testimony on behalf of appellant the court sustained a motion for a directed verdict in favor of appellee. Judgment was entered accordingly, and this appeal followed.

We think the court erred in so doing. The trial court should not direct a verdict, thereby taking the case from the jury, unless there is no substantial evidence to support a verdict in favor of the other party. Of course, in a case where a verdict has been rendered which, in the opinion of the trial court, is against the preponderance of the evidence, it is the duty of the trial court to set it aside and grant a new trial on proper motion therefor; but the trial court is not authorized to take the case from the jury in the first instance, if there is some substantial evidence to support a verdict against the party making the request or in favor of whom it is directed. In determining the question here, we view the evidence in the light most favorable to the complaining party. Viewing the evidence in this light, the facts are substantially as follows: Appellant is a woman of

moderate education, not unlettered or ignorant, but inexperienced in business matters. She lived on a small farm at Palatka, Arkansas, with her husband and five small children, aged from 11 to 2, until his death. She made proof of death, but heard nothing from appellee until June 29, 1927, when its agent, Mr. Dow, and Mr. Arnold came to see her. She was not well at the time. Dow told her the company didn't intend to pay the policy, and that he had brought the premium, about $29, and would pay that back, and wanted to take up the policy. She refused to take it. She asked to be permitted to go to town to consult with a friend, but was told that, if she refused to accept that, it was all she would get. He told her Mr. Harper had "lied" in his application, and that he had cancer of the rectum at that time, and the policy was null and void. She told him if she couldn't collect the policy she would lose her home, and that he talked to her so she broke down and cried; told her again the return of the premium was all he would pay. She refused the offer, expressed the desire to go to town and advise with friends, and finally he offered to pay her $100, which she finally accepted and signed a release in the presence of Mr. Arnold. Other facts and circumstances appear, but we think it unnecessary to detail them. Appellant was fully corroborated by Mr. Arnold as to what Dow said and did. We think the effect of this evidence, when considered in connection with the fact that Dow's attitude was dictatorial, domineering and insulting, was sufficient to go to the jury on the legality of the settlement and the release executed pursuant thereto. Moreover, he made false statements to her regarding the effect of the alleged false statements made by the insured in his application for insurance. The policy provides that "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties." Dow made the statement to her that Mr. Harper had misrepresented the condition of his health, and that this would avoid the policy. Such is not the law under the

above provision of the policy. If the applicant states what he honestly believes to be true regarding his physical condition, the fact that it turns out to be not true does not avoid the policy, as it is a representation merely. Of course, if his statements are false and known to him to be false, and are made fraudulently, they have the same effect as warranties. *Union Aid Life Ins. Co.* v. *Munford,* 180 Ark. 1048, 24 S. W. (2d) 966. It is true that appellant testified that insured had some rectal trouble, piles he thought, but probably hemorrhoids, which later necessitated an operation from which he died, but she also testified that it was not considered serious by them, and that he worked every day, made a crop in 1926 and harvested it. The question will be then were his statements made in good faith, if untrue, or were they made knowing them to be false and for the purpose of defrauding appellee. See *American Nat. Ins. Co.* v. *Chavey, ante* p. 865. But the question here is, was the settlement conclusive of appellant's rights as a matter of law under the evidence, or was it a question for the jury? We think the question one for the jury as to whether the release was procured by fraud or coercion.

We think the court properly sustained the demurrer to the second count of the complaint.

Reversed and remanded for new trial.

DECKER *v.* STATE.

Crim. 3796

Opinion delivered June 20, 1932.

E. E. Alexander and *Geo. M. Booth,* for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried and convicted for murder in the first degree of Manley Jackson, and adjudged to serve a life term in the State penitentiary as a punishment therefor, from which is this appeal.

The first assignment of error for a reversal of the judgment is that the trial court erred in allowing the prosecuting attorney to prove by Lige Dame, a witness for the State, that appellant had been engaged in the liquor business for several years. Even if improper to make this proof, appellant afterwards became a witness in his own behalf and admitted that he had engaged in the liquor business, so he was not prejudiced by the proof of the State in this respect.

The next assignments of error for a reversal of the judgment were the admissions in evidence of statements of witness, Lige Dame, to the effect that John Slayton had promised him $1,000 to kill Manley Jackson and $450 to burn a house, and had protected him in the sale of liquor in Pocahontas for a consideration, all in the absence of, and without the knowledge of, appellant. Objections were made and exceptions saved to the introduction of this evidence.

Such evidence could be admitted only on the theory that Lige Dame, who killed Jackson, was induced and encouraged to do so by John Slayton and appellant, or, to put it differently, that the three were conspirators in the commission of the crime.

Lige Dame testified that he killed Jackson at the instance and request of John Slayton and appellant; that John Slayton and Manley Jackson were opposing candidates for marshal at Pocahontas, and that Friday before the killing on Saturday John Slayton offered him $1,000 to kill Manley Jackson, and that he agreed to do so; that on the next day, Saturday, appellant came and informed him that Manley Jackson was having illicit relations with witness' wife, and advised that he kill him, and offered to help him do so; that, pursuant to the agreement, they induced Manley Jackson to go with them out in the country a short distance before daylight Sunday morning, where witness shot Manley Jackson four or five times in the back, and left him a corpse on the roadside.

The fact that both appellant and John Slayton approached Lige Dame for the same purpose within a few hours of each other and prevailed upon him to kill Manley Jackson tended to show that they conspired together to take his life. There being sufficient evidence from which to infer a conspiracy, the conduct and relationship of the conspirators, one to another, in lawlessness and crime was admissible as a circumstance tending to show the guilt of either in the particular crime charged.

The next assignment of error is that the court erred in allowing the State to show by George Promberger, Jr., and his father that appellant bought No. 45 calibre pistol shells at their hardware store about two months before Manley Jackson was killed. Manley Jackson was killed with bullets of that size, and for that reason the circumstance of the purchase was admissible.

The next assignment of error was the admission of appellant's evidence, taken in shorthand and transcribed at the coroner's hearing or examining trial, and also in a *habeas corpus* proceeding on application for bond by

John Slayton. It is argued that the admission of this testimony was in plain derogation of § 3122 of Crawford & Moses' Digest, which is as follows:

"In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense."

The introduction of the testimony was not objected to on this specific ground, and no general objection was made to it, so we cannot pass upon the admissibility thereof on appeal.

The next assignment for a reversal of the judgment is that the court withdrew instruction No. 11 from the jury after the case had been submitted. The jury had returned to the court to ask that the instructions be read to them again. In reading the instructions, the court discovered that the subject-matter contained in instruction No. 11 was fully covered by instruction No. 15, which appellant had requested, and therefore withdrew instruction No. 11 from their consideration. We are unable to see where any prejudice resulted to appellant by the withdrawal of one instruction which was fully covered by another.

The last assignment of error for a reversal of the judgment is that the testimony of appellant's admitted accomplice, Lige Dame, is not sufficiently corroborated to sustain the verdict and judgment of conviction.

The rule of evidence is that the corroboration of the testimony of an accomplice is not sufficient if it merely shows the killing and the circumstances thereof, but must connect the defendant with the commission of the crime. There are corroborating circumstances in the testimony tending to connect appellant with the murder of Manley Jackson, as follows:

A short time prior to the killing, appellant was arrested by Manley Jackson in a manner displeasing to

him. In making the arrest, Jackson drew a pistol on him, and he stated in a heated argument with him that he had better never do that again.

Appellant purchased, about two months before the killing, cartridges the same size that were used in killing Manley Jackson.

There is testimony in the record tending to show that appellant told of the killing before it was known in Pocahontas.

During the investigation of the killing by W. A. Jackson, father of deceased, appellant said to Joe Alphin, "Now listen; if you know anything, you had better keep your damn mouth shut."

Immediately after the investigation, just after appellant had been interrogated concerning his knowledge of the crime, he said to Frank Jankersfeldt, "The sons of b.....! Trying to find out something, and I am not talking."

No error appearing, the judgment is affirmed.

KIRKPATRICK FINANCE COMPANY *v.* STOTTS.

4—2593

Opinion delivered June 20, 1932.

Roy Penix, for appellant.

Dudley & Barrett, for appellee.

MEHAFFY, J. On December 29, 1928, the appellee, W. E. Stotts, purchased a Ford automobile from the Jonesboro Machine Company, of Jonesboro, Arkansas. He traded in an old automobile and paid some cash. The amount allowed for the old automobile and the cash paid left a balance of $360 due as the cash price of the automobile that he purchased. He, however, signed a contract, which stated that the total time price was $793.50; that the down payment was 50 per cent., and the amount of the note $396.70. This amount was to be paid in monthly installments of $39.67 each. The first installment was due January 29, 1927. The agreement between the purchaser and seller was that, if paid in full within 30 days, the balance would be $360. The difference between the cash price and the time price was interest, carrying charges, and insurance.

The contract signed by Stotts showed the amount of payments and when due, and there, in the face of the note, was written the following in ink: "1/29/29 received of W. E. Stotts $360 on this contract. Jonesboro Machine Co., by N. B. Stroud."

The contract provided that payments should be made to appellant, Kirkpatrick Finance Company, St. Louis, Missouri. It also retained title of the automobile until paid.

Stotts paid the $360, which was the amount due, less carrying charges, interest and insurance, within 30 days after he purchased the automobile. He never at any time made a payment to the appellant. The Jonesboro Machine Company, however, made five payments of $39.67 each to appellant.

It appears from the evidence that the appellant transferred the contract to the Industrial Savings Trust Comany, and thereafter the Jonesboro Machine Company became insolvent, and the Kirkpatrick Finance Company repurchased the Stotts note on May 27, 1929.

On August 7, 1929, the appellant brought suit in the circuit court against W. E. Stotts and J. Q. Lane as trustee in bankruptcy of the Jonesboro Machine Company, alleging that Stotts, in December, 1928, purchased, under a conditional sales contract, a Ford automobile for the sum of $793.50, of which he paid in cash $386.80, leaving a balance of $396.70, payable in ten equal monthly installments of $39.67; that Stotts executed his note and contract, in which title to the car was reserved; that, after the execution of the note and before maturity of any installments, the plaintiff purchased the note from the Jonesboro Machine Company; that thereafter the Jonesboro Machine Company was adjudicated a bankrupt, and J. Q. Lane became its trustee; that Stotts defaulted in the payment in June, and that the balance due at the time of bringing the suit was $198.35, principal and interest; that Stotts refused to pay the balance, and judgment was asked for the $198.35 with interest.

There was a specific attachment and summons served, and Stotts executed a bond and retained the property.

W. E. Stotts filed answer admitting the contract, but denied that he had defaulted in the payment of any installment, and denied all the material allegations in the complaint, alleging that he paid $433.50 at the time the contract was entered into, and executed his note for a balance of $360; that on January 21 he paid the balance, $360, to Jonesboro Machine Company, which was the agent of the plaintiff for the purpose of receiving payments from defendant and sending same forward to plaintiff; that the Jonesboro Machine Company had authority to, and did, collect from the defendant and other purchasers under similar contracts, and that the Jonesboro Machine Company remitted plaintiff the first five payments on said contract.

There was a trial by jury, and a verdict and judgment for defendant.

Appellant introduced in evidence the note and contract, and the contract showed that at the time it was entered into there was printed on the back of the note: "For value received the within note is indorsed to Kirkpatrick Finance Company, St. Louis, Missouri, without recourse. Jonesboro Machine Company, dealer, by N. C. Stroud, Pres."

R. C. Duffin, the secretary-treasurer of the Kirkpatrick Finance Company, and general manager of said company, testified that the Stotts note was bought by appellant January 4, 1929; that the balance due on purchase price was $198.35, and that appellant did not authorize the Jonesboro Machine Company to act as agent for the purpose of receiving payments on the Stotts note, and never gave any general authority to the Jonesboro Machine Company to act as agents on any other contract; that the Jonesboro Machine Company might have been given specific authority to collect on certain notes and contracts, but not on the Stotts note; that the appellant sold a group of notes, but not all of its notes, to the Industrial Savings Trust Company; that it afterwards repurchased the Stotts note May 27, 1929, and is now the legal owner of same; that the first four payments on the Stotts note came to the appellant in the form of dealer checks; that the Jonesboro Machine Company did not make the collections at the request of appellant; that appellant notified Stotts that it had purchased his note, and that payments should be made to it.

The appellant received four letters from the Jonesboro Machine Company, each inclosing checks for the sum of $39.67. The last of these letters was dated April 18, 1929. Witness testified that on May 31, 1929, appellant received a check for $39.67 in the form of a money order; that the record is not clear as to who sent this payment.

W. E. Stotts testified in substance that he purchased the automobile for $735 and paid $360 cash, and gave

his note for the difference; that at the time he entered into the contract he told Mr. Stroud, the agent of the Jonesboro Machine Company, that he would pay the difference in less than 30 days. He did pay it off in less than 30 days, and introduced the receipt signed by Jonesboro Machine Company, showing the payment.

The first he learned that the Kirkpatrick Finance Company was expecting payment was after the Jonesboro Machine Company went into bankruptcy. He signed the note sued on with the understanding that, if paid off in 30 days, he was to get $36 and some cents knocked off. The Jonesboro Machine Company was to hold the note 30 days. He understood that, if the note went away, the Kirkpatrick Finance Company was to own it. He received notice from the Kirkpatrick Finance Company that it had the note. He received other notices from this company. When he paid the $360, Mr. Stroud had already sent the note to the finance company. He notified the Industrial Savings Trust Company May 18, 1929, that he had paid the note in full and held the receipt.

After he made the last payment, he went to Mr. Stroud, and he told him not to worry about it. Stroud told him that, if he paid the note within 30 days, he would knock off the carrying charges and interest. The difference between $360 balance due and the amount of the note was interest, carrying charges and insurance.

Mamie Lilly testified in substance that she was working for the Jonesboro Machine Company at the time Stotts bought the car; that during the years 1927, 1928 and 1929 the average monthly sales of the Jonesboro Machine Company of new cars was about 30 a month, and half of the notes for the balance of the purchase price of these cars was bought by the Kirkpatrick Finance Company; that practically 15 cars each month were financed by the finance company for the Jonesboro Machine Company; that of over half these contracts the purchasers would make their payments to the Jonesboro Machine Company, and it would forward the money to the finance company. This continued up to the time of

the bankruptcy of the machine company. There was never any objection from the finance company to that method of handling the business. Mr. Stotts paid his account in full to the machine company. The machine company did business with the finance company from 1925 on. She saw Mr. Stotts make the $360 payment. She sent five checks for $39.67 each to the finance company to apply on the Stotts note. The machine company did not notify the finance company at the time it collected the $360. The machine company went into bankruptcy in May or June, three years ago.

Emery Buttrey testified that he was present when Stotts paid the note.

The appellant requested the court to submit to the jury three questions, or special findings, and these requests were refused by the court. This was in the discretion of the court. *Railway Co.* v. *Pankhurst,* 36 Ark. 371.

The appellant and appellee both made requests for numerous instructions, which the court refused. The court gave some instructions requested by appellant, but it is not necessary to set out the instructions here.

The court gave, on its own motion, the following instruction:

"The plaintiff sues the defendant on a certain promissory note introduced in evidence, which the defendant admits that he executed, and the testimony of the plaintiff is to the effect that there is now due on said note an unpaid balance of $198.35, with interest. The defendant states that the full amount of the indebtedness represented by said note was paid to the Jonesboro Machine Company, and defendant contends that the said Jonesboro Machine Company is the agent for the Kirkpatrick Finance Company, and authorized to accept his said payment.

"You are instructed that the execution of said note having been admitted, the burden of proof is on the defendant to show that the indebtedness represented thereby has been paid in such manner as to discharge

him from further liability thereon. There is no evidence in this case of express authority given to the Jonesboro Machine Company to accept payment of the note in question. Your verdict will therefore be for the plaintiff for the sum sued for, unless you find by a preponderance of the evidence that the Jonesboro Machine Company's collection of the payment, if any, from the defendant was ratified and confirmed by the plaintiff with full knowledge of all the facts."

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

It will be noticed from the instruction given by the court that the only question submitted to the jury was the question of ratification, and the jury found that the acts of the Jonesboro Machine Company were ratified by the Kirkpatrick Finance Company.

The undisputed evidence shows that the Kirkpatrick Finance Company had been doing business with the Jonesboro Machine Company since 1925; that the machine company sold on an average 30 cars a month; that half of these notes were purchased by the Kirkpatrick Finance Company, that is, the notes for 15 cars a month, at least during the years 1927, 1928 and 1929, and that the purchasers, during these years, paid directly to the machine company, and it, after collecting the money, would pay it to the finance company. In other words, the evidence shows that the transactions with reference to the purchase of the car by Stotts, and the payments for same, were the same as characterized their dealings for the last several years. It is also undisputed that the purchase price of the car was $735, and that $360 of this was paid at the time of the purchase. Not only were these transactions and dealings carried on for years, but the printed contracts showed that the purchase price was to be paid at the office of the finance company in St. Louis, Missouri.

In dealing with the machine company for years, and permitting the machine company to collect for it, the finance company not only knew of the method of doing

business, but ratified it. It was bound to know that the payments made by Stotts were made to the machine company, because all of the payments that it received were received from the machine company, and not from Stotts.

The evidence also shows that it was the agreement between Stotts and Stroud, of the machine company, that, if Stotts would pay the balance within 30 days, the balance would be $360. There is no dispute about this $360 being paid.

Stotts testified that the difference between the $360 and the amount named in the contract was for carrying charges, insurance and interest. If it were paid in cash or within 30 days, there would be no carrying charges, and the finance company would not have to carry insurance, and there would be no interest.

When all the facts and circumstances are considered, they show a ratification by the Kirkpatrick Finance Company of the acts of the Jonesboro Machine Company. The evidence shows that there was no objection at any time made by the Kirkpatrick Finance Company, and doubtless would have been none but for the bankruptcy of the Jonesboro Machine Company.

A principal cannot ratify a portion of an unauthorized transaction and not ratify the whole of it. He cannot avail himself of acts that are beneficial to him and repudiate the acts that are detrimental to him. 21 R. C. L. 923.

There need not be an express ratification, but ratification may be, and frequently is, implied from the acts of the parties, and when the facts justify the conclusion that the principal has ratified the acts, it is as effective as if there had been an express ratification.

Ratification, like agency itself, may be either established or disproved by the facts.

"In a great majority of the cases the ratification of unauthorized acts of an agent need not be and is not made expressly, but is implied from the acts and words of the principal, except where the ratification is required

to be in a particular form. * * * As between the principal and third person dealing with an agent, less is required to constitute a ratification than is required between the principal and the agent." 2 C. J. 488.

Less is required because a principal is frequently bound by the acts of the agent not within the scope of his authority. He may bind the principal if his acts are within the apparent scope of his authority. In other words, the act of the principal may be such as to lead third persons to believe that an agent has authority that in fact he does not have. In such case, the principal would be bound as to third persons.

The evidence was sufficient to justify the court in submitting to the jury the question of agency as well as ratification, but the appellant cannot complain at this not being done, because the instruction given by the court was as favorable to it as it was entitled to.

Under a certain set of facts a jury might find that the relation of principal and agent existed, without finding there was any ratification. If this had been submitted to the jury in the instant case, there would have been substantial evidence to justify a finding that the relation of principal and agent existed, but, as we have already said, the appellant cannot complain at this action of the court, and the appellee has made no objections to the court's refusal to instruct on the question of principal and agent.

Whether there was or was not a ratification was a question of fact for the jury. There is substantial evidence to support its verdict, and the judgment is affirmed.

GREEN *v.* STATE.

Crim. 3800

Opinion delivered June 20, 1932.

[redacted]

Gordon B. Carlton, for appellant.

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

McHANEY, J. Appellant was convicted on an indictment for robbery of the Bank of Horatio, and sentenced to ten years in the penitentiary. The only error complained of here is that the indictment does not allege facts sufficient to constitute the offense of robbery, and that his demurrer thereto should have been sustained. The indictment reads as follows: "The grand jury of Sevier County, in the name and by the authority of the State of Arkansas, accuse Fulton Green of the crime of robbery committed as follows, to-wit: The said Fulton Green in the county and State aforesaid, on the 10th day of April, A. D. 1931, unlawfully, wilfully, feloniously, violently and forcibly from the Bank of Horatio, Arkansas, a corporation, against its will and by intimidation did rob, steal, take and carry away $6,737.19 in gold, silver and paper money, lawful and current money of the United States of America and of the value of $6,737.19, the personal property of the said Bank of Horatio, Arkansas, a corporation, against the peace and dignity of the State of Arkansas."

By § 2410, Crawford & Moses' Digest, robbery is defined as follows: "Robbery is the felonious and violent taking of any goods, money or other valuable thing from the person of another by force or intimidation; the manner of the force or the mode of the intimidation is not material, further than it may show the intent of the offender."

The argument made against the above indictment is that it fails to name a natural person as the one from whom the property was taken by force or intimidation, and it is further urged that a corporation is incapable of feeling or expression and cannot be intimidated or put in fear. It is true the indictment alleges that the money was taken forcibly from the Bank of Horatio, a corporation, against its will and by intimidation, etc, but a corporation acts through its agents, and if the agents of the corporation were put in fear and the property was taken from them "unlawfully, wilfully, feloniously, violently and forcibly * * * and by intimidation," we think it would be unnecessary to name the particular agent or person in charge of the property of the corporation in the indictment. The statute as above quoted provides that such a taking from the "person" of another is robbery. Section 9732 of the Digest provides that "the word person includes a corporation as well as a natural person." Other sections of the digest, 3012, 3013, provide for the requisites and sufficiency of indictments. Section 3014 provides: "No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits." The fact that the indictment failed to name any particular natural person in charge of the funds of the bank that was held up and robbed by appellant could not tend to the prejudice of his substantial rights. It was sufficient to charge that the bank, a corporation, was robbed since the corporation is a "person" within the meaning of the statute and may be the subject of robbery the same as a natural person.

The demurrer was therefore properly overruled, and the judgment of conviction must be affirmed. It is so ordered.

STEPHENSON *v.* TAYLOR.

4—2638

Opinion delivered June 20, 1932.

[redacted]

J. Sam Rowland, for appellant.

M. A. Hathcoat, for appellee.

McHANEY, J. Appellant is the receiver of the Missouri & North Arkansas Railway Company under appointment by the District Court of the United States, Eastern District of Arkansas. Appellee, as State Bank Commissioner, is in charge of the affairs of the Citizens' Bank & Trust Company of Harrison, and of the Bank of Alpena, Alpena Pass, Arkansas, insolvents, by W. P. Watkins, special deputy. At the time said banks closed their doors and were taken over by appellee, appellant had on general deposit in receivership funds in the Citizens' Bank & Trust Company the sum of $30,844.53, and in the Bank of Alpena, the sum of $154.41. He presented his claim to the liquidating agent against each bank as preferred or prior claims on the ground that said fund in each bank is money due the United States. The claims were disallowed by the Bank Commissioner as preferred or prior claims, but were allowed as general claims without preference. Appellant then presented the claims to the chancery court for preference and same were again disallowed and classified as general claims against the banks. From the judgment so classifying these claims appellant has appealed.

It is contended by appellant that the claims are entitled to preference by reason of § 3466, Revised Statutes of the United States, reading in part as follows: "Whenever any person indebted to the United States is insol-

vent, * * * the debts due the United States shall be first satisfied." And by reason of the decision of the Supreme Court of the United States in *Bramwell* v. *U. S. Fidelity & Guaranty Co.*, 269 U. S. 483, and *Union Indemnity Co.* v. *Florida Bank & Trust Co.*, 48 Fed. (2d) 595. In the Bramwell case the superintendent of an Indian Reservation deposited funds of the government in a bank to be distributed to the individual Indians and to the tribe, the superintendent acting as the agent of the Federal Government. The bank gave bond to the agent for the protection of said funds, and on becoming insolvent the surety paid the agent the amount of the deposit and sought and was allowed to be subrogated to the right of the government to be classified as a preferred creditor of the bank. Bramwell, the Bank Commissioner, disputed the right and the Supreme Court of the United States sustained the allowance as a preferred claim. In the Union Indemnity Company case, *supra,* it was held that funds in the hands of a trustee in bankruptcy are entitled to preference under the same section of the statute.

We do not think either case is in point here. Neither of the insolvent banks was "indebted to the United States." The Federal receiver, appellant, is an operating receiver by appointment of the Federal Court and the funds on deposit were funds accumulated in the operation of the railroad. Under the order appointing him as receiver, he was directed to take charge of the property, operate the railroad and conduct the business thereof according to his best judgment in a way to produce the best results, just as the railroad company would do if in possession thereof. He was directed to deposit the money coming into his hands in some bank or trust company and to report to the court the bank or trust company so selected. He was authorized and directed to pay all taxes and assessments due or to become due and all expenses incident to the operation of the property. We think the receiver is in no better position to claim a preference from other depositors than the

railroad company itself would have been, had it been in charge of the property and made the deposits in question. *Andrew* v. *Crawford County State Bank* (Iowa) 224 N. W. 499; See also *Price* v. *United States,* 269 U. S. 492; *Stripe* v. *United States,* 269 U. S. 503. The gist of the whole matter is that appellant does not come within the provisions of § 3466, Revised Statutes of the United States, for the reason that the insolvent banks, by being indebted to the receiver of the railroad company, were not indebted to the United States.

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

COTNER *v.* STATE.

Crim. 3801

Opinion delivered June 20, 1932.

Lee G. King, Williams & Williams and *John P. Roberts,* for appellant.

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

BUTLER, J. From a conviction in the Charleston District of the Franklin Circuit Court upon a charge of assenting to reception of deposits in an insolvent bank with knowledge that the bank was insolvent, this appeal is prosecuted.

The sole ground urged for reversal is that the court erred in overruling the motion for change of venue filed in apt time by the defendant. The petition for the change was regular upon its face, properly signed and verified, and was supported by the affidavits of Lee G. King and ten other qualified electors of Franklin County. The affidavit of Lee G. King was subscribed and sworn to before the circuit clerk and the affidavits of the other affiants were sworn to before a notary public.

At the hearing, the notary before whom the affidavits were made was examined, and it appeared that he was an attorney assisting John P. Roberts in the defense of the appellant, and that he went to see a majority of the persons who signed the affidavits, either at their place of business or where they were employed. Without examination of the affiants or other proceedings being had, the court thereupon overruled the petition for a change of venue and denied the same.

It is suggested by learned counsel for the appellee that the action of the court was probably guided by the decision of this court in the cases of *Hammond* v. *Freeman,* 9 Ark. 62, and *Coleman* v. *Frauenthal & Co.,* 46 Ark. 302. In the law and equity courts of England it appears to have been the rule of practice to refuse to receive affidavits made by a client before his attorney (95 Am. Dec. 378, note; 6 Ann. Cas. 37, note), but, as pointed out in *Coleman* v. *Frauenthal & Co., supra,* the action of these courts seems to have been grounded upon rules of practice adopted by them for the guidance of litigants rather than the strict pursuance of the rule of law. Such a rule of practice has never been adopted by the courts of this State, although it appears to have been enforced, indeed extended, in the case of *Hammond* v. *Freeman, supra,* but which was made without comment or explanation and upon authority of a single case—*i. e., Taylor* v. *Hatch,* 12 Johnson 340, decided by a New York court.

The decision in *Hammond* v. *Freeman, supra,* was referred to in *Coleman* v. *Frauenthal, supra,* where the

court, speaking through Chief Justice COCKRILL, took occasion to say that the English cases announcing the rule were of recent origin, and that, "as these were no part of the practice of the courts prior to the fourth year of James I, they can have no binding force with us." The decision in that case was to the effect that an affidavit for an appeal from a justice of the peace, made before the appellant's attorney in his capacity of notary public, is not void. The reason for the rule promulgated by the English courts is not clear, although, as suggested in *People* v. *Spalding,* 2 Paige, Ch. 326, cited in *Coleman* v. *Frauenthal, supra,* it might have been intended to discourage attorneys from engaging in a practice which, in the opinion of the court, might lead to abuse, and some of the courts which have followed the English rule have placed it upon grounds of public policy. Since this rule has never been promulgated by our courts and never enforced except in the single exception of *Hammond* v. *Freeman, supra,* we decline now to announce any such rule, as we can see no good reason for it.

In the instant case it will be observed that the client did not swear to the petition for change of venue before his attorney, and affidavits taken by the attorney in the capacity of notary public were of other persons, and this would not appear to offend even the rule referred to by Chief Justice COCKRILL in *Coleman* v. *Frauenthal, supra.* It was stipulated between the attorneys representing the State and the attorney for the appellant that the affidavits of the supporting witnesses to the application for change of venue were "in regular form and were properly sworn to by reputable and qualified citizens and electors of Franklin County, Arkansas, but were not examined as to their credibility, although some of them were present in the court room when the court sustained the State's demurrer or motion to quash the change of venue." In this the court erred in failing to test the credibility of the supporting affiants and peremptorily dismissing the motion. When a petition for change of

venue with supporting affidavits in form prescribed by statute is filed, the only inquiry on which a trial court may enter is as to the qualifications of the supporting witnesses; and, if they are within the qualifications prescribed, the court is without further discretion, and the order for a change must be made. *Dewein* v. *State,* 120 Ark. 302, 179 S. W. 346; *Whitehead* v. *State,* 121 Ark. 390, 181 S. W. 154; *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376; *Mills* v. *State,* 168 Ark. 1005, 272 S. W. 671; *Clarkson* v. *State,* 165 Ark. 459, 264 S. W. 975.

For the error indicated the judgment of the court below is reversed, and cause remanded for further proceedings in accordance with law and with this opinion.

WILLIAMS *v.* PARNELL.

4—2707

Opinion delivered June 27, 1932.

R. E. Wiley, for appellant.

Hal L. Norwood, Attorney General, *Walter L. Pope,* Assistant, and *Coleman & Riddick,* for appellees.

HART, C. J., (after stating the facts). It is argued that the act is in violation of at least the spirit of § 1, article 16, of the Constitution, which reads:

"Neither the State nor any city, county, town or other municipality in this State shall ever loan its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the present existing indebtedness, and the State shall never issue any interest-bearing treasury warrants or scrip."

This provision was construed in the case of *Hays* v. *McDaniel,* 130 Ark. 52, 196 S. W. 934. It was there held that the act of 1917, authorizing the borrowing of a certain sum of money to cover deficiencies in the State's general revenue fund, to issue interest-bearing evidences of indebtedness therefor, and to levy a tax to create a sinking fund to pay the interest and principal of said note, was valid. After considering and defining the meaning of the provisions of the Constitution now under consideration, the court said:

"The Constitution is not a grant of power to the State, and we are not required to look to the Constitution for authority for legislative action. The State, acting through its Legislature, may borrow money for its own uses unless that right is denied to it by the Constitution, and the only inhibition against the State there contained, in this respect is that it shall not issue any interest-bearing treasury warrants or scrip."

It is now claimed that that decision contemplated that the State might borrow money for its own use for a "State purpose," but that this did not include money advanced for the building of roads, which is a county purpose as distinguished from a State purpose, and that therefore, the debt being made for the construction or aid of public roads, the issuance of bonds therefor is a loan of the State's credit within the prohibition of the provision of the Constitution above referred to. We do not think so.

In the case of *Sanderson* v. *Texarkana,* 103 Ark. 529, 146 S. W. 105, the court expressly held that the State, in

its sovereignty over all public highways, has full power over the streets, as well as over public roads, and, unless prohibited by the Constitution, the Legislature may confer on such agency, as it may deem best, the power of supervision and control over streets. The general rule is that, unless specifically restricted by the Constitution, the construction of highways by a State is the exercise of a public function, and it has been held that they may be constructed and maintained, either by the State, or under its authority, by municipal subdivisions or taxing districts created by the Legislature for that purpose. Elliott on Roads and Streets, vol. I, § 465, and cases cited; *Id.* §§ 509-514; 13 R. C. L., page 79, and cases cited.

The Legislature concluded to adopt a State system of public highways, and in 1923 and 1925 an act and an amendment thereto, commonly known as the Harrelson law, were passed. Under this act and amendment, the State Highway Commission was authorized to ascertain the amount and dates of the maturity of the principal of the valid unmatured bonds on January 1, 1924, which had been issued by each road improvement district in the State, and to allot and distribute to certain counties which had been classified the proportion in which the State highway fund allotted to them should be used in the payment respectively of bonds and interest coupons. This act was upheld in *Cone* v. *Hope-Fulton-Emmett Road Improvement District,* 169 Ark. 1032, 277 S. W. 544.

Again, in *Bonds* v. *Wilson,* 171 Ark. 328, 284 S. W. 24, a statute authorizing the State Highway Commission to adopt routes which are termed State highways along roads which were already public highways, or which might thereafter be made so under proper authority, was held valid.

The Legislature of 1927 passed an act which was amendatory of the Harrelson act. In it the Legislature declared it to be the policy of the State to take over, construct, repair, maintain and control all the public roads in the State, comprising the State highway system as defined in the act. This act was challenged on the ground

that it was in violation of the provision of the Constitution copied above. The court expressly held that the State might borrow money for the construction of the roads provided for in the act and issue State highway notes therefor, and that this did not violate the provision of the Constitution above referred to, to the effect that the State shall not loan its credit for any purpose. The court said that the State did not loan its credit, but only used it. The reason is that highways may be constructed and maintained for public use by the State itself or by governmental agencies created by law for that purpose. Public highways are for public use, and there is no reason why the power of taxation by the State may not be exercised in their behalf. While it is elemental that taxes may only be levied for a public purpose, one of the most important duties of the State is to provide and construct public highways. *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.

In the later case of *Cobb* v. *Parnell,* 183 Ark. 429, 36 S. W. (2d) 388, the court sustained an act passed by the Legislature of 1931, levying a general tax for the payment of bonds to be issued by the State Agricultural Board, as not being in violation of the provision of the Constitution prohibiting the State from loaning its credit for any purpose. In the majority opinion, the purpose of the act under consideration was held to be a public use, and the construction placed upon the provision of the Constitution now under consideration, in *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9, was expressly approved. In concluding the discussion, it was said that it has become recognized that the State, although prohibited from loaning its credit in the furtherance of public enterprises, may still use that credit for the promotion of the common good. Some of us dissented on the ground that the tax levied under the act was for a private purpose, and therefore unconstitutional, although it passed through the hands of public officers. In our dissenting opinion, however, we approved in express terms the construction placed upon the provision of the Constitution in *Hays* v.

McDaniel, 130 Ark. 52, 196 S. W. 194, and in *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9. We based our dissent on the ground that the power of taxation could not be resorted to in aid of any class in private business or public utilities, although such aid might promote general prosperity.

No additional reasons have been given by counsel in this case why the construction placed upon the provision of the Constitution under consideration in the cases above cited shall not be sustained. Therefore we hold that the subject is settled in this State, and we can see no useful purpose in entering again into a discussion and determination of the soundness of our former opinions. Under our system of government the Legislature alone may determine the public policy of the State with reference to taxation, and the courts have nothing to do with the wisdom and expediency of its acts, when done within constitutional limitations.

It is also contended that the demurrer admits certain allegations of the complaint that the constitutional requirements as to the passage of the act were not observed, and that this invalidates the enactment. The rule in this State is that an enrolled statute, signed by the Governor and deposited with the Secretary of State, raises the presumption that every requirement of the Constitution was complied with unless the contrary affirmatively appears from the records of the General Assembly, and this presumption is conclusive unless the record of which the court can take judicial knowledge shows to the contrary. *Butler* v. *Kavanaugh,* 103 Ark. 109, 146 S. W. 120; *Mechanics' Building & Loan Association* v. *Coffman,* 110 Ark. 267, 161 S. W. 198, and *Road Improvement District No. 6* v. *Sale,* 154 Ark. 551, 243 S. W. 825.

This court is committed to the rule that, if the defect or violation appears on the face of the act or by the records of which the court can take judicial notice, the power of the courts to determine the question is undoubted; but if the proper record shows that the act has received the sanction required by the Constitution and has been passed

agreeably to the Constitution, the regularity and stability of government and the peace of society requires that the act should have the force of a valid law. Otherwise every act of the Legislature would be open to be impeached, upon an inquiry into the facts which took place at its passage, and all confidence in legislative acts would be destroyed. The above reasoning was taken from *Green* v. *Weller,* 32 Miss. 690, and was expressly approved by this court in *Booe* v. *Road Improvement District,* 141 Ark. 140, 216 S. W. 500. The record of the Legislature, which includes the journals, shows that the act was passed conformably to the provisions of the Constitution.

The decision of the chancery court was correct, and will therefore be affirmed.

PARKER *v.* SIMS.

4—2587

Opinion delivered June 20, 1932.

Cochran & Arnett, for appellant.

Partain & Agee and *Rhyne & Shaw,* for appellee.

SMITH, J. On December 29, 1931, appellants filed exceptions to the final report of Lee G. Sims as liquidating agent of the insolvent Bank of Ratcliff, and caused notice of those exceptions to be served on Sims on January 1, 1932. A demurrer to these exceptions was filed on January 14, 1932. This demurrer was not disposed of, as on the same day an amended pleading was filed which enlarged and made more specific the original exceptions to the liquidating agent's report. A demurrer was also filed to this amended pleading, which alleged that it did not state facts sufficient to constitute a cause of action, and that the court was without jurisdiction of the action. The demurrer was sustained, and this appeal is from that decree.

Upon a suggestion of the diminution of the record in this case, there was issued a writ of certiorari, and the response of the clerk of the chancery court has brought before us the entire proceedings in the chancery court relating to the liquidation of the insolvent bank.

The appellants seek by their pleadings in this cause to question the fees allowed the liquidating agent and certain fees paid attorneys, and the allowance of certain credits claimed in the final report of the liquidating agent.

The proceedings in the chancery court, stated chronologically, are to the following effect: After taking over the bank as an insolvent institution, the Bank Commissioner filed in the chancery court a petition for an order to sell certain assets of the bank at private sale, and to compound certain debts regarded as bad or doubtful. An order granting the prayer of this petition was made June 2, 1930. A complete inventory of the assets of the bank had been previously filed May 26, 1930. The bank had been taken over by the Bank Commissioner on May 20, 1930.

On April 23, 1931, a detailed report was filed showing all claims, both general and preferred, which had been filed and allowed and paid, together with a statement

of all bills payable outstanding at the closing of the bank and of those paid since that date.

On May 15, 1931, an order was asked to make a final payment of 15 per cent. to the depositors, which, it was recited, would pay the depositors in full. Attached to this petition was the final report of the liquidating agent.

Upon obtaining the order to pay depositors, there was filed on May 25, 1931, a petition for an order directing the liquidating agent to call a meeting of the stockholders pursuant to the provisions of § 725, Crawford & Moses' Digest, to wind up the affairs of the bank in the manner provided by that section of the Digest. This section provides that, whenever the Bank Commissioner has paid the depositors and creditors of a bank (excluding stockholders) whose claims have been approved and allowed, and all expenses of liquidation, he shall call a meeting of the stockholders by giving notice for two weeks in some newspaper published in the county where the bank was located, at which meeting the stockholders shall determine whether the Bank Commissioner shall be continued as liquidator or whether the stockholders shall select an agent or agents for that purpose. At this meeting each stockholder is allowed one vote for each share of stock owned. If it is then so determined, the Bank Commissioner shall complete the liquidation of the bank's assets. If, however, it is determined to appoint an agent or agents for that purpose, such agent or agents are then elected by the stockholders, and such agent or agents are required to execute a bond, to be approved by the Commissioner, for the faithful performance of the trust, and thereupon the Commissioner "shall transfer and deliver to such agent or agents all the undivided or uncollected or other assets of such corporation then remaining in his hands; and upon such transfer and delivery the said Commissioner shall be discharged from any and all further liability to such bank and its creditors."

On June 15, 1931, there was filed in the chancery court a petition by Taylor, as Bank Commissioner, and Sims, as liquidating agent, praying that they be dis-

charged and that the liquidating agent's final report be approved. This petition recited that notice had been given as required by § 725, Crawford & Moses' Digest, and that the stockholders had held a meeting pursuant thereto. The petition sets out the minutes of this meeting, which contained the following recitals:

C. O. Parker was elected chairman of the meeting, and W. R. Chastain was elected secretary. The owners of a majority of the capital stock of the bank were present. The Deputy Bank Commissioner, as liquidating agent, made a report of the present status of the assets of the bank. A motion was unanimously adopted naming Parker, Chastain and John Baker, appellants herein, as agents of the stockholders "to determine the manner in which further liquidation shall be handled," and to employ such assistants as may be necessary for that purpose, and, pursuant to this purpose, they had employed Chas. X. Williams and Paul X. Williams.

This petition recited that the remaining assets so to be liquidated "are listed in a statement attached to this petition, and marked Exhibit A." This statement, made Exhibit A, contains a list of all the creditors, to which objection is now made. On the same day Parker, Chastain and Baker, as agents of the stockholders, filed in the chancery court a certificate of their appointment of Chas. X. and Paul X. Williams as liquidating agents, pursuant to authority conferred at the stockholders' meeting, to complete the liquidation of the affairs of the bank. Thereafter, and on the same day, the application of Taylor, as Bank Commissioner, and that of Sims, as his deputy, and the certificate of appointment of the stockholders' agents came on for hearing, and were approved by the court. This order recites that there is attached to the petition of the Bank Commissioner and that of his deputy "an inventory and list of the remaining assets of the bank" which remained after the credits were allowed, which are here questioned. The Commissioner and his deputy were discharged after being directed to "turn over and deliver to Chas. X. Williams and Paul X.

Williams, as such special liquidating agents, all of the assets listed as Exhibit A to the petition filed in this cause."

It is not questioned that this order was fully complied with by the Bank Commissioner and his deputy. This order was made and entered on June 15, 1931, and thereafter no further action was taken until Parker, Chastain and Baker filed their exceptions to Exhibit A of the report above mentioned.

The act creating the Fourteenth Chancery District, of which Logan County is a part (act 18, Acts of 1927, page 55), provides that three sessions of court shall be held each year in each district of that county, and that terms for the northern district, from which this appeal comes, shall be held the third Monday in February, June and October. The June term of the court, at which time the Commissioner's report was approved, had expired, and the October term had intervened before the exceptions of appellants to that report were filed, and no appeal has been prosecuted from the order of court made at the prior term.

The decree of the June term of the court had therefore become final, and could be vacated or modified only in the manner provided by § 6290, Crawford & Moses' Digest. It is insisted, however, that this proceeding is authorized by the fourth paragraph of that section, which provides that the court in which a judgment or final order has been made shall have power, after the expiration of the term, to vacate or modify such judgment or order, "* * * Fourth. For fraud practiced by the successful party in the obtaining of the judgment or order."

The original exceptions made no charge of fraud, and the fraud alleged in the amended pleading was that the liquidating agent, acting as a deputy of the Bank Commissioner, had secured the approval of his report without notice to appellants as agents of the stockholders, and by reporting to the court that there was no objection thereto, whereas appellants had not consented to its ap-

proval, and, had they been advised of the hearing of such report, they would have objected to numerous credits therein taken as being excessive or unauthorized by law.

Section 6292, Crawford & Moses' Digest, provides the procedure for vacating judgments under the fourth, fifth, sixth, seventh and eighth subdivisions of § 6290, and requires the filing of a complaint verified by affidavit. If the amended exceptions be treated as a complaint—which may well be done—yet it was not verified, and the court may have sustained the demurrer upon that ground, treating it as a motion to strike.

But we think there was no such fraud as required the court to vacate the decree on that ground. The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and does not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment assailed. It must be a fraud practiced upon the court in the procurement of the judgment itself. *Scott* v. *Penn,* 68 Ark. 494, 60 S. W. 235; *Womack* v. *Womack,* 73 Ark. 281, 83 S. W. 937; *James* v. *Gibson,* 73 Ark. 440, 84 S. W. 485; *Boynton* v. *Ashbranner,* 75 Ark. 415, 91 S. W. 20; *Parker* v. *Bowman,* 83 Ark. 508, 104 S. W. 158; *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166, 118 S. W. 250; *Williams* v. *Alexander,* 90 Ark. 591, 119 S. W. 1130; *Pattison* v. *Smith,* 94 Ark. 588, 127 S. W. 983; *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10; *Parker* v. *Nixon,* 184 Ark. 1085, 44 S. W. (2d) 1088.

It is also settled that the mere fact that a larger judgment was rendered than the facts justified does not show that a judgment was procured by fraud. The remedy for such an erroneous judgment is by way of appeal. *Estes* v. *Lucky,* 133 Ark. 97, 201 S. W. 815.

The case of *H. G. Pugh & Co.* v. *Martin,* 164 Ark. 423, 262 S. W. 308, was one in which a petition had been filed to vacate a judgment as having been fraudulently rendered. It was there said that: "The court was correct in

disposing of the appellants' petition or motion to vacate the decree as if a demurrer had been filed thereto, and in refusing to allow appellants to introduce testimony in support of the allegations of the petition. While the petition alleges fraud, collusion, and many other irregularities, there is no allegation setting forth facts sufficient to show that any fraud was perpetrated upon the court in the rendition of its decree of foreclosure."

Here there was no effort to introduce testimony, and the appellants stood upon their pleadings.

In sustaining the demurrer in the instant case, the chancellor had before him all the orders which he had himself previously made, and all the pleadings upon which those orders had been made. He knew, from his own orders and the record in the case, that the liquidating agent had made a full report of all his proceedings, which report asked credit for all the items here questioned. The chancellor had before him the minutes of the stockholders' meeting above referred to, which recited that this report was before the stockholders at that meeting, and there is nothing in the minutes of the meeting to indicate that any objection had been or would be made to this report. All parties knew that it was the purpose of the liquidating agent in calling this meeting to secure the discharge of himself and his principal, the Bank Commissioner, and that this order would not be made until the report of his administration had been submitted to and approved by the court, and they knew that the liquidating agent had been discharged and his successors appointed. The discharge of the Deputy Bank Commissioner as liquidating agent and the appointment of his successors occurred on the same date, and both orders were made in response to pleadings filed on that day. All parties in interest were before the court, either in person or through their chosen representatives.

Treating as true, as we must do, on demurrer, the allegations of appellants' complaint that the representation was made to the court that there was no objection to the liquidating agent's report, there was no fraud in

this. The facts stated herein warranted that assumption. However, it is not to be assumed that the report was approved by the court, notwithstanding this representation, without examination thereof by the court, and the judge, of course, knew whether he had performed his duty in this behalf.

It is insisted that the records to which we have referred were not offered in evidence when the court disposed of the demurrer, and that we should therefore consider only the allegations of appellants' complaint. These records were, however, before the court. Now, while it is true that courts cannot take judicial notice of their own records in other cases pending therein, even between the same parties, it is nevertheless true that a court does take judicial notice of pleadings upon which it has passed judgment and of those judgments in the particular case then under consideration. In *Williams* v. *Wheeler*, 131 Ark. 585, 199 S. W. 927, it was said: "Again, all the matters set forth in the motion were a part of the proceedings and pleadings, and it was the court's duty to take judicial notice of them. It was not necessary to prove them."

Moreover, we are of the opinion that appellants have not moved with that diligence which the law requires. The case of *Trumbull* v. *Harris*, 114 Ark. 493, 170 S. W. 222, was a proceeding to vacate a judgment under § 4431, Kirby's Digest (now § 6290, Crawford & Moses' Digest), and it was there said: "It is the duty of a litigant to keep himself informed of the progress of his case, and a party seeking relief against a judgment on the ground of unavoidable casualty or misfortune preventing him from defending must show that he himself is not guilty of negligence, and he cannot have relief if the taking of the judgment appears to have been due to his own carelessness." We there also quoted from the case of *Izard County* v. *Huddleston*, 39 Ark. 107, as follows: "In the case last cited the court said: 'The statute to vacate judgments by this proceeding is in derogation, not only of the common law, but of the very important policy of

holding judgments final after the close of the term. Citizens must have confidence in the judgments of our official tribunals as settlements of their controversies, and there should be some end of them. Unless a case be clearly within the spirit and policy of the act, the judgment should not be disturbed.' '' See also *Farmers' Mut. Fire Insurance Co.* v. *Defries,* 175 Ark. 558, 1 S. W. (2d) 19, and cases there cited.

Upon the whole case, we think no error was committed in sustaining the demurrer, and the decree must therefore be affirmed, and it is so ordered.

STATE EX REL ATTY. GENERAL *v.* REPUBLIC MINING & MANUFACTURING COMPANY.

4-2685

Opinion delivered July 4, 1932.

Carmichael & Hendricks, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

HART, C. J., (after stating the facts). The exercise of the taxing power is a sovereign attribute, and the mode of ascertainment of the tax is a matter of legislative discretion within the limits of the Constitution. Our Legislature passed an act providing for the collection of back taxes owed the State by corporations; and the statute, as amended, gave the State the right to recover back taxes where there had been a gross undervaluation of the prop-

erty belonging to a corporation. *State* v. *Kansas City & Memphis Railway & Bridge Company,* 117 Ark. 606, 174 S. W. 248; *State* v. *Bodcaw Lumber Company,* 128 Ark. 505, 194 S. W. 692; *White River Lumber Company* v. *State,* 175 Ark. 956, 2 S. W. (2d) 25; and *State ex rel Attorney General* v. *Chicago Mill & Lumber Corporation,* 184 Ark. 1011, 44 S. W. (2d) 1087.

The Legislature of 1923 passed an act to levy a privilege or license tax upon corporations engaged in severing our natural resources from the soil, which is commonly known as our Severance Tax Act. This is the act under which the taxes sought to be collected in this case were assessed against the defendant. The act has been sustained as not in violation of any of the provisions of our Constitution, and it has been held that the owner of the soil must pay the severance tax provided for in the statute. *Floyd* v. *Miller Lumber Company,* 160 Ark. 17, 254 S. W. 450; and *Miller Lumber Company* v. *Floyd,* 169 Ark. 473, 275 S. W. 741.

It is insisted, however, that our Back Tax Statute (§ 10,204 of Crawford & Moses' Digest) does not include overdue taxes levied under the Severance Tax Act. We do not agree with counsel in this contention. The act is very broad and comprehensive. It is well settled that the Legislature may authorize different modes of assessment for different purposes; and, under the authorities above cited, it is the settled law of this State that the State may recover against a corporation for a gross undervaluation of property in the assessment of it, provided such a remedy is given by the statute. The statute for the collection of overdue taxes from corporations just referred to provides that where the Attorney General is satisfied that in consequence of the failure from any cause to assess and levy taxes and after enumerating certain other particulars, concludes with the clause, "or from any other cause, that there are overdue and unpaid taxes owing to the State, etc.," it shall become his duty to at once institute a suit in

chancery in the name of the State for the collection of the same. The Legislature in the exercise of its sovereign power evidently meant to give the Attorney General the right to bring a suit for the collection of overdue taxes from corporations from all sources, and did not intend to limit the provisions of the act to back taxes due on property. It was evidently the intention of the Legislature to make the collection of overdue taxes from corporations uniform in its operation and to apply it to taxes levied from any source whatever. The act has been construed under our former decisions to be prospective in its operation; and, as soon as the Severance Tax Act was passed by the Legislature of 1923, the tax levied thereunder took its place in the section of the statute above referred to, prescribing proceedings for the collection of overdue taxes from corporations.

The Legislature of 1927 however passed an act which, as construed by this court, contains a mandatory provision that the Attorney General must obtain the permission of the Tax Commission before bringing a suit against a corporation for the collection of back taxes, and that the act, by implication, repeals so much of § 10,204 of Crawford & Moses' Digest, as authorized the Attorney General to bring action therefor. *State ex rel. Attorney General* v. *Standard Oil Company of Louisiana*, 179 Ark. 280, 15 S. W. (2d) 403. In that case it was expressly held that in an action to recover back taxes from a corporation, a complaint which fails to allege that the suit was instituted under the direction or approval of the Tax Commission, as required by the act of 1927, is subject to demurrer. The reason is that, inasmuch as the power of the State to recover back taxes from corporations, alleged to be due on account of underassessment, is dependent on the statute, the procedure prescribed by the statute must be followed as a condition precedent to its right to maintain such suit. Statutory provisions of this kind, intended to give a specific remedy to the exclusion of other remedies, must be followed; and if the officer or person authorized to sue for back

taxes fails to pursue the remedy available under the statute, he will not be entitled to recover.

The result of our views is that the court properly sustained a demurrer to the complaint because it did not contain an allegation that the Attorney General had been directed by the Tax Commission to bring the suit. It follows that the decree will be affirmed.

BARNEY *v.* TEXARKANA.

4-2682

Opinion delivered June 20, 1932.

H. M. Barney, pro se.

Willis B. Smith, and *Ben E. Carter*, for appellee.

HART, C. J., (after stating the facts). The decree of the chancery court was based upon a holding by the court that the plea of *res judicata* of the defendants should be sustained. It is elementary that all questions which might be litigated in an action of which the court has jurisdiction are *res judicatae* as to all parties thereto and their privies. The doctrine of *res judicata* is based on public policy, reason and experience. If all questions that have been decided by the court are to be regarded as still open for discussion and revision between the same parties and their privies, there would be no end of litigation until the ingenuity of counsel and the financial ability of the parties had been exhausted.

Then, too, the decision of the court in the mandamus suit on the former appeal became *stare decisis* and we are bound by it on the present appeal. It was there held that, after the sufficiency of a referendum petition was duly certified by the proper officer, a signer was not entitled to withdraw his signature in the absence of fraud. The court also said that the correctness of the city clerk's determination of the sufficiency of the petition for referendum could only be made in the chancery court. *Southern Cities Distributing Company* v. *Carter*, 184 Ark. 4, 41 S. W. (2d) 1085. This holding was based upon the court's construction of amendment No. 7 relating to the initiative and referendum. The amendment itself specifically provides that the sufficiency of all local petitions shall be decided in the first instance by the county clerk or city clerk, as the case may be, subject to review by the chancery court.

Under our statute, a defendant, when sued at law, must make all the defenses he has, both legal and equitable. If any of his defenses are expressly cognizable in equity, he is entitled to have them tried as in equity proceedings, and, for this purpose, to a transfer of the case to the chancery court. The principle of *res judicata* extends not only to the questions of fact and of law which were decided in the former suit but also to the rights

of recovery or defense which might have been but were not presented. In short, the uniform rule adopted by this court is that the judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which might have been interposed in the former suit. *Taylor* v. *King,* 135 Ark. 43, 204 S. W. 614, and cases cited; *Howard-Sevier Road Improvement District* v. *Hunt,* 166 Ark. 62, 265 S. W. 517; *Tri-County Highway Improvement District* v. *Vincennes Bridge Company,* 170 Ark. 22, 278 S. W. 627; *Newton* v. *Altheimer,* 170 Ark. 366, 280 S. W. 641; *Stevens* v. *Shull,* 179 Ark. 766, 19 S. W. (2d) 1018; and *Blackwell Oil & Gas Company* v. *Maddox,* 182 Ark. 1152, 34 S. W. (2d) 450.

Mandamus only lies to compel a person to do that which it is his duty to do without it, and cannot be used to compel the performance of that which is not lawful. A party, to be entitled to the writ, must show that he has a clear, legal right to the subject-matter, and that he has no other adequate remedy. *Arkansas State Highway Commission* v. *Otis & Company,* 182 Ark. 242, 31 S. W. (2d) 427; and *Shackleford* v. *Thomas,* 182 Ark. 797, 32 S. W. (2d) 810.

The doctrine of *res judicata* applies to the issues that might have been litigated in proceedings to obtain a writ of mandamus. 18 R. C. L., § 318, p. 358; *Kaufer* v. *Ford,* 100 Minn. 49, 110 N. W. 364.

In *Sauls* v. *Freeman,* 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190, a writ of mandamus was granted ordering the county commissioners to call an election for a change of county seat. An injunction was later asked for against the removal of the county records to the new county seat because there had been no legal examination by the county commissioners of the petition for the election and because certain parties whose names were on the petition were not qualified signers. The court held that these questions could have been litigated in the mandamus suit, and that the award of the mandamus adjudicated the legality of the petition in all respects and settled the

question of the duty of the commissioners to call the election.

In *State* v. *Sparrow,* 89 Mich. 263, 50 N. W. 1088, a land commissioner, by writ of mandamus, was required to set off for the petitioner certain lands to which he claimed to be entitled under a contract. Subsequently, the State sought to cancel the patents issued, and it was held that the State could not cancel on the ground that the land had not been patented to the State or offered at public auction, because this ground could have been set up by the State as a defense to the petition for mandamus.

The same principle was recognized and applied by the Supreme Court of North Dakota in a county seat election in *Dimond* v. *Ely,* 28 N. D. 426, 149 N. W. 349. The reasoning of all these cases is that the writ of mandamus does not issue as a matter of absolute right, and it would be an improper use of the writ to issue it when it is clearly apparent to the court to which application is made that it would serve no purpose and would be useless when issued. See also *Murphy* v. *Scott County,* 125 Minn. 461, 147 N. W. 447; and *Southern Pacific Rd. Co.* v. *United States,* 168 U. S. 1, 18 S. Ct. 18.

The Southern Cities Distributing Company was allowed to be made a party defendant in the mandamus suit, and all other interested parties, including the plaintiff in this action, might have been made parties to that suit. If they thought that the principles of law decided in the case of *Townsend* v. *McDonald,* 184 Ark. 273, 42 S. W. (2d) 410, applied to petitions for referendum on local measures, such as the one under consideration, they should have set up that as a defense to the mandamus suit and have asked that the case be transferred to the chancery court in order to have that issue determined. Not having done so, all interested parties are concluded, not only by the issues decided in that case, but by all issues which came within the purview of the pleadings and might have been decided in the case. If the contention now made by the plaintiff is correct, this would have

constituted an equitable defense in the mandamus proceeding, and the court, upon such defense being interposed, would have transferred the case to the chancery court, or the defendants might have appealed to this court from an adverse holding of the chancery court and have obtained the relief now sought. The plaintiff in the present action, and all other parties interested, knew then as well as now the grounds upon which the referendum was sought to be held invalid. At least, by the exercise of ordinary diligence, they could have been put in possession of all the facts on the subject of which they now have knowledge.

Having failed to set up this defense to the mandamus proceeding, the parties to that suit and their privies are barred by the judgment in that case from seeking to further adjudicate the matter in this case. Therefore the decree will be affirmed.

WILLIAMSON *v.* MONTGOMERY.

4-2717

Opinion delivered July 4, 1932.

Tom W. Campbell and *Chas. W. Mehaffy,* for appellant.

Sam E. Montgomery and *June P. Wooten,* for appellee.

MEHAFFY, J. Lamar Williamson is the chairman, J. H. Andrews is the secretary, and Harvey G. Combs is the assistant secretary of the Democratic State Central Committee of Arkansas.

The appellee, Robert L. Montgomery, Jr., is a citizen and qualified elector of the State of Arkansas.

On May 21, 1932, the appellee filed in the Pulaski Circuit Court a petition for mandamus, praying for an order requiring appellants to accept appellee's fee as a candidate for the Democratic nomination for the office of Treasurer of Arkansas, and to certify appellee's name to the various county committees as a candidate for said nomination.

The appellants filed a demurrer denying that the court had jurisdiction of the persons of defendants in the capacity in which they are sued, and denied that the court had jurisdiction of the subject of the action.

The court overruled the demurrer. Appellants saved their exceptions, and filed answer to appellee's petition, denying the material allegations in the complaint, and asking that the petition be dismissed.

The case was tried on the following agreed statement of facts:

"Stipulation: The parties in open court agree that witnesses, if present in court, would testify to the following facts; the plaintiff was at the office of Harvey G. Combs, assistant secretary of the Democratic State Central Committee, in Little Rock, at or about eleven o'clock P. M. on May 10, 1932. He mailed the pledge required by § 42 of the rules of the Democratic party in Arkansas,

and the fee required by § 45 of said rules, to J. H. Andrews, secretary of said committee, at Wynne, Arkansas, at eleven-thirty o'clock P. M. on May 10, 1932, and said pledge and fee were received by said secretary at an hour in the morning of May 11, 1932. Said secretary returned the fee to plaintiff. The defendants refused to accept said fee from plaintiff—the reason given that it was not received within the time required by the rules as construed by the defendant. At or about eleven o'clock P. M. on May 10, 1932, one Martin, of Wynne, Arkansas, a friend of plaintiff, advised J. H. Andrews, said secretary at Wynne, at plaintiff's request, that he would sign and file the pledge for plaintiff and pay the fee to said secretary at that hour, but said secretary advised said Martin that he would not accept the pledge with plaintiff's name signed by another party. A copy of the rules of the Democratic party in Arkansas in effect at the times mentioned herein are attached hereto as a part of this stipulation."

The entire rules of the Democratic party covering forty-six pamphlet pages were put in evidence, but we do not deem it necessary to burden this opinion with more than the following:

"Section 14. State Central Committee—Assistant Secretary.—To facilitate work of the Democratic organizations and that Democratic records may be preserved for future reference, the office of assistant secretary is hereby created. The said assistant secretary shall be appointed by the secretary of the State Central Committee subject to the approval of the said committee. It shall be his duty to keep the records in permanent form of all the proceedings and deliberations of State Central Committees and of State Conventions, and to perform such other duties as shall be required of him by the State Central Committee or by the officers thereof. His compensation shall be prescribed by the secretary."

Section 42 of said rules provides:

"Candidates for nomination shall file a written pledge to abide by the results of the primary and to support the nominees of the party."

Section 43 provides:

"All candidates for United States Senator, representatives in Congress and all State and district offices shall file the prescribed pledge with the secretary of the State Central Committee not later than ninety (90) days before the election; and all candidates for county and township offices shall file the prescribed pledge with the secretary of the county central committee not later than thirty (30) days preceding the election; and all candidates for municipal offices shall file their pledges with the secretary of the city central committee not later than thirty (30) days preceding the election.

"No candidate's name, who shall fail to sign and file said pledge, shall appear on the official ballot in said primary election. The chairman and secretary of the State Central Committee shall certify to the various county committees not later than July 20 the names of all candidates who have complied with the rules herein prescribed and no other names for such offices shall be put on the ballots by the county committees."

The court, on its own motion, made the following finding of fact; to which the appellants excepted:

"That plaintiff was in the office of H. G. Combs, assistant secretary, before midnight, May 10, 1932; that before midnight May 10, 1932, a person in Wynne, at the request of plaintiff offered to sign plaintiff's name to a pledge in the office of the secretary and to pay his fee; that it was announced by Mr. Combs, in his office in the presence of plaintiff, that the ticket would close at midnight and any other candidates desiring to file pledges and pay fees could do so at that time."

The appellants requested the court to make the following declarations of law, which the court refused to make, and appellants saved their exceptions:

"That this court has no jurisdiction; that the construction of the party rules which were made by the

committee is a matter entirely within the jurisdiction of the committee and not of this court; that where there are more than one reasonable construction to be placed upon the rules of the Democratic party and one of these constructions is adopted by the officers of the committee, this construction will govern.

"That filing the pledge and filing the fee on May 11, 1932, is not a compliance with the rules of the Democratic party.

"That the plaintiff did not file his pledge or pay his fee within the time prescribed by the rules of the Democratic party and that plaintiff is not entitled to have his name placed on the ballot.

"That § 9756 of Crawford & Moses' Digest does not apply to computation of time in rule of the Democratic party.

"That § 3772 of Crawford & Moses' Digest is the only statute conferring a cause of action on a candidate; that said statute confers a right of action on a candidate only, and to contest only the certification of nomination or the certification of vote.

"That the officers of the Democratic State Central Committee are not officers within the meaning of §§ 7020 and 7021 of Crawford & Moses' Digest, or any other statute; that the court had no jurisdiction to issue a writ of mandamus directed to officers or members of the Democratic State Central Committee; that the plaintiff has a remedy by appeal to the Democratic State Central Committee.

"That defendants are not ministerial officers to whom this court has jurisdiction to direct a writ of mandamus; that the placing of plaintiff's name on the ballot is not a ministerial act, but is one which involves exercise of discretion on the part of the committee and its officers."

The court then made and entered the following order and judgment:

"On this day comes the plaintiff in person and by his attorneys, Sam E. Montgomery and June P. Wooten, and

come the defendants by their attorney, Chas W. Mehaffy, and this cause is submitted to the court upon the complaint, demurrer, answer and stipulation of facts. After argument of counsel, the court being well and sufficiently advised as to all facts and matter of law arising thereunto, doth sustain the prayer of the complaint.

"The court finds that the declarations of law and findings of fact requested by plaintiff are correct and are hereby adopted by the court.

"It is therefore by the court ordered and adjudged that a writ of mandamus issue herein, directed to the defendants as officers of the Democratic State Central Committee of Arkansas commanding them to accept and file the pledge and fee of plaintiff heretofore tendered to them as a candidate for the Democratic nomination for the office of State Treasurer of Arkansas, and that they as such officers of said committee certify the name of plaintiff as a candidate for the nomination of State Treasurer to the various Democratic county committees in Arkansas not later than July 20, 1932, for the purpose of having plaintiff's name as such candidate printed upon the ballots to be voted at the Democratic Primary to be held in Arkansas on August 9, 1932.

"The defendants in open court, having knowledge of this judgment, waive actual service of said writ."

To the findings and judgment of the court, the appellants, at the time excepted, and asked that their exceptions be noted of record, which was done.

Thereupon the appellant filed motion for a new trial, which was by the court overruled, exceptions saved, and the case is here on appeal.

The Democratic party in Arkansas provided for a legalized primary to be held on August 9, 1932, for the purpose of nominating candidates for the general election in November.

J. H. Andrews, at Wynne, Arkansas, is secretary of the State Central Committee, and Harvey G. Combs, of Little Rock, is assistant secretary.

Under the rules and regulations of the party, candidates for State offices were permitted to file the pledge required with the assistant secretary at Little Rock.

Rule 43 of the rules adopted by the Democratic party in Arkansas provides that candidates shall file the prescribed pledge with the secretary of the State Central Committee not later than ninety (90) days before the election.

The requirement to file the pledges and the time in which they must be filed, is fixed by a rule of the Democratic party, and not by statute.

As we have said, the primary election to be held on August 9th is a legal election, but the requirements, in order to have one's name placed on the Democratic ticket as a candidate for nomination, are fixed by the rules of the party, and not by law.

It is contended however by the appellee that, although the party has a right to make rules, it has no right to construe the rules when made.

The agreed statement of facts in this case shows that the appellee, Mr. Montgomery, was at the office of Harvey G. Combs, assistant secretary of the Democratic Central Committee, about 11 P. M., on May 10, 1932.

Instead of filing his pledge at the office of the assistant secretary, where other candidates were filing their pledges and paying the fee, and where the appellee knew he could pay his fee, file his pledge, and have his name put on the ticket, he mailed the pledge and the fee to J. H. Andrews, secretary, at Wynne, Arkansas, at 11:30 P. M., on May 10, 1932.

The pledge and fee were received by the secretary on the morning of May 11, 1932.

The officers of the State Central Committee, construing the rule, fixed the time for closing the ticket at midnight on May 10, 1932.

Notwithstanding this time was fixed and known to appellee, and he was advised of this decision on the part of the committee, and notwithstanding it was announced

in his presence that the time for filing pledges and paying fees expired at midnight, appellee declined to file his pledge and pay his fee to the assistant secretary, but mailed them to the secretary at Wynne, Arkansas, at a time when he knew it could not reach the secretary before midnight of May 10th, the time fixed for closing the ticket.

Appellee says there are two major questions presented in this appeal. The first one is, did the court have jurisdiction to entertain the petition made?

It is further stated in the argument of this question by appellee: "Where by statute a Democratic primary election has been made a legal election, and a member of that party desires to become a candidate, complying with all the party rules, can the officer of the central (or executive) committee arbitrarily refuse to obey the law of the party by denying to such a member the right to become a candidate?"

We have no such case made by the pleading and evidence in this case. If the committee or officers acted either fraudulently or in such an arbitrary manner as to prevent a person who in good faith sought to comply with the party rules, the court would require the officers themselves to comply with the rules.

That, however, is a very different matter from saying to the central committee or its officers that they have a right to make rules but no right to interpret them.

It would be strange indeed, if the party had power to make rules, but could not, in good faith, construe them.

In this case there is no question of fraud or intention to deprive appellee of any right. The appellants acted in good faith, and, if the position taken by appellee is correct, then the committee, or its officers, could not construe any rule of the party, but every time there was any necessity for interpretation or construction, they would be controlled by the court.

If the Legislature, in providing for the primary election law, had intended any such thing as this, it

would have said so. The Legislature has provided for certain questions to be determined by the courts, but when the party makes a rule governing its procedure, and in good faith interprets that rule, the court has no authority to substitute its interpretation for that of the committee.

Of course, if there was any question of fraud, deception, wrongdoing, or anything else that prevented an elector from getting his name on the ticket, the courts would have jurisdiction to prevent the wrong. But we have no such question here.

It is stated that in the case of *Tuck* v. *Cotton,* 175 Ark. 409, 299 S. W. 613, the question involved there was purely a party matter, not governed by statute, and over which the court had no control. What we said in that case was that the Legislature had authority to give the court jurisdiction, but, unless it was clear that it intended to do this, the court will not assume jurisdiction, but will leave these matters to be determined by the political parties, just as they were before the enactment of primary election law.

We further held that the law does not seek to interfere with the management of party affairs by the central committee or conventions.

The courts have no power to interfere with the judgments of the constituted authorities of established political parties in matters involving party government and discipline, or to determine disputes within a political party as to the regularity of the election of its executive officers.

Attention is also called by the appellee to the case of *Spence* v. *Whitaker,* 178 Ark. 51, 9 S. W. (2d) 769. We said in that case: "If one should deliberately fail or refuse to file the pledge required by the law, it would be the duty of the committee to refuse to put his name on the ticket."

The rule involved in this case, as construed by the proper authorities of the party, required the pledge to

be filed by midnight on May 10th. Is there any doubt that the appellee not only knew about the rule, but knew how the committee interpreted it, and knew, according to the committee's interpretation, that the time ended at midnight on the 10th? He was present in Mr. Combs' office and given the opportunity to file his pledge and get his name on the ticket, but he refused to do this, and at about 11:30 mailed his pledge to Wynne, Arkansas.

The court might put a different construction upon the rule, but it was the party's business to make the rule and the party's business to interpret it.

It appears from the record in this case that the officers of the party interpreted the rule, published it, and advised everybody who wished to become a candidate that the time for filing the pledge would end at midnight on the 10th.

The rule adopted by the Democratic party is not in conflict with any statute, and there is no statute prohibiting the party from, in good faith, interpreting its own rules.

We said in a recent case:

"Being a voluntary political organization and not an agency of the State, the Democratic party had the right to prescribe the rules and regulations defining the qualifications of membership, and to provide that only white people could become members, without coming within the prohibition of either the Fourteenth or Fifteenth Amendment. * * * There is no more reason to say that the Democratic party in Arkansas cannot make the rule in question than there is to say that the Masonic bodies in Arkansas may not exclude them on account of color." *Robinson* v. *Holman,* 181 Ark. 428, 26 S. W. (2d) 66.

Appellee refers to 20 C. J. 112. In the same volume at page 104 it is said: "In the absence of constitutional or statutory provisions to the contrary, the authorities of a political party, such as State and county executive committees, may, in accordance with party usage, make

and enforce reasonable regulations relating to nominations within the party."

In the instant case, as we have already said, there are no constitutional or statutory provisions contrary to the rule adopted by the party. It is a matter of common knowledge that, ever since the enactment of the primary election law and the adoption of the rule under consideration, the officers of the Democratic State Central Committee have placed its interpretation upon the rule by fixing the time within which the pledge must be filed. This action on the part of the officers of the committee is a matter of common knowledge.

It is done not only by the State central committee, but by the county central committees and committees in cities and towns, and whenever such committee, in good faith, interprets and declares the meaning of the rule, the courts have no right or authority to put a different interpretation on the rule.

We said in the case of *Robinson* v. *Holman, supra*:

"Political parties are political instrumentalities. They are in no sense governmental instrumentalities.

"The State has nothing to do with the holding of primary elections. The statute fixes the date for holding primary elections, but the State appoints no officers to hold a Democratic primary. It does not pay the cost thereof. The machinery for holding a Democratic primary election in Arkansas is entirely an instrumentality created by the party with which the State, as a State, has nothing to do."

The case of *Combs* v. *Gray,* 170 Ark. 956, 281 S. W. 918, discussed by appellee, involved the question of the adoption of a constitutional amendment.

Appellee also calls attention to the case of *Walker* v. *Grice,* 159 S. E. 914. That case involved the right of the Democratic committee to remove from office persons appointed by it. That case was decided by the Supreme Court of South Carolina, and the court said:

"It is evident from the above extract that the Legislature intended to give primary elections a legal status,

and to place them, together with the entire party machinery, under the protection of the courts, not only for the purpose of punishing frauds, but also for the enforcement of rights acquired therein."

But there is nothing in that decision holding that a court has authority to compel a committee of a political party either to make a certain rule or to interpret a rule in a certain way.

The court also said in that case: "We call attention to the fact that the rules of the State Democratic party cannot conflict with the enactments of the Legislature as to primary elections whether state, county or municipal.

"We find no conflict between the rules of the State Democratic party and the statutory enactments."

Attention is called to the case of *People* v. *Democratic General Committee,* 164 N. Y. 335, 51 L. R. A. 674. In that case it will be seen that the expenses of the primary election under the statute had to be paid by the same officers or boards, and in the same manner as the expenses of the general election. Besides that the court said, in discussing the power of the committee, that it provided many things for the conduct of the committee, but the right to expel a member was not one of them. It was said, in speaking of the Legislature:

"It decided that the wrongs that had been and were being done to the primary voters exceeded that which could result from occasional association with a hostile member. In other words, it was determined that the majority of the primary voters were entitled to select any representative they might desire, who should be responsible to those electing him, and only to them, for his conduct in office."

The appellee quotes at length from the case of *State* v. *Hunter,* 134 Ark. 443, 204 S. W. 308. In that case the court construed a statute which provided that notice shall be filed "not less than fifteen days before the election." The court held that, adopting the statutory rule of construction "where a certain number of days are required

to intervene between two acts, the day of one only of the acts may be counted." Many courts have construed statutes like the one involved in *State* v. *Hunter* just as the committee in this case construed the party rule. There is authority supporting each of the interpretations. The weight of authority probably supports the interpretation adopted by the officers of the committee. However this may be, there is authority to support the interpretation of the committee, and it had the right not only to make the rule but to interpret it.

This court said in *Jones* v. *State*, 42 Ark. 93; "Where a certain number of days are required to intervene between two acts, the day of one only of the acts is to be counted, but when a statute requires notice of at least a certain number of days before an act, this means so many full days, and the day of the notice and the act are both excluded from the computation." The court can compel the committee to act if it refuses to do so, but it cannot control its discretion.

Nearly all of the authorities referred to are based on statutes, and, of course, the committee could not make or enforce a rule that was prohibited by statute, or that was in conflict with the statute.

We have already said that, if there was any charge of fraud or arbitrary action, the court would have jurisdiction, and mandamus would lie to compel a compliance with the rules of the party.

It is contended by the appellee that the pledge was filed in time. What we have already said answers this question. That is, that the interpretation of the rule, where it was done in good faith, and resulted in no harm to anybody, is for the committee and not the courts.

Appellants have referred to a great many cases which we do not deem it necessary to review here, because holding that the interpretation of the rule, in good faith, by the committee, was not subject to review by the courts, makes it unnecessary to discuss any other questions.

The judgment of the Pulaski Circuit Court is reversed, and appellee's petition dismissed.

SMITH, J., (dissenting). The statute provides: "The primary elections of all political parties shall be held on the second Tuesday in August preceding the general election." Section 3758, Crawford & Moses' Digest. That date, in the present year (1932), falls on August 9, 1932.

The majority say: "Rule 43 of the rules adopted by the Democratic Party in Arkansas provides that candidates shall file the prescribed pledge with the Secretary of the State Central Committee not later than ninety (90) days before the election." The fee for placing the name of the candidate on the ticket must be paid within the same time. The majority also say that the pledge and fee from Montgomery were received by the secretary (of the committee) on the morning of May 11, 1932. It is not questioned that the secretary of the committee was a proper person with whom to file the pledge and to whom the fee should be paid, although filing may be made with, and payment may be made to, the assistant secretary of the committee.

It occurs to me therefore that the only question in the case is, whether Montgomery filed his pledge and paid his fee "not later than ninety (90) days before the election."

It is true the chairman and secretary of the Democratic State Central Committee announced that this rule could be complied with only by paying the fee and filing the pledge on or before midnight of May 10, 1932, but, this construction to the contrary notwithstanding, the rule remained unchanged. I do not understand that it is contended, or that it is the intention of the majority to decide, that the chairman and secretary have power to make rules. It is held only that they may construe the rules, but that, when this construction is publicly announced and fairly made, it becomes as binding as a rule itself. From this holding I respectfully dissent. If a rule is erroneously construed, but must be modified to

conform to that construction, if publicly announced and fairly made, this can be nothing more nor less than the power to amend the rules by construction. I submit that the chairman and secretary have no such power.

It must not be forgotten that this primary election is a legal election, and that we have not only party rules, but we have statutory regulations applicable thereto. These party rules must be construed with reference to all applicable statutes and judicial constructions thereof. The present proceeding partakes of the nature of a contest by an eligible candidate before the chairman and secretary of the committee, who are assuming to act for the committee, to enforce his right to become a candidate.

Section 3778, Crawford & Moses' Digest, appears to have relevancy upon this issue. It reads as follows: "All laws or rules of political organizations holding primary elections providing for contest before political conventions or committees other than the proceedings herein provided shall be of no further force or effect."

We get back therefore to the question with which we started, the correct answer to which should control the decision of this case, and that is, did Montgomery in fact file his pledge and pay his fee within the time fixed by the party rules when properly construed?

We have a statute which I think very definitely decides this question. That is § 9756 of Crawford & Moses' Digest, which reads as follows: "Where a certain number of days are required to intervene between two acts, the day of one only of the acts may be counted."

It is a matter of calculation, about which there is no question nor room for construction, that if, as the statute quoted requires, either May 11th or August 9th is counted (and only one of these dates may be counted), Montgomery paid the fee and filed his pledge ninety days before the election. Any correct calendar will verify this calculation.

The exact question here presented was expressly decided in the case of *State* v. *Hunter,* 134 Ark. 443, 204 S. W. 308, which was also an election case. The facts in

that case were that the election commissioners of Perry County were indicted for suppressing the certificate of nomination of a candidate for sheriff, contrary to the statute which provides that such certificates of nomination shall be filed with the county election commissioners "not more than sixty days nor less than fifteen days before the election." The argument was there made that under this statute fifteen full days must intervene between the date of filing the nominating certificate and the date of the election. In overruling that contention, it was there said: "Counsel rely on the decision of this court in *Jones* v. *State,* 42 Ark. 93, where, under a statute providing that road hands 'shall have at least three days' actual notice' before being required to work on public roads, the court held that the statute required three full days to intervene between the giving of the notice and the day the work was to begin. We do not think that case controls the present one. We have another statute which provides that 'where a certain number of days are required to intervene between two acts, the day of one only of the acts may be counted.' Kirby's Digest, § 7822. Applying that rule to the language of the statute now under consideration, it does not mean that there must be fifteen full days intervening between the filing of the notice with the commissioners and the day of election. The language of the statute is that the notice shall be filed 'not less than fifteen days before the election,' and under the statutory rule of interpretation one of the days should be excluded in the count. Adopting that rule of construction, the certificate of nomination was, according to the allegation of the indictment, filed within the time prescribed by statute."

If that decision is adhered to, it must follow that Montgomery paid his fee and filed his pledge "not later than ninety (90) days before the election," and the chairman and secretary of the committee were without power to hold otherwise, regardless of their good faith in so holding.

It is therefore my opinion that the judgment of the circuit court should be affirmed.

TEXARKANA *v.* TAYLOR.

Cr. 3806

Opinion delivered June 27, 1932.

Willis B. Smith and *Ben E. Carter,* for appellant.

Paul Jones, B. B. Bacon and *Will Steel,* for appellee.

SMITH, J. In the trial of this case in the court below the court, after hearing the testimony, made a finding of facts, the correctness of which is not questioned. It reads as follows:

"The court finds that H. H. Taylor is a resident of Texarkana, Texas, is a practicing attorney of that city, that he has an office in that city and has no office in Texarkana, Arkansas. He is here prosecuted for failing to pay an occupation tax to the city of Texarkana, Arkansas, for 1931. During that year he appeared in the municipal court of Texarkana, Arkansas, as attorney for various parties at least 25 times. He had one client whose office was in Texarkana, Arkansas, and he consulted with this client as its attorney in its office in Texarkana, Arkansas. He has been admitted to practice before the Supreme court and the other courts of the State of Texas.

"The court finds as a matter of law that the city of Texarkana does not have authority to impose an occupation tax on attorneys who appear in the courts in that city unless they reside in that city, or have an office or place of business there. Taylor does not have an office or place of business in Texarkana, Arkansas, nor does he reside in that city. He is not therefore liable for the occupation tax, and the court therefore finds him not guilty.

"It is the opinion of the court that the statutes of Arkansas grant to Taylor, as a Texas attorney, the right to appear in the courts of this State. See §§ 603 to 606, inclusive, of Crawford & Moses' Digest. If the city has the power to tax the exercise of this right, it has the power to destroy it. The court does not think the Legislature meant to vest in the city the right to say who should appear as attorneys in the courts held in the city. The court therefore finds that the power to impose an occupation tax on attorneys which was vested in the city by § 7618 of Crawford & Moses' Digest did not include the power to tax an attorney who neither resides in nor has an office or place of business in the city, and who only appears in court and/or advises his clients in said city.

"The court therefore finds the defendant not guilty."

Section 7618, Crawford & Moses' Digest, to which the court referred, provides that hereafter any city of the first or second class shall have the power to enact ordinances requiring any person, firm, individual or corporation who shall engage in, carry on or follow any trade, business, profession, vocation, or calling, within the corporate limits of such city (with certain exceptions not here involved) to take out and procure a license therefor, and to pay into the city treasury the amount of money specified in such ordinance for such license and privilege.

Pursuant to the power thus conferred, the city of Texarkana, a city of the first class, passed an ordinance imposing an occupation tax, which provides: "That it shall be unlawful for any person, firm or corporation or

individual in the city of Texarkana, Arkansas, to engage in the following businesses, trades, occupations, vocations, callings or professions without having first obtained and paid the license therefor from the city collector, the amount of which license is hereby fixed in this ordinance." Attorneys-at-law are included in the occupations there named and taxed.

Similar ordinances enacted in other cities have been upheld, and the question of power need not be reviewed. That has been definitely settled. *Davies* v. *Hot Springs,* 141 Ark. 521, 217 S. W. 769; *McIntosh* v. *Little Rock,* 159 Ark. 607, 252 S. W. 605; *Shepherd* v. *Little Rock,* 183 Ark. 244, 35 S. W. (2d) 361.

It is argued very earnestly and with much plausibility that the Texarkana ordinance, by its terms, applies only to residents of that city pursuing the named occupations, etc., within its limits. But whether this be true or not, we think the court below was correct in holding that § 605, Crawford & Moses' Digest, applied to and governed in this case, and that appellee's status was that of an enrolled nonresident attorney, within the meaning of that section.

Chapter 3 of Thornton on Attorneys-at-Law is devoted to the subject of taxation of attorneys. Vol. I, page 103. After citing cases from numerous courts to the effect that nonresident attorneys who pursue their profession in cities other than that of their residence may be taxed in such cities, the author says: "It is doubtful if mere incidental practice would subject a nonresident to taxation."

The court below evidently regarded the practice of appellee in the courts of this State as merely incidental to the practice of his profession in the adjoining State, and that he was not therefore subject to the tax. We concur in this view.

Section 605, Crawford & Moses' Digest, is applicable to such cases and governs in this. This section provides that justices of the peace and the clerks of courts of record shall keep a record of nonresident attorneys enrolled

in such court, and shall charge each nonresident attorney a fee of a dollar for such enrollment. This section applies not only to cities of the first and second class, but to the entire State, and, as there does not appear to be any authority for the exaction of any other fee from appellee, the judgment of the court below must be affirmed, and it is so ordered.

[redacted]

VINEYARD *v.* STORM.

4-2611

Opinion delivered June 27, 1932.

[redacted]

Verne McMillen and *W. G. Dinning,* for appellant.

Brewer & Cracraft, for appellee.

SMITH, J. Three separate suits were brought in the Phillips Circuit Court against G. H. Vineyard, doing business as Vineyard Transfer Company, to recover damages occasioned by the collision between an automobile driven by one Laurens Whipple Milner, Jr., and a truck driven by an employee of Vineyard. One suit was by the executrix of the estate of Milner, Jr., the latter having been killed in the collision. Manual Lupkin, who was in the car, sued also to recover compensation for his personal injury. The third suit was brought on behalf of the owner of the car, who was not in it at the time of the collision. Judgment was rendered in favor of the plaintiff in each case, in the first for $5,000, in the second for $250, and in the third for $250 also, and this appeal is from those judgments.

The negligence alleged as constituting the causes of action was that the truck driver "did negligently, care-

lessly and recklessly, while operating said truck at a high rate of speed, without regard for the safety of others, and while on the wrong side of said road, did run said truck against and caused it to collide with a Pontiac roadster driven by the deceased, who was at the time as far over as he could possibly be on the right side of the road, going to the town of Marianna, and while he was driving said car carefully and with due regard for his own safety and the safety of others."

The answer put the truth of these allegations in issue in each case, and the cases were heard on conflicting testimony, that on the part of the plaintiffs being sufficient to support the finding that the collision resulted from the negligence of the driver of the truck in the particulars stated. The issue of fact was submitted under instructions which are not questioned as correct declarations of law.

We think no useful purpose would be served by a detailed statement of the conflicting testimony, and for that reason we do not set it out. It must suffice to say that the testimony on the part of the plaintiff is legally sufficient to support the finding that the collision was the result of the negligence of the driver of the truck.

In the argument of the case before the jury counsel for plaintiff, replying to the argument of counsel for defendant, said: "They say Mr. Vineyard will have to pay it (the judgment). I say the insurance company will have to pay it." Upon objection being made to that statement, the court said: "That is an improper argument. The attorney for the plaintiff stated that he was undertaking to say that the money comes out of Mr. Vineyard, and he says it will come out of the insurance company, to which remark the defendant excepts, and the attorney for the plaintiff offers to withdraw the argument, and the court admonishes the jury not to consider that statement in any respect, which the attorney for the plaintiff made. It is highly improper, and the attorney for the plaintiff is instructed to refrain from any such argument."

This was an improper argument, but it appears to have been made in response to an argument equally improper. In a sense, it was invited error, and that fact cannot be overlooked in determining the sufficiency of the ruling of the court in removing its prejudice. *Caddo River Lbr. Co.* v. *Grover,* 126 Ark. 449, 190 S. W. 560.

However, we think the admonition of the court to the jury was sufficient to remove any prejudice that might otherwise have resulted. Numerous cases have settled the practice that a large discretion must be exercised by the trial court in determining the action to be taken when counsel have gone beyond the bounds of legitimate argument, the action in each case being such as is deemed appropriate to eliminate the prejudicial effect of the improper argument, and judgments are not reversed because of the argument where that action was taken. We think in the instant case that the ruling of the court was sufficient to remove the prejudice.

Upon the whole case we find no prejudicial error, and the judgment must be affirmed. It is so ordered.

CADE *v.* STATE.

Crim. 3813

Opinion delivered June 27, 1932.

Price Dickson, Karl Greenhaw and *Duty & Duty,* for appellants.

Hal L. Norwood, Attorney General, and *John H. Caldwell,* Assistant, for appellee.

John Mayes, Earl Blansett and *John W. Nance, amici curiae.*

McHaney, J. Appellant, O. W. Bass, is the county superintendent, and the other appellants are members of the county board of education of Washington County, Arkansas. At the April, 1932, term of the Washington Circuit Court, they were indicted by the grand jury of said county for falsely and fraudulently certifying the returns of the election held in that county on the first day of March, 1932, for the election of members of the county board of education. The indictment charged that appellants falsely and fraudulently certified one Paul Brogdon as having been elected to the county board of education, when in truth and in fact one A. W. Mintun was elected. After the indictment was returned, the prosecuting attorney filed a petition with the court praying for an order suspending them from office under § 10,335, Crawford & Moses' Digest, to which appellants filed response. The court granted the prayer of the petition and suspended appellants from office pending their trial upon said indictment. From this order of suspension appellants have appealed.

For a reversal of the case appellants make two contentions: First, that § 3888 of Crawford & Moses' Digest, under which they say they were indicted, has no application to school elections; and, second, that the members of the county board of education and the county superintendent are not county officers, within the meaning of said § 10,335.

■ Section 3888, Crawford & Moses' Digest, reads as follows: "Any election officer or other person whosoever who shall wilfully make a false count of any election ballots, or falsely or fraudulently certify the returns

of any election, or steal, destroy, secrete or otherwise make way with any election ballot, tally sheet, certificate or ballot box, either before or after the closing of the polls, shall be deemed guilty of a felony, and, on conviction thereof, punished by imprisonment at hard labor in the penitentiary not less than two years nor more than seven years."

The court suspended appellants from office under § 10,335, which provides, in substance, that, when an indictment is filed in any circuit court against "any county or township officer" for the offenses therein named, the court shall immediately order such officer suspended from office until tried. "Provided, such suspension shall not extend beyond the next term after the same shall be filed in such circuit court, unless the cause is continued on the application of the defendant."

Section 3888, above quoted, is a part of the election laws of this State, and is § 43 of the act of March 4, 1891, Acts 1891, p. 32, entitled, "An act to regulate elections in the State of Arkansas."

Section 30 of act 169, Acts 1931, p. 476, same being designated in § 1 as the "School Law," provides that the election returns of all school elections shall be made to the county superintendent of schools immediately after the election; that he shall call a meeting of the county board within fifteen days after the election; that said board shall canvass the returns and certify the result to the county clerk for record in his office. Provision is made for notification and issuing commission to those elected to the board, and for contests. It is further provided that: "The election laws regulating the nomination and certification of the names of candidates for county offices shall govern in the matter of candidates for members of the county board of education." This has reference to the manner of getting the names of candidates for membership on the county board on the ticket to be voted on in the annual school election. The annual school election, held on the first Tuesday in March each year, is not a primary but a general election—a general school election.

Any elector of the county may become a candidate for membership on the board by paying a fee of $1 to the county treasurer, not later than 20 days before the election. We see no reason why § 3888 should not apply to the general annual school election as well as to other general elections. Its terms are sufficiently broad to include the county board. It applies to "any election officer or other person whomsoever who shall * * * falsely or fraudulently certify the returns of any election." If it does not apply, there is no applicable statute defining and punishing this particular offense or breach of duty. It is suggested that § 197 of said act 169 applies. It provides that "any * * * county board of education * * * who shall wilfully fail or refuse to comply with any provision of the 'school law' for which no punishment is otherwise provided by law shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than ten ($10) dollars, nor more than five hundred ($500) dollars." We think this section has no application, as we are of the opinion that punishment is otherwise provided by law in said § 3888, and that appellants did not fail or refuse to comply with the law. It is further argued that this court, in *Stout* v. *State,* 43 Ark. 413, and in *Brown* v. *Haselman,* 79 Ark. 213, 95 S. W. 136, held that the provisions of the general election law had no application to school elections. In the former case we held that the provision of the general election law of January 23, 1875, (§ 3881, Crawford & Moses' Digest) prohibiting the giving away or selling intoxicating liquor on election day, did not apply to an election for a school director at an annual school meeting provided for by the Common Schools Act of 1875. In the latter case we held that § 1667, Kirby's Digest (now § 3883, Crawford & Moses' Digest) had no application to a school election. Section 3883, as well as § 3881, are parts of the act of January 23, 1875, p. 92, Acts 1875, which was entitled "An act providing a general election law." In the latter case we said: "The act in term applies only to general elections of State, county and township officers, and to special elections held to fill

vacancies in said offices." The reason for the holding in the two cases above mentioned therefore becomes apparent. The act in question in this case is entitled "An Act to Regulate Elections in the State of Arkansas." It is therefore not limited in its title to general elections, such as the act of 1875 above mentioned, and, being broad enough in its terms to apply to school elections, we hold that § 3888 of the Digest is applicable to the case at bar.

The next question for determination is whether the county board of education and the county superintendent are county officers. As to the county board of education, we think there can be no question that they are county officers. Its members are elected for a definite term. Their jurisdiction extends to the whole county. As a board, it is given broad and comprehensive powers over the conduct and management of the schools of the county, including the organization, reorganization and change in boundary lines of school districts. They are given all the powers formerly conferred upon the county court. As to the county superintendent, while he is not elected at the annual school election by direct vote of the people, he is elected by the county board, for a definite term, not to exceed two years, and his jurisdiction is co-extensive with the county. See §§ 32, 33, 42, 92 of Act 169 of 1931. While he is not a member of the county board, he is in express terms by said act made an executive officer of the board. The act requires returns of the school election to be made to him, and, within 15 days, he is required to call a meeting of the county board to canvass and certify to the county clerk the returns of said election. The law permits him to act as secretary of the board, or they may elect some member of the board as secretary. Whether appellant Bass is secretary of the county board, the record does not disclose, but he is an executive officer thereof, and as such it is alleged that he participated in the acts charged in the indictment. We therefore hold that both he and the members of the county board are county officers within the meaning of § 10,335, Crawford & Moses' Digest. See also *Lucas* v.

Futrall, 84 Ark. 540, 106 S. W. 667; *Middleton* v. *Miller County* and *Miller County* v. *Kosminsky,* 134 Ark. 514, 204 S. W. 421; *Warren* v. *McRae,* 165 Ark. 436, 264 S. W. 940; *Ft. Smith* v. *Quinn,* 174 Ark. 863, 296 S. W. 722. In the second case above mentioned, we held that the position of county health officer is not an office and does not come within the constitutional provision concerning officers holding over after the expiration of their respective terms, until the election and qualification of their successors. In the case last cited we held that a member of the city fire department was an officer of the city of Fort Smith under the act then under consideration and entitled to his salary during the time he was wrongfully excluded from office.

We are therefore of the opinion that both contentions of counsel for appellants can not be sustained, and that the judgment of the circuit court suspending them from office is correct and must be affirmed.

HORNOR *v.* CRAGGS.

4-2709

Opinion delivered June 27, 1932.

Bevens & Mundt, for appellant.

Moore, Daggett & Burke, for appellee.

BUTLER, J. Appellant, who owns land in Cotton Belt Levee District No. 1, hereinafter referred to as the district, brought this suit against the directors of the district, to restrain them as such directors from issuing and delivering bonds of the district in payment of rights-of-way required for the relocation of certain parts of the system of levees within the district.

The pleadings in the case disclose the following facts: The district was organized by the county court of Phillips County under the provisions of chapter 109, Crawford & Moses' Digest, and pursuant to the authority thus conferred the directors of the district have built twenty-four miles of levees along the west bank of the Mississippi River to protect the lands of the district from overflow by that stream. Prior to the passage of the National Flood Act by the Congress of May 15, 1928, the cost of the levees within the district was borne as follows: one-third by the district and two-thirds by the Federal government. Since the passage of this act the entire cost of construction of levees along the front line of the Mississippi River from Cape Girardeau, Missouri, to "Head of Passes" is borne entirely by the Federal government, but the Federal act provides that the local levee districts shall provide, without cost to the United States, all rights-of-way for levee foundations and levees. Recent surveys by the corp of engineers of the United States army, having supervision of levee construction, discloses that there are several miles of levee within the district which will have to be relocated or set back on account of the caving banks of the Mississippi River, and tentative contracts have been made by the Federal government with various contractors to build the levees so relocated, but, in accordance with the provisions of the flood control act above referred to, the Federal government has demanded of the district's directors that they acquire, at the cost of the district, the necessary rights-of-way and foundations for such relocated levees. The damages to the landowners whose lands must be taken for the purposes stated have been adjusted be-

tween the district and the landowners, and the sum of money required for this purpose is $50,000. The district can pay these damages only by the issuance of the bonds of the district. It has no money available for this purpose at this time from any other source. On account of the general depression and the lack of a suitable market for securities of this character, the district is unable to sell these bonds except at a great discount, but the landowners have agreed to accept these bonds at par in payment of their damages. The requirements of the statute in the matter of procuring the assent of the landowners to the bond issue have been complied with.

The point raised in the landowner's complaint is that the district has no authority under the law to issue and deliver bonds in payment of this right-of-way. A demurrer was filed to this complaint, and a demurrer was filed by the plaintiff landowner to the answer of the district, and the cause was heard upon these demurrers. The court sustained the demurrer to the complaint and overruled the demurrer to the answer, thus holding, in effect, that, under the allegations of the pleadings set out above, the district had and has the authority to issue its bonds for the purpose stated.

Full power to construct the levee is conferred by chapter 109, Crawford & Moses' Digest, title "Levees." The power is there conferred not only to acquire necessary rights-of-way, but to pay the construction cost of the levees themselves, and pursuant to this power rights-of-way were acquired and the levee constructed. The power to construct and maintain these levees is not exhausted by their original construction, but is a continuing one, and incidental thereto the right exists under the statute to relocate and reconstruct levees, as the exigency of the case may require. It was so expressly decided in the case of *West* v. *Cotton Belt Levee Dist. No. 1,* 116 Ark. 538, 173 S. W. 403.

That case involved this identical district. The relocation of certain levees in the district had then, as now, become necessary on account of the encroachments of

the Mississippi River, and there was involved in the former case the power of the district to assess and collect betterments to pay the cost thereof. The district there proceeded under the same statute which it has here invoked.

In holding that the district had the power to relocate the levees and to assess and collect betterments to pay for this new work, it was there pointed out that § 4938, Kirby's Digest, (which is now a part of chapter 109, Crawford & Moses' Digest) provides that it shall be the duty of the directors of the district to determine what work is necessary to protect the district from overflow and to do that work, and the acquisition of right-of-way, which must be paid for, is a necessary part of this work.

Discussing the continuing power of the directors in this behalf, it was pointed out in that case that the ever-shifting, yet always present, danger of overflow makes it imperative that the directors of the district shall have the broadest latitude in dealing with the situation, and for this reason the construction of the levee is never completed, as work is constantly necessary to be done on it for the purpose of accomplishing the results intended by the organization of the levee district, and it was there said that if the power were exhausted by a single exercise the purpose of the statute would be defeated.

It is pointed out that, while chapter 109, Crawford & Moses' Digest, authorizes the issuance of bonds, it is silent as to the manner of their disposition, and it is insisted therefore that the bonds must be disposed of pursuant to the power there implied, which can only be to sell the bonds for cash to the highest bidder, and with the cash derived from such sale to construct the improvement.

We think however that the power of the directors is not thus limited. There may be, and no doubt there is, an implied limitation on the power of the directors in this behalf, which would prevent them, at the suit of

any landowner in the district from disposing of the bonds in a manner amounting to waste, but under the allegations of the pleadings before us this is not the case here. On the contrary, the bonds are being disposed of at par.

It is true the pleadings before us do not disclose how the right-of-way was acquired, whether by condemnation or otherwise, but this is an unimportant detail. The case of *Young* v. *Red Fork Levee District,* 124 Ark. 61, 186 S. W. 604, held that the act of February 24, 1905 (Acts 1905, page 143) was a general law and applied to all levee districts in the State, whether organized under general or special statutes. Under § 1 of this act (which appears as § 3933, Crawford & Moses' Digest) the power is conferred upon the directors of all levee districts "to enter upon, take and hold any lands or premises whatever, whether by purchase, grant, donation, devise, or otherwise, that may be necessary and proper for the location, relocation, construction, repair or maintaining any line of levees" which may be necessary in promoting the purposes of the district.

There is no allegation that the landowners whose lands are to be taken for the new right-of-way are to be paid an excessive price for their lands, and the good faith of the directors is not questioned. The plaintiff landowner by this his suit questions only their authority and power to pay these damages with bonds even at par.

The case of *Hopson* v. *Hellums,* 108 Ark. 460, 158 S. W. 771, has no application to the facts in this case. It was there held that act 279 of the Acts of 1909 did not contemplate that by a single offering a contract might be let for the construction of the proposed improvement, to be paid for in the bonds of the district, by a single bid which disposed of both the bonds and the work. The reason for so holding was that some bidders might desire to bid on the construction work who would not be able to handle a bond issue, while other bidders might not want their purchase of bonds hampered with the contractor's obligation to construct the improvement, and

there would be therefore no common basis for these two classes of bidders.

Here we have no question of different landowners offering their lands for right-of-way purposes, and no question of competitive bids is involved. We have only the question of the power of the district to take the lands of a particular owner and to pay him therefor with bonds of the district. We think the district has this power, and the decree of the court below, which accords with this view, must be affirmed, and it is so ordered.

[redacted]

McDaniel *v.* Missouri State Life Insurance Company.

4-2622

Opinion delivered July 4, 1932.

[redacted]

Ivan McMullin and *Baker & Gautney,* for appellant.

Allen May, J. R. Burcham, Charles Frierson, Jr., and *Chas. D. Frierson,* for appellee.

HART, C. J., (after stating the facts). The correctness of the judgment depends upon the construction to be placed upon the policy in connection with the application for it. The application was dated September 4, 1928, and the date of the policy was September 11, 1928. The policy was not delivered nor the premium paid until October 5, 1928. The premiums for the first and second years were paid. If the eight months extended insurance is to be counted from the date of the policy, September 11, 1930, it would expire on May 11, 1931, which was before the death of Mrs. McDaniel on June 4, 1931. If, however, the extended insurance is to be counted from the delivery of the policy, which did not take place until the payment of the premium on October 5, 1928, then the insured would have one year thereafter with a grace period of thirty-one days in which to pay the second premium. Thus it will be seen that the policy lapsed if the extended insurance period is to be counted from the date of the policy; and it would be in force at the time of the death of Mrs. McDaniel if it is to be counted from the date of the delivery of the policy.

It is sought to reverse the judgment upon the well-settled doctrine in this State, as well as elsewhere, that, where there are two inconsistent clauses in a policy of insurance, that one should be adopted which is more favorable to the insured. The reason is that policies of insurance are written on forms prepared by the insurance company, and the insured has no voice whatever in their preparation. *Travelers' Protective Insurance Association of America* v. *Stephens, ante* p. 660.

As will be seen from our statement of facts, the policy itself provides that the first year's insurance will

end on the 11th day of September, 1929, and the insurance will be continued upon the payment of the annual premium of $28.62 on the 11th day of September in every year during the continuance of the policy. It is earnestly insisted that this provision of the policy is inconsistent with the clause of the application copied in our statement of facts. It provides that if the first premium is not paid in cash at the time the application is made, the insurance shall not take effect until the first premium thereon shall be actually paid to and accepted by the company during the life and good health of the insured.

In making this contention, reliance is placed upon the cases cited in the brief and upon case notes to 6 A. L. R., at page 774, and to 32 A. L. R., at page 1253. The case notes cited recognize a division in the authorities on this point. We do not deem it necessary to review them, however, for we are of the opinion that there is no ambiguity whatever when the whole of the provision of the application is considered. As we have just seen, it provides that, if the first premium is not paid in cash at the time the application is made, the insurance shall not take effect until the first premium has been paid to and accepted by the company or its duly authorized agent, and the policy delivered to and accepted by the insured during the life and good health of the insured. The provision, however, continues as follows, "but, in that event, the policy shall bear the date of its issuance, and all future premiums shall become due on such policy date, and all policy values and extended insurance shall be computed therefrom."

The language quoted is plain and unambiguous. It is true that the policy itself would not take effect until it was delivered to the insured, and the first premium was paid by him while in good health. If the insured should die prior to the delivery of the policy, liability under the policy would not attach. But the insured, by agreeing that the policy should bear the date of its issuance in the same clause and that all future premiums should become due on such policy date and all extended

insurance should be computed therefrom, in express terms, about which there could be no mistake, fixed the date of the policy as the date from which the extended insurance should be computed. The parties were capable of contracting, and made a contract plain and unambiguous in its terms, and courts have no right by construction to give it a different meaning. *McCampbell* v. *New York Life Company,* 288 Fed. 465, certiorari denied in 262 U. S. 759.

The judgment of the circuit court was therefore correct, and it will be affirmed.

LEWIS SUPPLY COMPANY *v.* GALLOWAY.

4-2621

Opinion delivered July 4, 1932.

Jo M. Walker, for appellant.

Moore, Daggett & Burke, for appellee.

BUTLER, J. The Lewis Supply Company, hereinafter referred to as appellant, a dealer in automobiles in the city of Helena, brought suit in the municipal court of that city against appellee to recover from her $451.92, the balance alleged to be due upon the sale of an automobile. The balance of purchase money was evidenced by a number of small notes payable monthly and each within the jurisdiction of the municipal court. A number of these notes had been executed to appellee's order by a third party and by her indorsed to appellant.

Appellee filed an answer, in which she admitted the purchase of the automobile for the agreed price of $870, and upon which there was due the balance alleged. By way of defense she pleaded that the automobile had been sold "under the usual ninety day dealer's guaranty as to soundness of the car" and upon the express warranty that the car was "free from defective workmanship and mechanism." She alleged that the car had a defective wheel, which collapsed and caused it to run off of an embankment, thereby being demolished and its value destroyed. She therefore denied that she was indebted to appellant in any sum.

Inasmuch as appellee claimed damages, on account of the alleged breach of the warranty, in a sum in excess of the jurisdiction of the municipal court, she filed a separate suit for the amount thereof in the circuit court, in which suit she prayed judgment for the payments made by her and for the return to her of her notes or the value thereof.

Upon an appeal being perfected from the judgment of the municipal court, that cause was, by consent, consolidated with the suit brought originally in the circuit court by appellee, and from a judgment in appellee's favor is this appeal.

Appellee had the right to institute a separate suit to recover her damages; indeed, she could not have interposed this demand as a set-off without remitting so much thereof as would bring it within the jurisdiction of the municipal court. *Kilgore Lbr. Co.* v. *Thomas,* 95 Ark. 43, 128 S. W. 62.

According to the testimony on behalf of appellee, she was driving on one of the State's highways, about twenty-five miles per hour when the right rear wheel collapsed, and the car ran off the road and rolled down an embankment, turning over twice as it did so. This completely demolished the car and totally destroyed its value. This wheel was later examined and its spokes were found to be defective. Witnesses testified that the spokes "were brashy and some of them were decayed," and that they had been made of timber "mixed between the white and the heart of the timber," and were worm-eaten.

The testimony was conflicting as to the cause of the wreck, that on the part of the appellant company being to the effect that appellee was driving at an excessive speed. The testimony was also conflicting as to the condition of the spokes, but a witness who testified as an expert on behalf of appellant in regard to the spokes stated that spokes were of three grades, A, B and C, the latter being the lowest grade, and as to the spokes of this car he stated, "That would be about 'C'. If you could work one of those in without the man knowing it."

Upon the whole case we think the testimony sufficient to support the finding that there had been a breach of the "general sales guaranty as to the soundness of the car" and of the special warranty that the car was free from defective workmanship.

After the demolition of the car it was examined by a representative of the appellant, to whom appellee stated: "That car is yours; it isn't mine." The car appears however after the wreck to have been of so little value that no one wanted it.

It is insisted that appellee waived the breach of the warranty through the following facts: As a part of the purchase price appellee executed to appellant four notes for $17.50 each, and paid one of those notes when due, but payment of the other three was refused. These three unpaid notes were included in the suit in the municipal court, where judgment was rendered thereon. This judgment was paid by appellee. This was no waiver, as appellee was compelled to pay this judgment, and she was asking for her damages in a separate suit, and she did not elect to remit her demand to a sum low enough to be within the jurisdiction of the municipal court, thereby defeating a recovery in that case.

In the case of *Parrett Tractor Co.* v. *Brownfiel,* 149 Ark. 566, 233 S. W. 706, it was held not to be error to refuse an instruction, in substance, that an unconditional promise to pay the balance of the purchase price of goods with knowledge of a breach of warranty constituted a waiver of the breach, it being there said that where there is a breach of an express warranty, the vendee may rescind the contract, or he may affirm the contract, keep the property, and, when sued for the price, set up the false warranty by way of recoupment.

Appellee did not elect to keep the property, and so advised appellant. If there was, in fact, a breach of the warranty, and the jury has so found under the instructions correctly submitting that issue, appellee had the right to rescind the sale and to demand a return of so much of the purchase money as had been paid. This is the remedy which appellee elected to pursue, as soon as she was advised of the breach of the warranty, and she was within her legal rights in so doing. *Neel* v. *West-Winfree Tobacco Co.,* 142 Ark. 505, 219 S. W. 326. This offer to rescind must be made within a reasonable time. Here it was made immediately, although it has been held that where the property is entirely worthless and wholly unfit for the intended use, an offer to return the property, in order to rescind, is not essential. The Neel case, just cited, so holds.

In the judgment from which this appeal comes it was adjudged that appellee recover the amount paid, and as to the notes held by appellant it was adjudged that they "are without consideration and are ordered canceled and held for naught."

Under the verdict of the jury, which we find was returned upon testimony legally sufficient to support it, the judgment must be affirmed, and it is so ordered.

ATLAS SUPPLY COMPANY *v.* MCAMIS.

4-2629

Opinion delivered July 4, 1932.

R. S. Dunn, for appellant.

Evans & Evans, for appellee.

HUMPHREYS, J. Appellant intervened in an attachment suit brought by appellee against J. H. Flower in the circuit court of the Southern District of Logan County alleging that prior to the issuance and levy of the writ of attachment upon the property involved, J. H. Flower had executed a mortgage to it upon said property to secure an indebtedness of $1,554.88 and that its mortgage lien thereon was superior to the attachment lien. The intervention contained a prayer for the dismissal of the attachment and for the enforcement of the mortgage lien against the property.

Appellee filed an answer denying the material allegations contained in the intervention and praying that its attachment be sustained, and that the property levied upon be sold to pay the debt J. H. Flower owed him.

The cause was submitted upon the pleadings and testimony, which resulted in a personal judgment against J. H. Flower in favor of both appellant and appellee for the respective amounts claimed by them, and a finding and judgment declaring appellee's attachment lien upon the property superior to appellant's lien.

This appeal is for the sole purpose of ascertaining whether the trial court erred in adjudging appellee's lien on the property paramount to appellant's lien thereon.

The mortgage executed to appellant was not acknowledged as required by § 1521 of Crawford & Moses' Digest in order to give it any validity as to third parties. It omitted the word "consideration" or words of similar import, and the attempted record of same constituted no notice to third parties of the existence thereof. Although good as between the parties thereto, as to third parties it was just as if it had never been executed or filed. *Drew County Bank & Trust Company* v. *Sorben,* 181 Ark. 943, 28 S. W. (2d) 730.

Again, had appellant's mortgage been properly acknowledged, the filing thereof was fatally defective and was no notice to third parties of the existence thereof. In order to constitute notice to third parties of the existence of the mortgage by filing only, it was necessary that appellee or some one for him sign the following indorsement: "This instrument to be filed but not recorded." Crawford & Moses' Digest, § 7384. Appellant's mortgage had no such indorsement upon it.

The judgment of the trial court is therefore affirmed.

LITTLE RED RIVER LEVEE DISTRICT NO. 2 *v.* STATE.

4-2691

Opinion delivered July 4, 1932.

Culbert L. Pearce, for appellant.

Brundidge & Neelly, and *Hal L. Norwood,* Attorney General, for appellee.

HUMPHREYS, J. This is a suit by the State of Arkansas to quiet or validate its tax titles to certain lands in White County by curing the informalities and irregularities contained in the forfeiture proceedings by which it acquired its tax titles thereto. The authority for the suit is found in act No. 296 of the Acts of 1929, which was construed by this court in the case of *State* v. *Delinquent Lands,* 182 Ark. 648, 32 S. W. (2d) 1061, to mean that

the State, upon notice by publication, might confirm its tax titles in courts of equity against informalities or irregularities connected with the forfeiture and sale thereof to the State.

Appellant, in response to the notice by publication, intervened in the action alleging that it acquired title to certain of the lands (describing them) embraced in the suit under proceedings to enforce its lien for improvement taxes.

The intervention contains three paragraphs.

Paragraph one alleged that the sales of said lands to the State for State, county, and school taxes were totally void on account of irregularities in levying the taxes and sales of the lands for nonpayment of same for the following reasons:

"(1) The proceedings of the levying courts in levying the taxes and in making appropriations thereof were irregular, null and void. (2) The assessors did not properly prepare, certify and file the lists of assessable lands with the county clerks, at the time and in the manner prescribed by law. (3) The collectors did not post notices in the respective townships, showing the days and places taxes would be collected. (4) The clerks did not comply with the requirements of the statutes in furnishing the collectors a complete list of delinquent lands in the county, giving the names of the owners, etc. (5) The tax collectors did not prepare, certify and file in the county clerk's offices a list of delinquent lands, within the time prescribed by law. (6) Notices of sale were not published for the time and in the manner prescribed by law. (7) The county clerks did not record the lists of delinquent lands at the times and in the manner prescribed by law."

Paragraph two alleged that the proceedings by which appellant acquired its tax titles to said lands for the nonpayment of improvement taxes were regular.

Paragraph three is as follows:

"The assessed values placed on said lands for State, county and school purposes were made at a time when lands were much more valuable than at this time. Said assessed values averaged more than $6 per acre while the actual market value of said land at the time did not exceed $4 per acre. Under the laws and rules adopted by the State Tax Commission, said assessments should have been fixed at no more than one-half of the fair market value of said lands at the time of assessment. This would have reduced the assessed value from more than $6 per acre down to $2 per acre. All subsequent assessments were made, extended and carried forward in the same manner as the assessment upon which said void tax sales were made, and each and all of said assessments are therefore null and void for the same reasons."

The prayer of the intervention is that on account of the void assessments and void sales of the lands for State, county, and school purposes, appellee be denied the right to quiet its title thereto; but, if allowed to do so, the sales be canceled and assessments reduced to fair and equitable amounts, and that appellant then be allowed to pay same, including subsequent taxes based upon the re-valuation.

Appellee demurred to paragraphs one and three of appellant's intervention for the following reasons:

"Because said paragraphs do not state facts sufficient to constitute an answer to the complaint of plaintiff, neither do they set up facts sufficient to entitle it to the relief prayed for in said intervention.

"Because, if said lands were erroneously assessed, the intervener had a plain, adequate remedy at law, of which the intervener failed to avail itself, and cannot now take advantage of it in this proceeding.

The demurrer was sustained to paragraphs one and three of the intervention and appellant declined to plead further, whereupon the court dismissed the intervention and rendered a decree in accordance with the prayer of appellee's complaint, from which is this appeal.

Appellant contends that the trial court should have overruled appellee's demurrer to the first paragraph of the intervention because the State cannot confirm, under act 296 of the Acts of 1929, the title to tax lands acquired by it on void levies and void sales. The answer to this contention or argument is that the State is not attempting to do so. It is only attempting to validate or cure tax sales on account of "informalities and irregularities" in the levy of taxes or sales thereof. This is the extent of the State's authority under the act. *State* v. *Delinquent Lands,* 182 Ark. 648, 32 S. W. (2d) 1061. It is true that appellant alleged in paragraph one of the intervention that the levy of taxes and sales were void. This allegation is a mere conclusion of law, and not sufficient on demurrer. Appellant assigns in said paragraph seven reasons for the invalidity of the levies and sales, but all of the reasons assigned are mere informalities and irregularities in making the levies or sales. These are the very defects the State can cure in confirming her tax titles; hence the demurrer to that part of the intervention attacking them was properly sustained. The only right of an improvement district claiming to be the owner of lands to defend against the confirmation of the State's tax titles on account of informalities and irregularities in the levy and sale thereof is found in § 8 of said act, which is as follows:

"Any special improvement district claiming that there is owing it overdue taxes on any lands described in the State's petition shall have a right to be made a party defendant to the State's suit for the purpose of contesting the sale under which the forfeiture to the State was made. Any such improvement district, upon payment of the amount of taxes, penalty and costs for which the land was forfeited and all past-due taxes which would have accrued had the land remained on the tax books at the valuation against it immediately prior to the forfeiture, shall be subrogated to the State's lien for the amount so paid, and such improvement district may

include such amount due the district for taxes, and shall have the right to foreclose for such amount as though the same had been assessed against such land in favor of the improvement district."

As appellant's allegations in paragraph one of its intervention failed to comply with § 8 of said act by tendering into court the amount due the State thereunder, the demurrer thereto was properly sustained. The State's right to levy and collect taxes for the support of government and to make its taxes a first lien on the property in the State cannot be questioned. The State exercised this paramount right in the passage of the following statute in 1879:

"Taxes assessed upon real and personal property shall bind the same and be entitled to preference over all judgments, executions, incumbrances or liens whensoever created."

Act 269 of the Acts of 1929 provides a method by which to inforce this paramount or prior lien of the State for its taxes against the former owners of forfeited lands, including improvement districts, which acquired lands through foreclosure proceedings for the nonpayment of improvement district taxes.

Appellant also contends that the trial court should have overruled appellee's demurrer to the third paragraph of the intervention on account of an overvaluation of lands for taxation. Chancery courts have no jurisdiction to correct erroneous assessments. Appellant's remedy was by appeal. Crawford & Moses' Digest, § 9911; Cooley on Taxation, vol. 2, p. 1382; Desty on Taxation, vol. 1, p. 605; *State* v. *Little,* 94 Ark. 217, 126 S. W. 713; Pulaski County Board of Examiners cases, 49 Ark. 518, 6 S. W. 1; *Clay County* v. *Brown Lumber Company,* 90 Ark. 413, 119 S. W. 251; *Wells Fargo & Company* v. *Crawford Co.,* 63 Ark. 576, 40 S. W. 710.

Appellant's last contention is that act 296 of the Acts of 1929 is void because it impairs the obligation of contracts contrary to the provisions of the Constitution

of Arkansas and the Constitution of the United States. The contract it says the act impairs is the lien accorded it by the act creating it for improvement taxes which declared the levee district's assessments shall be a lien in the nature of a first mortgage. The act creating appellant district, in thus declaring its lien a first mortgage, had reference, of course, to contractual liens and not to the State's paramount lien for taxes for governmental purposes. This right on the part of the State was a part of the district's charter, and every contract it has made, as much so as if it had been written therein. Act 296 of the Acts of 1929 is valid, and it is not in conflict with art. 1, § 10, of the Federal Constitution and art. 2, § 17 of the State Constitution.

No error appearing, the decree is affirmed.

SAFEWAY STORES, INC. *v.* INGRAM.

4-2619

Opinion delivered July 4, 1932.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

Sam T. and *Tom Poe* and *George W. Clark,* for appellee.

McHaney, J. Appellee sued appellant for damages, and in his complaint alleged that on the 22nd day of November, 1930, he purchased from appellant a piece of cheese loaf to be used and consumed as food; he ate a portion thereof and immediately thereafter became violently ill, sick at his stomach, causing a continuous emission therefrom for more that 12 hours, accompanied by a high temperature, followed by nervousness and nervous rigors; and since that time he has been unable to retain any substantial food in his stomach, but has been forced to exist on a very restricted diet; that said cheese loaf was unfit for human consumption, was poison and caused him to be stricken with ptomaine poison; that the servant of appellant knew said food was unwholesome, and that he was buying same for food, and that he relied upon the recommendation of said servant that said food was wholesome and nutritious. Appellant denied all the allegations of the complaint. A trial resulted in a verdict and judgment for appellee against appellant in the sum of $3,000.

For a reversal of the judgment appellant first argues that the court erred in giving instructions 2 and 5 at the request of appellee for the reason, it is urged, that the action was based upon a breach of implied warranty that the food sold was fit for consumption, whereas the two instructions mentioned defined the duty of appellant to exercise ordinary care in the sale of food for human consumption to see that the food they sell is reasonably fit for the purpose for which it is intended, and that, if appellant's employee knew, or, by the exercise

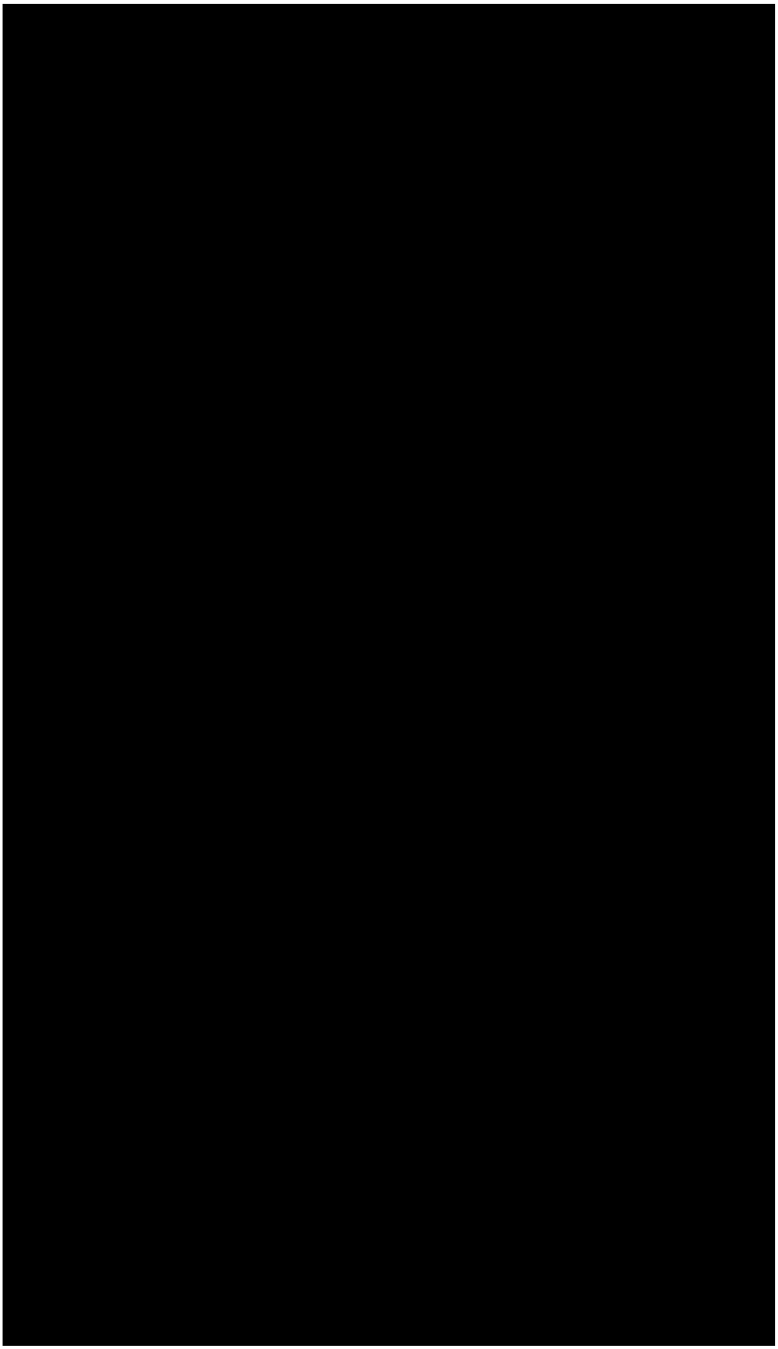
of ordinary care, could have known, that the cheese loaf sold was unfit for human consumption, defendant would be liable. It is said that these two instructions are at least confusing to the jury, as instructions 1 and 3 given at appellee's request are based on the theory of implied warranty, and that it permitted appellee to recover on a theory not alleged in the complaint. Only a general objection was made to instructions 2 and 5, and the objection now argued is not raised by a general objection. The instructions complained of were correct declarations of law, were not inherently wrong, and a general objection fails to raise the question now argued. This court has held that the retail dealer of food for immediate consumption may be liable for damages both for a breach of implied warranty and for negligence in failing to use ordinary care. *Heinemann* v. *Barfield,* 136 Ark. 456, 207 S. W. 58. Therefore the rule relating to breach of implied warranty does not relieve appellant from the exercise of ordinary care.

Complaint is also made to instruction No. 9. This instruction told the jury, in substance, that, if appellee was suffering with stomach trouble at the time he ate the cheese loaf, but the unwholesome cheese loaf aggravated or accentuated his condition, causing him to suffer the disorder from which he complains, if any, still appellant would be liable. In other words, even though appellee might be sick, or his stomach in poor condition, appellant would have no right to sell him unwholesome food causing him to suffer ptomaine poisoning. We think no prejudice resulted to appellant in this regard. It defended on the ground, first, that the cheese loaf was pure and wholesome, and, 2d, that any illness suffered by appellee was caused by a prior condition of his stomach. No specific objection was made to this instruction, and we think it correctly states the law applicable to the facts in this case. Appellant would have no right to sell even a sick man poisoned food. See *St.*

L. I. M. & S. R. Co. v. *Steel,* 129 Ark. 520, 197 S. W. 288, for similar rule. Moreover, the court instructed the jury in No. 3 given at appellant's request, that if they believed from the evidence appellee suffered with a stomach trouble at the time he bought the cheese loaf; that same was pure and wholesome; and that the trouble he suffered after eating it was due to his then condition and not to the unwholesomeness of the food, the verdict should be for appellant. We are therefore of the opinion no error was committed in this regard.

It is next urged that the testimony of Dr. Ponder, an expert witness for appellee, was incompetent. Dr. Ponder sat in the court room, heard appellee and Dr. Harrod, his physician, testify concerning his symptoms and was asked to state whether or not in his opinion appellee's condition as testified to by him and Dr. Harrod could be attributed to food poisoning. He answered that it could. It is said this was error, and that to permit the witness to base his opinion upon the testimony of Dr. Harrod would deprive it of the right of pointing out such parts of Dr. Harrod's testimony as would be improper in a hypothetical question. No objection was made to any part of Dr. Harrod's testimony. There was no conflict in the testimony at the time Dr. Ponder testified. We are therefore of the opinion that this point is ruled adversely to appellant by the decision of this court in the recent case of *Arkansas Baking Co.* v. *Wyman, ante* p. 310.

The next assignment of error is that the court erred in giving at appellee's request instruction No. 5-A, which reads as follows: "The court instructs you, notwithstanding evidence may have been offered seeking to impeach the testimony of the plaintiff, yet, notwithstanding such impeaching evidence, the jury are the sole and exclusive judges of the weight and credibility of all the witnesses who have testified in this case." It is said that this is an instruction upon the weight of the evidence and unnecessarily stresses the fact that the jury could

disregard the impeaching evidence. Appellant introduced a number of witnesses who testified that appellee's reputation for truth and morality was bad, and some of them said they would not believe him on oath on a matter in which he was interested. We do not think this instruction amounts to a comment on the weight of the evidence, and, while it mentions the fact that impeaching evidence had been introduced, the concluding part of the instruction is that "the weight and credibility of all the witnesses who have testified in the case" was for their exclusive determination. This is not a comment upon the weight of the testimony, nor do we think it emphasizes any particular testimony, as it applied to all the witnesses in the case. Cases cited by appellant holding that it is error for the trial court to emphasize any particular testimony do not apply.

It is finally insisted that the verdict is excessive and that the amount thereof resulted from certain improper remarks made by counsel for appellee, who stated that it was possible that an insurance company might have protected appellant against loss in this case. Objection was made to the language, which the court sustained and specifically instructed the jury to disregard it. In addition counsel himself withdrew the remarks. It is admitted this cured whatever error might have been committed in this regard, but that such statement, when taken in connection with the evidence of pain and suffering and loss of time, caused the jury to render a larger verdict than it might have otherwise been. We cannot agree with appellant in this regard. While the evidence is unsatisfactory and was in sharp conflict, we have reached the conclusion that there is substantial evidence to support the verdict which is not clearly excessive, and that the judgment must be affirmed. It is so ordered.